
In the Matter of the Compensation of
ADRIAN U. BOTELLO, Claimant
WCB Case No. 01-04144
ORDER ON REVIEW (REMANDING)
Westmoreland & Mundorff, Claimant Attorneys
James B. Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Lowell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Marshall's order that: (1) declined to uphold SAIF's *de facto* denials; and (2) dismissed claimant's request for hearing without prejudice. On review, the issues are hearing procedure and propriety of the dismissal. We vacate and remand.

FINDINGS OF FACT

Claimant sustained multiple injuries in a logging accident on July 18, 2000. SAIF accepted numerous conditions on August 1, 2000, and modified the acceptance on March 26, 2001 to include some dental conditions. (Exs. 3, 14). On April 21, 2001, claimant's attorney requested that SAIF accept the following "omitted conditions": depression, post traumatic stress disorder (PTSD) and anxiety. (Ex. 16). SAIF responded on May 8, 2001 that it needed additional information to process claimant's request. (Ex. 19). SAIF accepted PTSD on June 18, 2001. (Ex. 22).

In the meantime, claimant requested a hearing on May 24, 2001, raising an issue of a *de facto* denial of an "omitted condition." SAIF did not file a cross-request for hearing. A hearing was held on August 22, 2001.

CONCLUSIONS OF LAW AND OPINION

At hearing, claimant raised the issue of SAIF's *de facto* denial of his depression and anxiety conditions. (Tr. 1). SAIF's attorney explained why those conditions were not accepted:

"As to the anxiety condition, that condition is already encompassed within the scope of the prior acceptance of post traumatic stress disorder, which was issued on June 18, 2001; therefore, SAIF is not required to formally

accept the condition pursuant to [ORS 656.262(7)(a).] However, we are also not denying the condition and will continue to pay benefits pursuant to the prior issued acceptance. As to the depression condition, claimant has failed to establish through a preponderance of the medical evidence that he suffers from a separate diagnosis of depression.” (Tr. 2).

Claimant’s attorney requested that the record be left open to depose Drs. Heck and Veith. (*Id.*) Although SAIF’s attorney objected to claimant’s request, the ALJ continued the case for depositions. (Tr. 4). The parties deposed Dr. Veith on January 3, 2002.

On January 14, 2002, claimant’s attorney withdrew his request for hearing, asserting that “[a]s no denial has been issued from SAIF Corporation in regards to this matter there is no denial to affirm in your dismissal order.” SAIF responded by noting that it had issued verbal denials at hearing, urging the ALJ to affirm those denials.

On January 22, 2002, the ALJ dismissed claimant’s request for hearing without specifying whether the dismissal was with or without prejudice. The ALJ noted that, because claimant had withdrawn his request for hearing, the merits of the *de facto* denials were no longer before him, and he declined to issue an advisory opinion regarding whether or not the *de facto* denials should be upheld.

SAIF requested reconsideration, arguing that the verbal denials should be upheld and, alternatively, requesting that the ALJ dismiss claimant’s request for hearing with prejudice. On reconsideration, the ALJ adhered to his original order without further explanation.

On review, SAIF argues that the ALJ should have upheld its oral denial of claimant’s depression claim. SAIF contends that the parties agreed to litigate the merits of the depression condition.

After claimant’s withdrawal of his hearing request regarding the *de facto* denials, there was no longer a timely request for hearing that would vest jurisdiction in the Hearings Division. *See Linda J. Jackson*, 53 Van Natta 1215 (2001) (after the carrier withdrew its hearing request regarding an order on reconsideration, the Hearings Division no longer had jurisdiction over the

reconsideration order). Therefore, the ALJ correctly determined that he was without authority to address issues arising from claimant's request for hearing.

Alternatively, SAIF contends that the ALJ should have dismissed claimant's request for hearing with prejudice.

Because the ALJ's order did not expressly dismiss claimant's hearing request with prejudice, the dismissal was without prejudice. *E.g.*, *David H. McKinley*, 52 Van Natta 890 (2000); *Julie Mayfield*, 42 Van Natta 871 (1990) (an ALJ's order of dismissal is interpreted by the Board as a dismissal "without prejudice" unless the order otherwise specifies).

When the party requesting a hearing moves for dismissal, and there is no cross-request for hearing, the ALJ has discretion to set the terms and conditions of an order of dismissal as he or she deems proper. We will not disturb the terms and conditions imposed by the ALJ, absent an abuse of discretion. *E.g.*, *Julie Mayfield*, 42 Van Natta at 872. However, in the absence of reasons for such a dismissal, we are unable to review for an alleged abuse of discretion. *Janell Tacket*, 47 Van Natta 1594 (1995); *Ronald D. Robinson*, 44 Van Natta 1232 (1992).

Here, despite SAIF's request for a dismissal with prejudice, the ALJ provided no explanation for his decision to reject SAIF's request for an order of dismissal "with prejudice." Under these circumstances, we are unable to review for an abuse of discretion. Because the ALJ's order provides no reason for dismissing the request for hearing without prejudice, we find this record "improperly, incompletely or otherwise insufficiently developed."¹ ORS 656.295(5); *Janell Tacket*, 47 Van Natta at 1595.

Accordingly, the ALJ's January 22, 2002 order, as reconsidered February 1, 2002, is vacated. This matter is remanded to ALJ Marshall with instructions to issue a final, appealable order on remand explaining the reasons for issuing the dismissal order without prejudice. Thereafter, should either party wish to request Board review of the ALJ's order on remand, they may do so.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 18, 2002

¹ In reaching this conclusion, we make no comments as to the merits of SAIF's "dismissal with prejudice" argument.