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	No. 80149-0-I DIVISION ONE UNPUBLISHED OPINION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.
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> 1.2.10 On November 16, 2016, Ms. Abdi had no objective findings proximately caused by the industrial injury.
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> 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.
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> 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.
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> 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.
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> 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: