Jones (Simmons), Donna

SCOPE OF REVIEW

Aggravation

In an appeal from a denial of an application to reopen the claim, the Board has jurisdiction to address an alleged mental health condition, notwithstanding that the order does not specifically indicate the Department considered such condition. ***….In re Donna Jones (Simmons)*, BIIA Dec., 99 22362 (2001)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DONNA R. JONES (SIMMONS)	)	**DOCKET NO. 99 22362**
	)	
CLAIM NO. N-931001	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL**
	)	**FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Donna R. Jones (Simmons), by
Robinson & Kole, P.S., Inc., per
David W. Robinson

Employer, Country Meadow Village, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Michael A. Kristof, Assistant

The claimant, Donna R. Jones (Simmons), filed an appeal with the Board of Industrial Insurance Appeals on December 6, 1999, from an order of the Department of Labor and Industries dated November 24, 1999. The order denied the claimant's application to reopen her claim. **REMANDED FOR FURTHER PROCEEDINGS.**

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 Department of Labor and Industries to a Proposed Decision and Order issued on February 26, 2001, in which the Department order of November 24, 1999, was reversed and remanded to the Department with direction to reopen the claim, provide the claimant with treatment for her low back condition, pay the claimant time loss compensation for the period from August 10, 1999 through November 24, 1999, evaluate the claimant's mental health condition, and take whatever further action is indicated.

This is an "aggravation appeal" with terminal dates of October 21, 1996 and November 24, 1999. As of October 21, 1996, the first terminal date, the claimant had alleged no mental health condition, nor had the Department made any adjudication regarding such a condition. The August 19, 1999 application to reopen the claim, which eventually resulted in the November 24, 1999 order under appeal, did not mention a mental health condition. Both parties agree that as of the second terminal date, the Department had made no adjudication regarding any mental health

condition under this claim. In her appeal from the order denying the reopening application, however, the claimant identified her disability as injuries to the spine, extremities and "related emotional conditions." The issue before the Board at this time is whether we have jurisdiction to address the claimant's alleged mental health condition when the order denying reopening does not specifically indicate that the Department considered such a condition. We conclude that the Board does have that authority. We specifically intend this decision to clarify the discussion begun in an earlier Board decision, *In re David L. Kelmis,* Dckt. No. 99 10480 (May 10, 2000).

The Proposed Decision and Order contains an accurate summary of the evidence presented in the record, so we revisit that only briefly here. Ms. Simmons injured her back in 1994. The claim was closed with an award equal to Category 2 of WAC 296-20-280 on October 21, 1996. The claimant filed a reopening application on August 19,1999. The only condition specifically identified on the reopening application is the low back condition. The record establishes objective evidence of worsening of that condition between the terminal dates accompanied by specific treatment recommendations. The claimant also presented testimony that she was totally temporarily disabled from August 10, 1999 through November 24, 1999. The Proposed Decision and Order directed payment of time loss compensation for that period.

The Department does not contest the finding that the claimant's physical condition worsened between the terminal dates. The Department's Petition for Review takes issue with the direction to pay time loss compensation on the basis that a total temporary disability determination exceeds the scope of the Board's review. This contention has no merit in light of *In re Junior Wheelock*, BIIA Dec., 86 4128 (1987). On remand, the industrial appeals judge need not disturb that determination.

The issues on appeal are not articulated in the records of the two mediation conferences that were convened in this appeal, but at the scheduling conference on May 30, 2000, the claimant noted that she would present a psychiatric witness. The first hearing was set for November 13, 2000. The Department raised no objection to the issue of a psychiatric condition until the November 2, 2000 deposition of Dr. Christopher Noell. The industrial appeals judge allowed the claimant to present Dr. Noell's testimony and allowed the claimant to testify as to her mental state between the terminal dates. The case was transferred to another industrial appeals judge for preparation of the Proposed Decision and Order. He revisited the Department's objections and overruled them based on the Board's decision in *In re David L. Kelmis.*

The facts in *Kelmis* are similar to the facts of this appeal. In *Kelmis*, the claimant's Notice of Appeal was actually forwarded to the Board by the Department. It did not mention any emotional or

mental health issues. Mr. Kelmis first specifically raised the issue of a mental health condition at the scheduling conference. The Department moved for Summary Judgment on the issue of the Board's limited jurisdiction. The industrial appeals judge granted in part, limiting the claimant's evidence to a showing that a psychiatric condition existed. The industrial appeals judge further indicated that if the condition did exist, the claim would be remanded to the Department for further adjudication. The claimant presented the testimony of a forensic psychiatrist. The industrial appeals judge was persuaded that a mental health condition existed and, accordingly, remanded the claim to the Department to determine whether the condition was proximately caused by the industrial injury and, if so, what benefits accrued as a result.

The Department petitioned for review in *Kelmis* on the basis that the Board's review was limited solely to the denial of the reopening application for the accepted physical condition and that it lacked jurisdiction to direct the Department to consider whether a new condition was related to the industrial injury. We remanded the appeal to hearings to allow the claimant to present evidence of "a prima facie case" (1) that a mental health condition exists that is the subject of a diagnosis within the terminology of the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed.; (2) that the condition is proximately caused by the industrial injury or occupational disease; and (3) that the condition resulted in increased disability between the terminal dates. We further found that if the injured worker could provide medical evidence that established a legally sufficient or prima facie case, the claim should be remanded to the Department to adjudicate any and all issues surrounding the mental health condition. We failed to define what we meant by **adjudicate** in light of the fact that we only directed a remand if the industrial appeals judge already found that a prima facie case for benefits was made. Based on the Board's direction, Mr. Kelmis was allowed to present further psychiatric testimony. On remand, the industrial appeals judge in that case determined that Mr. Kelmis made a prima facie case that the mental health condition was related to the industrial injury, but not that it had worsened between the terminal dates. None of the parties petitioned for review and the Proposed Decision and Order became final on February 22, 2001.

In the present case, our industrial appeals judge determined that the claimant made a prima facie case that she suffered from a mental health condition causally related to the industrial injury between the terminal dates. In the final conclusion of law, he remanded the claim to the Department with instructions to "evaluate" the claimant's mental health condition and "take whatever further action" is indicated. This direction to the Department is unclear. What does the

word "evaluate" mean in light of the determination that the claimant has already made a prima facie case for allowance of the condition?

On further consideration, we conclude that the position we adopted in *Kelmis* concerning our jurisdiction in cases concerning the scope of the Department's order rejecting a reopening application was narrow and unworkable. The Board, like any other administrative agency, has the inherent power to determine if a dispute is within its jurisdiction or the scope of its review. *Callihan v. Department of Labor & Indus.*, 10 Wn. App. 153 (1973), at 157; *In re Keith Hunt*, BIIA Dec., 92 6213 (1994). We conclude that in the face of any order rejecting a reopening application, we have jurisdiction to determine the existence of any conditions that are alleged to have worsened such that they may form the basis for reopening an industrial insurance claim, whether or not they are specifically included in the order on appeal. The Department bases its objection on the holding of *Hanquet v. Department of Labor & Indus*., 75 Wn. App. 657 (1994). That case stands for the proposition that the Board's jurisdiction extends only to issues decided by the Department, explicitly or implicitly, in its orders. Clearly, the Department did not explicitly decide the issue of whether Ms. Simmons has a mental health condition related to her industrial injury or whether it worsened between the terminal dates. Implicitly, however, the Department decided all bases on which the claim could be reopened. The argument that the reopening application made no mention of a mental health condition is not well taken. The requirements of a reopening application, as established by the Supreme Court in *Donati v. Department of Labor & Indus*., 35 Wn.2d 151 (1949) are merely that the application be in writing and that it give the Department **some** information to the effect that worsening has occurred. There is no requirement that the claimant file a separate application for each condition that may have worsened.

The circumstance where a claimant files a reopening application that mentions only a single condition that has worsened is analogous to the instance where a claimant files an original application for benefits that does not completely list all physical conditions related to the industrial injury. We considered such a circumstance in the case of *In re Lori L. Robinson,* Dckt. No. 99 13360 (November 1, 2000). While the *Robinson* case has not been designated as a significant decision of this Board, we find it useful to revisit our reasoning in that decision.

In *Robinson*, the claimant filed an application for benefits for an injury to one knee. The claim was rejected. On appeal to the Board, the industrial appeals judge directed the Department to allow the claim for injuries to **both** knees. In its Petition for Review, the Department alleged that

the Board exceeded its jurisdiction because the application for benefits referenced only one knee. We rejected that contention, stating,

> It is clear from the facts and circumstances of this case that the March 2, 1999 adjudication by the Department applied to both knees. While the application for benefits mentioned only the left knee, it is not unusual for an industrial insurance claim to include adjudications of conditions or areas of the body that were not originally mentioned in the application for benefits. In this case, the claimant reported right knee symptoms and complaints several months before the Department issued its March 2, 1999 order. All three doctors who testified either treated or examined the claimant's right knee before that order was issued. We believe, therefore, that the Department had been apprised of the right knee condition and the claimant's allegation that it was industrially related prior to its issuance of that order. The order under appeal in this matter is a rejection order. Such an order is an adjudication by the Department that the claim **in its entirety** is not valid and/or compensable. Therefore, such an order must be construed to reject all potential conditions that are alleged to have resulted from the industrial injury or occupational disease for which the claim was filed and of which the Department had notice prior to its issuance of such an order.

Robinson, at 2. We note that in *Robinson* the evidence established that the claimant had provided information about the expanded scope of the claim before the issuance of the order on appeal. If our jurisdiction on appeal were as limited as the Department suggests it is, the claimant would be foreclosed from even establishing what information the Department actually had available. On remand, one factor the industrial appeals judge should consider is whether there were diagnoses or treatment recommendations in the claimant's records provided to the Department that support her claim for an industrially related mental health condition.

In re Ronald Holstrom, BIIA Dec., 70,033 (1986) established the limit of the Board's jurisdiction in the case where the Department rejects a reopening application on the specific grounds that a new condition is not related to the original injury. In that instance, the Department, having determined the injury was not the proximate cause of the claimed condition, has clearly not had occasion to consider what treatment or other benefits might accrue if the condition were allowed. All the Board may do in those circumstances is remand the claim with direction to allow the condition and provide benefits according to law. The same limitation on our actions would logically apply in the face of a determination that a "new" condition not specifically identified in the order rejecting reopening is related to the original injury. On remand the parties should be allowed to develop and present their cases on the existence and causation of Ms. Simmons' alleged industrially related mental health condition. If a preponderance of the evidence establishes a

causal relationship between such a condition and the industrial injury, the claim should be remanded with instructions that, in addition to such other relief to which the claimant has established her entitlement, the Department is to allow the condition and provide benefits according to law.

The Proposed Decision and Order dated February 26, 2001, is hereby vacated. This matter is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings of fact and conclusions of law as to each contested issue, based on the entire record, and consistent with this order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 5th day of September, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member