
In the Matter of the Compensation of
GAYLE R. MOORE, Claimant
WCB Case No. 00-08303
ORDER ON REVIEW
Kryger et al, Claimant Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer, Bock, and Biehl. Member Biehl chose not to sign the order.

Claimant requests review of Administrative Law Judge (ALJ) Mills' order that: (1) declined to admit "post-reconsideration" evidence; and (2) affirmed an Order on Reconsideration that awarded 9 percent (28.8 degrees) unscheduled permanent disability for claimant's cervical condition. On review, the issues are propriety of the ALJ's evidentiary ruling¹ and extent of unscheduled permanent disability.

We adopt and affirm the ALJ's order, except we do not adopt the first paragraph on page 4 of the Opinion and Order or the June 5, 2001 Interim Order.

In addition, we offer the following response to claimant's request for a "full evidentiary hearing."

Claimant bears the burden of proving injury-related impairment. Pursuant to ORS 656.283(7), "[c]laimant was on notice that he needed to present written evidence to DCBS [Department of Consumer and Business Services] *before* he sought a hearing before the ALJ[.]" *SAIF v. Everett*, 179 Or App 112, 117, *rev den* 334 Or 76 (2002) (emphasis added).

Here, claimant presented no evidence to DCBS (the Director, through the Workers' Compensation Division Appellate Unit) on his own behalf. After effectively bypassing that administrative proceeding, claimant now seeks a "full evidentiary hearing." However, claimant's failure to timely and adequately address the merits of his claim before the Appellate Unit amounts to a failure to exhaust his administrative remedies. *See Mullenau v. Dept. of Revenue*, 293 Or 536, 540 (1982); *Larry Draheim*, 54 Van Natta 1419, 1423 (2002) (failure to

¹ The ALJ's June 5, 2001 Interim Order addressing the evidentiary issue is incorporated by reference in the ALJ's June 14, 2002 Opinion and Order. *See* O&O pp. 1, 4.

present documentary evidence on reconsideration amounted to failure to exhaust administrative remedies); *see also Johnson v. City of Salem*, 180 Or App 387, 388 (2002) (“As a condition to claimant’s right to present evidence in a testimonial form at hearing, the claimant must exhaust his or her administrative remedies by presenting the evidence in a documentary form at the prior level of review.”) (summarizing holding of *SAIF v. Everett*, 1790 Or App 112). This failure is fatal to claimant’s appeal of the agency’s Order on Reconsideration. *Mullenaux*, 293 Or at 541 (cited in *Everett*, 109 Or App at 119). Under these circumstances, claimant is not entitled to a “full evidentiary hearing” and he may not present evidence outside the reconsideration record. *See Everett*, 109 Or App at 119 n.5²; *Tinh Xuan Pahn Auto v. Bourgo*, 143 Or App 73 (1996) (“post-reconsideration” clarifying report from the medical arbiter not admissible if prepared at the request of the parties).

Finally, because claimant failed to exhaust his administrative remedies, we do not reach his argument that due process required a hearing under the circumstances of this case. *See id.* at n. 5; *Yanet Molina*, 54 Van Natta 971, 974 (2002) (we are unable to consider the claimant’s due process argument where she did not exhaust her administrative remedies).

ORDER

The ALJ’s order dated June 14, 2002 is affirmed.

Entered at Salem, Oregon on January 28, 2003

² “As the court explained in *Mullenaux*, a party does not exhaust his or her administrative remedies ‘simply by stepping through the motions of the administrative process without affording the agency an opportunity to rule on the substance of the dispute.’ *Id.* 293 Ore 536[.]” *Everett*, 179 Or App 119.