Leibfried, Ronald

AGGRAVATION (RCW 51.32.160)

Last closing order not final

Where a prior closing order was not communicated to the claimant it was improper to construe a further order denying a subsequent application to reopen the claim as an order affirming the order closing the claim. The issues before the Department on an application to reopen the claim are different from those involved when closing the claim. In this case, the Board therefore directed the Department to treat the application to reopen the claim as a protest and to issue a further determinative order concerning the closure of the claim. ***….In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00015-4. Although this decision correctly determines an application to reopen can be treated as a protest, consider the effect of *In re Jorge Perez-Rodriquez*, BIIA Dec., 06 18718 (2008) on the effects of the denial of an application to reopen that becomes final when the original closing order was not communicated.]

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Application to reopen treated as protest

It is proper to treat an application to reopen a claim as a protest of the order closing the claim where the evidence indicates the last closing order was never communicated to the claimant. In this case, the Board therefore directed the Department to treat the application to reopen the claim as a protest and to issue a further determinative order concerning the closure of the claim. ***….In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00015-4.]

SCOPE OF REVIEW

Aggravation

Where a prior closing order was not communicated to the claimant it was improper to construe a further order denying a subsequent application to reopen the claim as an order affirming the order closing the claim. The issues before the Department on an application to reopen the claim are different from those involved when closing the claim. In this case, the Board therefore directed the Department to treat the application to reopen the claim as a protest and to issue a further determinative order concerning the closure of the claim. ***….In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 91-2-00015-4.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD K. LEIBFRIED	**)**	**DOCKET NO. 88 2274**
	)	
CLAIM NO. T-077058	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald K. Leibfried, by
Law Offices of Tom G. Cordell, per
Tom G. Cordell, Attorney, and
Jeanette M. Gunther, Legal Assistant

Self-Insured Employer, AMFAC, Incorporated, by
Gavin, Robinson, Kendrick, Redman,
Pratt, & Crollard, Inc., P.S., per
Randall D. Leeland, Attorney, and Laura Manley, Legal Assistant

This is an appeal filed by the claimant, Ronald K. Leibfried, on June 3, 1988 from an order of the Department of Labor and Industries dated May 11, 1988 which adhered to the provisions of a Department order dated April 7, 1988. The Department's order of April 7, 1988 denied the claimant's application to reopen the claim for aggravation of condition and ordered that the claim remain closed pursuant to an order of September 14, 1987 and denied self-insured responsibility for a "chronic thoracic strain". **APPEAL DISMISSED**.

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 employer to a Proposed Decision and Order issued on May 1, 1990 in which the order of the Department dated May 11, 1988 was reversed and the matter remanded to the Department to provide further treatment and take such other action as may be indicated.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. In particular, contrary to statements in the employer's Petition for Review, we conclude that the employer had ample opportunity to fully litigate the question of whether the claimant received the Department order of September 14, 1987.

That issue was first raised by claimant's counsel at the first hearing, just before the testimony of the claimant. Counsel for the self-insured employer did not object at that time. In fact, the self-insured employer cross-examined extensively on that issue. Following the testimony of Mr. Leibfried,

the employer requested the opportunity to present lay witnesses regarding the issue of the communication of the September 14, 1987 order. At no time through the hearing process did the employer object to litigation of the communication issue. Additionally, on January 26, 1990 the Industrial Appeals Judge sent a letter to both counsel, indicating that he had reviewed the transcript and determined that the jurisdictional issue would be resolved by a finding that the order of September 14, 1987 was not communicated to the claimant. He gave counsel until February 9, 1990 to respond. There is no indication that counsel for the self-insured employer took any action. The question of whether the September 14, 1987 order was communicated to the claimant is therefore properly before us.

This is a claim for an industrial injury to claimant's lower back which occurred on May 19, 1987. The Department issued its first closing order on September 14, 1987. That order was mailed to the claimant at an address in Quincy, Washington, where he no longer resided. Mr. Leibfried contends he first learned that his claim was closed when he went to his doctor in February of 1988, seeking further treatment. At that time, the receptionist checked a computer terminal and determined that the claim was closed. Since the claim was closed, he filed an application to reopen. Apparently, it was not until after the litigation had started in this matter, that the closing order of September 14, 1987 was actually communicated to the claimant.

There is nothing to rebut the claimant's version of what occurred. The self-insured employer had from April 17, 1989, the date Mr. Leibfried testified, until at least February 9, 1990, the date that the Industrial Appeals Judge requested the parties' respective positions regarding his finding on the jurisdictional issue, in order to offer additional information regarding the communication of the order. Since we have no reason to disbelieve Mr. Leibfried's testimony, we conclude that the September 14, 1987 order was not communicated to him until sometime after litigation had started in this appeal.

After finding that the September 14, 1987 order had not been communicated to the claimant, our Industrial Appeals Judge construed the claimant's application to reopen for aggravation filed on March 3, 1988 as a timely protest to the Department order of September 14, 1987. He also determined that the Department order of May 11, 1988 constituted an order affirming the September 14, 1987 closure order. He then characterized this appeal as a direct appeal from the May 11, 1988 "closing" order and remanded the claim for further treatment. We disagree with the Industrial Appeals Judge's analysis that the May 11, 1988 order constitutes an order affirming the September 14, 1987 closing order.

It is proper to construe the March 3, 1988 application for reopening as a protest to the Department order of September 14, 1987. At the time that application was filed, the claimant was aware of the closing order of September 14, 1987, based only on oral information he received at his attending physician's office in February 1988. It is clear that the application for reopening filed on claimant's behalf on March 3, 1988, was filed in order to notify the Department of his need for continued treatment. The application therefore constituted a timely protest to the Department order of September 14, 1987, which closed the claim.

However, the September 14, 1987 Department order contained language indicating that the Department would issue a further appealable order upon receipt of a protest. The filing of the protest automatically set the September 14, 1987 order aside and held it in abeyance. The Department must investigate further and enter another determinative order. In re Santos Alonzo, BIIA Dec., 56,833 (1981).

The Industrial Appeals Judge construed the May 11, 1988 Department order as an order issued in response to the protest of March 3, 1988. He interpreted the May 11, 1988 order as adhering to the provisions of the September 14, 1987 closing order. We disagree. In issuing the May11, 1988 order, the Department adhered to the provisions of a Department order of April 7, 1988, which denied the application to reopen for aggravation of condition. In doing so, the Department determined that there had been no objective worsening of the claimant's condition since the previous order issued by the Department on September 14, 1987. However, because the September 14, 1987 order never became final, the aggravation issue was not properly before the Department. Reid v. Dep't of Labor & Indus., 1 Wn.2d 430 (1939). Furthermore, there is a substantial difference between determining the need for further treatment in a claim prior to initial final closure, and determining whether there has been an aggravation of the condition since previous closure, as required by our aggravation statute. It is the former issue, no the latter, which must be decided by the Department. Our jurisdiciton is limited to those issues actually determined by the Department. In re Ronald F. Holstrom, BIIA Dec., 70,033 (1986).

Since the aggravation issue was not properly before the Department and since the Department has not responded to the issues raised by the claimant's protest of March 3, 1988, we do not have jurisdiction over this appeal. The claim must be remanded to the Department with instructions to consider the March 3, 1988 aggravation application as a timely protest to the Department order of September 14, 1987, and to issue a further determinative order on the issues raised by the protest.

FINDINGS OF FACT

1. On June 8, 1987 the Department of Labor and Industries received an accident report alleging an industrial injury to claimant, Ronald K. Leibfried, while in the course of his employment with Lamb Weston (now AMFAC) on May 19, 1987. On June 16, 1987 the Department issued an order allowing the claim. On September 14, 1987 the Department issued an order terminating time loss compensation as paid through May 25, 1987 and closing the claim without award for permanent partial disability.

   On March 3, 1988 an application to reopen the claim for aggravation of condition was received by the Department. On April 7, 1988 the Department issued an order denying the claimant's application to reopen for aggravation of condition. On April 20, 1988 the claimant filed a protest and request for reconsideration of the Department's order of April 7, 1988. On May 11, 1988 the Department issued an order adhering to the provisions of its order of April 7, 1988.

   On June 3, 1988 the claimant filed a notice of appeal from the Department's order of May 11, 1988. On June 30, 1988 the Board of Industrial Insurance Appeals issued its order granting the appeal, assigning it Docket No. 88 2274 and ordering that further proceedings be held.

2. On May 19, 1987, while in the course of his employment with Lamb Weston (AMFAC, Inc.), the claimant sustained an industrial injury to his lower back while shoveling potatoes.

3. The order of the Department dated September 14, 1987, which terminated time loss compensation and closed the claim without an award for permanent partial disability, was mailed to the claimant at an address in Quincy, Washington. Claimant no longer resided at that address. The order of September 14, 1987 was not communicated to the claimant until sometime after the claimant filed the application to reopen on March 3, 1988. The claimant was orally advised by his doctor's office in February 1988 that the claim had been closed, which prompted the filing of the reopening application on March 3, 1988, so that he could receive continued treatment.

4. The Department did not consider the protest to the Department order of September 14, 1987, and did not issue a subsequent order addressing issues raised by the protest after reconsideration of said order.

CONCLUSIONS OF LAW

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

2. The March 3, 1988 application to reopen constitutes a timely protest to the Department order of September 14, 1987. This protest automatically set aside and held the September 14, 1987 Department order in abeyance.

3. This appeal is dismissed, and the matter remanded to the Department of Labor and Industries to take administrative action expeditiously on the claimant's timely protest and request for reconsideration of the order of September 14, 1987, and to enter a determinative order based on reconsideration of said order.

It is so ORDERED.

Dated this 7th day of December, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member