

## **Free, Merle, Jr.**

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### **SCOPE OF REVIEW**

#### **Closing order segregating condition**

In an appeal from a Department order closing the claim without award for permanent disability and without denial of responsibility for a contested psychiatric condition, the Board has jurisdiction to determine the extent of disability due to the psychiatric condition where the notice of appeal raised the issue of permanent disability due to the aggravated psychiatric condition and the parties fully tried the issue of psychiatric disability as well as its causal relationship to the injury. ....*In re Merle Free, Jr.*, BIIA Dec., 89 0199 (1990)

Scroll down for order.



1 injury and its sequelae and the worsening of Mr. Free's preexisting psychiatric condition. She then  
2 determined that the Department should have the opportunity to pass on the issue of permanent  
3 psychiatric impairment resulting from such worsening of the preexisting psychiatric condition.  
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5 In fact, the Department had passed on the psychiatric causal relationship issue, and by clear  
6 implication had passed upon the psychiatric permanent impairment issue as well. It paid for  
7 psychiatric treatment at one point, it issued an order on April 23, 1986 which denied responsibility for  
8 the psychiatric component, and after a lengthy period of reconsideration, it closed the claim on  
9 December 13, 1988 without any permanent disability award, and without any denial of responsibility  
10 for the psychiatric component.  
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12 The scope of the Board's jurisdiction is limited by the Department order on appeal, the notice of  
13 appeal, and the issues raised thereby. Lenk v. Dep't of Labor & Indus., 3 Wn.App. 977, 478 P.2d 761  
14 (1970); Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 292 P.2d 865 (1956). The notice of appeal  
15 in the instant case clearly raised the issue of permanent partial disability due to the aggravated  
16 psychiatric condition. The Department's defense, on the other hand, was that the injury-caused  
17 psychiatric aggravation was only a temporary one.  
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19 The parties fully tried the issue of psychiatric permanent partial disability as well as the issue of  
20 causal relationship between the industrial injury and the psychiatric condition before the Board. The  
21 Department has, therefore, fully exercised its original jurisdiction on the permanent impairment issue  
22 and fully litigated the question before us. The Board therefore does have jurisdiction over this issue.  
23 See, In re Anton Worklan, BIIA Dec., 26,538 (1967); Noll v. Dep't of Labor & Indus., 179 Wash. 213  
24 (1934).  
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26 Having determined that the issue of permanent impairment due to the psychiatric condition is  
27 properly before us, we have reviewed the evidence to determine whether Mr. Free has proved  
28 entitlement to a permanent partial disability award.  
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30 Prior to the June 1984 industrial injury, Mr. Free took lithium in conjunction with psychiatric  
31 treatment beginning in 1978 and for about three years thereafter. However, he was essentially free of  
32 symptoms of depression between January 1982 and June 1984. His wife testified his depression is  
33 worse since the industrial injury of June 1984. Mr. Free's employer since 1987 testified that Mr. Free  
34 is allowed to periodically miss work should he experience physical or emotional problems. Dr. David  
35 McConnell, a psychiatrist, treated Mr. Free from April 1985 to the date of the hearings. He diagnosed  
36 cyclothymic disorder, dyslexia, and intermittent explosive disorder. He stated that any treatment which  
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1 the claimant receives at this point is palliative. It was his opinion that the psychiatric condition which  
2 preexisted the industrial injury was exacerbated by it. Since the exacerbation was in the form of  
3 depression, the conclusion must be drawn that only the cyclothymic disorder was affected. According  
4 to Dr. McConnell, while Mr. Free had a mental condition prior to the June 1984 industrial injury, he  
5 then had no permanent impairment attributable to that condition. As of the 1988 closing date, Dr.  
6 McConnell rated Mr. Free's permanent mental health impairment as best described by Category 2 of  
7 WAC 296-20-340.  
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11 Dr. Robert Fink, a psychiatrist, examined Mr. Free at the Department's request on one  
12 occasion, December 23, 1985, three years prior to the closing date. He generally agreed with Dr.  
13 McConnell's diagnosis. He also agreed that Mr. Free's preexisting cyclothymic disorder had been  
14 exacerbated by the industrial injury. However, he concluded this was only a temporary exacerbation.  
15 He stated that the portion of the psychiatric condition attributable to the industrial injury became fixed  
16 and stable sometime prior to his examination. He saw no permanent worsening and felt the Category  
17 2 rating was inappropriate. He did, however, state that the claimant's underlying psychiatric condition  
18 still needed palliative treatment.  
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22 With conflicting expert opinions, the trier of fact must decide which opinion, if either, to prefer.  
23 The Industrial Appeals Judge correctly points out that Dr. McConnell's opinion concerning Mr. Free's  
24 mental impairment is to be preferred over Dr. Fink's. As the treating physician, he was in a far better  
25 position to observe Mr. Free than was Dr. Fink, who examined on only one occasion, three years prior  
26 to claim closure. Special consideration should be given the opinions of an attending physician unless  
27 specific reasons for not accepting the attending physician's opinion are articulated. Hamilton v. Dep't  
28 of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988). There are no reasons not to prefer Dr.  
29 McConnell's conclusions. Mr. Free has sustained his burden of proof.  
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33 After consideration of the Proposed Decision and Order and the Petition for Review filed  
34 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed  
35 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of  
36 law, with the addition of our further determination concerning a permanent partial disability award for  
37 psychiatric impairment.  
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41 The Board makes the following:  
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## FINDINGS OF FACT

1. On July 5, 1984 the Department of Labor and Industries received a report of accident from the claimant, Merle E. Free, Jr., alleging that he sustained an industrial injury on June 28, 1984 while he was working for Pacific Logging, Inc. On November 13, 1984 the Department issued an order allowing and closing the claim. On November 26, 1984 the claimant filed a protest with the Department. On January 18, 1985 the Department issued an order setting aside its order dated November 13, 1984 and holding the claim open.

On April 23, 1986 the Department issued an order closing the claim with a permanent partial disability award equal to 5% as compared to total bodily impairment, paid at 75% of its monetary value, and denying responsibility for depression, generalized anxiety disorder and cyclothymic disorder. On June 3, 1986 the claimant filed a protest with the Department. On December 8, 1987, the Department issued an order holding the order of April 23, 1986 in abeyance.

On December 13, 1988 the Department issued an order closing the claim with time loss compensation as paid, no permanent partial disability award, and demanding reimbursement in the amount of \$2,250.00 for the permanent partial disability award which had been paid on April 23, 1986. On January 18, 1989 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On February 3, 1989 the Board issued an order granting the appeal, assigning Docket No. 89 0199 to the appeal and directing that hearings be held on the issues raised by the appeal.

2. On June 28, 1984 Merle Free experienced lower back pain after carrying logging equipment weighing from 15 to 90 pounds. He subsequently received both orthopedic and psychiatric medical treatment.
3. On December 13, 1988 Merle Free suffered conditions diagnosed as (1) cyclothymic disorder (2) dyslexia (3) intermittent explosive disorder and (4) a degenerative intervertebral disc at L5- S1. The cyclothymic disorder preexisted the industrial injury of June 28, 1984 and was permanently worsened by that industrial injury. Damage to the L5-S1 disc was caused by the industrial injury of June 28, 1984. Mr. Free's dyslexia and intermittent explosive disorder were neither caused nor aggravated by the industrial injury. Claimant's organic and psychiatric conditions causally related to the industrial injury are fixed, as they would not be improved by medical treatment. As of December 13, 1988, the permanent impairment attributable to Mr. Free's psychiatric condition due to the industrial injury was best described by Category 2 of WAC 296-20-340, which, pursuant to WAC 296- 20-680(6) is equal to 10% as compared to total bodily impairment; Mr. Free's permanent lumbosacral impairment due to the industrial injury was equal to Category 2 of WAC 296-20-280, which, pursuant to WAC 296-20-680(3) is equal to 5% as compared to total bodily impairment.

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**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. As of December 13, 1988 Merle Free's preexisting psychiatric condition, cyclothymic disorder, was permanently worsened as a result of his industrial injury of June 28, 1984, and he suffered a permanent partial disability equal to 10% as compared to total bodily impairment.
3. As of December 13, 1988, Merle Free suffered a permanent partial disability as a result of his industrial injury of June 28, 1984 to his low back equal to 5% as compared to total bodily impairment.
4. The Department's order dated December 13, 1988 which closed the claim with time loss compensation as paid, no permanent partial disability award, and demanded reimbursement in the amount of \$2,250.00 for the permanent partial disability award which the Department had paid on April 23, 1986 in regard to back impairment, is incorrect and should be reversed and the claim remanded to the Department with direction to accept responsibility for the exacerbation of Merle Free's preexisting psychiatric condition, cyclothymic disorder, as the result of the industrial injury, and to close the claim with permanent partial disability awards equal to 10% as compared to total bodily impairment for mental health impairment and 5% as compared to total bodily impairment, paid at 75% of the monetary value, for low back residuals.

It is so ORDERED.

Dated this 20th day of June, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_  
SARA T. HARMON Chairperson

/s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

/s/ \_\_\_\_\_  
PHILLIP T. BORK Member