Russell, William

EXPERT TESTIMONY

Scope of expertise

Because a psychologist is not a physician as contemplated by WAC 296-20-210, the psychologist cannot rate permanent partial impairment. **….*In re William Russell*, BIIA Dec., 95 0628 (1996) [**dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WILLIAM C. RUSSELL)	**DOCKET NOS. 95 0628 & 95 0712**
)	
CLAIM NOS. T-332305 & T-121166)	**DECISION AND ORDER**

APPEARANCES:

Claimant, William C. Russell, by
Small, Snell, Weiss & Comfort, P.S., per
Richard E. Weiss and Kathryn C. Comfort

Self-Insured Employer, Clover Park School District #400, by
Thomas G. Hall & Associates, per
Thomas G. Hall

In the matter assigned Docket No. 95 0628, the claimant, William C. Russell, filed an appeal with the Board of Industrial Insurance Appeals on February 14, 1995, from an order of the Department of Labor and Industries dated January 11, 1995. The order canceled a February 28, 1994 order and closed the claim with time loss compensation as paid through June 26, 1991, and with a permanent partial disability award of Category 2 for cervical impairment, less prior awards. No permanent partial disability award was paid for low back injury over and above that paid on Claim No. T-121166. **AFFIRMED**.

In the matter assigned Docket No. 95 0712, the claimant, William C. Russell, filed an appeal with the Board of Industrial Insurance Appeals on February 15, 1995, from an order of the Department of Labor and Industries dated January 11, 1995. The order closed the claim with time loss compensation as paid through February 3, 1989, and with a permanent partial disability award of Category 2 for low back impairment. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer, Clover Park School District #400 (Clover Park), to a Proposed Decision and Order issued on February 13, 1996, in which the order of the Department issued in Claim No. T-332305 on January 11, 1995, was

reversed and remanded to the Department with directions to find that Mr. Russell was a totally and permanently disabled worker as of June 27, 1991.

We find it necessary to address one of the evidentiary rulings. On November 8, 1995, Nancy King, Ph.D., testified in this case. Ms. King is a clinical and vocational psychologist. She is not a medical doctor. During her testimony, Ms. King was asked by claimant's counsel if she had an opinion concerning Mr. Russell's psychiatric impairment. Over the objection of counsel for the self-insured employer, Ms. King's Category 4 (WAC 296-20-340) permanent partial disability rating was admitted.

WAC 296-20-210 codified the general rules used for conducting uniform medical examinations and for determining permanent partial disability ratings. Subsection (1) provides that, "Examinations for the medical determination of the extent of permanent bodily impairment shall be made only by physicians currently licensed to practice medicine and surgery." A psychologist is not a "physician" as contemplated by WAC 296-20-210. *See*, WAC 296-20-01002. Therefore, we sustain the employer's objection at page 35 of the November 8, 1995 transcript and strike the response that appears at page 35, lines 17-22. When reaching this decision we are cognizant that we have permitted psychologists to testify to the causal relationship between a given industrial event and existence of a psychiatric condition. *See*, *In re Robert Hedblum*, BIIA Dec., 88 2237 (1989). Nonetheless, the interpretation of that case should not be construed to extend authority to a psychologist to rate permanent partial impairment in derogation of WAC 296-20-210(1).

The Board has reviewed the remaining evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. Those rulings are affirmed.

In addition to correcting the above described evidentiary ruling, we have granted review because we do not believe that the testimony presented demonstrates that Mr. Russell was a totally and permanently disabled worker. After the second industrial injury (April 4, 1990), the

employer offered Mr. Russell a legitimate job opportunity that met Mr. Russell's physical limitations. We reach this conclusion after examining the employer's past history of providing work duty accommodations to Mr. Russell after his first industrial injury (February 18, 1988).

Specifically, Mr. Russell injured his low back on February 18, 1988, when he slipped and fell while in the course of employment with Clover Park. He returned to work in January 1989. The self-insured employer made sufficient accommodations according to Mr. Russell's own admissions. He noted that the employer allowed him to rest on a cot as needed. Further, Mr. Russell claimed that his supervisor would drive him home on tough days. Pedro S. Gonzalez, Mr. Russell's friend and a witness called on his behalf, acknowledged that Mr. Russell was given a lot of leeway. The past actions by the self-insured employer are an indicator that the job offers made to Mr. Russell after the second industrial injury were legitimate and credible.

Mr. Thomas Eklund, the past risk manager with the self-insured employer, was instrumental in developing the job positions for Mr. Russell after his second injury. We find Mr. Eklund's testimony to be credible because he no longer works for Clover Park and does not have a personal stake in the outcome of this case. On May 30, 1991, Mr. Russell was offered a position as a building maintenance helper. The physical demands of this position included no lifting over ten pounds, no stooping, no bending, and no pushing or pulling. Mr. Russell refused this position.

On January 23, 1992, Mr. Russell was offered a position as a building maintenance helper/truck driver. The physical requirements for this job were the same as the one offered on May 30, 1991, except Mr. Russell would be required to ride back to the shop and pick up small tools or parts when requested. Mr. Russell refused this offer.

The positions offered May 30, 1991 and January 23, 1992, were within Mr. Russell's physical capabilities. Dr. Roy D. Broman, a physician called to testify on behalf of Mr. Russell, felt that the claimant could work in a light to sedentary job that did not require prolonged sitting. The job offers made by the self-insured employer were within Dr. Broman's estimates of Mr. Russell's capabilities. Drs. George Delyanis, Scott V. Linder, Dan A. Welch, Phillip Grisham, and David M. Chaplin all believed that Mr. Russell's capabilities exceeded those provided by Dr. Broman.

Of all the physicians who testified in this case, Dr. James A. Nowogroski was the only doctor who felt that Mr. Russell suffered from physical restrictions severe enough to prevent him from accepting the two positions offered by Clover Park. Specifically, he did not believe that Mr. Russell could sit for more than 5 to 10 minutes, stand for more than 15 minutes, lift more than 5 pounds, bend, squat, kneel, nor crawl. These restrictions are not persuasive because Mr. Russell sat longer than the period described in Dr. Nowogroski's testimony during the hearing, and he admitted that he could lift 10 to 15 pounds of groceries. In essence, Mr. Russell could physically perform the jobs offered by Clover Park.

The pivotal question is whether Mr. Russell was precluded from employment when taking into consideration his physical restrictions together with any residuals from any *psychiatric* disorder.

Ms. King, after conducting a vocational/psychological evaluation, did not believe that Mr. Russell was employable. In many instances, a combined vocational evaluation and psychological work-up provides added information on a person's ability to return to work. In this case, we do not find Ms. King's opinions persuasive because she failed to spend the time necessary to perform a credible evaluation. Specifically, Ms. King admitted that she did not spend enough time to obtain sufficient information to determine whether Mr. Russell had any personality

disorders. This was a determination that she could have made as it was within her stated area of expertise. This type of information is imperative in order to determine whether any psychiatric barriers were related to the industrial injuries, or whether they developed as a natural progression of some other unrelated event. This information is also essential to evaluate any mental/emotional obstacles to employment.

Likewise, Ms. King did not investigate whether the self-insured employer would make any job duty accommodations. She stated that employment was not likely because Mr. Russell would have to lie down during the day. Nonetheless, she failed to discover that the self-insured employer had made such accommodations in the past. Further, Ms. King failed to obtain an accurate description of Mr. Russell's physical capabilities. She considered a performance based physical capacities evaluation by Dr. Welch in 1992, as providing the proper level of restrictions. Dr. Welch personally challenged his own findings because Mr. Russell did not put forth a consistent effort. We are further concerned that Ms. King was not familiar with the Washington Administrative Code provisions for performing psychological evaluations.

For the above reasons, we believe that Ms. King's evaluation is suspect and not persuasive. We, accordingly, hold that Mr. Russell could have performed either of the jobs that Clover Park had offered him and that he is not entitled to benefits as a permanently totally disabled worker.

FINDINGS OF FACT

1. On April 30, 1990, the Department of Labor and Industries received an application for benefits alleging an industrial injury to the claimant on April 4, 1990, during the course of his employment with Clover Park School District #400. The claim was allowed, assigned Claim No. T-332305, and benefits paid. On February 28, 1994, the Department issued an order closing the claim with time loss compensation as paid through June 26, 1991, and with a permanent partial disability award of Category 2 for low back impairments. Following a timely appeal from the claimant and a Department abeyance order, an order was issued on January 11, 1995, canceling the February 28, 1994 order and closing the claim with time loss compensation as paid through June 26, 1991, and with a permanent

partial disability award of Category 2 for cervical impairment. No permanent partial disability award was paid for the low back injury over and above that paid on Claim No. T-121166. The claimant appealed this order to the Board on February 14, 1995, and the appeal was assigned Docket No. 95 0628.

2. On April 4, 1988, the Department received an application for benefits alleging an industrial injury to the claimant on February 18, 1988, during the course of his employment with Clover Park School District #400. The claim was allowed, assigned Claim No. T-121166, and benefits paid. On January 11, 1995, the Department issued an order closing the claim with time loss compensation as paid through February 3, 1989, and with a permanent partial disability award of Category 2 for low back impairments. The claimant appealed this order to the Board on February 15, 1995, and the appeal was assigned Docket No. 95 0712.

3. As of June 27, 1991 and January 11, 1995, the claimant's low back condition, proximately caused by the February 18, 1988 industrial injury, was fixed and no longer in need of further necessary and proper medical treatment. The condition merited the permanent partial disability award granted by the Department.

4. As of June 27, 1991 and January 11, 1995, the claimant's low back and cervical conditions, proximately caused by the April 4, 1990 industrial injury, were fixed and no longer in need of further necessary and proper medical treatment. The conditions merited the permanent partial disability award granted by the Department.

5. Mr. Russell could work in a light to sedentary capacity between June 27, 1991 and January 11, 1995. On May 30, 1991, Mr. Russell was offered a position as a building maintenance helper by Clover Park School District #400. The physical demands of that position were within Mr. Russell's physical capacities. Mr. Russell refused this position for personal reasons.

   On January 23, 1992, Mr. Russell was offered a position as a building maintenance helper/truck driver by Clover Park School District #400. The physical demands of that position were within Mr. Russell's physical capacities. Mr. Russell refused this position for personal reasons unrelated to the restrictions proximately caused by the industrial injuries.

6. Mr. Russell did not suffer from any psychiatric impairment proximately caused by either the February 18, 1988 or the April 4, 1990 industrial injuries.

7. Between June 27, 1991 and January 11, 1995, the claimant was capable of obtaining and performing gainful employment on a reasonably continuous basis, given his age, education, work history, and the combination of his industrially related cervical and lumbar conditions.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals.

2. Between June 27, 1991 and January 11, 1995, the claimant was not a totally and temporarily disabled injured worker as a result of his February 18, 1988 or April 4, 1990 industrial injuries as contemplated by RCW 51.32.090.

3. Between June 27, 1991 and January 11, 1995, the claimant was not a permanently totally disabled worker as a result of his February 18, 1988 or April 4, 1990 industrial injuries as contemplated by RCW 51.08.160.

4. The January 11, 1995 order of the Department of Labor and Industries in Claim No. T-121166, that closed the claim with time loss compensation as paid through February 3, 1989, and with a permanent partial disability award of Category 2 for low back impairments, is correct and is affirmed.

5. The January 11, 1995 order of the Department of Labor and Industries in Claim No. T-332305, that closed the claim with time loss compensation as paid through June 26, 1991, and with a permanent partial disability award of Category 2 for cervical impairment and no further award for the low back over and above that paid on Claim No. T-121166, is correct and is affirmed.

It is so ORDERED.

Dated this 12th day of July, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
ROBERT L. McCALLISTER Member

DISSENT

I dissent. I agree with our industrial appeals judge that this well motivated 45-year-old worker should be found permanently disabled as of June 27, 1991. I also agree that the key factor in determining Mr. Russell's inability to work is his psychiatric condition caused by his industrial injury. There is no question that Mr. Russell has severe physical limitations related to his industrial injury, his claim having been closed with a Category 2 permanent partial disability both for a cervical condition and a low back condition. His physical limitations, in conjunction with a pain disorder clearly related to the industrial injury, prevent him from returning to work despite his strong work history.

Although I agree with the majority that Dr. King, as a psychologist, is not a "physician" and is precluded from making disability ratings on psychological conditions, I believe that her testimony about the causal relationship between Mr. Russell's psychiatric condition and the industrial injury is much more convincing than that of Dr. Carter, a psychiatrist who testifies almost exclusively for the Department and self-insured employers.

In summary, I would adopt the reasoning and findings and conclusions of the industrial appeals judge and find Mr. Russell to be a permanently totally disabled worker.

Dated this 12th day of July, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
FRANK E. FENNERTY, JR. Member