98933-8

No. 80149-0 I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HINDA ABDI

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
BOARD OF INDUSTRIAL INSURANCE APPEALS

Respondent.

APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Hinda Abdi, an injured worker seeking industrial insurance benefits for a February 8, 2012 injury at work.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeals' June 15, 2020 decision in *Abdi v. Department of Labor and Industries,* Case No. 80149-0-I, and the Court of Appeals' July 30, 2020 order denying her motion for reconsideration.

III. ISSUES PRESENTED FOR APPEAL

Does a final and binding order of the Department of Labor and Industries denying responsibility for a physical or mental condition prevent an injured worker from reopening her claim based on that condition?

Does the doctrine of res judicata preclude an injured worker from reopening an industrial insurance claim when the order of the Department of Labor and Industries does not specifically deny responsibility for the condition that is the basis of the worker's reopening application?

IV. STATEMENT OF THE CASE

On June 15, 2012, the Department of Labor and Industries (Department) allowed Ms. Abdi's claim for injuries arising out of a February 8, 2012 industrial accident.

On September 5, 2014 and September 8, 2014, the Department issued orders denying responsibility for conditions diagnosed as a depressive disorder not otherwise specified (ICD 9 diagnosis code 311) and a pain disorder. Such decisions of the Department are usually called "segregation orders." On September 9, 2014, the Department closed Ms. Abdi's claim. On April 28, 2016, an industrial appeals judge (IAJ) dismissed Appellant's appeals related to her depressive and pain disorders and affirmed the order closing the claim. On September 6., 2016, the Board of Industrial Insurance Appeals (Board) upheld that decision.

Ms. Abdi did not appeal the Board's dismissal of these appeals to superior court. Instead, she applied to reopen her claim. On November 14, 2016, the Department denied her application because "[t]he medical record shows the conditions caused by the injury have not worsened since final claim closure." On January 13, 2017, Ms. Abdi appealed the Department's order to the Board.

On June 20, 2018, an IAJ conducted a hearing on Ms. Abdi's reopening application. Abdi appeared at the hearing pro se and called four doctors as witnesses, including Dr. Holly Holbrooks-Kuratek, a psychiatrist. Dr. Holbrooks-Kuratek began treating Ms. Abdi in August 2016. She testified that she diagnosed Ms. Abdi with "persistent depressive disorder" (ICD 9 diagnosis code 300.4), that Ms. Abdi had

exhibited "a consistent pattern of depression directly related to the injury," and that Ms. Abdi's depression worsened in April 2015.

The Department argued Ms. Abdi cannot reopen her claim based on depression because she failed to appeal the Board's final decision in her previous claim determining that her depression and pain disorders were not proximately caused by her industrial injury. The Department did not explain to the Court that the segregated condition was depressive disorder not otherwise specified (ICD 9 diagnosis code 311) and that in her appeal of the denial of her reopening application Ms. Abdi presented testimony that her application was based on persistent depressive disorder (ICD 9 diagnosis code 300.4). Nor did the Department advise the Court of Board case law indicating the doctrine of res judicata will "bar the claimant from obtaining further benefits only when the prior order specifically denies responsibility for the very condition for which the claimant seeks to obtain benefits." *In re Bradley Erben,* Dckt. No. 04 16663 (December 21, 2005).

Based on the Department's characterization of the law, the Court of Appeals agreed.

On July 6, 2020, Ms. Abdi moved for reconsideration, citing to decisions of the Board of Industrial Insurance Appeals holding that if an injured worker establishes that a "condition previously segregated...objectively worsened between the terminal dates and proved

the worsening was proximately caused by his industrial injury, his claim could be reopened." *In re Jeremy R. Elsey,* Dckt. No. 13 21591, at 5 (March 16, 2015).

On July 21, 2020, the Department filed an opposition to the motion for reconsideration. Citing to outdated case law from 1946 and 1974, the Department contended that the doctrine of res judicata precludes Ms. Abdi from reopening her claim based on segregated medical or psychological conditions. However, the Department also admitted that this case law is inconsistent with the Board's interpretation of the law as set forth in the 2015 *Jeremy R. Elsey* decision.

On July 30, 2020, the Court of Appeals denied Ms. Abdi's motion for reconsideration.

V. ARGUMENT

A. The Supreme Court Should Grant Review to Resolve the Inconsistency Between the Board's Current Interpretation of the Res Judicata Effect of Segregation Orders on Reopening Applications and Older, Apparently Contrary Decisions of the Court of Appeals.

The Supreme Court may grant review and consider a Court of Appeals opinion if it "involves an issue of substantial public interest that should be determined by the Supreme Court." *State v. Watson,* 155 Wn.2d 574, 577 (2005) *citing* RAP 13.4(b)(4). Such substantial public interest is present in this case because there is an apparent inconsistency between the Board's current interpretation of the res judicata effect of segregation

orders on reopening applications and decisions of the Court of Appeals that are 46 and 74 years old. Clarity is needed on this point for both Washington employers and workers.

1. The Board of Industrial Insurance Appeals Has Determined that an Order Denying Responsibility for a Given Condition Has no Effect on Aggravations to Such Conditions Occurring After the Order Was Entered.

A worker seeking to reopen a claim must establish by medical evidence that a condition proximately caused by his or her industrial injury worsened between the terminal dates of the aggravation period. *Moses v. Dep't of Labor & Indus.,* 44 Wn.2d 511, 517, 268 P.2d 665 (1954). Here, it is agreed that the first terminal date is September 9, 2014 and the second terminal date is November 14, 2016.

Appellant met her burden by presenting the testimony of Dr. Holbrooks-Kuratek who opined that Ms. Abdi exhibited a "consistent pattern of depression directly related to the injury" and that this depression worsened beginning in April 2015 -- during the aggravation period.

The Department's September 2014 segregation order denying responsibility for this condition has no res judicata effect on any worsening of the condition that occurred after September of 2014. "The rule is that an order of the supervisor from which no appeal is taken is res judicata as to any issue before the department at the time it was entered, but is not res judicata as to any aggravation occurring subsequent to that

date." *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 900-01. 239 P.2d 555 (1952) (citing *Donati v. Dep't of Labor and Indus.*, 35 Wn. 2d 151, 211 P.2d 503 (1949)).

The principle articulated in *Karniss* allows injured workers to reopen claims when a "condition previously segregated...objectively worsened between the terminal dates." *In re Jeremy R. Elsey,* Dckt. No. 13 21591, at 5 (March 16, 2015) ((citing *In re Bradley Erben,* Dckt. No. 04 16663 (December 21, 2005); *In re Natalie Nunez,* Dckt. No. 13 12100 (September 19, 2014)).

> Had Mr. Elsey established the lumbar condition previously segregated in the June 2 order objectively worsened between the terminal dates and proved the worsening was proximately caused by his industrial injury, his claim could be reopened. Mr. Elsey's claim could also have been reopened had he proved he developed a new lumbosacral condition (that is, one not segregated in the June 24 order) between the terminal dates that was proximately caused by his industrial injury.

Id.

This point is well-accepted part of the Board's jurisprudence. Marylin L. Taylor, the industrial appeals judge who heard Ms. Abdi's appeal, wrote in her proposed decision and order, "Even if the Department previously has denied responsibility for a particular condition under the claim, the worker may be able to argue that the previously-segregated condition worsened, and the worsening was proximately caused by the

injury." *In re Hinda C. Abdi,* Dckt. No. 17 10463, at 7 (September 13, 2018)(citing *In re Bobby O. Coleman,* Dckt. No. 14 C0102 (October 12, 2015)(crime victims compensation case)).

Judge Taylor then reiterated the same principle later on in her decision, "Although the Department previously denied responsibility for Ms. Abdi's depression and chronic pain conditions, Ms. Abdi's claim could be reopened if she established that those conditions, whether or not caused by the industrial injury, worsened as a result of the injury after the claim closed." *Id.*

In *Bobby O. Coleman,* the Board vacated an Industrial Appeals Judge's finding that "an order denying responsibility for the low back forever barred the claimant from asserting the Department should accept responsibility for a low back condition under this claim," and ordered further hearings be held so that Mr. Coleman could present evidence that a dorso-lumbar/lumbosacral condition caused by his assault arose between the terminal dates or that the assault caused a pre-existing low back condition to worsen and become disabling." *In re Bobby O. Coleman,* at 1.

2. The Board's Decisions Are Presumed to be Correct, and is Entitled to Deference in its Interpretation of the Industrial Insurance Statute.

The Board's findings and decision are presumed to be correct. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.,* 138 Wn.2d 1, 5, 977 P.2d 570 (1999). State agencies – such as the Board – are entitled to deference when it interprets the statute it is charged with implementing. *Dep't of Labor & Indus. v. Rowley,* 185 Wn.2d 186, 208, 378 P.3d 139 (2016). On this point of law, the Board has determined that a Department order denying responsibility for a certain condition does not prevent a worker from reopening his or her claim if the segregated condition worsens due to the industrial injury after the claim has closed.

3. Notwithstanding the Board's Clearly Stated Position that Segregation Orders do not Have Res Judicata Effect on Reopening Applications Based on a Segregated Condition, the Court of Appeals Relied on Outdated Case Law and Ruled Against the Injured Worker.

In its opposition to Mr. Abdi's motion for reconsideration, the Department relied in large part on *LeBire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 414-17, 128 P.2d 308 (1942) and *Brown v. Bd. of Ind. Ins. Apps.,* 11 Wn. App 790, 794-95, 525 P.2d 274 (1974). Ms. Abdi admits that these decisions – the most recent of which was decided almost 50 years ago – offer support for the Department's res judicata argument, but they are entirely inconsistent with the Board's current interpretation of the industrial insurance statute.

The legal standard set forth in *In re Jeremy Elsey* is not an aberration or the result of inartful drafting. It is the clearly stated and widely accepted policy of the Board of Industrial Insurance Appeals. The Supreme Court should grant review to confirm that Board's interpretation of this point of law is correct.

B. The Supreme Court Should Grant Review Because the Court of Appeals Erred in its Res Judicata Analysis.

The Supreme Court may grant review when the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals. RAP 13.4(b)(1-2).

The *LeBire* and *Brown* decisions cited above provide authority for the proposition that a worker cannot reopen an industrial insurance claim based on a segregated condition. *LeBire,* 14 Wn.2d at 414-17; *Brown,* 11 Wn.App. at 794-95. However, subsequent decisions of the Board provide a necessary framework for interpreting these appellate decisions.

The Board has clarified that for the doctrine of res judicata to apply, the relevant segregation order must "specifically deny responsibility for the very condition" for which the claimant seeks to obtain benefits. *In re Bradley Erben,* Dckt. No. 04 16663 (December 21, 2005)(quoting from *In re Dennis Brabon,* Dckt. No. 01 17577 (October 28, 2002).

Here, the Department segregated depressive disorder not otherwise specified (ICD 9 diagnosis code 311) but presented evidence at the Board that her reopening application was based on persistent depressive disorder (ICD 9 diagnosis code 300.4). While clearly similar, the segregated condition is not the "very condition" for which Ms. Abdi seeks to obtain benefits. Therefore, the Court of Appeals incorrectly determined that the res judicata principles set forth in *LeBire* and *Brown* apply to Ms. Abdi's appeal, and its decision should be reversed.

VI. CONCLUSION

Relying on outdated case law inconsistent with current Board policy, the Court of Appeals erred in its analysis of the res judicata effect of the Department's order denying responsibility for depressive disorder not otherwise specified. The Supreme Court is needed to provide clarity on this point, and Ms. Abdi respectfully requests that her petition for review be granted.

Unaware of the Board's interpretation of the res judicata principles set forth in *LeBire* and *Brown,* the Court of Appeals erred in its res

judicata analysis because the segregated condition was not the "very condition" for which Ms. Abdi is seeing benefits.

Dated this 20th_ day of August, 2020

/s/ *Daniel R. Whitmore*

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CERTIFICATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I arranged for service of a copy of the above Petition for Review on the below-listed attorneys of record for respondent on August 20, 2020.

/s/ *Ana Rojas*

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VII. APPENDIX

Attached are the decision of the Court of Appeals and the order denying reconsideration.

FILED
6/15/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HINDA ABDI,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondent.

No. 80149-0-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Pro se Abdi challenges a superior court order affirming the Board ruling dismissing her application to reopen her industrial injury claim. Abdi asserts that the evidence establishes that her depression and pain disorders worsened after her claim was closed and that this worsening was proximately caused by the original injury. But, Abdi's expert witnesses conceded that they could not relate any change in the allowed conditions to her original injury. And, a prior unappealed Board decision determined that Abdi's depression and pain disorders were not related to her injury, thus precluding relitigation of that claim. None of Abdi's remaining assertions of error provide a basis for reversal. We affirm.

FACTS

Hinda Abdi emigrated from Somalia to the United States in 1992. She began working soon after she arrived. On February 8, 2012, while working as a housing stability

case manager for Neighborhood House, Abdi was holding a large number of files while seated on a chair. As she began to stand up, the chair moved unexpectedly, causing her to fall and injure her right shoulder, elbow, wrist, and hand.

On June 15, 2012, the Department of Labor and Industries (Department) allowed Abdi's claim for benefits, and she received treatment for these physical conditions. The Department closed Abdi's claim effective September 26, 2013. Abdi's last day working for Neighborhood House was September 27, 2013. She has remained unemployed employed ever since.

After Abdi lost her job, she manifested mental health conditions which were diagnosed as a depressive disorder and a pain disorder. On September 5 and September 8, 2014, the Department entered orders denying responsibility for these disorders based on its determination that they were not proximately caused or aggravated by her allowed industrial injury claim. On September 9, 2014, the Department closed Abdi's claim with no award for permanent partial disability. On April 28, 2016, an industrial appeals judge (IAJ) dismissed Abdi's appeals related to her depressive and pain disorders and affirmed the order closing her claim. On September 6, 2016, the Board upheld that decision.

Abdi did not appeal the Board's dismissal of those appeals to superior court. Instead, she applied to reopen her claim. On November 14, 2016, the Department notified Abdi that her application was denied because "[t]he medical record shows the conditions caused by the injury have not worsened since the final claim closure." On January 13, 2017, Abdi appealed the Department's order to the Board.

On June 20, 2018, an IAJ conducted a hearing on the issue of whether Abdi's conditions proximately caused by her industrial injury worsened between September 9, 2014 and November 14, 2016. Abdi appeared at the hearing pro se and called four doctors as witnesses.

Abdi testified that she continues to have difficulty performing basic functions such as writing, cooking, cleaning, or caring for herself and her children. She stated that she believes her pain got worse because she did not receive appropriate medical treatment and because her employer failed to put her on light duty after her fall. She further testified that she suffers from "lack of hope," has trouble concentrating, and wastes a lot of time on Facebook.

Dr. Holly Holbrooks-Kuratek, a psychiatrist, began treating Abdi in August 2016. She opined that Abdi exhibited a "consistent pattern of depression directly related to the injury" based on Abdi's "strong focus on this issue . . . with few other factors coming into play in our conversation." Upon reviewing Abdi's treatment notes, she further opined that Abdi's depression worsened beginning in April 2015.

Dr. Benjamin Balderson, a clinical psychologist, began treating Abdi in May 2017. He stated that Abdi's current diagnoses are "major depressive disorder, single episode, and chronic pain syndrome." He opined that Abdi's mental health conditions are more probably than not related to her work injury. However, Dr. Balderson did not express an opinion as to whether Abdi's mental health condition worsened between 2014 and 2016.

Dr. Chalib Husseini, an orthopedic surgeon, first saw Abdi in April 2016 when she came to him seeking a second opinion regarding her physical pain. Dr. Husseini opined

on a more probable than not basis that Abdi's shoulder and thumb conditions worsened between September 2014 and November 2016. However, he could not say on a more probable than not basis that her condition worsened as a result of her industrial injury "because it's possible they could get worse just with the passage of time." And, Dr. Gary Kegel, an orthopedic surgeon, similarly testified that although "there were signs of worsening of some of these conditions" between December 2013 and September 2016, he could not "conclusively say that the industrial injury caused the worsening."

On September 13, 2018, the IAJ issued a proposed decision and order dismissing Abdi's claim. The judge found that the record contained no evidence that the physical conditions proximately caused by her industrial injury objectively worsened between September 2014 and November 2016. The judge further found that the record contained no evidence that the depression or pain disorder worsened as a result of her industrial injury during this period.

On September 28, 2018, Abdi petitioned the Board for review of the IAJ's proposed decision and order. Her petition included new medical evidence. On October 19, 2018, the Board rejected the new evidence, denied Abdi's petition for review, and adopted the proposed decision and order as the final order of the Board.

On November 6, 2018, Abdi appealed the Board's decision in superior court. On June 12, 2019, the superior court entered findings of fact, conclusions of law, and judgment affirming the Board's decision. Abdi appealed.

ANALYSIS

Abdi argues the superior court erred in affirming the Board's decision to dismiss her application to reopen her industrial injury claim because she presented prima facie evidence of her worsening conditions and their relationship to her industrial injury. She challenges the following relevant findings of fact:

> 1.2.9 On September 9, 2014, Ms. Abdi had no objective findings proximately caused by the industrial injury.
>
> 1.2.10 On November 16, 2016, Ms. Abdi had no objective findings proximately caused by the industrial injury.
>
> 1.2.11 The record does not include evidence that the physical conditions proximately caused by industrial injury worsened between September 9, 2014 and November 16, 2016.
>
> 1.2.12 Ms. Abdi did not present evidence that her right thumb condition was proximately caused by, or objectively worsened, as a result of the industrial injury between September 9, 2014 and November 16, 2016.
>
> 1.2.13 The record does not contain evidence that Ms. Abdi's depression worsened as a result of the industrial injury between September 9, 2014 and November 16, 2016.
>
> 1.2.14 The record does not include evidence that Ms. Abdi's pain disorder worsened as a result of her industrial injury between September 9, 2014 and November 16, 2016.

A worker may apply to the Department to reopen an earlier workers' compensation claim due to aggravation or worsening of her industrial injury. RCW 51.32.160(1)(a). The Department's decision to deny reopening of a claim may be appealed to the Board, and the Board's decision may in turn be appealed in superior court. RCW 51.52. 060, RCW 51.52.110.

The superior court's review of a Board order is de novo and based solely on the evidence and testimony presented to the Board. Butson v. Dep't of Labor & Indus., 189

Wn. App. 288, 295, 354 P.3d 924 (2015); RCW 51.52.115. "In granting a motion to dismiss under CR 41(b)(3), the court may weigh the evidence and make a factual determination that the plaintiff has failed to come forth with credible evidence of a prima facie case, or the court may view the evidence in the light most favorable to the plaintiff and rule as a matter of law that the plaintiff has failed to establish a prima facie case." Hendrickson v. Dep't of Labor & Indus., 2 Wn. App. 2d 343, 352, 409 P.3d 1162, review denied, 190 Wn.2d 1030, 421 P.3d 450 (2018). The superior court may substitute its own findings and decision for the Board's only if it finds from a "'fair preponderance of credible evidence'" that the Board's findings and decision were incorrect. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting McClelland v. ITT Rayonier, Inc., 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). The Board's decision is considered prima facie correct and the opposing party must support its challenge by a preponderance of the evidence. RCW 51.52.115; Eastwood v. Dep't of Labor & Indus., 152 Wn. App. 652, 657, 219 P.3d 711 (2009).

Our review is governed by RCW 51.52.140, which provides that an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." In reviewing the superior court's decision, we determine "'whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings.'" Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180, 210 P.3d 355 (2009) (quoting Watson v. Dep't of Labor & Indus., 133 Wn. App. 903, 292, 138 P.3d 177 (2006)). Substantial evidence is evidence "sufficient to persuade a rational,

fair-minded person that the finding is true." Cantu v. Dep't of Labor & Indus., 168 Wn. App. 14, 21, 277 P.3d 685 (2012).

Under Washington's Industrial Insurance Act, Title 51 RCW, a claimant must establish the following four elements by medical testimony and objective symptoms to reopen an industrial injury claim on the basis of aggravation: (1) a "causal relationship between the injury and the subsequent disability"; (2) aggravation of the injury resulting in increased disability; (3) an increased aggravation between "the terminal dates of the aggravation period"; and, (4) a showing that the "disability on the date of closing the order was greater than the supervisor found it to be." Eastwood, 152 Wn. App. at 657-58 (footnote omitted) (quoting Phillips v. Dep't of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956)); RCW 51.32.160(1)(a). "Objective symptoms" are "'those within the independent knowledge of the doctor, because they are perceptible to persons other than a patient.'" Hendrickson, 2 Wn. App. 2d at 354 (quoting Hinds v. Johnson, 55 Wn.2d 325, 327, 347 P.2d 828 (1959)).

Abdi first asserts that she established a prima facie case for reopening based on her worsening shoulder and thumb conditions. She points to evidence that multiple doctors noted signs of deterioration of these conditions and referred her for further treatment after her claim closed. However, Dr. Husseini and Dr. Kegel both expressly testified that although Abdi's conditions worsened during the relevant time period, they could not state on a more probable than not basis that they worsened as a result of her injury. "For a claimant to prove causation, the testimony of medical experts 'must establish that it is more probable than not that the industrial injury caused the subsequent

disability.'" Grimes v. Lakeside Indus., 78 Wn. App. 554, 561, 897 P.2d 431 (1995) (quoting Zipp v. Seattle Sch. Dist., 36 Wn. App. 598, 601, 676 P.2d 538 (1984)). Although the industrial injury need not be the sole proximate cause of disability, opinions expressed in terms of possibility rather than probability are insufficient to establish causation. Id. Because Abdi did not establish causation on a more probable than not basis, she did not establish a prima facie case for reopening on this basis.

Abdi further asserts that she established a prima facie case for reopening based on her depression disorder and pain disorder because Dr. Holbrooks-Kuratek and Dr. Balderson both opined that her mental health disorders were more probably than not related to her work injury. The Department contends that Abdi cannot reopen her claim based on either of these conditions because she failed to appeal the Board's final decision in her previous claim determining that her depression and pain disorders were not proximately caused by her industrial injury. We agree.

"When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). "Failure to appeal an adverse ruling at any level transforms the ruling into a final order." Kingery v. Dep't of Labor & Indus., 80 Wn. App. 704, 708, 910 P.2d 1325 (1996), aff'd Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162, 937 P.2d 565 (1997). "An unappealed Department order is *res judicata* as to the issues encompassed within the terms of the order, absent fraud in the entry of the order." Kingery, 132 Wn.2dat 169 (citing Abraham v. Dep't of Labor & Indus.,

178 Wn. 160, 34 P.2d 457 (1934)). "An unappealed final order from the Department precludes the parties from rearguing the same claim." Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 538, 886 P.2d 189 (1994). Because Abdi did not appeal the Board's final orders denying responsibility for her mental health disorders based on its determination that these disorders were not proximately caused or aggravated by her allowed industrial injury claim, she cannot seek to reopen her claim on the same basis.

In her motion for reconsideration at the superior court below, Abdi asserted that she was not responsible for failing to appeal the Board's final order because (1) she never received a copy of the ruling, (2) the Department "interfered with" her claim, (3) the Department offered to reopen her claim, and (4) she is not an attorney. The record contains no support for these assertions. And, pro se litigants are held to the same standard as attorneys. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Abdi raises several other issues for our consideration, none of which provide a basis for reversal.

First, Abdi assigns error to Finding of Fact 1.2.1:

> On September 26, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

Abdi asserts that she agreed to include the jurisdictional history in the Board record, but for use as evidence, not solely for jurisdictional purposes. She claims that she "did not agree with these findings and facts" because she "misunderstood due to lack of court terminology, no interpreter, limited court language and procedures." But, Abdi points to no evidence indicating that she asked for an interpreter or that she misunderstood the

agreement. Nor does she specify which part of the jurisdictional history she disagrees with or explain how she was prejudiced thereby. Abdi shows no error.

Abdi next assigns error to Finding of Fact 1.2.2:

> Hinda C. Abdi sustained an industrial injury on February 8, 2012 when her chair slipped while she was reaching for a form, causing her to fall onto her upper right side. Her workers' compensation claim No. AR-47693 was allowed.

Abdi contends that this finding should have further specified that she "carried heavy bags site to site for seven years prior [to the] on the job injury on February 8, 2012." She nevertheless agrees that the finding is factually accurate. Abdi has not shown error.

Abdi next assigns error to Finding of Fact 1.2.6:

> On April 28, 2016, an industrial appeals judge issued an order dismissing the appeals related to Ms. Abdi's mental health conditions for failure to present evidence to make a prima facie case and affirming the order closing Ms. Abdi's claim.

Abdi appears to contend that this finding is erroneous, because the superior court failed to properly review and reconsider the medical evidence in support of this claim, or to take into account "procedural irregularities due to department's interference for evidence." But, she does not dispute that the superior court properly found that the Board issued a decision in 2016 regarding the Department's decision to deny her claim for mental health conditions, and therefore has not shown that the finding is erroneous. This unappealed final order precluded further review of the matters resolved therein.

Abdi further appears to contend that she is entitled to time-loss compensation pursuant to RCW 51.32.090(4), occupational benefits pursuant to RCW 51.32.180, and vocational rehabilitation benefits pursuant to RCW 51.32.095(2). But, the sole issue decided by the Department was whether to grant Abdi's application to reopen her claim.

"[I]f a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court." Lenk v. Dep't. of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970).

Abdi next contends that the IAJ committed prejudicial error by failing to call Dr. James Keyes, a psychologist who treated Abdi, to testify at her reopening hearing. The record does not support this assertion. Abdi asked the IAJ to subpoena five medical experts, including Dr. Keyes. The IAJ responded that "subpoenas will be issued after you confirm that each of the doctors named below has agreed to testify on June 20 at the times you have indicated." After Abdi confirmed that they did, the IAJ informed Abdi that she would arrange for the subpoenas to be prepared and mailed to Abdi. It is unclear why Dr. Keyes did not testify at the hearing. In any case, Abdi did not raise the matter at the hearing or ask the IAJ to call Dr. Keyes while the hearing was underway. Abdi has not shown that Dr. Keyes's absence resulted from any act or omission of the IAJ. Moreover, Dr. Balderson extensively referenced Dr. Keyes's treatment notes throughout his testimony. Abdi has not shown error.

Finally, Abdi contends that the Board and superior court erred in refusing to consider new documents and medical records that she filed after the hearing, including the results of medical tests conducted in February and June 2018. She contends that these records prove that her conditions worsened during the relevant time period and that her claim should be reopened.

In rejecting Abdi's new evidence, the Board stated, "We will not consider new evidence attached to a Petition for Review absent proof that the new evidence could not

have been discovered with reasonable diligence prior to the hearing." Although the Board's review of the IAJ's proposed decision and order is de novo, it is not required to accept new evidence that could have been offered before the IAJ. See Boyd v. Dep't of Labor & Indus., 1 Wn. App. 2d 17, 34, 403 P.3d 956 (2017). The Board's opportunity to consider new evidence is "roughly analogous to the opportunity to present new evidence on reconsideration under CR 59(a)." Id. A party is entitled to reconsideration of rulings where there is "[n]ewly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). We agree that none of Abdi's posthearing documents and records meet this standard.

Abdi also appears to assert that the superior court erred in failing to require the Department to file her entire workers' compensation claim file with the court. But, the superior court cannot receive evidence or testimony not offered to the Board absent an alleged irregularity in the Board's procedure not shown in the Board's record. RCW 51.52.115. Although Abdi suggests that the Department's "interference with evidence" constitutes a procedural irregularity that meets this standard, the record does not support her assertion.

We affirm.

Appelwick, J.

WE CONCUR:

FILED
7/30/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

HINDA ABDI,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondents.

No. 80149-0-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Hinda Abdi, filed a motion for reconsideration. The respondent, Department of Labor and Industries, Board of Industrial Insurance Appeals, has filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

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Judge

LAW OFFICES OF DANIEL R WHITMORE

August 20, 2020 - 3:57 PM

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