Aguilar-Vasquez, Jose

SCOPE OF REVIEW

Time-loss compensation

In an appeal of an order terminating time-loss compensation benefits, the Board's scope of review extends to consideration of the cause of any conditions impacting employability, even though the Department's prior consideration of such cause and its impact is not shown. **….*In re Jose Aguilar-Vasquez*, BIIA Dec., 03 15196 (2004)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOSE L. AGUILAR-VASQUEZ	)	**DOCKET NO. 03 15196**
	)	
CLAIM NO. X-184523	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
	)	**FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Jose L. Aguilar-Vasquez, by
Sharpe Law Firm, per
Robert J. Heller

Employer, Tight Is Right Construction, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Kirsten Stecher, Assistant

The claimant, Jose L. Aguilar-Vasquez, filed an appeal with the Board of Industrial Insurance Appeals on May 7, 2003. Mr. Aguilar-Vasquez appeals an April 28, 2003 order of the Department of Labor and Industries. In this order, the Department affirmed a December 19, 2002 order wherein the Department ended time loss compensation as paid through December 18, 2002, upon a determination that Mr. Aguilar-Vasquez was able to work. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DECISION

In a Proposed Decision and Order issued on May 4, 2004, the industrial appeals judge dismissed the appeal. Mr. Aguilar-Vasquez filed a timely Petition for Review. This matter is therefore before the Board for review pursuant to RCW 51.52.104 and RCW 51.52.106.

This is Mr. Aguilar-Vasquez's appeal from an April 28, 2003 Department order wherein the Department affirmed termination of time loss compensation effective after payment through December 18, 2002. The period of requested time loss compensation denied by the Department, and therefore within our review authority, is December 19, 2002 through April 28, 2003. We have granted review because the industrial appeal judge erred in striking relevant portions of the deposition testimony of neurologist Dr. Stan Schiff and of psychiatrist Dr. Pablo Proano.

Through the testimony of Dr. Schiff and Dr. Proano, Mr. Aguilar-Vasquez contends that the covered industrial foot injury proximately caused a complex regional pain syndrome (CRPS), limiting him to sedentary work, and proximately caused depression with severe concentration

problems, and vegetative and psychotic symptoms, resulting in severely limited capacity to function. Dr. Proano testified to a global assessment score of 38 on a scale of 100.

The testimony of Dr. Schiff and Dr. Proano concerns the proximate cause effects of the industrial injury upon Mr. Aguilar-Vasquez's capacity to function mentally and physically. The testimony was directly relevant to the issue of whether Mr. Aguilar-Vasquez was capable or incapable of gainful employment.

The parties did not identify any prior order or other written determination of the Department that had accepted or denied Department responsibility for CRPS or for any mental health condition. The industrial appeals judge was therefore concerned that determinations of whether such conditions existed, whether such conditions were caused by the covered industrial injury, and whether the conditions had disabling effects, would exceed the scope of the Board's review authority. The industrial appeals judge, upon motion by the Department, struck the testimony of Dr. Schiff and Dr. Proano regarding CRPS and depression, including the asserted effects of these conditions upon Mr. Aguilar-Vasquez's functional capacities. The industrial appeals judge then dismissed the appeal because, without the testimony, Mr. Aguilar-Vasquez's evidence did not establish a prima facie case for relief.

We disagree with the industrial appeals judge's conclusion that the testimony of Dr. Schiff and Dr. Proano, regarding CRPS and depression, should be stricken. Consideration of the testimony, insofar as relevant to the determination of whether the covered industrial injury caused Mr. Aguilar-Vasquez to be temporarily totally disabled December 19, 2002 through April 28, 2003, is necessary to fulfill our obligation to make findings and conclusions upon each contested issue of fact and law in a matter properly before us, as directed in RCW 51.52.104 and RCW 51.52.106.

A correct scope of review analysis requires that we be mindful of (a) our obligations, under RCW 51.52.104 and RCW 51.52.106, to fully decide cases properly before us, while also adhering to (b) the principle that our jurisdiction is appellate only:

> It is not disputed that the board's and the superior court's jurisdiction is appellate only, and for the board and the trial court to consider matters not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction. Both parties agree that if a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court.

Lenk v. Department of Labor & Indus., 3 Wn. App. 977, 982 (1970).

> To ascertain whether the board acted within its proper scope of review . . . we look to the provisions of the order appealed to the board. The questions the board may consider and decide are fixed by the order from which the appeal was taken. . . as limited by the issues raised by the notice of appeal. *Brakus v. Department of Labor & Indus.,* 48 Wn.2d 218 . . . (1956).

Lenk, at 982.

Scope of review analysis raises the question: Is it proper to consider particular evidence, and make detailed findings of fact and conclusions of law in light of the appellant's contentions that a specific Department order is incorrect? For instance, in *Lenk,* the Department had rejected the claim. The Board directed that the claim be allowed only for a dermatitis condition. The claimant objected to, as beyond the proper scope of review, a Board finding that as of May 9, 1996, the claimant had an arthritic condition that was **not** causally related to the alleged occupational exposure to creosote. The court reasoned that, when the Department rejected the claim, three issues arose: (1) Whether or not there was an industrial accident or occupational exposure; (2) Whether or not there exists a disability; and, (3) Whether or not the disability complained of is causally related to the alleged injury or occupational exposure. The court observed that the claimant's Notice of Appeal and evidence advanced the contention that an arthritic condition had developed some time after the exposure to creosote and was caused by the exposure. The court reasoned that, although the Department had not explicitly addressed the issue of the extent of the resulting effects of the industrial exposure to creosote, the Board's finding regarding the arthritic condition was proper in order to address the claimant's contentions in support of claim allowance. See *Lenk*, at 983-987.

In a Board designated Significant Decision we have used like reasoning to determine whether a matter is properly within our permissible scope of review. For instance, see *In re Donna Jones (Simmons)*, BIIA Dec., 99 22362 (2001). This was an Order Vacating Proposed Decision and Order and Remanding Appeal For Further Proceedings. In that case, the claimant appealed from a Department order wherein the Department denied reopening of the claim on grounds of worsening of the industrial injury. In support of worsening, the claimant presented the testimony of a psychiatrist to establish that the injury had caused a mental health condition to develop. The Department had not explicitly previously determined whether the claimant had a mental health condition that was caused by the theretofore covered industrial injury. We noted that in its denial of the claimant's application to reopen her claim, "Implicitly, however, the Department decided all bases on which the claim could be reopened." *Jones (Simmons)*, at 4.

In another designated Significant Decision in an aggravation case, we identified the limit of our scope of review upon determining that a claim should be reopened on grounds that a new condition (focal segmental amyotrophy) was caused by the industrial injury. See *In re Ronald Holstrom*, BIIA Dec., 70,033 (1986). The Department had denied Mr. Holstrom's application to reopen his claim, upon determining that the new condition was not related to his original covered industrial injury. Having made such a determination, the Department had no occasion to go further to determine whether Mr. Holstrom should be provided treatment under the claim or an award for permanent partial disability. The Board, having determined the new condition was caused by the industrial injury, decided only the lesser, required question of reopening and left to the Department's original jurisdiction the question of treatment, permanent partial disability, and other benefits.

In the case now before us, Mr. Aguilar-Vasquez alleges that the covered foot injury proximately caused one or two conditions (CRPS and/or depression) that he contends contribute to temporary total disability from employment. His appeal, **which we must decide** pursuant to RCW 51.52.104 and RCW 51.52.106, is from a Department order denying the temporary total disability benefits. Determinations of temporary total disability, like determinations of permanent total disability, require that the Board address the question of whether limitations caused by the industrial injury have rendered the worker unemployable. *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972), and *Bonko v. Department of Labor & Indus.*, 2 Wn. App. 22 (1970). Consideration of the industrial injury includes the "conditions as result therefrom." RCW 51.08.100. Such conditions caused by the injury include the mental conditions as well as the physical conditions. See, *e.g.*, *In re Robert Hedblum,* BIIA Dec., 88 2237 (1989).

Consistent with the court's reasoning in *Lenk,* and consistent with this Board's decisions, we must hold then that our determination of whether Mr. Aguilar-Vasquez's industrial injury has caused temporary total disability necessarily entails consideration of his evidence that disabling conditions resulting from the industrial injury include CRPS and depression. We reverse the industrial appeals judge's Interlocutory Order dated April 2, 2004, date stamped April 7, 2004, and we reverse the Order Declining Review of Interlocutory Appeal, dated April 19, 2004, and date stamped April 20, 2004. We direct that, subject to rulings upon other objections not discussed herein, the testimony of Dr. Stan Schiff concerning CRPS and the testimony of Dr. Pablo Proano concerning depression be admitted into evidence and considered in determining whether Mr. Aguilar-Vasquez was a temporarily totally disabled worker during the period December 19, 2002 through April 28, 2003.

Prior to such consideration, however, the Department shall be allowed to present its evidence, as the industrial appeals judge deems fair and reasonable, on the issue of whether Mr. Aguilar-Vasquez was temporarily totally disabled during this period due to conditions caused by his industrial injury. We leave it to the industrial appeals judge to rule upon any motions the Department may have requesting leave to develop such evidence.

We note, consistent with this Board's caution in *Holstrom,* that the industrial appeals judge should make only those findings and conclusions necessary to decide the issue of whether Mr. Aguilar-Vasquez was a temporarily totally disabled worker during the period December 19, 2002 through April 28, 2003. These include the causative effects of the industrial injury during this period, the limitations if any imposed by conditions caused by the industrial injury, and the effect if any of such limitations upon Mr. Aguilar-Vasquez's employability.

The Proposed Decision and Order dated May 4, 2004, is vacated. This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based on the entire record, and consistent with this order. Any party aggrieved by the Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

It is so **ORDERED**.

Dated this 14th day of September, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member