COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

JAY TAYLOR,	)	**No. 28523-5-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	**Division Three**
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Jay Taylor appeals a superior court decision which affirmed the denial of his claim of partial permanent disability. Mr. Taylor contends there was not substantial evidence to support the denial. We disagree and affirm the superior court.

FACTS

Mr. Taylor suffered neck and back injuries in a car accident while working in March 2004. He filed a claim with the Department of Labor and Industries (Department). The Department paid for Mr. Taylor's treatment by a chiropractor and a physical

therapist for the next 18 months. On September 6, 2005, the Department issued an order declaring Taylor had reached maximum medical improvement (MMI) and closed his claim. Taylor appealed the closure to an Industrial Appeals Judge (IAJ). Mr. Taylor did not dispute that he had reached MMI, but he claimed that his injuries constituted a partial permanent disability (PPD). The IAJ heard testimony from Mr. Taylor, his wife, his chiropractor, and a chiropractor and physician retained by the Department. Mr. Taylor's chiropractor, Dr. Aaron Chan, testified that Mr. Taylor had several problems with his neck and back that met the criteria for PPD. Dr. Barbara Jessen, M.D., and Dr. Dennis Byam, a chiropractor, also conducted medical exams of Mr. Taylor. They found Mr. Taylor exhibited subjective complaints of pain, but found no objective evidence to support a finding of PPD.

The IAJ affirmed the Department's decision to close Mr. Taylor's claim. Mr. Taylor appealed the IAJ decision to the Labor and Industries Board of Industrial Insurance Appeals (Board). The Board affirmed the closure of the claim. Mr. Taylor then appealed to superior court. The court considered the evidence, adopted the Board's findings, and affirmed. This appeal followed.

ANALYSIS

"RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising

under the Industrial Insurance Act." *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 857, 86 P.3d 826, *review denied*, 152 Wn.2d 1031 (2004). Superior courts review a Board hearing *de novo*, but do not receive new evidence. RCW 51.52.115. The Board's findings are considered *prima facie* correct and the party challenging the Board's ruling bears the burden of showing that the evidence preponderates in its favor. *Id.*; *Ravsten v. Dep't of Labor & Indus*., 108 Wn.2d 143, 146, 736 P.2d 265 (1987). To that end, the factfinder in the superior court trial is free to find evidence contrary to the Board's determination if it is convinced the evidence weighs in that direction. *Gaines v. Dep't of Labor & Indus*., 1 Wn. App. 547, 550, 463 P.2d 269 (1969).

In turn, appellate courts review the superior court's rulings (1) for "substantial evidence" to support the court's findings of fact, (2) to see if the court's conclusions of law flow from the findings of fact, and (3) *de novo* on pure issues of law. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Evidence is substantial if it is "sufficient to persuade a fair-minded, rational person of the truth of the matter." *R&G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413, *review denied*, 152 Wn.2d 1034 (2004).

A party challenging a Board decision bears the burden of proving the decision was incorrect by a "fair preponderance of the evidence." *Dep't of Labor & Indus. v. Moser*,

35 Wn. App. 204, 208, 665 P.2d 926 (1983). Permanent partial disability is defined as a disability remaining after MMI is achieved. WAC 296-20-19000. WAC 296-20-240 provides, in relevant part, the categories of disabilities for neck and high back injuries:

> **Categories of permanent cervical and cervico-dorsal impairments.**
>
> (1) No objective clinical findings are present. Subjective complaints may be present or absent.
>
> (2) Mild cervico-dorsal impairment, with objective clinical findings of such impairment with neck rigidity substantiated by X-ray findings of loss of anterior curve, without significant objective neurological findings.
>
> This and subsequent categories include the presence or absence of pain locally and/or radiating into an extremity or extremities. This and subsequent categories also include the presence or absence of reflex and/or sensory losses. This and subsequent categories also include objectively demonstrable herniation of a cervical intervertebral disc with or without discectomy and/or fusion, if present.
>
> (3) Mild cervico-dorsal impairment, with objective clinical findings of such impairment, with neck rigidity substantiated by X-ray findings of loss of anterior curve, narrowed intervertebral disc spaces and/or osteoarthritic lipping of vertebral margins, with significant objective findings of mild nerve root involvement.

WAC 296-20-280 provides, in relevant part, the categories for lower back impairments:

> **Categories of permanent dorso-lumbar and lumbosacral impairments.**
>
> (1) No objective clinical findings. Subjective complaints and/or sensory losses may be present or absent.
>
> (2) Mild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant X-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present.
>
> (3) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment but without

significant X-ray findings or significant objective motor loss.

Dr. Chan characterized Mr. Taylor's impairments as Category 2 and 3 and pointed to some objective evidence to support his findings. Dr. Byam and Dr. Jessen both concluded that Mr. Taylor exhibited Category 1 impairments and they contradicted or discounted the findings by Dr. Chan. The trial court, like the Board before it, was entitled to weigh this conflicting testimony and reach its own conclusion. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964).

The "attending physician" doctrine requires that the testimony of attending physicians or others who provide primary medical care be given special consideration by the trier of fact in worker's compensation cases. *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 128-129, 186 P.2d 76 (1947); *Judd v. Dep't of Labor & Indus.*, 63 Wn. App. 471, 475, 820 P.2d 62 (1991). Mr. Taylor contends that the IAJ and the superior court were required to give Dr. Chan's testimony special deference because he was Mr. Taylor's primary medical provider. But the "attending physician" doctrine does not require a factfinder to disregard testimony that contradicts a primary provider. *See Chalmers v. Dep't of Labor & Indus.*, 72 Wn.2d 595, 599, 434 P.2d 720 (1967).

Mr. Taylor argues that the Board and the superior court improperly discounted Dr. Chan's testimony because he is a chiropractor and use of a chiropractor's opinion in

assessing disability is regulated by statute.

RCW 51.32.112(2) provides:

> Within the appropriate scope of practice, chiropractors licensed under chapter 18.25 RCW may conduct special medical examinations to determine permanent disabilities in consultation with physicians licensed under chapter 18.57 or 18.71 RCW. The department, in its discretion, may request that a special medical examination be conducted by a single chiropractor if the department determines that the sole issues involved in the examination are within the scope of practice under chapter 18.25 RCW. *However, nothing in this section authorizes the use as evidence before the board of a chiropractor's determination of the extent of a worker's permanent disability if the determination is not requested by the department.*

(Emphasis added.)

Both the Board and the superior court ruled that the statute prohibited Dr. Chan from identifying the category of disability, but both tribunals considered his testimony for the purposes of assessing whether Mr. Taylor had a PPD. This was consistent with the statute and the "attending physician" doctrine. Both Dr. Byam and Dr. Jessen testified that they had done an examination of Mr. Taylor and found no objective medical symptoms justifying a finding of PPD. This was sufficient evidence to support the IAJ and the Board's ruling. All indications in the record are that the IAJ and the superior court carefully considered Dr. Chan's testimony. They were not required to accept it.

CONCLUSION

The trial court did not err in determining that the claim of PPD was not proven.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

_____
Sweeney, J.

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Siddoway, J.