

Cuellar, Ruben

SCOPE OF REVIEW

Vocational rehabilitation determinations

In appeals from a closing order and an order terminating time-loss compensation benefits, the Board's scope of review does not extend to entitlement to vocational services. The Board's prior decision in *In re Albina Pascual*, BIIA Dec., 09 20949 (2010) does not hold that the Board will order vocational services. It only holds that the Board's scope of review on vocational issues extends to whether the Department followed its procedures under the statutes and regulations in the course of making the decision about vocational services. ...***In re Ruben Cuellar, BIIA Dec., 12 13134 (2013)*** [Editor's Note: The Board's decision was appealed to Pierce County Superior Court, No. 14-2-06446-8.]

Vocational rehabilitation - jurisdiction of Board

In appeals from a closing order and an order terminating time-loss compensation benefits, the Board's scope of review does not extend to entitlement to vocational services. The Board's prior decision in *In re Albina Pascual*, BIIA Dec., 09 20949 (2010) does not hold that the Board will order vocational services. It only holds that the Board's scope of review on vocational issues extends to whether the Department followed its procedures under the statutes and regulations in the course of making the decision about vocational services. ...***In re Ruben Cuellar, BIIA Dec., 12 13134 (2013)*** [Editor's Note: The Board's decision was appealed to Pierce County Superior Court, No. 14-2-06446-8.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: RUBEN CUELLAR**) **DOCKET NOS. 12 13134 & 12 13135**
2)
3 **CLAIM NO. Y-089408**) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING FOR**
5) **FURTHER PROCEEDINGS**

5 **APPEARANCES:**

6 Claimant, Ruben Cuellar, by
7 Law Offices of Betsy Rodriguez, P.S., per
8 Betsy Rodriguez and Dwayne L. Christopher

9 Employer, Commons at Federal Way Mall, by
10 Washington Retail Association,
11 None

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Christine J. Kilduff, Assistant

15 In Docket No. 12 13134, the claimant, Ruben Cuellar, filed an appeal with the Board of
16 Industrial Insurance Appeals on March 15, 2012, from an order of the Department of Labor and
17 Industries dated February 10, 2012. In this order, the Department affirmed an October 18, 2011
18 order in which it paid loss of earning power compensation benefits through August 2, 2011, and
19 then terminated time-loss compensation benefits because the worker was able to work. **APPEAL**
20 **REMANDED FOR FURTHER PROCEEDINGS.**

21 In Docket No. 12 13135, the claimant, Ruben Cuellar, filed an appeal with the Board of
22 Industrial Insurance Appeals on March 15, 2012, from an order of the Department of Labor and
23 Industries dated February 13, 2012. In this order, the Department affirmed a November 2, 2011
24 order in which it closed the claim with a permanent partial disability award of 12 percent of the left
25 leg above the knee joint with short thigh stump (3 inches or below tuberosity of ischium). **APPEAL**
26 **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

27 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
28 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
29 Order issued on March 8, 2013, in which the industrial appeals judge dismissed the appeals.

30 We have granted review because we believe that Mr. Cuellar's appeals should not have
31 been dismissed. We find that Mr. Cuellar presented a prima facie case supporting his entitlement
32

1 to total disability benefits and this matter must be remanded to the hearing process to allow the
2 Department to present evidence.

3 Mr. Cuellar appealed two orders, one terminating time-loss compensation benefits and the
4 other closing his claim. On appeal and in his Petition for Review, Mr. Cuellar has repeatedly
5 requested the Board remand his claim to the Department for the purpose of obtaining additional
6 vocational services. Without additional vocational services Mr. Cuellar asserts that he cannot
7 perform reasonably continuous gainful employment. Claimant's Petition for Review, pg 18,
8 lines 18 – 20. During the hearings and in briefs filed by the parties the question of whether the
9 Board could direct the Department to provide vocational services was thoroughly analyzed.
10 However, the question raised by this appeal is not whether the Board can direct the Department to
11 provide 'further' vocational services (we cannot) but whether, in the alternative, Mr. Cuellar is
12 entitled to benefits as a permanently totally disabled worker.

13 It is well established that vocational services are provided by the Department of Labor and
14 Industries (Department) at the discretion of the 'supervisor.' The decision to provide or not to
15 provide vocational services is discretionary and may only be challenged based on a showing of
16 abuse of discretion by the supervisor. RCW 51.32.095 (1) and (2), *In re Todd Eicher*, BIIA
17 Dec., 88 4477 (1990). See also, *In re Mary Spencer*, BIIA Dec., 90,0264 (1991), and *In re*
18 *Armando Flores*, BIIA Dec., 87 3913 (1989).

19 We note that in the Petition for Review, and elsewhere in the record, Mr. Cuellar does not
20 contend that the director (supervisor) abused his or her discretion in providing vocational services
21 while the claim was open. Rather, Mr. Cuellar asserts that the vocational services were provided
22 by the Department but were not sufficient to make him capable of reasonably continuous gainful
23 employment. He further asks the Board to direct the Department to provide additional vocational
24 services in order to become capable of reasonably continuous gainful employment. The question
25 of vocational services – any and all vocational services – has been limited to the discretion of the
26 supervisor by the Legislature. Mr. Cuellar has cited no authority that allows the Board to direct the
27 Department to provide vocational services absent a showing that the supervisor abused his or her
28 discretion.

29 The only logic we can see in Mr. Cuellar's argument for additional vocational services is that
30 once the supervisor has authorized services that the Board may then review the adequacy of those
31 services in an appeal closing the claim. Again, Mr. Cuellar cites no authority to extend the Board's
32

1 scope of review to determine whether additional vocational services are warranted. Vocational
2 services, as a benefit under the Industrial Insurance Act, are solely within the discretion of the
3 supervisor.

4 When the Department closes a claim it must determine the extent of any permanent
5 disability proximately caused by the industrially related condition. If there is permanent disability
6 then Department must further evaluate whether the disability prevents the injured worker from
7 obtaining and performing reasonably continuous gainful employment and is permanently totally
8 disabled. *Leeper v. Department of Labor and Indus.*, 123 Wn.2d 803 (1994). The Department runs
9 a risk when closing a claim if it determines that an injured worker is capable of reasonably
10 continuous gainful employment. An injured worker may challenge that decision on appeal. If the
11 worker is successful the Department cannot defend on the basis that vocational services would
12 make the worker capable of reasonably continuous gainful employment.

13 In our recent decision of *In re Tesfai G. Ukbagergis*, Dckt No. 09 20737, (April 21, 2011), we
14 addressed the question of whether further retraining would help Mr. Ukbagergis become
15 employable.

16 We agree with the Department that, with retraining, Mr. Ukbagergis likely would be
17 employable. The question before us, however, is whether he is employable absent
18 any retraining. The Department, citing *Pacific Car and Foundry Co. v. Coby*, 5 Wn.
19 App. 547 (1971), argues that the worker's "occupational retraining prognosis" must be
20 considered in assessing total disability. However, *Coby* involved an appeal by the
21 employer from an order of the Department that had classified the worker as
22 permanently totally disabled; certainly a worker's "occupational retraining prognosis"
23 would be a factor considered by the Department in assessing whether a worker is
24 totally disabled, because the Department has the authority to provide vocational
25 services to injured workers who require and likely would benefit from such services.
26 **However, after the Department has determined that the worker is not totally
27 disabled and that determination has been appealed to this Board, the worker's
28 "occupational retraining prognosis" is no longer a factor in determining
29 whether the worker is totally disabled.**

30 *Ukbagergis*, at 4. (Emphasis added)

31 The focus in a dispute of a closing order is either proper and necessary medical treatment or
32 the extent of permanent disability. If a worker seeks benefits as a permanently totally disabled
worker it is not necessary to show that he or she would remain unemployable even if further
retraining was provided. The issue on appeal from a closing order is the extent of permanent
disability – if any – and not whether vocational services would mitigate total disability. As noted, the
Department runs a risk in closing a claim when there are serious unresolved vocational issues. The

1 remedy for the failure to provide vocational services sufficient to make a worker capable of
2 obtaining reasonably gainful employment is permanent total disability.

3 We note that the industrial appeals judge did not identify permanent total disability as an
4 alternative issue in the Interlocutory Order Establishing Litigation Schedule dated September 24,
5 2012. Mr. Cuellar, through his attorney, steadfastly argued throughout the hearing process and in
6 the Petition for Review that vocational services were the primary relief sought in the course of the
7 appeal. As we have explained, the Board cannot direct the Department to provide vocational
8 services absent a showing of abuse of discretion by the supervisor/director. Therefore, what
9 remains to be decided is the extent of permanent disability. Mr. Cuellar's counsel presented
10 permanent total disability as an alternative remedy at the hearing held on January 23, 2013.
11 1/23/13 Tr. at 93. In the Petition for Review Mr. Cuellar renewed permanent total disability as
12 alternative relief and cited appropriate legal authority. *Kuhnle v. Department of Labor & Indus.*,
13 12 Wn.2d 191 (1942), *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972) and
14 *Leeper*. Irrespective of Mr. Cuellar's insistence to the contrary, we cannot direct or award further
15 vocational services. Because he has not pursued keeping the claim open for further treatment, the
16 only remaining relief available to Mr. Cuellar on appeal is consideration of whether he is entitled to
17 further disability benefits.

18 We wish to briefly distinguish our decision of *In re Albina Pascual*, BIIA Dec., 09 20949
19 (2010). In *Pascual* the Board reviewed the claim file under the authority of *In re Mildred Holzerland*,
20 BIIA Dec., 15,729 (1965), to determine if the Department had appropriately responded to a request
21 for vocational services. The Board found that communications from Ms. Pascual's attending
22 physician and other documents in the file raised the issue of the need for vocational services. We
23 held:

24 However, the existence of those documents raises the question of whether a
25 vocational expert has assessed the worker's employability or her eligibility for
26 vocational services. If so, then the Department may have been required to:
27 "(iv) Review the assessment report and determine whether the worker is eligible for
28 vocational rehabilitation plan development services, and (v) Notify all parties of the
29 eligibility determination in writing." WAC 296-19A-030(2)(iv) and (v). In addition, the
30 claimant would have been entitled to dispute that determination pursuant to
31 WAC 296-19A-410 through 296-19A-470.

32 *Pascual* at 5.

The claim file did not indicate that the Department had taken the actions required by its own
regulations to address the request for vocational services. The Board remanded the appeal to the

1 hearing process to take evidence on whether the Department had responded to a request for
2 vocational services consistent with the Industrial Insurance Act and its own regulations.

3 *Pascual* does not hold that the Board will order vocational services; it holds only that the
4 Board's scope of review on vocational issues extends to whether the Department followed its
5 procedures under the statute and regulations in the course of making a decision about vocational
6 services. If the appealing party could affirmatively show that the Department did not follow a
7 requirement of its own rules, the Board could direct the Department, that is, the supervisor, to follow
8 those procedures and issue a further decision. The Board would not direct the Department to
9 provide vocational services.

10 We clarified the limited holding of *Pascual* in the subsequent decision of *In re Craig R. St.*
11 *Onge*, Dckt Nos. 09 14365, 09 19470, 09 20162, 09 20163, 09 20164 & 09 20164-A & 09 20667,
12 (September 2, 2010). The Board held:

13 None of the orders before us explicitly address vocational benefits. We are cognizant
14 that in a recent decision, *In re Albina M. Pascual*, Dckt. No. 09 20949 (July 22, 2010),
15 we remanded an appeal to the hearings process to address a vocational issue despite
16 the absence of an order on appeal explicitly addressing vocational issues. We
17 remanded because an issue was raised regarding whether the Department followed
18 the process set forth in RCW 51.32.095 or WAC 296-19A with respect to vocational
19 services.

18 *St. Onge*, at 3.

19 The issue in *Pascual* and *St. Onge* is the Department's process regarding vocational
20 determinations and not the substance of those determinations. Substantive vocational decisions
21 can only be challenged on an abuse of discretion standard.

22 *Pascual* is not applicable in Mr. Cuellar's case as he has not alleged any procedural or
23 substantive error by the Department regarding vocational services. Mr. Cuellar simply argues that
24 he needs more services.

25 RCW 51.32.095(10) specifies that claims cannot be 'reopened' for vocational rehabilitation
26 services only. The Department argues that the word 'reopening' refers generally to 'keeping' a
27 claim open to provide vocational services as opposed to a situation involving the application to
28 reopen a claim. This view is consistent with our decision in *Ukbagergis*. An appeal based on the
29 claim for additional vocational service must be based on an abuse of the Department's discretion in
30 either awarding or denying such benefits.

