IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHARLES A. LOOMIS, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 41831-2-II UNPUBLISHED OPINION

Armstrong, P.J. — Charles Loomis suffered an industrial-related low back injury in 1971. Since then, the Department of Labor and Industries (Department) has reopened Loomis's claim on numerous occasions to provide him additional benefits. In May 2006, the Department closed Loomis's claim and denied him time loss compensation. The Board of Industrial Insurance Appeals (Board) and the superior court affirmed this order, which Loomis now appeals.

Loomis argues the Board and the superior court lacked subject matter jurisdiction over the 2006 order because the Department failed to properly close two of his previous claims. Loomis also contends that the director of the Department (Director) abused his discretion by denying Loomis disability benefits in 2006. We hold that the Board and the superior court had subject matter jurisdiction over the 2006 order despite the alleged Department errors and that substantial evidence supports the Director's discretionary decision to deny Loomis further time loss compensation because he is voluntarily unemployed. We affirm.

FACTS

Loomis sustained a low back injury in 1971. He then filed an industrial insurance claim and the Department awarded him benefits. The Department closed Loomis's claim for the first time on May 5, 1975. Following Loomis's July 3, 1975 application to reopen his claim for aggravation of condition, the Department reopened his claim on September 22, 1975; Loomis did not appeal this order.

A Department pharmacy consultant sent an interoffice communication on October 22, 1982, after the Department next closed Loomis's claim on October 6, 1982, suggesting the time had come for Loomis to discontinue Darvocet because he had become dependent on it. The Department did not take any action.

In 1992, the Director determined Loomis was eligible for disability benefits despite his over-seven status.[1] The Department stated that Loomis was ineligible for time loss compensation, however, because even though it had considered Loomis employable as a draftsman in 1987, he had voluntarily removed himself from the work force and did not intend to return to work. But the Department provided Loomis with additional vocational retraining services in 1992, after which it found him able to work in computer-aided drafting.

Loomis applied to reopen his 2003 claim and, on September 29, 2004, the Department

[1] "Over seven" status is a term of art, meaning that it has been seven years since the first closing order became final and the worker is generally only eligible for medical treatment, but not disability benefits. RCW 51.32.160.

reopened his claim for medical treatment only. The Department closed Loomis's claim in 2006. Loomis asked the Department to reconsider the closing order to allow him time loss compensation. On April 20, 2006, the Department determined Loomis ineligible for time loss compensation because he was not working before the re-opening of his claim in 2006, and because neither the worsening of injury nor surgery had changed his employment status or earnings. The Department affirmed its closing order on May 12, 2006. Loomis appealed to the Board.

In 2007, the Board issued a proposed decision and order finding Loomis's appeal meritless and unsupported by legal authority. The administrative law judge recommended affirming the Department, reasoning that: (1) the Board had jurisdiction over the parties and subject matter of the appeal and (2) the Director did not abuse his discretion by denying further disability awards under RCW 51.32.160. Loomis petitioned for review. In 2008, the Board denied Loomis's petition for review and the proposed decision and order became the final decision and order.

Loomis then appealed to the superior court. The superior court affirmed the Board's decision, holding that it had jurisdiction and it did not abuse its discretion in 2006 by denying Loomis further disability awards under RCW 51.32.160.

ANALYSIS

I. Standard of Review

We review the superior court's decision by asking whether substantial evidence supports the trial court's factual findings; we review de novo whether the trial court's legal conclusions

flow from the findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). Where, as here, the stipulated facts are filed with the Board, we look to the stipulated facts, rather than the Board's findings. *Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 647 n.1, 677 P.2d 1134 (1984). Whether the Department and the Board had jurisdiction to decide the May 2006 closing order is an issue of law. And whether the Director abused his discretion in denying Loomis time loss compensation in the May closing order turns on whether the evidence supports the decision.

II. Subject Matter Jurisdiction

Loomis contends the Board and the superior court lacked subject matter jurisdiction over the Department's 2006 closing order because the Department should have treated (1) his July 3, 1975 application as a motion to reconsider and (2) an October 22, 1982 interoffice communication as a protest to the October 6, 1982 closing order. The Department responds that it did not mismanage Loomis's claim and that the Board and superior court had subject matter jurisdiction despite the Department's alleged errors because the 2006 closing order is within the type of controversy the Board and the court have authority to adjudicate. We agree.

The Board and superior court have broad authority to decide claims for workers' compensation. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 536, 889 P.2d 189 (1994); *see also Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934) ("[T]he department has original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred."). The Board has broad authority to review appeals from the Department. RCW 51.52.050(1)-

(2)(a). Superior courts have jurisdiction to review appeals from Board decisions. RCW 51.52.050(2)(c). The Board and superior court's broad authority to adjudicate claims for workers' compensation includes review of the Department's "determination to close a claim or to deny an application to reopen a claim." *Shafer v. Dep't of Labor & Indus.*, 140 Wn. App. 1, 7, 159 P.3d 473 (2007).

The Board and superior court have subject matter jurisdiction if they have authority to adjudicate the "type of controversy" involved in the action. *Marley*, 125 Wn.2d at 539. The type of controversy, not the particular facts of the case, is conclusive in determining whether the Board and superior court have subject matter jurisdiction. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003). Thus, "'type'" refers to the "'nature of the case.'" *Dougherty*, 150 Wn.2d at 317 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U. L. Rev. 1, 28.

The Supreme Court has cautioned against misconstruing errors of law as jurisdictional flaws. *Marley*, 125 Wn.2d at 541. An order the Department has authority to make is not void, even if it is legally erroneous. *Marley*, 125 Wn.2d at 541. "'If the type of controversy is within the subject matter jurisdiction, then all other defects . . . go to something other than subject matter jurisdiction.'" *Marley*, 125 Wn.2d at 539 (quoting Martineau, at 26-27).

Loomis argues that the Department committed legal error by failing to consider his 1975 reopening application as a protest to the closing order. Although Loomis filed his reopening application within the time to move for reconsideration, he labeled the request an "application to reopen," which requires aggravation of the injury. *See* RCW 51.52.050(1); RCW

51.32.160(1)(a).[2] He also listed his symptoms and a date on which the symptoms worsened after the order's closing date. Additionally, Loomis stipulated that he filed an "aggravation application." Certified Appeal Board Record (CABR) Ex. 1, at 1. Loomis has provided no reason why the Department should have considered his application to reopen as a motion to reconsider his claim.

Loomis's argument that a Department pharmacy consultant, in an interoffice communication regarding Loomis's Darvocet use, effectively protested a previous Department order, also fails.[3] All Department orders "shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department." RCW 51.52.050(1). The Department cannot appeal its own order after the appeal period has ended unless fraud or something of a like nature was present, requiring equitable relief. *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 221, 292 P.2d 865 (1956). If the Department is barred from appealing its own decisions, it cannot file a request with itself for reconsideration of its own order. The Department may, however, "[m]odify, reverse, or change" any order or decision. RCW 51.52.060(4)(a). The interoffice communication did not purport to modify, reverse, or change the October 1982 closing order. Rather, it suggested only that Loomis discontinue Darvocet. Because Loomis did not apply for reconsideration of the 1982 closing

[2] "If aggravation . . . takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final . . . readjust the rate of compensation in accordance with the rules in this section." RCW 51.32.160(1)(a).

[3] Loomis did not provide argument in his brief or support this argument with any legal authority or references to the record as required by RAP 10.3(a)(6). Loomis merely states that the interoffice communication was a protest to the closing order and "[a]ccording to the [s]ignificant Board [d]ecisions cited above," the Department was required to issue a further appealable order. Br. of Appellant at 20.

order, it became final and binding 60 days after issuance.

Moreover, even if we consider these two incidents as legal errors, they would not divest the Board and the superior court of subject matter jurisdiction over the 2006 closing order because the claim is the type of controversy the Board and court have authority to adjudicate.[4] *Marley*, 125 Wn.2d at 539. An "error neither deprives the Department of subject matter jurisdiction to adjudicate [an] application [to reopen] nor deprives the Board or a superior court of subject matter jurisdiction to review those Department adjudications." *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 783, 271 P.3d 356 (2012). Thus, we hold the Board and superior court had subject matter jurisdiction to consider and uphold the May 12, 2006 closing order.[5] *See Marley*, 125 Wn.2d at 539.

III. Department's 2006 Denial of Further Disability Benefits

Loomis also appeals the Department's 2006 denial of further disability awards. Loomis argues the Department abused its discretion by allowing disability benefits in 1992 but not in 2006, even though Loomis was in over-seven status on both occasions.

[4] Loomis does not contend that decisions to close a worker's compensation claim are not the type of controversy the Department has authority to resolve, he argues only that the two alleged errors deprive the Board and court of subject matter jurisdiction.

[5] Loomis raises the issue of res judicata in his assignments of error. He contends that the superior court erred in denying his claim under the doctrine of res judicata because the Department improperly administered his claim beginning in May 1975. But Loomis does not provide argument in his brief or support it with citation to legal authority or to the record as required by RAP 10.3(a)(6). Moreover, because Loomis failed to timely appeal the 1975 and 1982 closing orders, they are now final and res judicata applies to the orders. RCW 51.52.050(1) (All Department orders "shall become final within sixty days from the date the order is communicated to the parties unless . . . an appeal is filed with the board of industrial insurance appeals."); *see also Marley*, 125 Wn.2d at 537 (res judicata applies to the final order).

We presume the Board's decision is prima facie correct under RCW 51.52.115; a party attacking the decision must prove the Board wrong by a preponderance of the evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). On review, the superior court may substitute its findings only if it determines by a preponderance of the evidence that the Board's findings were incorrect. *Ruse*, 138 Wn.2d at 5. Our review is then limited to examining the record to determine whether substantial evidence supports the Board's findings on the stipulated facts and whether the court's conclusions of law flow from the findings. *See Ruse*, 138 Wn.2d at 5. Substantial evidence is that quantity of evidence sufficient to persuade a rational fair-minded person that a finding is true. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006).

In an over-seven claim, the worker is eligible for medical treatment and may receive disability benefits only at the Director's discretion. RCW 51.32.160(1)(a); *see also Walmer v. Dep't of Labor & Indus.*, 78 Wn. App. 162, 166, 171, 896 P.2d 95 (1995). When there is room for two reasonable opinions on whether to grant a discretionary benefit, the Director does not abuse his discretion by denying the benefit. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 809, 863 P.2d 64 (1993).

Here, the Board held the Director did not abuse his discretion by denying further disability benefits and affirmed the May 12, 2006 order closing Loomis's claim. On appeal, Loomis argues that because the Director granted him disability benefits in 1992, he erred in denying him disability benefits in 2006. The record shows, however, that the Department found Loomis ineligible for time-loss compensation in 1992 as it did again in 2006. The Director discretionarily granted

Loomis disability benefits in 1992 despite his over-seven status. After the Department reopened Loomis's claim in 1992, a Department claims manager wrote a letter stating Loomis was ineligible for time-loss compensation. The claims manager stated time-loss benefits are intended to replace lost wages, but the claims manager found that Loomis had no intention of returning to work. Thus, the claims manager determined Loomis had voluntarily retired because he was employable as a draftsman in 1987, and he had not re-entered the workforce. Again in 2006, the Director denied time-loss benefits because he found Loomis was not working before the reopening of his claim; therefore, neither the worsening of his injury nor surgery changed his employment status or earnings.[6]

Loomis also argues that the Director's denial of disability benefits in 2006 was an abuse of discretion because his "life circumstances" had not changed since 1992. Br. of Appellant at 24. Nothing in the stipulated facts, however, suggests Loomis's life circumstances were unchanged between 1992 and 2006. Loomis received training for consumer-aided drafting between 1992 and 1994, and stipulated that the Department found him able to work in that field after training. We conclude that ample evidence supports the Director's 2006 finding that Loomis's unemployed status was unrelated to his industrial injury. Accordingly, substantial evidence supports the Board's decision.

[6] In making his decision in 2006, the Director considered a recommendation from a department claims adjudicator who stated that Loomis had been unattached from the work force since 1976 and had been on social security disability since April 1977. Additionally, the Department found Loomis able to work as a consumer-aided drafter in 1994 after retraining and that Loomis made a statement declaring he was never medically retired but had been unable to secure employment despite retraining.

IV. Attorney Fees

Lastly, Loomis requests attorney fees and costs. RCW 51.52.130(1) authorizes this court to award attorney fees and costs on appeal:

> If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Because Loomis has not prevailed on appeal, we decline to award him fees and costs.

The Board and superior court had subject matter jurisdiction over the May 12, 2006 closing order because the Board and the superior court have broad authority to adjudicate appeals on workers' compensation claims. Substantial evidence supports the Board's holding that the Director did not abuse his discretion in denying Loomis further disability benefits in 2006. We affirm the May 12, 2006 Department order closing Loomis's claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.