Ayers, Kris

TREATMENT

Subsequent condition impairing recovery

WAC 296-20-055 allows the Department to authorize treatment for a pre-existing condition that retards recovery from the effects of an industrial injury, but does not allow the Department to authorize treatment for unrelated conditions developed subsequent to the industrial injury. **….*In re Kris Ayers*, BIIA Dec., 04 10250 (2005)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KRIS L. AYERS	)	**DOCKET NO. 04 10250**
	)	
CLAIM NO. M-415723	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Kris L. Ayers, by
Law Offices of David L. Harpold, per
Robert G. Bauer

Employer, Nicholson Mfg. Co.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
William A. Garling, Jr., Assistant

The claimant, Kris L. Ayers, filed an appeal with the Board of Industrial Insurance Appeals on January 8, 2004, from an order of the Department of Labor and Industries dated December 22, 2003. In this order, the Department denied responsibility for conditions diagnosed as hypersensitivity pneumonitis and pulmonary inflammation. The Department order is **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 claimant to a Proposed Decision and Order issued on February 1, 2005, in which the industrial appeals judge affirmed the Department order dated December 22, 2003.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. Although we agree with our industrial appeals judge that the order in which the Department denied responsibility for the claimant's hypersensitivity pneumonitis and pulmonary inflammation should be affirmed, we have granted review to clarify our jurisdiction and to clearly set forth our reasoning.

The claimant, Kris L. Ayers, suffered an industrial injury to her back and neck in 1998. As part of her treatment for the industrial injury, she entered a physical rehabilitation program as well as a pain clinic. During the time that she was involved in this treatment, she developed the pulmonary conditions at issue in this appeal. The pulmonary conditions are unrelated to the accepted conditions under the claim and they were not caused by the treatment regime. Because of the pulmonary conditions, Ms. Ayers had difficulty breathing and was unable to participate in the

rehabilitation program for a number of weeks. Ms. Ayers seeks to have the treatment for the pulmonary conditions included in this claim because the pulmonary conditions retarded her recovery from the industrially related condition.

The controversy in this case focuses on the interpretation of WAC 296-20-055, which allows the Department to provide treatment for unrelated conditions that may be retarding recovery of the accepted industrial injury. Although the parties argue whether WAC 296-20-055 applies, the order under appeal does not directly address the application of WAC 296-20-055 to the facts of this case.

In order to clarify our jurisdiction to address this issue, we have reviewed the Department's microfiche file. *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965). A review of the microfiche indicates that counsel for Ms. Ayers sent a letter to the Department dated January 15, 2003. In this letter, claimant's counsel requested that the Department accept responsibility for the claimant's pulmonary conditions pursuant to WAC 296-20-055 and issue an order either granting or denying the request. On December 22, 2003, the Department issued an order in which it denied responsibility for the pulmonary conditions. It is this order that is under appeal. It is clear to us from our review of the Department's microfiche that the Department rejected the claimant's request for treatment of the pulmonary conditions in its order under appeal pursuant to the provisions of WAC 296-20-055.

Although we agree with the resolution of the appeal as set out by the industrial appeals judge in the Proposed Decision and Order, we have granted review in order to fully explain our reasoning. The controversy, as we have stated, focuses on the interpretation of the language of WAC 296-20-055.

The claimant argues that the language of WAC 296-20-055 does not require the condition retarding recovery to be a condition pre-existing the industrial injury, and therefore a condition which develops after the industrial injury and retards recovery may be treated under the rule. Ms. Ayers reasons that the Department should provide treatment for her pulmonary conditions even though she developed the conditions subsequent to the industrial injury.

The Department argues that the clear language of the rule should be read as one comprehensive statement which addresses only **pre-existing** conditions that retard recovery, and therefore the Department should not provide treatment for Ms. Ayers' pulmonary conditions which developed subsequent to the industrial injury. While there is no language in this WAC provision specifically excluding a subsequent condition from being treated, there is no language in the WAC which specifically addresses subsequent conditions.

We have reviewed a number of prior Board decisions that have considered treatment for conditions which retard recovery. *In re Linda M. McGoff*, Dckt. No. 93 1555 (May 11, 1994) and *In re Gayle D. Cantrell*, Dckt. No. 89 1432 (April 10, 1990), deal with the issue of treatment for obesity. In *McGoff* there is a finding regarding Ms. McGoff's weight gain. Finding of Fact No. 5 indicates that the weight gain occurred between April 15, 1992 and March 24, 1993, and was neither related to the industrial injury nor did it prevent her recovery from the industrial injury of April 14, 1988. In the text in *McGoff*, the Board noted that at the time of the industrial injury Ms. McGoff's weight was recorded at 240 pounds and at the time of the application for aggravation her weight was 254 pounds. The Board found that the weight gain had not played any significant part in the development of the conditions caused by the injury or in the need for further treatment.

In *Cantrell*, the industrial injury occurred in 1981 and the Department allowed treatment for the obesity. The treatment began in 1988. It is unclear from the decision whether Ms. Cantrell's obesity pre-existed the industrial injury or was a condition that developed between the date of the injury in 1981 and the date of the treatment program in 1988.

In *In re Judy L. Williams*, Dckt. No. 90 6926 (April 3, 1992), the Board found that treatment for a pre-existing lung condition was retarding recovery and was therefore allowable under WAC 296-20-055 for the unrelated condition. In *In re James D. Saxton*, Dckt. No. 90 0466 (April 22, 1991), the Board held that treatment for the pre-existing dental condition was authorized under WAC 296-20-055. Finally, in *In re June McClure*, Dckt. 69,028 (March 25, 1986), the Board held that although Ms. McClure's weight problem pre-existed her industrial injury, treatment under WAC 296-20-055 may be authorized. However, since the medical evidence established that the underlying industrial injury had healed and was no longer in need of any medical treatment, there was no authority to provide treatment for the obesity since it no longer retarded recovery.

None of these cases directly interpret WAC 296-20-055 on the issue before us, that is, whether the rule authorizes treatment for a **subsequent** condition which is retarding recovery. We are unable to find any other Board decisions which address this issue and we have found no court cases which interpret the rule's provisions.

WAC 296-20-055 begins with a statement directed to pre-existing conditions. The first sentence states: "Conditions preexisting the injury or occupational disease are not the responsibility of the department." This reference to pre-existing unrelated conditions is repeated in paragraph two of the rule. Paragraph two reads, as follows:

> Temporary treatment of an unrelated condition may be allowed, upon prior approval by the department or self-insurer, provided these

> conditions directly retard recovery of the accepted condition. The department or self-insurer will not approve or pay for treatment for a known **preexisting** unrelated condition for which the claimant was receiving treatment prior to his industrial injury or occupational disease, which is not retarding recovery of his industrial condition. (Emphasis added.)

There is no reference in this section that refers to any subsequent condition retarding recovery. We believe, when read as a whole, WAC 296-20-055 addresses only pre-existing conditions which retard recovery. This is consistent with the fundamental principles of our Industrial Insurance Act. It has long been the rule in our Industrial Insurance Act that pre-existing disabling conditions are considered with the residual effects of the industrial injury in determining permanent total disability. *Miller v. Department of Labor & Indus.*, 200 Wash. 674 (1939) and *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972). However, disabilities which manifest after the industrial injury are not considered in determining permanent total disability. *Erickson v. Department of Labor & Indus.*, 48 Wn.2d 458 (1956); *In re Pearl* Howes, BIIA Dec., 58,356 (1982). In short, our Industrial Insurance Act takes the injured worker in the condition it finds the worker at the time of the industrial injury or occupational disease, complete with all pre-existing infirmities. We believe WAC 296-20-055 provides for treatment for such pre-existing conditions which must be addressed in order to allow recovery from the industrial injury.

We find nothing in the fundamental principles of our Industrial Insurance Act to support the claimant's theory that WAC 296-20-055 authorizes treatment for conditions developed subsequent to the industrial injury. Nor do we find any language in WAC 296-20-055 which supports the claimant's position. The language of WAC 296-20-055 plainly and simply applies only to pre-existing conditions which retard recovery from the effects of the industrial injury.

The Department order is correct and is affirmed.

FINDINGS OF FACT

1. On April 7, 1998, the Department received an application for benefits in which the claimant, Kris L. Ayers, alleged that she sustained an industrial injury to her back and neck on March 2, 1998, in the course of her employment with Nicholson Manufacturing. On June 9, 1998, the Department issued an order in which it allowed the claim.

   On January 8, 2004, the claimant filed a Notice of Appeal from the Department's order dated December 22, 2003, in which the Department provided: Department denies responsibility for condition diagnosed as hypersensitivity pneumonitis and pulmonary inflammation.

On February 6, 2004, the Board issued an order in which it granted the appeal, assigned Docket No. 04 10250, and directed that further proceedings be held on the issues raised therein.

2. Kris L. Ayers sustained an industrial injury to her neck and back on March 2, 1998, in the course of her employment with Nicholson Manufacturing.

3. In early 2003, approximately five years after her industrial injury, Ms. Ayer's developed a pulmonary condition diagnosed as hypersensitivity pneumonitis and pulmonary inflammation. Ms. Ayers' pulmonary condition was not proximately caused by the March 2, 1998 industrial injury but was rather the result of Ms. Ayers' allergic reaction to something in the environment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The claimant's conditions diagnosed as hypersensitivity pneumonia and/or pneumonitis arose subsequent to the March 2, 1998 industrial injury and were not proximately caused by the industrial injury.

3. WAC 296-20-055 does not authorize or require treatment of a condition unrelated to the industrial injury that manifests itself subsequent to the industrial injury when the industrial injury is not a proximate cause of that condition.

4. The claimant is not entitled to treatment for her unrelated condition(s) diagnosed as hypersensitivity pneumonia and/or pneumonitis pursuant to the provisions of WAC 296-20-055.

5. The order of the Department of Labor and Industries dated December 22, 2003, is correct and is affirmed.

It is so **ORDERED**.

Dated this 18th day of May, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member