

Bard, Katherine

RES JUDICATA

Segregation order

A condition segregation order that is different and new from a prior segregation determination can't be considered res judicata.***In re Katherine Bard*, Order Vacating Proposed Decision and Order, BIIA Dec., 19 22559 (2021)**

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

IN RE: KATHERINE I. BARD

DOCKET NO. 19 22559

CLAIM NO. AR-05354

**ORDER VACATING PROPOSED DECISION
AND ORDER AND REMANDING THE APPEAL
FOR FURTHER PROCEEDINGS**

In late 2012, Katherine Bard was employed as a nursing assistant for Vashon Community Care. She injured her low back while helping a resident move from a toilet to a wheelchair. She has appealed a 2019 Department order that denied lumbar degenerative disc disorder. Based on the Department's motion for summary judgment premised on res judicata, our industrial appeals judge determined that the Department had no authority to issue its 2019 segregation order because an unchallenged 2013 segregation order was final and binding on the issue. Our judge concluded that the 2019 order must consequently be vacated, and dismissed Ms. Bard's appeal. Ms. Bard contends that scope of review principles and the ends of justice preclude us from granting the Department's motion. We conclude that our judge erred in dismissing Ms. Bard's appeal based on res judicata, but not for the reasons she contends. The Proposed Decision and Order is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

DISCUSSION

In November 2012, as a certified nursing assistant at Vashon Community Care, Ms. Bard injured her back while transferring a patient. Her claim was allowed and she received at least treatment benefits. While her claim was open, the Department issued an order on November 18, 2013, segregating lumbar disc degeneration as unrelated. Ms. Bard did not timely challenge that segregation order. The Department subsequently closed her claim in a May 12, 2014 order that Ms. Bard also did not timely challenge.

Based on Ms. Bard's subsequent application to reopen her claim, lengthy litigation followed. In June 2018, based on a superior court judgment, the Department reopened her claim effective April 10, 2015. Her claim has been open ever since. In administering the claim, the Department issued its August 6, 2019 order that states it has "reconsidered the order of 11/18/2013 which denied lumbar degenerative disc disorder. The Department has determined the order is correct and it is affirmed."

Ms. Bard appealed the 2019 segregation order. The Department moved for summary judgment based solely on res judicata, contending it had no authority to revisit the issue of whether the condition should be segregated in 2019, because it had already determined the issue in a final

1 and binding 2013 order. At oral argument, the Department's counsel stated that her client issued the
2 2019 order by "mistake." Based on res judicata, our industrial appeals judge determined that the
3 Department had no authority to issue its 2019 segregation order, determined the order must be held
4 for naught, and dismissed Ms. Bard's appeal.

5 Res judicata only applies if the prior final and binding determination and the determination later
6 at issue involve the same cause of action or claim.¹ We believe our industrial appeals judge erred in
7 construing the Department's 2013 and 2019 orders as involving the same claim. Read fairly, they do
8 not. The Department's 2019 order cannot reasonably be read as simply saying **again** that, **as of**
9 **November 18, 2013**, Ms. Bard's lumbar degenerative disc disorder was unrelated to her claim.
10 Rather, reasonably, it must be read as stating that **as of August 6, 2019**, Ms. Bard's lumbar
11 degenerative disc disorder **continued** to be unrelated. That is a different and new claim
12 determination and is not one that can be considered res judicata by the Department's 2013 order.
13 We have previously recognized this point, explaining that a final and binding order addressing a
14 claimant's conditions "that are entitled to res judicata effect are limited to [the date of the order]."²
15 Such an order "cannot be given any res judicata effect regarding aggravation of the claimant's
16 conditions **subsequent to its date**."³

17 Under res judicata, Ms. Bard cannot now re-litigate whether she suffered claim-related lumbar
18 disc degeneration **up through May 12, 2014**. The Department segregated the condition in its 2013
19 order that Ms. Bard never timely challenged. The determination later became the law of the case
20 through May 12, 2014, the date of the closing order, when Ms. Bard made no timely challenge to that
21 order.⁴ Based on the Department's 2019 order and Ms. Bard's timely appeal of it, however, she has
22 every right to now litigate whether she developed a claim-related new or aggravated lumbar
23 degenerative disc disorder **at any point from May 13, 2014, through August 6, 2019**. Since the
24 law of the case is that the condition was not related as of May 2014, the evidence that it somehow
25 became related in the interim or developed in the interim may prove difficult to develop. Nonetheless,
26 the worker is surely entitled to pursue a case within the above listed confines. The Department's
27 May 12, 2014 closing order could not have addressed, and did not address, that contention.

30 ¹ *In re Jorge Perez-Rodriguez*, BIIA Dec., 06 18718 (2008) at 2.

31 ² *Perez-Rodriguez*, at 8.

32 ³ *Perez-Rodriguez*, at 8 (Emphasis added).

⁴ *In re Tamra Archer Leigh*, Dckt. No. 17 26280 (October 31, 2019).

1 Consequently, our industrial appeals judge erred in dismissing Ms. Bard's appeal based on res
2 judicata.

3 **ORDER**

4 The October 9, 2020 Proposed Decision and Order is vacated. This order vacating is not a
5 final Decision and Order of the Board within the meaning of RCW 51.52.110.

6 This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for
7 further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial
8 appeals judge will issue a new Proposed Decision and Order. The new order will contain findings
9 and conclusions as to each contested issue of fact and law. Any party aggrieved by the new
10 Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.

11 Dated: January 26, 2021.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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14 LINDA L. WILLIAMS, Chairperson

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16 ISABEL A. M. COLE, Member
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**Addendum to Order
In re Katherine I. Bard
Docket No. 19 22559
Claim No. AR-05354**

Appearances

Claimant, Katherine I. Bard, by Reck Law, PLLC, per Tara J. Reck

Employer, Vashon Island Community Care, by Comprehensive Risk Management (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Heather Leibowitz

Department Order Under Appeal

In Docket No. 19 22559, the claimant, Katherine I. Bard, filed an appeal with the Board of Industrial Insurance Appeals on September 27, 2019, from an order of the Department of Labor and Industries dated August 6, 2019. In this order, the Department affirmed its November 18, 2013 order denying lumbar degenerative disc disorder.

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 Proposed Decision and Order issued on October 9, 2020.