

Osorio, Jesus

SCOPE OF REVIEW

Segregation order

In appeal from an order denying responsibility for a specific psychiatric condition, the Board's scope of review does not extend to other alleged psychiatric conditions if those conditions had not been alleged in previous protests. Distinguishing *In re Sheri Gorham*, BIIA Dec., 11 23281 (2013).***In re Jesus Osorio*, BIIA Dec., 15 11214 (2016)**

Scroll down for order.

1 his emotions. Although Mr. Osorio had a history of fatigue prior to the injury, he denied having
2 problems with depression.
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4 Richard L. Schneider, M.D., a psychiatrist, examined Mr. Osorio on April 22, 2014. He
5 diagnosed Mr. Osorio with dysthymia, which is a chronic low level form of depression. According to
6 Dr. Schneider, this condition was preexisting and not aggravated by the industrial injury. However,
7 Dr. Schneider felt that it was interfering with Mr. Osorio's recovery from the injury and should be
8 treated with anti-depressant medications.
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10 In October 2014, Mr. Osorio came under the care of Stephen Hull, a registered nurse
11 practitioner specializing in psychiatry. Nurse Hull conducted a mental status examination and
12 administered a diagnostic test for depression called a PHQ-9. Based on the clinical findings and
13 Mr. Osorio's test results, Nurse Hull diagnosed major depression and a pain disorder associated
14 with psychological factors and a general medical condition. Nurse Hull noted that Mr. Osorio had a
15 preexisting history of depressed moods, but was able to work despite these episodes. In Nurse
16 Hull's opinion, the industrial injury lit up or aggravated Mr. Osorio's preexisting depression, resulting
17 in the need for treatment, including psychotropic medication. Although Nurse Hull continued to
18 treat Mr. Osorio until June 29, 2015, there was no change in Mr. Osorio's mental health conditions.
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20 After filing his appeals, Mr. Osorio was seen by a psychiatrist, Ronald G. Early, M.D. Unlike
21 Nurse Hull, Dr. Early did not find a documented preexisting mental health condition in Mr. Osorio's
22 medical records. Mr. Osorio reported a multiplicity of symptoms to Dr. Early, including chronic pain,
23 depressed mood, irritability, fatigue, apathy, social isolation, and suicide ideation. On the Beck
24 depression inventory, Mr. Osorio scored a 46, which suggested a severe level of depression.
25 Dr. Early concluded that Mr. Osorio had a depressive disorder, not otherwise specified, and a pain
26 disorder associated with psychological factors (depression) and a general medical condition (the
27 industrial injury and its sequelae). He attributed these conditions to the industrial injury and did not
28 believe that further treatment was likely to improve Mr. Osorio's mental health symptoms.
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30 Mr. Osorio does not challenge the segregation of dysthymia from his industrial insurance
31 claim. However, he contends that the industrial appeals judge should have directed the
32 Department to accept responsibility for major depression and a pain disorder. We agree with
33 Mr. Osorio.
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1 Docket No. 15 11214

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3 The Department sent Mr. Osorio's protest of the September 15, 2014 order to the Board as
4 an appeal. In the protest, Mr. Osorio's attorney requested that the Department place the order in
5 abeyance to allow additional time "to investigate the issues raised by the order." The protest did
6 not include a request for allowance of a mental health condition. At the hearing, Mr. Osorio's
7 attorney stipulated that the issue in Docket No. 15 11214 was whether the condition of dysthymic
8 disorder was proximately caused by the industrial injury. After resting his case, he sought to
9 expand the issues to include a request for allowance of the conditions diagnosed by Nurse Hull and
10 Dr. Early (major depression and pain disorder). The Department's attorney did not object to Mr.
11 Osorio's request to seek allowance of major depression, but he expressed concern about including
12 the condition of pain disorder because "the Department hasn't had an opportunity to pass on that."¹
13 The industrial appeals judge determined that the Board's scope of review was limited to the
14 question of whether the dysthymic condition should be allowed. He also concluded that the
15 Department's order should be affirmed because Mr. Osorio failed to establish that the Department
16 incorrectly segregated this condition.
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19 Mr. Osorio argues that by segregating dysthymic disorder, the Department implicitly
20 considered the condition of major depression. We agree, although experts testified that dysthymic
21 disorder and major depression are distinct diagnoses that involve different diagnostic criteria. They
22 also described that the conditions reside within an array of depressive disorders. For example,
23 Dr. Schneider, when asked if Mr. Osorio was suffering from major depression, noted that he found
24 "nothing that rose to the level of worsening of his dysthymic disorder."² Dr. Schneider also testified
25 that dysthymic disorder is listed among the depressive disorders. Dr. Early also described
26 dysthymia as a disorder where there has been a persistent history of symptoms of depression over
27 the course of many years. We are satisfied from the testimony of these doctors that consideration
28 of dysthymic disorder necessarily involves consideration of depression. The scope of our review in
29 the order segregating dysthymic disorder involves consideration of major depression.
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32 Next, Mr. Osorio argues that *In re Sherri Gorham*³ authorizes the Board to reach the issue of
33 whether the Department should accept responsibility for pain disorder in Docket No. 15 11214.
34 *Gorham* holds that in an appeal from a Department order affirming its order segregating mental
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¹ 10/21/2016 Tr. at 49.

² Schneider Dep. at 19.

³ BIIA Dec., 11 23281 (2013).

1 health conditions, the worker may litigate allowance of the mental health conditions identified in the
2 protest of the segregation order notwithstanding the fact that the Department did not expressly deny
3 responsibility for the conditions in the order under appeal. A critical fact in *Gorham* was that the
4 worker's protest of the segregation order specifically identified the mental health conditions she
5 sought to have allowed under the claim. Because the Department was made aware of the worker's
6 request in the protest, its affirming order constituted a denial of the request.
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10 *Gorham* does not apply here. Mr. Osorio's protests of the Department's May 2, 2014
11 segregation order and its affirming order of September 15, 2014, make no mention of an alleged
12 pain disorder.⁴ In fact, the only relief Mr. Osorio requested was an order accepting responsibility for
13 "depression/dysthymia." Because Mr. Osorio's protests did not put the Department on notice that
14 he was requesting allowance of pain disorder, it cannot be said that the Department's actions in
15 response were a denial of the condition.
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19 Docket No. 15 12417
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21 The industrial appeals judge determined that Mr. Osorio was entitled to time-loss
22 compensation benefits from July 31, 2014, through August 30, 2014. This determination rests on
23 the opinion of Dr. Early, who testified that Mr. Osorio was unable to work during this period due to
24 the mental health limitations caused by the industrial injury. The industrial appeals judge correctly
25 resolved the time-loss issue. However, he failed to make the necessary findings and conclusions
26 regarding the conditions that have caused Mr. Osorio's temporary total disability.
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29 *In re Jose L. Aguilar-Vasquez*⁵ addresses the scope of our review in an appeal of an order
30 terminating time-loss compensation benefits. We held that the issue of temporary total disability
31 necessarily entails consideration of the conditions alleged to be disabling as a result of the
32 industrial injury or occupational disease. As a result, the findings and conclusions resolving the
33 time-loss issue must include the causative effects of the industrial injury during the period at issue;
34 the limitations caused by the industrially related conditions; and the effect of such limitations on the
35 claimant's ability to work.⁶ The Proposed Decision and Order illustrates the rationale for our holding
36 in *Aguilar-Vasquez*. On the one hand, the industrial appeals judge determined that he lacked the
37 authority to consider Mr. Osorio's request for allowance of major depression and pain disorder. On
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45 ⁴ We have examined the contents of the claimant's protest to the May 2, 2014 segregation order under the authority of *In re*
46 *Mildred Holzerland*, BIIA Dec., 15,729 (1965).

47 ⁵ BIIA Dec., 03 15196 (2004).

⁶ *Aguilar-Vasquez* at 5.

1 the other hand, he determined that Mr. Osorio was unable to work based on the limitations caused
2 by these same conditions. The industrial appeals judge's determinations are incongruous. Under
3 *Aguilar-Vasquez*, Mr. Osorio's request for time-loss compensation benefits encompasses, by
4 necessary implication, the issue of whether he has disabling limitations due to mental health
5 conditions (major depression and pain disorder) proximately caused by the industrial injury.
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9 The evidence in this case supports Dr. Early's diagnosis and opinion on the issue of
10 proximate cause. Like Dr. Early, Nurse Hull diagnosed Mr. Osorio with major depression and a
11 pain disorder. Nurse Hull was in the best position to evaluate Mr. Osorio's mental health, having
12 examined him on multiple occasions over the course of nearly eight months. There is no indication
13 in the record that the Department's expert, Dr. Schneider, considered the records of Nurse Hull in
14 arriving at his diagnoses. Nurse Hull also shares Dr. Early's opinion that the conditions of major
15 depression and pain disorder are related to the industrial injury. They part ways only on the issue
16 of whether Mr. Osorio had a preexisting depression. Nurse Hull believes he did. Dr. Early does
17 not. Although the treatment records immediately following the injury suggested that Mr. Osorio had
18 prior problems with depression, this history came from Mr. Osorio, who had to use an interpreter
19 because he speaks very little English. Due to the language barrier, Mr. Osorio's remarks may have
20 been misunderstood. More importantly, there are no records prior to the injury indicating that
21 Mr. Osorio was diagnosed or treated for a mental health condition. This medical history
22 undermines the opinion of Dr. Schneider, who attributed Mr. Osorio's mental health symptoms to a
23 preexisting dysthymia. The preponderance of the evidence establishes that Mr. Osorio's major
24 depression and pain disorder were caused by the industrial injury.
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33 Mr. Osorio also established his entitlement to time-loss compensation benefits from July 31,
34 2014, through August 30, 2014. Dr. Early testified that Mr. Osorio's major depression and pain
35 disorder have caused significant limitations in his ability to understand and carry out instructions;
36 maintain attention and concentration; and interact with others. In Dr. Early's opinion, these
37 limitations would have made it difficult for Mr. Osorio to maintain a full-time sustained level of
38 employment with adequate attendance and productivity. Nurse Hull was not asked to address
39 Mr. Osorio's ability to work from a psychological standpoint. However, he had the opportunity to
40 examine Mr. Osorio less than two months after the disputed time-loss period and his findings are
41 more in line with those of Dr. Early than Dr. Schneider. If we accept the findings of all three
42 experts, the picture that emerges is that Mr. Osorio's mental health deteriorated significantly after
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1 Dr. Schneider's examination, as he continued to deal with chronic pain following his failed back
2 surgery. Dr. Schneider's opinion that there are no psychological limitations caused by the injury
3 lacks foundation given the evolution of Mr. Osorio's symptoms. The evidence in the record
4 convinces us that Dr. Early offered the most accurate assessment of Mr. Osorio's level of
5 functioning in the aftermath of the industrial injury.
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8 **DECISION**

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- 10 1. In Docket No. 15 11214, the claimant, Jesus Osorio, filed a protest with the Department of Labor
11 and Industries on November 13, 2014. The Department forwarded it to the Board of Industrial
12 Insurance Appeals as an appeal. The claimant appeals a Department order dated
13 September 15, 2014. In this order, the Department denied responsibility for the condition
14 diagnosed as dysthymic condition but authorized treatment on a temporary basis as an aid to
15 recovery. This order is incorrect and is reversed. This matter is remanded to the Department to
16 deny responsibility for dysthymic disorder and accept responsibility for major depression.
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 - 18 2. In Docket No. 15 12417, the claimant, Jesus Osorio, filed an appeal with the Board of Industrial
19 Insurance Appeals on March 5, 2015, from an order of the Department of Labor and Industries
20 dated January 23, 2015. In this order, the Department denied time-loss compensation benefits
21 from July 31, 2014, through August 30, 2014. This order is incorrect and is reversed. This
22 matter is remanded to the Department with directions to accept responsibility for major
23 depression and pain disorder and to pay time-loss compensation benefits from July 31, 2014,
24 through August 30, 2014.
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32 **FINDINGS OF FACT**

- 33 1. On March 10, 2015, an industrial appeals judge certified that the parties
34 agreed to include the Jurisdictional History in the Board record solely for
35 jurisdictional purposes in Docket no. 15 11214.
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- 37 2. On May 14, 2015, an industrial appeals judge certified that the parties
38 agreed to include the Jurisdictional History in the Board record solely for
39 jurisdictional purposes in Docket No. 15 12417.
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- 41 3. Jesus Osorio injured his low back on May 25, 2013, while bending over
42 to pick up a 12-foot irrigation filter in the course of his employment with
43 Custom Orchards, Inc. Mr. Osorio underwent low back surgery as a
44 result of the injury.
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- 1 4. Jesus Osorio developed major depression and a pain disorder
2 proximately caused by the industrial injury.
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- 4 5. Prior to the industrial injury, Mr. Osorio experienced episodes of a
5 depressed mood due to job dissatisfaction, but was not diagnosed or
6 treated for a mental health condition.
- 7 6. The condition diagnosed as dysthymic disorder was not proximately
8 caused or aggravated by the industrial injury.
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- 10 7. Mr. Osorio was born in Mexico. He is 58 years old and has a fifth grade
11 education. He has worked primarily in agriculture.
- 12 8. The mental health conditions proximately caused by the industrial injury
13 resulted in significant limitations from July 31, 2014, through August 30,
14 2014, impacting Mr. Osorio's ability to understand and carry out
15 instructions; maintain concentration and attention; tolerate
16 criticism; adhere to a work schedule; and interact with others. These
17 limitations prevented Mr. Osorio from maintaining a full-time
18 sustained level of employment with adequate attendance and
19 productivity.
- 20 9. Mr. Osorio was unable to perform reasonably continuous gainful
21 employment from July 31, 2014, through August 30, 2014, due to the
22 limitations proximately caused by the industrial injury.

23 **CONCLUSIONS OF LAW**

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- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the
26 parties and subject matter in these appeals.
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- 28 2. The issue of whether Mr. Osorio developed major depression and a pain
29 disorder proximately caused by the industrial injury is within the Board's
30 scope of review in the appeal assigned Docket No. 15 12417.
- 31 3. Jesus Osorio was a temporarily totally disabled worker within the
32 meaning of RCW 51.32.090 from July 31, 2014, through August 30,
33 2014.
- 34 4. The Department order dated September 15, 2014, is incorrect and is
35 reversed and remanded to the Department to deny responsibility for
36 dysthymic disorder and accept responsibility for major depression.
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Addendum to Decision and Order
In re Jesus Osorio
Docket Nos. 15 11214 & 15 12417
Claim No. AU-33159

Appearances

Claimant, Jesus Osorio, by Smart, Connell, Childers & Verhulp, P.S., per Michael V. Connell
Employer, Custom Orchards, Inc., by Penser North America, Inc., per Veronica Shriver
Retrospective Rating Group, PITB Services, Inc., Retro #10626 & 10962, None
Department of Labor and Industries, by The Office of the Attorney General, per Dale E. Becker

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 February 3, 2016, in which the industrial appeals judge affirmed the Department order dated September 15, 2014, and reversed and remanded the Department order dated January 23, 2015.

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.