Dorr, Robert, Jr.

AGGRAVATION (RCW 51.32.160)

Over seven years after initial closure (RCW 51.32.160)

The Director abused her discretion when she failed to consider whether the worker was unable to work because of the industrial injury and based her decision to deny benefits solely on the basis that the worker had not been working. ***….In re Robert Dorr, Jr.*, BIIA Dec., 07 23982 (2009)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT DORR, JR.	)	**DOCKET NO. 07 23982**
	)	
CLAIM NO. J-134560	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Robert Dorr, Jr., by
Walthew, Thompson, Kindred, Costello & Winemiller, P.S., per
Robert J. Heller

Employer, Brecht Cycle, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Andrew J. Simons, Assistant

The claimant, Robert Dorr, Jr., filed an appeal with the Board of Industrial Insurance Appeals on October 25, 2007, from an order of the Department of Labor and Industries dated September 12, 2007. In this order, the Department denied additional disability benefits to Mr. Dorr based on the discretionary decision of the Director that only payment of medical benefits to Mr. Dorr was appropriate. The Department order is **REVERSED AND REMANDED**.

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 claimant to a Proposed Decision and Order issued on September 23, 2008, in which the industrial appeals judge affirmed the Department order dated September 12, 2007. All contested issues are addressed in this order.

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

The sole issue presented by this appeal is whether the Director of the Department of Labor and Industries abused her discretion when she determined that the claimant is not eligible to receive disability benefits. The evidence presented by the parties, and the information before the Director at the time of her decision, are well presented in the Proposed Decision and Order and will be restated here only as necessary to explain our decision that the Director abused her discretion by failing to consider whether Mr. Dorr had voluntarily removed himself from the work force.

Because the application to reopen this claim was filed more than seven years from the date the first closing order became final, this is an "over seven" case, and the decision whether to award time loss compensation and other disability or "accident fund" benefits is committed to the Director's discretion. See RCW 51.32.060; *In re Ernest Therriault*, BIIA Dec., 90 0876 (1990). Our authority in such an appeal is limited to determining whether there has been an abuse of the exercise of discretion, and the claimant therefore carries a heavy burden: to prove that the Director's exercise of discretion was arbitrary or capricious based on the information then before her. *In re Mary Spencer*, BIIA Dec., 90 0264 (1991). In Spencer, we stated as follows:

> discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. (Citation omitted) Where the decision or order . . . is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted)

Quoting *State Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Arbitrary and capricious action consistently has been described as, "willful and unreasoning action, without consideration and in disregard of the facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." See, for example, *Pierce County Sheriff v. Civil Service Commission*, 98 Wn.2d 690, 695 (1983) (citations omitted). We stress that it is not the conclusion reached by the Director, but the failure to consider whether Mr. Dorr had voluntarily removed himself from the work force or whether he was unable to work because of the industrial injury that compels us to reverse this decision.

The Director exercised her discretion pursuant to Department Policy 16.40. Exhibit No 1, Attachment A. That Policy 16.40 provides in pertinent part as follows:

4. Accident fund benefits for the worker depend on certain conditions.

To qualify for the director's consideration of accident fund benefits, the worker must meet **both** of these criteria:

> The worker has not voluntarily removed himself or herself from the work force; (See Policy 5.91.) **and**
>
> The worker must be unable to work as a direct result of the industrial injury, as verified by medical documentation.

In addition, the worker must meet **one** of the following criteria:

> The worker requires inpatient surgery or specified outpatient surgery; **or**
>
> The worker has a life-threatening need for treatment; **or**
>
> The worker can benefit from a newly approved medical procedure that would significantly reduce the level of impairment; **or**
>
> The worker has a significant increase in PPD [permanent partial disability].

Policy 5.91, referred to above in Policy 16.40, provides that time loss compensation (in "non-over seven" cases) is not payable to workers who have voluntarily retired from the work force. Policy 5.91 requires that four criteria be met before a worker is determined to have voluntarily retired, including a lack of evidence of a bona fide attempt to return to gainful employment, and a determination that the industrial injury was not a proximate cause of the worker's decision to retire. It does not appear that these factors were at all considered in the present case.

The Director's decision included consideration of a recommendation generated pursuant to Department Procedure 16.40. Exhibit No 1, Attachment B. That recommendation and the Director's letter dated September 11, 2007, state that the decision was based on the fact that the claimant had not worked for 10 years and suffered no loss of wages, no surgery has been recommended, and no significant increase in permanent partial disability is anticipated. Thus, without further analysis or consideration, the Director equated the claimant's not working with his having voluntarily removed himself from the work force.

Yet, as recognized by the provisions of Policy 5.91, many individuals who are not working have not voluntarily removed themselves from the work force. Many are only temporarily unemployed and are actively seeking gainful employment; others are totally disabled and unable to work, including those unable to work as a direct result of an industrial injury. Yet the record before us reflects that no further inquiry was made as to the reason the claimant had not worked for the preceding 10 years.

We note that this claim was closed in 1992 with an award for permanent partial disability consistent with that described by Category 7 of the categories of permanent dorso-lumbar and lumbosacral impairments, and an award for permanent partial disability consistent with that described by Category 3 of the categories for evaluation of permanent impairments of mental health, reflecting the significant disabling conditions proximately caused by the industrial injury. In addition, this claim was reopened for further treatment after Mr. Dorr established that his mental health condition, proximately caused by the industrial injury, had worsened. Despite statements

from Mr. Dorr's treating psychiatrist, Ronald G. Early, M.D., that Mr. Dorr was unable to work because of the psychiatric condition caused by the industrial injury, and that a failure to provide adequate psychiatric treatment would place Mr. Dorr at great risk for life-threatening depression, the recommendation to the Director and the Director's decision emphasize that the claimant has not worked since 1995, without considering why he had not been working. Both documents also stress that no surgery was being recommended, even though Mr. Dorr is being treated only by a psychiatrist.

An agency can abuse its discretion when it fails to follow its own procedural rules, or acts without consideration of and in disregard of the facts. *In re Personal Restraint of Dyer*, 157 Wn.2d 358, 363 (2006) (citation omitted). Here, by concluding her analysis after determining merely that the claimant was not working, and by failing to consider whether the claimant had voluntarily removed himself from the work force or was unable to work because of the industrial injury, the Director has failed to consider the relevant factors contained in the Department's own policy for making such determinations. As such, the Director's decision was exercised on untenable grounds, and was logically unconnected to determining whether disability benefits should be awarded, and constitutes an abuse of discretion.

We recognize that no set of facts necessarily entitles a worker to receive disability benefits in an "over seven" case. The Director might award such benefits to a worker who does not satisfy any of the criteria contained in the Department Policy, and not award them to a worker who satisfies most or all of the factors, without abusing her discretion. However, Mr. Dorr is entitled to have the Department follow its own rules, and is therefore entitled to a determination of whether he voluntarily removed himself from the work force or was unable to work because of the industrial injury. We also recognize that we cannot, and do not, order the Director to award disability benefits to Mr. Dorr; we direct her only to exercise her discretion appropriately.

FINDINGS OF FACT

1. On June 28, 1982, the claimant, Robert Dorr, Jr., filed an Application for Benefits with the Department of Labor and Industries, in which he alleged the occurrence of an injury during the course of his employment with Brecht Cycle, Inc. (Seattle Harley Davidson) on April 21, 1982. On October 1, 1982, the Department issued an order in which it allowed the claim.

   On June 26, 1992, the Department issued an order in which it directed that the claim be closed with time loss compensation as paid and with an award for permanent partial disability consistent with that described by Category 7 of the categories of permanent dorso-lumbar and

lumbosacral impairments, and an award for permanent partial disability consistent with that described by Category 3 of the categories for evaluation of permanent impairments of mental health. That order was not appealed.

On March 11, 2005, the Department received an application to reopen the claim. The Department initially denied the reopening application by order of April 11, 2005, and after receiving a protest from the claimant on June 7, 2005, affirmed that denial by order of August 31, 2005. The Department's orders of April 11, 2005, and August 31, 2005, were canceled by a Department order of March 14, 2007, based on a Board Decision and Order in Docket No. 05 21488 that was issued on February 22, 2007. In its order of March 14, 2007, the Department further determined that this claim was reopened effective March 8, 2005, for authorized medical treatment and benefits as appropriate under the industrial insurance laws.

On September 11, 2007, the Director of the Department of Labor and Industries issued a letter decision in which she determined that Mr. Dorr's request for time loss compensation benefits must be denied. This letter indicated that a Department order reflecting her decision would follow.

On September 12, 2007, the Department issued an order in which it stated that Mr. Dorr's claim was reopened effective March 8, 2005, for medical treatment only; that the Director of the Department of Labor and Industries had the authority to grant additional benefits such as time loss compensation or disability awards for those claims that had been closed over seven years from the first claim closure (10 years for eye injuries from the first claim closure); and that the Director decided that only payment of medical benefits was appropriate. In this order, the Department further specified that additional disability benefits would not be granted.

On October 25, 2007, Mr. Dorr filed a Notice of Appeal to the Department's September 12, 2007 order with the Board of Industrial Insurance Appeals. The Board granted the appeal on November 5, 2007, under Docket No. 07 23982 and agreed to hear the appeal.

2. Director Schurke had 78 pages of documents before her on September 11, 2007, including: Recommendation to the Director, dated August 16, 17, and 22, 2007; Director's letter of September 11, 2007; Cover page from the claimant's attorney dated September 7, 2007, regarding prescription for six massage therapy visits; Chart notes dated August 22, 2007; Department's order of June 26, 1992; Report of Medical (Psychiatric) Examination by Dr. Murray dated March 2, 1990; Letter from Dr. Early dated August 21, 1989; IME Report dated May 22, 1989; Claimant's request for time loss compensation dated June 27, 2007; Claims phone referral notes dated July 17, 2007; Chart notes dated June 28, 2007; Prescription dated May 1, 2007, by Dr. Downey; Letter from claimant's attorney dated June 19, 2007, requesting time

loss compensation; Letter from Dr. Early dated May 17, 2007; Chart notes dated May 14 and May 24, 2007; Department letter dated May 2, 2007, authorizing six massage therapy visits; Department letter to Dr. Ly dated May 2, 2007; Prescription for massage therapy dated March 22, 2007; Notice to Department regarding transfer of attending physician dated March 27, 2007; Letter to Department from Board regarding interest dated March 1, 2007; Board Decision and Order dated February 22, 2007, in Docket No. 05 21488; Proposed Decision and Order dated January 24, 2007; Request to Dr. Rogge from Department for medical records dated February 1, 2007; Signed medical release form dated July 14, 2005; Ballard Orthopedic and Fracture Clinic Exam Notes in 2005 and 2006; Report of Examination by Dr. Romano dated May 6, 2005; Letter to Dr. Rogge from Dr. Berg dated May 19, 2005; First Request to Dr. Rogge from Department for medical records dated July 20, 2005; Duplicate of Document No. 25; Duplicate of Document No. 26; Duplicate of Document No. 27; Petition and Request for Review dated June 7, 2005, to Department order of April 11, 2005; Duplicate of Document Nos. 27 and 32; Application to Reopen Claim received by Department on March 10, 2005.

3. The Director of the Department of Labor and Industries failed to follow the Department's own procedural rules for determining whether to award disability benefits to the claimant, and acted without consideration and in disregard of the relevant facts. By limiting her consideration to whether the claimant was employed when the application to reopen the claim was filed, and by failing to consider whether the claimant had voluntarily removed himself from the work force or was unable to work because of the industrial injury, the Director's decision was exercised on untenable grounds, and was logically unconnected to determining whether disability benefits should be awarded.

CONCLUSIONS OF LAW

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

2. The decision whether to award time loss compensation benefits to the claimant in this appeal is committed to the discretion of the Director of the Department of Labor and Industries, and review of that decision is therefore limited to determining whether there has been an abuse of the exercise of that discretion.

3. The Director abused her discretion and acted in an arbitrary and capricious manner, by limiting her consideration to whether the claimant was employed when he applied to reopen this claim, and by failing to consider whether the claimant had voluntarily removed himself from the work force or was unable to work because of the disability proximately caused by the industrial injury.

4. The order of the Department dated September 12, 2007, and the Director's letter decision dated September 11, 2007, are incorrect and are reversed. This matter is remanded with direction that the Director exercise her discretion appropriately in determining whether to award disability benefits to the claimant, and to take such other and further action as may be indicated or required by the law and the facts.

Dated: January 6, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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