Pascual, Albina

SCOPE OF REVIEW

Vocational rehabilitation determinations

In an appeal from a closing order the Board's scope of review conceivably includes the issue of whether the Department failed to act or failed to follow the process set forth in RCW 51.32.095 or WAC 296-19A regarding vocational services. ***….In re Albina Pascual*, BIIA Dec., 09 20949 (2010)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ALBINA M. PASCUAL	)	**DOCKET NO. 09 20949**
	)	
CLAIM NO. AF-16640	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE**
	)	**APPEAL FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Albina M. Pascual, Pro Se

Employer, Holiday Inn Express, by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Dana E. Blackman, Assistant

The claimant, Albina M. Pascual, filed an appeal with the Board of Industrial Insurance Appeals on August 21, 2009, from an order of the Department of Labor and Industries dated July 27, 2009. In this order, the Department affirmed its June 3, 2009 order in which it ended time-loss compensation benefits as paid through May 12, 2009, and closed the claim effective June 3, 2009, with no further treatment and no permanent partial disability. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 13, 2010, in which the industrial appeals judge dismissed the appeal for failure to establish a prima facie case under RCW 51.52.050. The Department filed a response on June 30, 2010. The Board received a letter from the claimant's treating chiropractor, F. Douglas Wilson, D.C., on July 2, 2010.

At hearing, the claimant raised the issues of treatment and vocational services. The industrial appeals judge found she had not made a prima facie case regarding the former and determined the latter was not within the Board's jurisdiction in an appeal from a closing order. We agree with the resolution of the treatment issue. However, a remand is necessary to develop the record regarding whether any issues regarding vocational services are properly before the Board in this appeal.

The claimant presented the testimony of her treating chiropractor, F. Douglas Wilson, D.C. Dr. Wilson agreed he was only recommending palliative care. That does not meet the definition of proper and necessary treatment contained in WAC 296-20-01002. The industrial appeals judge therefore correctly concluded that Ms. Pascual had failed to make a prima facie case regarding entitlement to further treatment as of July 27, 2009.

The claimant has petitioned for review, attaching a March 3, 2010 letter from another chiropractor, Lucas Q. Homer, D.C. She contends she did not have time to present this second opinion and asks that we consider it. This appears to be the same letter Ms. Pascual brought to the hearing, although Dr. Homer's name was not mentioned at that time. The industrial appeals judge explained to Ms. Pascual that he could not review the document, unless the Assistant Attorney General was willing to stipulate to its admissibility, which she was not. Once it became clear the industrial appeals judge intended to dismiss her appeal for failure to make a prima facie case, Ms. Pascual indicated she would like to present the testimony of the doctor who prepared the letter. The industrial appeals judge explained that she had not confirmed that witness and disallowed the testimony. Even considering the letter as an offer of proof, it does nothing to help Ms. Pascual overcome the hurdle of making a prima facie case. Like Dr. Wilson, Dr. Homer is recommending maintenance care. Thus, there is no merit in the claimant's challenge to the Proposed Decision and Order with respect to the treatment issue.

On July 2, 2010, after we granted review, Dr. Wilson filed a letter dated June 25, 2010, arguing that the claimant's condition had worsened since claim closure, that she needs further treatment to decrease her pain and improve her function, and that she is physically unable to work at this time due to the March 5, 2008 injury. To the extent Dr. Wilson is contending that the claimant's condition has become aggravated within the meaning of RCW 51.32.160, the proper remedy would be to file an application to reopen with the Department. The issue is not before us in the current appeal.

Dr. Wilson's contention that Ms. Pascual is not able to work is related to one of the remedies the claimant is seeking in this appeal, vocational retraining. As a threshold matter, the Board cannot order the Department to provide vocational services. That determination is within the Department's sole discretion under RCW 51.32.095, and can only be reviewed for abuse of discretion by the Board. However, there is still the question of whether any aspect of the vocational issue that Ms. Pascual attempted to raise at hearing is within the scope of the Board's review in this appeal from the July 27, 2009 closing order.

The Notice of Appeal consists of three letters from Dr. Wilson, dated June 8, 2009, July 23, 2009, and August 18, 2009. In all three letters, he seeks to have the claim remain open so that the worker may receive vocational retraining. The first two letters were addressed to the Department, and Dr. Wilson also filed a separate appeal from the initial June 3, 2009 closing order, in Docket No. 09 15975. That appeal was denied because the Department held the order in abeyance. A court may take **judicial notice** of its own records in the same case. *Cloquet v. Department of Labor & Indus.,* 154 Wash. 363 (1929). Pursuant to ER 201, we take judicial notice of the fact that Dr. Wilson's June 8, 2009 letter served as the Notice of Appeal in Docket No. 09 15975.

Thus, the Department had ample notice from the outset that the claimant was seeking retraining and can be fairly assumed to have considered that issue when it held the June 3, 2009 closing order in abeyance, affirmed it on July 27, 2009, and chose not to reassume jurisdiction thereafter. Based on that rationale alone, Ms. Pascual at least should have been allowed to present her own testimony and that of Dr. Wilson to explain what vocational rehabilitation issue they were attempting to raise, for example, what they were complaining about in terms of Department action or inaction.

Initially, the claimant was advised that she would be able to raise her concerns. As a result of the December 21, 2009 pre-hearing conference, an Interlocutory Order Establishing Litigation Schedule was issued. Two issues were identified, treatment and "Whether the claimant is entitled to vocational re-training." Both the claimant and the Department identified Jennifer Bows, a vocational expert, as a witness at that time. On December 31, 2009, the industrial appeals judge sent Ms. Pascual a letter explaining the process and her burden of proof. With respect to vocational retraining, she was advised: "If you believe you were not employable due to your condition(s) related to the industrial injury or occupational disease, you must prove that the Director of the Department of Labor and Industries abused discretion regarding whether you were employable. Testimony of a vocational counselor, medical witness, or other expert may be helpful."

In her January 21, 2010 witness confirmation letter, Ms. Pascual confirmed that Dr. Wilson would testify and notified the industrial appeals judge that she would not be presenting Ms. Bows' testimony. In its January 27, 2010 witness confirmation letter, the Department confirmed that Dr. Joseph McFarland and Dr. Stephen A. Liston would testify.

At the beginning of the March 18, 2010 hearing, the industrial appeals judge noted the two issues listed in the Interlocutory Order Establishing Litigation Schedule and that Ms. Pascual had decided not to call a vocational expert. He asked if she was still seeking vocational retraining and

she confirmed that she was. When he asked the Assistant Attorney General if she agreed with his statement of the issues, she said that, on further review, the Department believed that entitlement to vocational retraining was not within the Board's jurisdiction, because the appeal was from a closing order and "we don't have a process that went through VDRO or Vocational Dispute Resolution Office." 3/18/10 Tr. at 5. The industrial appeals judge did not ask the Assistant Attorney General and the claimant to elaborate regarding what, if anything, had happened procedurally regarding vocational services at the Department level, or to produce any documents from the claim file, to supplement the Jurisdictional History, which contains no information in that regard.

After referring to RCW 51.32.095, the industrial appeals judge concluded that: "Because the issue of vocational retraining has not been decided at the Department level, or at least is not shown to be so within this Appeal, the Board apparently has no jurisdiction to issue an Order regarding vocational retraining based on the Order under appeal of July 27, 2009, which affirms the Closing Order of June 3, 2009." 3/18/10 Tr. at 6.

Thereafter, in questioning the claimant, the industrial appeals judge asked no questions regarding what, if anything, had happened regarding vocational services at the Department level. When it came time for Dr. Wilson to testify, he was asked if Ms. Pascual's condition related to the March 5, 2008 industrial injury was fixed and stable. He responded that Ms. Pascual "wasn't given the chance for vocational rehabilitation." 3/18/10 Tr. at 46. The Assistant Attorney General objected, based on relevance, and that testimony was stricken. Dr. Wilson asked: "We can't bring up vocational rehabilitation? No." 3/18/10 Tr. at 49. That statement was stricken. After his testimony was concluded, and when he thought he was off the record, Dr. Wilson said: "Yeah, that was my main reason we filed a Reopening, was for vocational." 3/18/10 Tr. at 49-50. That comment was also stricken.

In summary, having first agreed that vocational retraining could be addressed in this appeal, the Department changed course on the day of hearing. It argued that the issue was not within the Board's jurisdiction, because the appeal was not from a decision made through the VDRO process. The industrial appeals judge agreed, and precluded the claimant from offering any evidence on this issue. When Dr. Wilson attempted to explain that he had sought to keep the claim open for the purpose of seeking retraining for Ms. Pascual, his limited testimony was stricken, and the issue was not explored through questions and answers in colloquy.

As explained above, the Notice of Appeal consists of correspondence from Dr. Wilson. Taken as an offer of proof, those letters indicate he would likely have testified that: He requested a

vocational evaluation, and received no response; he was never made aware of the claimant working with a vocational counselor and did not review job descriptions or release her for work; the medical examiners released her, with no restrictions, and signed job descriptions stating she could perform the types of jobs she was performing that caused her initial injury; and, in his opinion, Ms. Pascual needed to be retrained for lighter work that would not exacerbate her condition.

The questions the Board may consider and decide are limited by the order from which the appeal was taken and the issues raised by the notice of appeal. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977, 982 (1970). The determination of whether a worker is eligible for vocational services is a matter within the sole discretion of the supervisor of industrial insurance, with our review limited to whether there has been an abuse of discretion as to the determination or the process laid out in RCW 51.32.095 and WAC 296-19A. The Jurisdictional History reveals nothing regarding what action, if any, the Department took with respect to vocational services. We have reviewed the Department file under the authority of *In re Mildred Holzerland,* BIIA Dec., 15,729 (1965), to determine if the Department made a determination regarding Ms. Pascual's eligibility for vocational services, whether any dispute was filed with the VDRO, and whether a Director's decision was issued. See, WAC 296-19A-410 through WAC 296-19A-470. We have found no indication that any of those actions were taken at the Department level.

The Department file does show some indications of vocational activity, including an Ability to Work Progress Report, a Job Analysis for laundry laborer, and an Assessment Closing Report, fax received at the Department on May 19, 2009. We have not read the contents of those documents nor are we considering them in any way to resolve the merits of this appeal. However, the existence of those documents raises the question of whether a vocational expert has assessed the worker's employability or her eligibility for vocational services. If so, then the Department may have been required to: "(iv) Review the assessment report and determine whether the worker is eligible for vocational rehabilitation plan development services. and (v) Notify all parties of the eligibility determination in writing." WAC 296-19A-030(2)(iv) and (v). In addition, the claimant would have been entitled to dispute that determination pursuant to WAC 296-19A-410 through 296-19A-470.

Furthermore, if the vocational counselor failed to include Dr. Wilson in the process, as his letters suggest, the vocational process might be subject to challenge because he is listed as the attending provider on the July 27, 2009 Department order, and that status was confirmed by his testimony. The attending provider plays an important role under the vocational rehabilitation rules. See, e.g., WAC 296-19A-030(1). Under the medical aid rules, as well, the attending provider has a

role to play. If the worker has not returned to work, the provider is required to indicate in the 60-day report whether a vocational assessment will be necessary to evaluate a worker's ability to return to work and why. WAC 296-20-06101. The same requirement is set forth in the definitional section, WAC 296-20-01002, under "Attending provider report."

The evidentiary record does not contain the necessary information to make determinations regarding any of these matters, and the claimant was precluded from presenting such evidence through her own testimony or that of Dr. Wilson. As a general proposition, the July 27, 2009 closing order would be considered an adjudication of "the totality of the claimant's entitlement to all benefits of whatever form, as of the date of claim closure." *In re Randy Jundul*, BIIA Dec., 98 21118 (1999), at 3. Thus, in an appeal from a closing order, our scope of review could conceivably include a contention that the Department has failed to act or failed to follow the process set forth in RCW 51.32.095 or WAC 296-19A, with respect to vocational services. Just because the claimant has not appealed from a director's decision resulting from the VDRO process, that does not necessarily mean there are no issues with respect to vocational services cognizable in this appeal.

We also note that in his June 25, 2010 letter, Dr. Wilson raised the issue of whether the claimant is employable. That question is intertwined with the vocational issues. On remand, the claimant's vocational concerns may become moot. Further inquiry may reveal that she is arguing in the alternative, that is, she is either challenging the way the Department addressed the vocational aspect of the claim or she is contending that, without vocational services, she is not employable and is therefore entitled to time-loss compensation or permanent total disability benefits. If Ms. Pascual is seeking the latter, the industrial appeals judge will be called upon to determine whether she is employable or not. That is the same determination the Department would have to make in deciding whether Ms. Pascual is entitled to vocational services. There would therefore be no reason to remand the claim to the Department to make the same determination. *In re Peter Dodge*, Dckt. No. 90 4017 (January 2, 1992).

The May 13, 2010 Proposed Decision and Order is vacated. This order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings to determine what issues Ms. Pascual is raising regarding vocational services and employability, and to allow both parties to present evidence on those issues. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain

findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

Dated: July 22, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
LARRY DITTMAN Member