

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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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.
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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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16 ISABEL A. M. COLE, Member
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