Casey, Margaret

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

Where the Department received a copy of a Superior Court judgment regarding the appeal of the last order closing the claim and the time for acting on the application to reopen the claim has passed, resulting in the application being deemed granted, the consequence is that the claim is considered to have been reopened for temporary worsening or aggravation--the worker must still prove entitlement to further benefits. **….*In re Margaret Casey*, BIIA Dec., 90 5286 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 92-2-04909-6.]

SCOPE OF REVIEW

"Deemed granted" application to reopen claim

The Board will address the merits of a worker's entitlement to further benefits in an appeal where an application to reopen has been "deemed granted" when the parties had full and fair opportunity to present evidence concerning whether the worker was entitled to further benefits. **….*In re Margaret Casey*, BIIA Dec., 90 5286 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 92-2-04909-6.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARGARET G. CASEY	**)**	**DOCKET NO. 90 5286**
	)	
CLAIM NO. H-460233	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Margaret G. Casey, by
Don W. Taylor, Attorney at Law

Employer, R.A. Hatch Co., by
None

Department of Labor and Industries, by
Office of the Attorney General, per
James M. Hawk, Assistant

This is an appeal filed by the claimant, Margaret G. Casey, on October 5, 1990 from an order of the Department of Labor and Industries dated September 19, 1990. The Department order denied the claimant's application to reopen her claim for aggravation of condition. Reversed and remanded, in part.

PROCEDURAL AND EVIDENTIARY MATTERS

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 on behalf of the claimant to a Proposed Decision and Order issued on October 16, 1991 which affirmed the Department order dated September 19, 1990.

The Board has reviewed the evidentiary rulings in the record of proceedings and in the Proposed Decision and Order and finds that no prejudicial error was committed and said rulings are hereby affirmed.

DECISION

On December 16, 1988, Margaret G. Casey filed an application to reopen her claim for aggravation of condition with the Department of Labor and Industries, contending that conditions causally related to her industrial injury of February 5, 1979 had worsened or become aggravated since November 13, 1985 when the claim was initially closed with a permanent partial disability award.

When the application to reopen was filed, an appeal from an order of this Board dated March 30, 1987 affirming the Department's closing order was pending in Superior Court, and a final court judgment affirming the Department's order was not entered until April 23, 1990. A copy of the Superior Court judgment, affirming the Department's November 13, 1985 order closing the claim, was received

by the Department on May 17, 1990. The Department order dated September 19, 1990, denying the application to reopen the claim for aggravation of condition, was issued more than ninety days following the date on which the Department received a copy of the Superior Court judgment determining that the first terminal date order dated November 13, 1985 was final.

Ms. Casey's application to reopen was filed on December 16, 1988, well after July 1, 1988. This placed the Department under an obligation to act upon that application in accordance with the time limits set forth in RCW 51.32.160, as amended by the legislature effective as of July 1, 1988. The period within which the Department had to act upon the application to reopen did not commence until the November 13, 1985 closing order became final. In re Edwin E. Fiedler, BIIA Dec., 90 1680 (1990) (citing Reid v. Dep't of Labor & Indus., 1 Wn.2d 430 (1939) and State ex rel Stone v. Olinger, 6 Wn.2d 643 (1940)). In light of our holding in Fiedler, the Department was under no obligation to act upon the application to reopen the claim until the November 13, 1985 order (determining the first terminal date) had become final through the entry of a Board or Court order. See also, WAC 296-14-400 (last paragraph). When the Department order establishing the first terminal date became final, the time constraints imposed by RCW 51.32.160 again become applicable. While we are not prepared to determine the earliest date on which the period for Department action commenced, it clearly could be no later than the date on which the Department received a copy of the Superior Court judgment making the November 13, 1985 order final.

The Superior Court judgment was entered pursuant to a mandate issued by Division II of the Court of Appeals on April 11, 1990 which certified that its decision entered on March 10, 1990, vacating an order granting mistrial and reinstating the jury verdict, became the decision terminating review on April 19, 1990. The Court of Appeals mandated the case to Superior Court for further proceedings consistent with its opinion. As the entry of the Superior Court judgment pursuant to the mandate constituted a ministerial act, no appeal could lie from that judgment and it became final upon entry. It follows that in these circumstances the additional time allowed for appeal of an order before it became final would not be available to the Department. See In re Daniel Bauer, BIIA Dec., 47,841 (1977). Even if the Department was provided the additional period allowed for an appeal, the Department order denying the application to reopen the claim dated September 19, 1990, was not entered within the 90-day time limit set forth in RCW 51.32.160.

Allowing the Department the greatest latitude possible, it was obligated under RCW 51.32.160 to act within ninety days of May 17, 1990, the date on which a copy of the Superior Court judgment was received by the Department. The Department took no action to extend the time within which it had to act on Ms. Casey's reopening application, and did not issue an order of denial until September 19, 1990. As this order was issued more than ninety days following the latest possible date on which the Department could have been considered to have learned of the finality of the November 13, 1985 order, the claimant's application must be considered to have been "deemed granted" by operation of RCW 51.32.160. Fiedler, supra.

That Ms. Casey's application to reopen the claim for aggravation of condition has been "deemed granted" does not lead us to disagree with the ultimate determinations made herein in the Proposed Decision and Order. Ordinarily, where we make a determination that an application to reopen a claim has been "deemed granted", we would return the case to the Department to reopen the claim and make further investigation and conduct further evaluations as necessary to properly administer the claim. See, e.g., Fiedler, supra. We have not previously had the occasion to pass upon the question of what benefits, if any, a worker is entitled to receive by virtue of an application to reopen a claim being "deemed granted." We do so now, as it is necessary to a resolution of the issues raised by this appeal.

The consequence of the application to reopen being "deemed granted" is simply that the claim must be considered to have been reopened for temporary worsening or aggravation. In order for Ms. Casey to receive treatment, time loss compensation, or any other benefits, she must still sustain the burden of establishing entitlement to further benefits. In order to establish entitlement to further treatment, and temporary disability benefits, she must establish, through medical testimony, the need for further treatment for conditions causally related to her industrial injury and the inability to be gainfully employed as a result of such conditions. In re Maria Chavez, BIIA Dec., 87 0640 (1988). It is not necessary for her to establish aggravation or worsening in order to receive treatment or temporary disability benefits, since the "deemed granted" provision concedes aggravation for those limited purposes. However, for Ms. Casey to establish entitlement to an award for permanent disability -- partial or total -- she must show that there has been a permanent worsening or aggravation of conditions causally related to the industrial injury of February 5, 1979, since the first terminal date of November 13, 1985. Dinnis v. Dep't of Labor & Indus., 67 Wn.2d 654 (1965). As pointed out accurately and thoroughly in our industrial appeals judge's Proposed Decision and Order, Ms. Casey

has failed to establish entitlement to any further benefits, either for temporary or permanent aggravation of her conditions causally related to the industrial injury.

In relation to Ms. Casey's physical conditions caused by the industrial injury, there does not appear to be a scintilla of evidence of any objective nature supporting a need for treatment, increased disability, or impairment. Nothing of an objective nature was provided by Dr. Peter Fisher, who testified on behalf of the claimant after examining her on two occasions, January 28, 1986 and August 10, 1990. We agree with Dr. Fisher's determination that Ms. Casey would not benefit from further treatment. Furthermore, he identified no objective findings justifying his rating of low back impairment, Category 5 of WAC 296-20-280. In fact, there is no objective evidence in the record which would support rating of the claimant's low back impairment in any category other than Category 1. While we completely disagree with Dr. Fisher's determination that Ms. Casey was totally and permanently disabled as of the second terminal date, September 19, 1990, we do not need to address that issue as she has failed to establish any permanent aggravation or increased disability causally related to the industrial injury.

Even if reliance is placed on the testimony of Dr. S. Harvard Kaufman, Ms. Casey's psychiatric witness, there is insufficient evidence to establish entitlement to further benefits for a psychiatric condition.[1] Accepting Dr. Kaufman's diagnosis of a somatoform pain disorder as being causally related to the industrial injury still results in findings which support his determination as of August 10, 1990 that this condition should be rated in Category 1 of WAC 296-20-340, i.e., with no permanent partial impairment. Although Dr. Kaufman expressed an opinion in equivocal terms that Ms. Casey could not work, his testimony establishes no disability in the sense of impairment caused by the psychiatric condition he diagnosed. Dr. Kaufman was also of the opinion that the psychiatric condition he diagnosed was fixed and would not benefit from further treatment.

As previously indicated, where we determine that an application to reopen a claim has been "deemed granted", we would ordinarily remand the claim to the Department for further investigation. Here, however, the claimant and all other parties have been provided a full and fair opportunity to present evidence concerning whether or not the claimant is entitled to further benefits. It would be a useless act inconsistent with principles of judicial economy, and would simply foster piecemeal litigation, to require the Department to conduct such further investigation. See, e.g., In re Junior

[1]We reach this conclusion having given full consideration to Price v. Dep't of Labor & Indus., 101 Wn.2d 520 (1984), which relieves the claimant of the burden of providing objective medical findings in order to establish causal relationship or aggravation of a psychiatric condition.

Wheelock, BIIA Dec., 86 4128 (1987). Ms. Casey has failed to establish a need for treatment or the inability to be gainfully employed at any time following the submission of her application to reopen her claim. Furthermore, she has failed to present persuasive evidence that there has been any permanent worsening of her condition resulting in increased permanent disability of either a partial or total nature. She has simply failed to meet her burden of establishing entitlement to further benefits.

We agree further with the thorough evidentiary discussion made in the Proposed Decision and Order. However, we must reverse the Department order of September 19, 1990 as Ms. Casey's reopening application had been "deemed granted" by operation of the 90-day time limitation in RCW 51.32.160. The claim will be remanded to the Department to be reopened, but then summarily closed without any additional benefits.

FINDINGS OF FACT

1. On February 8, 1979, the claimant, Margaret G. Casey, filed an application for benefits with the Department of Labor and Industries, alleging the occurrence of an industrial injury to her low back on February 5, 1979, while in the course of her employment with R. A. Hatch Co. On February 28, 1979, the Department issued an order allowing the claim and authorizing time loss compensation. The claim was eventually closed pursuant to a Department order of November 13, 1985, which also authorized an award for permanent partial disability equal to 10 percent as compared to total bodily impairment, for low back impairment.

   The claimant filed a timely appeal of the Department order of November 13, 1985, which order was affirmed by the Board of Industrial Insurance Appeals in our order of March 30, 1987. A timely appeal was then taken by claimant to Pierce County Superior Court. On April 23, 1990, a Superior Court judgment was entered affirming the Department order dated November 13, 1985 and a copy of that judgment was received by the Department of Labor and Industries on May 17, 1990.

   On December 16, 1988, the claimant had filed an application to reopen the claim for aggravation of condition. This application was denied by the Department pursuant to an order of September 19, 1990. On October 5, 1990, the claimant filed a notice of appeal with the Board. On November 26, 1990, the Board issued an order granting the appeal and assigning it Docket No. 90 5286.

2. On February 5, 1979, the claimant bent over to pick up a 16 pound plastic barrel, injuring her low back while in the course of her employment with R. A. Hatch Co.

3. As of November 13, 1985, the claimant's condition causally related to the industrial injury of February 5, 1979, was diagnosed as back pain secondary to discectomy at L4-5 and rated at Category 3 of

WAC 296-20-280, categories of permanent dorso-lumbar and lumbosacral impairments.

4. As of November 13, 1985, the claimant's condition causally related to the industrial injury was fixed and stable and not in need of further curative treatment.

5. As of September 19, 1990, claimant's condition causally related to the industrial injury of February 5, 1979 was fixed, stable, and not in need of further curative treatment and had not been in need of treatment since November 13, 1985.

6. As of September 19, 1990, the claimant had not developed a mental health condition as a causal result of her industrial injury of February 5, 1979.

7. Claimant's application to reopen her claim for aggravation of condition was not acted upon by the Department within ninety days of the date on which the November 13, 1985 order became final, and this application was accordingly deemed granted.

8. During the period October 17, 1988 through September 19, 1990, the claimant was not, as a result of her 1979 industrial injury, unable to engage in gainful employment on a reasonably continuous basis.

9. As of September 19, 1990, the claimant's low back condition causally related to her industrial injury of February 5, 1979 had not permanently worsened since November 13, 1985 and did not result in any further permanent impairment since that date.

CONCLUSIONS OF LAW

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

2. On or before September 19, 1990, claimant's application to reopen her claim on the basis of aggravation of condition had been "deemed granted", by operation of the provisions of RCW 51.32.160 as amended effective July 1, 1988.

3. Between November 13, 1985 and September 19, 1990, the claimant's condition causally related to her industrial injury of February 5, 1979 was not in need of further treatment, did not render her temporarily totally disabled, and had not become permanently aggravated in any manner within the meaning of RCW 51.32.160.

4. The order of the Department of Labor and Industries dated September 19, 1990, which denied the claimant's application to reopen her claim for aggravation of condition, is incorrect in part and is reversed, and the claim is remanded to the Department with directions to issue an order determining that the claimant's aggravation application filed on December 16, 1988 had been "deemed granted" and to thereupon close the claim

effective September 19, 1990 without payment of any benefits and without further award for time loss compensation or permanent disability.

It is so **ORDERED**.

Dated this 11th day of May, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
PHILLIP T. BORK Member