Robles, Rogelio

VOCATIONAL REHABILITATION

Option 2 benefits under RCW 51.32.099

If a worker elects Option 2 under RCW 51.32.099(4) and establishes worsening of a condition under the claim so that claim closure is not appropriate, the Option 2 selection must be rescinded. **….*In re Rogelio Robles,* BIIA Dec., 14 21084 (2015)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROGELIO D. ROBLES	**)**	**DOCKET NOS. 14 21084, 14 21085 & 14 21086**
	)	
CLAIM NO. AH-73284	**)**	**DECISION AND ORDER**

Rogelio Robles injured his low back while working for Washington Beef, Inc. when he attempted to grab a cow hide, but slipped and twisted. He received medical treatment for this condition, including two-level discectomy and fusion surgeries. Afterward, the Department determined that Mr. Robles would be eligible for vocational services.

The Department issued a series of orders in which they determined that Mr. Robles's (Option 2) vocational award was equal to $10,942.20 to be paid to him biweekly in the amount of $851.06; denied responsibility for a right inguinal hernia; and closed the claim with a permanent partial disability award equal to Category 2, WAC 296-20-280, for permanent low back impairments.

Mr. Robles alleges that he did not fully understand his choices when selecting vocational Option 2 and now wishes to change his selection to Option 1; that in addition to the low back conditions, the industrial injury caused a right inguinal hernia as well as a number of mental health conditions that should be accepted and treated under this claim; and that he should be provided additional time-loss compensation and vocational benefits under this claim.

Our industrial appeals judge affirmed the total amount and the biweekly payment amount of Option 2 benefits; affirmed the denial of responsibility for the right inguinal hernia; but remanded the matter to the Department to deny time-loss compensation benefits from April 17, 2014, through August 8, 2014, allow depressive disorder as a condition proximately caused by the industrial injury; and keep the claim open.

We conclude that the order establishing the payments under his Option 2 selection must be reversed because a prior related order became final before Mr. Robles's protest. Thus, the Department did not have jurisdiction to issue the order. However, we have jurisdiction to consider Mr. Robles's arguments regarding the Option 2 selection through his appeal of the closing order. Mr. Robles's appeal of the denial of responsibility for the right inguinal hernia must be dismissed because he presented no evidence that the industrial injury caused his right inguinal hernia. We agree that the Department's decision to close the claim must be reversed and we direct the Department to accept responsibility for Mr. Robles's depressive disorder; pay time-loss compensation benefits; and provide further proper and necessary treatment. We also direct the Department to rescind the Option 2 selection because RCW 51.32.099(4)(b) directs that a worker's Option 2 selection is rescinded by a determination that claim closure was not appropriate.

DISCUSSION

Dckt. No. 14 21084--Department Authority to Issue August 4, 2014 Order.

On November 13, 2014, Mr. Robles and the Department stipulated to the correctness of the facts contained in the Board-prepared "Jurisdictional History" chart. Page 2 of that chart indicates that the Option 2 selection order was issued by the Department on April 16, 2014. The April 29, 2014 order set forth the amount and payment rate of Mr. Robles's Option 2 monetary benefits.[1] No protest or appeal was filed by Mr. Robles to either the April 16, 2014, or the April 29, 2014 Department orders until July 15, 2014. On that date the Department received a protest letter regarding any adverse orders from a legal assistant employed by the law office retained by Mr. Robles to represent him regarding his industrial insurance claim. This protest letter was not timely as to either the April 16 or 29, 2014 Department orders.[2] Nonetheless on August 4, 2014, the Department issued an order purporting to affirm the April 29, 2014 order. No such similar order regarding the April 16, 2014 order was issued. Mr. Robles filed a timely appeal from the August 4, 2014 order. This factual scenario raises a jurisdictional question. If, however, there was no timely Protest and Request for Reconsideration, the April 29, 2014 order became final and the Department's August 4, 2014 order is at least voidable if not void.

As provided by *In re Mildred Holzerland*, BIIA Dec. 15,729 (1965), we reviewed the Department file to determine whether we have jurisdiction over this appeal. From this review, we take notice of the following facts: The April 29, 2014 order was translated into Spanish and copies mailed to Mr. Robles's last-known address at the time. Mr. Robles had been receiving mail from the Department at that address for years. He still resides there. The Department file did not contain any documents that explicitly protested or could be interpreted as raising questions regarding the provisions of the April 29, 2014 Department order. There was no indication from the Department file to suggest that Mr. Robles did not receive his copy of that order.

Based on our review of the Department file, we conclude that Mr. Robles did not protest the April 29, 2014 order before July 15, 2014, nor did anyone on his behalf. There was no timely protest or appeal of that order. The Department could have reconsidered that order "within the time limited for filing a notice of appeal to the board" without regard to whether a protest or appeal had been filed had it directed "the submission of further evidence or the investigation of any further

[1] The specifics of the award are not stated in the chart's entry for the April 29, 2014 order. The order provided that Mr. Robles's (Option 2) vocational award was equal to $10,942.20 to be paid to him biweekly in the amount of $851.06.
[2] RCW 51.52.050(1) & .060(1).

fact."[3] It did not do so within the time limit specified in the statute. Therefore the underlying (April 29, 2014) Option 2 benefit calculation order became final and binding on the parties. The Department lacked authority to issue the August 4, 2014 order and it must be reversed.

Dckt. No 14 21085--the order segregating the right inguinal hernia as unrelated to this claim

Mr. Robles did not present any medical evidence to support the inclusion of the right inguinal hernia condition as part of this claim. Because he failed to present a prima facie case for relief, the correct disposition of this appeal is to dismiss it rather than to affirm the order under appeal. As further support for our action we note that in his Petition for Review Mr. Robles did not include any argument for covering the right inguinal hernia condition under this claim.

Dckt. No 14 21086--Claim Closure/Entitlement to Additional Benefits and rescission of the selection of Option 2 vocational benefits

Mr. Robles contends that this claim was closed in error because he requires proper and necessary medical treatment for mental health conditions proximately caused by the March 19, 2009 industrial injury. We have reviewed the expert testimony and conclude the Proposed Decision and Order correctly decided the questions of causation and treatment of Mr. Robles's mental health condition(s).

The existence of a significant depressive disorder was verified by the scores on the Beck Depression Inventory testing administered by Ronald G. Early, M.D. We give greater weight to Dr. Early's testimony regarding causation and treatment of this condition due to his better understanding of Mr. Robles's mental health history both before and after the industrial injury. That historical evidence supports the finding that his depression did not clinically manifest itself until after the failure of his low back surgery. Mr. Robles's drinking and marital problems began because of the depression, not vice versa.

However, the evidence supporting the existence of the other mental health conditions diagnosed by Dr. Early is far less compelling. Mr. Robles has not manifested unusual pain behaviors or non-organic findings that would suggest that his pain is anything other than physically based. While anxiety often goes hand in hand with depression, in this case there is little evidence of clinically significant anxiety. And neither Dr. Early nor Michael Friedman, D.O., suggested treatment for an anxiety condition if one exists.

[3] RCW 51.52.060(3).

Mr. Robles elected Option 2 benefits. Such an election does not prevent him from contesting the closing order and asserting his need for additional treatment and other benefits under the claim.[4] We conclude that Mr. Robles has a new medical condition, the depressive disorder, in the sense that it had not been accepted by the Department at the time it issued the order closing the claim. We also conclude that this new condition requires proper and necessary medical treatment that makes closure of the claim inappropriate at this time. In so doing, we have implicitly concluded that Mr. Robles has shown a worsening of his overall medical condition accepted under the claim within the meaning of RCW 51.32.099(4)(b).

RCW 51.32.099(4)(b) states in relevant part:

> The department shall issue an order as provided in RCW 51.52.050 confirming the option 2 election, setting a payment schedule, and terminating temporary total disability benefits effective the date of the order confirming that election. The department shall thereafter close the claim. A worker who elects option 2 benefits shall not be entitled to further temporary total, or to permanent total, disability benefits except upon a showing of a worsening in the condition or conditions accepted under the claim such that claim closure is not appropriate, **in which case the option 2 selection will be rescinded** and the amount paid to the worker will be assessed as an overpayment . . .. (Emphasis ours.)

The statutory language is clear and not subject to interpretation. By operation of law the August 4, 2014 order is reversed; the vocational award as provided by the Option 2 election by Mr. Robles is rescinded; and the Department must take further action consistent with RCW 51.32.099, including assessing an overpayment of the Option 2 benefits paid to Mr. Robles. The circumstances surrounding Mr. Robles's selection of Option 2 are not relevant. The Option 2 selection is rescinded regardless of whether he understood the consequences of selecting that option.

This leaves only the question of Mr. Robles's entitlement to time-loss compensation benefits from April 17, 2014, when that benefit was ended, through August 8, 2014, the date of the closing order under appeal. The Option 2 benefit that was paid to him beginning April 29, 2014, and continuing after August 8, 2014, was the same amount that he would have been paid had he been receiving his regular time-loss compensation benefits under RCW 51.32.090.[5] Thus, if he is entitled to time-loss compensation benefits for the period above, the only additional money he would receive would be the time-loss compensation benefits from April 17-28, 2014, because the

[4] *In re Bill Ackley*, BIIA Dec., 09 11392 (2010)
[5] RCW 51.32.099(4)(b).

time-loss compensation entitlement afterwards would be offset against the overpayment created by the rescission of the Option 2 choice.

Based on the following discussion of the statutory vocational program as it applies to Mr. Robles's case, we direct the Department to pay the full amount of the time-loss compensation benefits for the period in question (less the offset created by the rescission of the Option 2 election). As provided by RCW 51.32.095(1) an assessment was made by vocational rehabilitation and retraining experts because Mr. Robles was receiving time-loss compensation benefits. Their recommendation was that vocational rehabilitation services were both necessary and likely to enable Mr. Robles to become employable at gainful employment. Following that recommendation, the "supervisor or supervisor's designee" concluded that he be provided vocational services. These services were considered to be "both necessary and likely to make the worker employable at gainful employment . . .. "[6]

The supervisor's conclusion that vocational benefits be provided to Mr. Robles constitutes an admission by the Department that without the provision of those benefits he was temporarily unable to work at any gainful employment. The record doesn't reflect when the supervisor made this determination, but we can infer that it occurred in January 2014 because it was that month that vocational counselor Nicole Hernandez was assigned to provide Mr. Robles with vocational plan development services. Mr. Robles was notified of his entitlement to plan development services at that time.

Vocational plan development services are described in WAC 296-19A-090. In Mr. Robles's case, these services were provided to him between January and April 2014, at which time a plan was developed to retrain him as a "sorter." Payment of time-loss compensation benefits continues during the period of plan development.[7] It is during the plan development phase that the worker is advised of the Option 1 or Option 2 election and is counseled on what happens and what benefits are available under each choice.

Following the submission to the Department of the vocational plan the worker selects either Option 1 or Option 2. Option 1 is the implementation of the vocational plan, which can take up to

[6] RCW 51.32.095(2).

[7] This is implied by RCW 51.32.099(2)(c), which permits an employer to make a valid return-to-work offer to the worker during plan development. If the employer makes such an offer, then "the vocational plan development services and temporary total disability compensation shall be terminated." Also .099(4)(b) which states a worker who selects Option 2 is no longer entitled to TTD or PTD benefits.

two years to complete.[8] Time-loss compensation benefits would have continued during the implementation of the vocational plan had Mr. Robles elected Option 1. Option 2 is the election not to proceed with the plan; the injured worker declines further vocational benefits, receives the equivalent of 6 months of time-loss compensation benefits as calculated and paid under RCW 51.32.090 and vocational costs, including training, equipment, clothing, etc., remain available to him for a five-year period.[9] Time-loss compensation benefits are terminated and the claim is closed thereafter.

Thus, throughout the vocational rehabilitation process until the completion of the vocational plan, the worker is entitled to time-loss compensation benefits. It is inconsistent for the Department to contend, as here, that Mr. Robles was able to work all along and advocate that time-loss compensation benefits should be denied once he elected Option 2 on April 11, 2014. It is true that the Option 2 election required termination of time-loss compensation, but that was by operation of law, not because of medical and vocational evidence that he was able to work.

DECISION

In Docket No. 14 21084, the August 4, 2014 order in which the Department affirmed its April 29, 2014 order and determined that Mr. Robles's (Option 2) vocational award was equal to $10,942.20 to be paid to him biweekly in the amount of $851.06 is incorrect because the April 29, 2014 order was final and the Department did not have jurisdiction to affirm it. The August 4, 2014 order is reversed.

In Docket No. 14 21085, Mr. Robles did not present a prima facie case in support of his assertion that the August 6, 2014 order in which the Department affirmed a June 25, 2014 order denying responsibility for a right inguinal hernia is incorrect. Mr. Robles's appeal is dismissed.

In Docket No. 14 21086, the August 8, 2014 order in which the Department affirmed its June 26, 2014 order closing the claim with a permanent partial disability award equal to Category 2, WAC 296-20-280, for permanent low back impairments is incorrect. The August 8, 2014 order is reversed and the matter remanded to the Department to accept responsibility for Mr. Robles's depressive disorder and provide further proper and necessary treatment; rescind Mr. Robles's Option 2 selection under RCW 51.32.099(4)(b); assess an overpayment of the

[8] RCW 51.32.099(4)(a).
[9] RCW 51.32.099(4)(b).

monetary benefits paid to him under Option 2; reinstate time-loss compensation benefits from April 17, 2014, through August 8, 2014; and for further action as indicated by the law and the facts.

FINDINGS OF FACT

1. On November 13, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. The Department issued an order on April 29, 2014, in which it established the amount of Mr. Robles's Option 2 monetary benefits and the payment schedule of those benefits. Mr. Robles did not protest or appeal that order until July 15, 2014. On August 4, 2014 the Department issued an order in which it purported to affirm its April 29, 2014 order. On September 29, 2014, Mr. Robles timely appealed the August 4, 2014 order.

3. Rogelio Robles injured his low back while working for Washington Beef on March 19, 2009, when he grabbed at a cow hide, but slipped and twisted. He received treatment for this condition and eventually had a two-level discectomy and fusion.

4. Mr. Robles is approximately 47 years old. He engaged in physical labor throughout his adult life. He had no back pain or limitations or psychological conditions before his March 19, 2009 injury.

5. No evidence was presented that the March 19, 2009 industrial injury proximately caused Mr. Robles to sustain a right inguinal hernia.

6. The pain and limitations created by the industrial injury and low-back surgery proximately caused Mr. Robles to develop depressive disorder.

7. As of August 8, 2014, Mr. Robles required medical treatment for his depressive disorder that was proximately caused by the March 19, 2009 industrial injury. The depressive disorder had not reached medical stability.

8. Between April 17, 2014, and August 8, 2014, Mr. Robles was temporarily unable to obtain and perform reasonably continuous gainful employment due to the low back and mental health disabilities and restrictions proximately caused by the March 19, 2009 industrial injury.

9. In January 2014 the supervisor of the Department determined vocational services were both necessary and likely to make Mr. Robles employable at gainful employment. Thereafter a vocational plan for Mr. Robles was developed and approved by the Department. He was then informed of his vocational plan options.

10. Mr. Robles voluntarily elected Option 2 under RCW 51.32.099(4)(b) to decline vocational plan implementation services. Under Option 2 he received monetary benefits beginning on April 29, 2014 and continuing through at least August 8, 2014.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. Mr. Robles's protest of the April 29, 2014 Department order was not timely. The April 29, 2014 order was final and the Department could no longer review it. The Department lacked authority to issue its August 4, 2014 order.

3. Mr. Robles did not present a prima facie case that his right inguinal hernia condition was proximately caused by the March 19, 2009 industrial injury.

4. Mr. Robles was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from April 17, 2014, through August 8, 2014.

5. Mr. Robles's depressive disorder proximately caused by the industrial injury was not medically fixed and stable as of August 8, 2014, and he is entitled to further treatment as provided by RCW 51.36.010.

6. As provided by RCW 51.32.099(4)(b) Mr. Robles's Option 2 election is rescinded and the monetary benefits paid him under Option 2 constitute an overpayment.

7. The Department order dated August 4, 2014, is incorrect and is reversed because the April 29, 2014 order was final and the Department did not have jurisdiction to affirm it. .

8. Mr. Robles's appeal from the August 6, 2014 Department order is dismissed for failure to present a prima facie case for relief.

9. The Department order dated August 8, 2014, is incorrect. It is reversed and remanded to the Department to accept responsibility for Mr. Robles's depressive disorder, provide further proper and necessary medical treatment; rescind Mr. Robles's Option 2 selection pursuant to RCW 51.32.099(4)(b), assess an overpayment of the monetary benefits paid to him pursuant to Option 2; reinstate time-loss compensation for the period of April 17, 2014 through August 8, 2014; and for further action as indicated by the law and the facts.

Dated: December 15, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

Addendum to Decision and Order
In re Rogelio D. Robles
Docket Nos. 14 21084, 14 21085 & 14 21086
Claim No. AH-73284

Appearances

Claimant, Rogelio D. Robles, by Smart Connell Childers & Verhulp, P.S., per Darrell K. Smart

Employer, Washington Beef, Inc., None

Department of Labor and Industries, by The Office of the Attorney General, per James A. Yockey

Department Order(s) Under Appeal

1. In Docket No. 14 21084, the claimant, Rogelio D. Robles, filed an appeal with the Board of Industrial Insurance Appeals on September 29, 2014, from an order of the Department of Labor and Industries dated August 4, 2014. In this order, the Department affirmed an April 29, 2014 order that stated Mr. Robles's (Option 2) vocational award was equal to $10,942.20 to be paid to him biweekly in the amount of $851.06.

2. In Docket No. 14 21085, the claimant, Rogelio D. Robles, filed an appeal with the Board of Industrial Insurance Appeals on September 29, 2014, from an order of the Department of Labor and Industries dated August 6, 2014. In this order, the Department affirmed a June 25, 2014 order that denied responsibility for a right inguinal hernia.

3. In Docket No. 14 21086, the claimant, Rogelio D. Robles, filed an appeal with the Board of Industrial Insurance Appeals on September 29, 2014, from an order of the Department of Labor and Industries dated August 8, 2014. In this order, the Department affirmed a June 26, 2014 order that closed the claim with a permanent partial disability award equal to Category 2, WAC 296-20-280, for permanent low back impairments.

Petition for Review

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 July 17, 2015, in which the industrial appeals judge affirmed the orders of the Department dated August 4, 2014, and August 6, 2014, and reversed and remanded the Department order dated August 8, 2014.

Evidentiary Rulings

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