AGGRAVATION (RCW 51.32.160)

Discretionary reopening by Director

STANDARD OF REVIEW

Waiver of time limit for reopening claims

In an appeal of Director's letter refusing to waive the time limit for filing an application to reopen the claim, the standard of review is whether the decision not to waive the time limit constitutes an "abuse of discretion." ....In re Ernest Therriault, BIA Dec., 90 0876 (1990)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ERNEST J. THERIAULT ) DOCKET NOS. 90 0876 & 90 1365
) CLAIM NO. G-370616 ) DECISION AND ORDER

APPEARANCES:

Claimant, Ernest J. Therriault, Pro Se

Employer, Alaska Copper Company, Inc., by
None

Department of Labor and Industries, by
Office of the Attorney General, per
Larry A. Jones, Assistant

These are appeals filed by the claimant on February 16, 1990 to a Director's Letter dated February 8, 1990 which determined the claim would not be reopened and a Department order dated February 8, 1990 which provided as follows: "You are not eligible for disability benefits because we did not receive your application within the time limits set by law (10 years for eye injuries, 7 years for all other injuries). Your claim will remain closed." The Director's letter is affirmed and the Department order dated February 8, 1990 is REVERSED AND REMANDED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on August 6, 1990 in which the Director's Letter dated February 8, 1990 and the order of the Department dated February 8, 1990 were affirmed.

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

Mr. Therriault was severely burned on November 14, 1972 while employed by Alaska Copper Company, Inc. He has previously received permanent partial disability awards equal to 40% as compared to total bodily impairment for physical residuals due to the injury and 50% as compared to total bodily impairment for psychiatric residuals due to the injury.

Mr. Therriault has filed numerous applications to reopen his claim due to aggravation of his condition. This appeal is before us as a result of an application to reopen which was received by the Department on February 28, 1988.
Mr. Therriault has appealed two determinations made by the Department. Those appeals have been consolidated and we will address both in this decision. Docket No. 90 1365 is an appeal of a Director's letter refusing to exercise his discretion to reopen the claim over seven years from the first order closing this claim on March 20, 1974.

Mr. Therriault's burden of proof in that appeal is to show that the Director abused his discretionary authority to reopen pursuant to RCW 51.32.160. See Botica v. Dep't of Labor & Indus., 184 Wash. 573 (1935). Our review of the record leads us to the conclusion that the Director did not abuse his discretion and we will affirm that determination.

The second appeal, Docket No. 90 0876, is from a Department order refusing to reopen the claim because the application was received more than seven years after the first closing order. There is no question that Mr. Therriault's aggravation application was indeed filed beyond the seven year time limit. Thus, under RCW 51.32.160 as amended in 1988, his claim cannot be reopened for additional compensation. That is, unless the Director chooses to exercise his discretion and reopen this claim, Mr. Therriault cannot receive further time-loss compensation, permanent partial disability, or a pension. However, there is no time limitation for reopening for additional treatment. Therefore, if Mr. Therriault has proved by a preponderance of the evidence that his condition causally related to his industrial injury has objectively worsened between January 30, 1976 and February 8, 1990 so as to require further treatment, his claim can be reopened for that purpose. We believe Mr. Therriault has sustained that burden.

The industrial appeals judge admitted Exhibit 29, offered by the Department's representative, to the record. This exhibit is a letter from Dr. G. Christian Harris, a psychiatrist certified in his specialty, to Donna Wagner, a claims adjudicator for the Department of Labor and Industries. The letter is dated February 2, 1989 and details Dr. Harris's conclusions based on his sessions with Mr. Therriault on December 12, January 9, 12 and 20, 1989. Dr. Harris had previously seen Mr. Therriault in 1975. (Exhibit 9).

In his report of February 2, 1989, Dr. Harris diagnoses Mr. Therriault's psychiatric condition as a paranoid disorder causally related to the industrial injury. Dr. Harris believes Mr. Therriault's overall condition and level of functioning were clearly worse than at the time of closure and seemed treatable as of February 2, 1989. Dr. Harris recommended that Mr. Therriault be engaged in regular psychotherapeutic treatment for his condition (Exhibit No. 29).
This evidence is uncontested and it is clear to us that based on Dr. Harris's letter Mr. Therriault's claim should be reopened for further treatment. We should point out that Mr. Therriault's claim can only be reopened to provide him further treatment. Unless the Director exercises his discretion, RCW 51.32.160 specifically does not allow Mr. Therriault to receive any benefits such as an increase in his permanent partial disability awards or time-loss compensation or a pension.

**FINDINGS OF FACT**


On March 20, 1974, the Department issued an order awarding permanent partial disability equal to 40% of total bodily impairment for physical residuals and 30% of total bodily impairment for psychiatric residuals, deducted advances on permanent partial disability, paid a cash award in the amount of $2,000.00, indicated that the balance of permanent partial disability in the amount of $14,250.00 would be paid at the rate of $500.00 per month plus 6% interest, terminated time-loss compensation as paid through October 1, 1973, and closed the claim.

On March 29, 1974, the employer filed a protest and request for reconsideration of the Department's order of March 20, 1974. On April 5, 1974, the Department issued a letter responding to the protest and request for reconsideration of March 29, 1974. On April 22, 1974, the employer sent correspondence to the Department concurring with the Department's findings and recommendations.

On December 5, 1974, the claimant filed an application to reopen for aggravation of condition. On February 13, 1975, the Department issued an order denying claimant's application to reopen for aggravation of condition.

On January 23, 1976, the claimant filed an application to reopen for aggravation of condition. On January 30, 1976, the Department issued an order denying claimant's application to reopen for aggravation of condition.
On February 10, 1976, the claimant filed a Notice of Appeal with the Department of Labor and Industries which provided the Notice of Appeal to the Board of Industrial Insurance Appeals from the Department’s order of January 30, 1976. On February 27, 1976, the Board issued its order granting the appeal in Docket No. 47,701. On June 23, 1976, the Board issued its Order on Agreement of Parties remanding Docket No. 47,701 to the Department of Labor and Industries to reopen the claim and to pay additional permanent partial disability equal to 20% as compared to total bodily impairment for psychiatric residuals and to close the claim.

On June 25, 1976, the Department issued its order reopening the claim, paying additional permanent partial disability equal to 20% for unspecified disability for psychiatric residuals, terminating time-loss compensation as paid and closing the claim.

In December 1984, the claimant filed an application to reopen for aggravation of condition. On April 8, 1985, the Department of Labor and Industries by correspondence denied claimant’s December 1984 application to reopen for aggravation of condition.

On October 24, 1986, the claimant filed an application to reopen for aggravation of condition and requested waiver of the seven year statute applicable to aggravation applications. On November 24, 1986, the Department forwarded correspondence to claimant denying claimant’s request to reopen the claim under the discretionary authority of RCW 51.32.160.

On December 11, 1986, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department’s correspondence of November 24, 1986. On January 27, 1987, the Board of Industrial Insurance Appeals issued its order denying the appeal in Docket No. 86 4406.

On February 28, 1988, the claimant filed an application to reopen for aggravation of condition. On April 21, 1989, the Department issued its order denying claimant’s application to reopen for aggravation of condition.

On May 2, 1989, the Board of Industrial Insurance Appeals received a Notice of Appeal from claimant from the Department’s order of April 21, 1989. On May 26, 1989, the Board of Industrial Insurance Appeals issued its order granting the appeal in Docket No. 89 1780. On November 16, 1989, the Board issued its Order on Agreement of Parties in Docket No. 89 1780 reversing the Department’s order of April 21, 1989, and remanding the claim to the Department to give the Director the opportunity to exercise discretion and reopen the claim.

On February 2, 1990, the Department issued an order superseding and holding for naught its order of April 21, 1989, pursuant to the order of the Board of Industrial Insurance Appeals of November 16, 1989.
On February 8, 1990, the Department issued an order denying claimant's application to reopen for aggravation of condition received on February 28, 1989, because the application had not been received within the seven year time limitation established by RCW 51.32.160.

On February 8, 1990, the Director of the Department of Labor and Industries sent correspondence to the claimant refusing to exercise his discretionary authority to reopen the claim beyond the seven year time limitation prescribed by RCW 51.32.160.

On February 16, 1990, the Board of Industrial Insurance Appeals received a Notice of Appeal from claimant from the Department's order of February 8, 1990. On March 16, 1990, the Board of Industrial Insurance Appeals issued its order granting the appeal, assigning it Docket No. 90 0876 and ordering that further proceedings be held.

On February 16, 1990, the Board of Industrial Insurance Appeals received a Notice of Appeal from the claimant from the Director's letter of February 8, 1990. On March 16, 1990, the Board issued its order granting the appeal, assigning it Docket No. 90 1365 and ordering that further proceedings be held.

2. On November 14, 1972, while in the course of his employment with Alaska Copper & Brass Company the claimant, Ernest J. Therriault, experienced an industrial injury. He suffered multiple burns and psychiatric impairment as a result of this injury.

3. As a result of his industrial injury the claimant has suffered a psychiatric condition which was diagnosed as a depressive reaction as of March 7, 1974.

4. As of February 2, 1989, the claimant was suffering from a paranoid disorder which was causally related to his industrial injury of November 14, 1972.

5. Between January 30, 1976, and February 8, 1990, the claimant's psychiatric condition causally related to his industrial injury worsened.

6. As of February 8, 1990, the claimant's psychiatric condition was not fixed and stable and was in need of further treatment.

7. Claimant's application to reopen for aggravation of condition was filed with the Department on February 28, 1988. His claim was first closed on March 20, 1974.

8. The Director of the Department of Labor and Industries did not abuse his discretion in his letter dated February 8, 1990, when he declined to reopen this claim upon his own motion.

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to these appeals.
2. Between January 30, 1976, and February 8, 1990, the claimant's condition, causally related to his industrial injury worsened within the meaning of RCW 51.32.160 and required further treatment.

3. The Director of the Department of Labor and Industries did not abuse his discretion in refusing to reopen the claim on his own motion pursuant to his authority under RCW 51.32.160 and the letter of February 8, 1990, which refused to reopen the claim on that basis is affirmed.

4. The Department order of February 8, 1990, which denied claimant's reopening application because it was beyond the seven year limit provided by law is incorrect and is reversed and the claim is remanded to the Department of Labor and Industries to reopen the claim to provide the claimant with treatment for his psychiatric condition and to take whatever further action is indicated and allowed by law.

It is so ORDERED.

Dated this 26th day of October, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/  
SARA T. HARMON  Chairperson

/s/  
FRANK E. FENNERTY, JR.  Member

/s/  
PHILLIP T. BORK  Member