Valero, Dora

MOTION TO DISMISS

Failure to make a prima facie case

In deciding whether to grant a CR 41(b)(3) motion to dismiss, we are required to accept the non-movant's evidence as true; view all the evidence in the light most favorable to the non-movant; and determine if there is any evidence or reasonable inference from the evidence establishing a prima facie case. **....*In re Dora Valero,* Order Vacating Proposed Decision and Order, BIIA Dec., 19 19528 (2021)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DORA E. VALERO	)	**DOCKET NO. 19 19528**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CLAIM NO. SL-21080	)	**FOR FURTHER PROCEEDINGS**

Dora E. Valero worked at the Hanford site from 1978 until 2002 as a secretary trainee and an administrative assistant. In 2018, she was diagnosed with myasthenia gravis, a neurological condition. The Department allowed Ms. Valero's claim pursuant to the presumption provided in RCW 51.32.187. Our hearing judge concluded that the employer, the U.S. Department of Energy (DOE), failed to present a prima facie case that the Department order allowing Ms. Valero's claim under RCW 51.32.187 was incorrect and dismissed the appeal pursuant to CR 41(b)(3). The DOE appeals this decision arguing that Ms. Valero's myasthenia gravis was not caused by any environmental exposure during her employment at the Hanford site and that her condition is due entirely to her genetic predisposition. We find that, when viewing the evidence in the light most favorable to the non-moving party, the DOE has made a prima facie case that Ms. Valero's condition did not arise naturally and proximately out of the distinctive conditions of her employment at the Hanford site. The Proposed Decision and Order of December 31, 2020, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

DOE workers with certain qualifying medical conditions, including neurological diseases, are presumed to have an occupational disease arising naturally and proximately from their employment at the Hanford site.[1] To overcome this presumption, the DOE must show by clear and convincing evidence that Ms. Valero's condition did not arise naturally and proximately from her employment at the Hanford site. Evidence rebutting the presumption "may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities."[2] If the DOE rebuts the statutory presumption, the burden returns to Ms. Valero and the Department to prove that her myasthenia gravis arose naturally and proximately from the distinctive employment as an administrative assistant between 1978 and 2002.

[1] RCW 51.32.187.
[2] RCW 51.32.187(2)(b).

A prima facie case means that a party must present substantial evidence that, if unrebutted or uncontradicted, would convince an unprejudiced, thinking mind of the truth of the issues on appeal.[3] Another definition for prima facie case is one that "will prevail until contradicted and overcome by other evidence."[4] A mere scintilla of evidence is insufficient to meet this burden.[5] In deciding whether to grant the CR 41(b)(3) motion to dismiss, we are required to accept the DOE's evidence as true; view all the evidence in the light most favorable to the employer; and determine if there is any evidence or reasonable inference from the evidence establishing a prima facie case.

Here, James M. Haynes, M.D., testified that myasthenia gravis is "best thought of as genetic in origin" and that it was "highly unlikely and even less likely than that" that Ms. Valero's condition was related to her employment at the Hanford site. In explaining his opinion, Dr. Haynes testified that he's "never heard of such a thing" and that he's never encountered an allegation of an environmental cause in the "literature."[6] Additionally, Lawrence C. Yearsley testified that because Ms. Valero's work at the Hanford site was administrative in nature, she would not have been close to any source of radiological exposure. In support of this conclusion, Mr. Yearsley pointed to Ms. Valero's lifetime dosimetry record, which he believed showed that she was well below what a regulatory occupational exposure level of radiation would be for any sort of occupation. He explained that in reviewing the records of her exposure, he found that her lifetime exposure would not have exceeded just one year's worth of exposure allowance. In Mr. Yearsley's opinion, there was no difference between Ms. Valero's safety working as an administrative worker at the Hanford site versus working in an administrative building at the Federal Building in Richland.

Accepting the opinions of Dr. Haynes and Mr. Yearsley as true, and viewing the light most favorable to the DOE, their collective testimonies meet the minimum threshold of establishing a prima facie case that Ms. Valero's myasthenia gravis did not arise naturally and proximately from her work at the Hanford site between 1978 and 2002. Accordingly, Ms. Valero and the Department must present their evidence in support of claim allowance under RCW 51.32.187.

Finally, we want to address the argument put forward by Ms. Valero and the Department that the employer needed to present clear and convincing evidence in order to establish a prima facie

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[3] *In re William Morgan*, Dckt. No. 91 3417 (January 14, 1993).
[4] *Black's Law Dictionary*, 1189 (6th ed. 1990).
[5] *In re Peter Kim*, BIIA Dec. 00 21147 at 2 (2002) citing *Omeitt v. Dep't of Labor & Indus.*, 21 Wn.2d 684 (1944).
[6] Haynes Dep. at 25-26.

case. They rely on *Spivey v. City of Bellevue*,[7] as controlling when deciding if the DOE has met its burden. *Spivey* involved two appeals brought under a similar statute, RCW 51.32.185, which provided for a legal presumption that occupational disease claims brought by firefighters for melanoma should be allowed unless the employer could show, based on a preponderance of the evidence, that the condition was not occupationally related. Notably, in *Spivey*, both of the underlying cases being appealed involved situations where the claim had been fully litigated; that is, both the employer and the worker had put on evidence in support of their respective positions. The *Spivey* court was asked to determine what effect the statutory presumption had when evaluating the totality of the evidence, not what evidence was necessary for the employer to make a prima facie case in light of the statutory presumption. Because this appeal has not been fully litigated, we do not find *Spivey* to be controlling.

ORDER

This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: August 13, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

[7] 187 Wn.2d 716 (2017).

Addendum to Order
In re Dora E. Valero
Docket No. 19 19528
Claim No. SL-21080

Appearances

Claimant, Dora E. Valero, by Smart Law Offices, per Christopher L. Childers

Self-Insured Employer, U.S. Department of Energy, by Wallace Klor Mann Capener & Bishop, P.C., per Lawrence E. Mann

Department of Labor and Industries, by Office of the Attorney General, per Bryan M. S. Ovens

Department Order(s) Under Appeal

In Docket No. 19 19528, the employer, U.S. Department of Energy, filed an appeal with the Board of Industrial Insurance Appeals on September 3, 2019, from an order of the Department of Labor and Industries dated July 5, 2019. In this order, the Department affirmed as correct its previous order dated April 1, 2019, which allowed Ms. Valero's claim as an occupational disease pursuant to the Hanford presumption under RCW 51.32.187, with a date of manifestation determined to be July 13, 2018.

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely petition for review of Proposed Decision and Order issued on December 31, 2020. On April 2, 2021, both Ms. Valero and the Department filed their respective responses to the Department of Energy's Petition for Review.