
In the Matter of the Compensation of
CHERYL C. NICHOLS, Claimant
Own Motion No. 03-0479M
OWN MOTION ORDER REFERRING FOR CONSOLIDATED HEARING
Malagon Moore et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

The SAIF Corporation has submitted a “Carrier’s Own Motion Recommendation,” recommending against reopening claimant’s 1994 claim for a “post-aggravation rights” new or omitted medical condition (“L4-5 disc condition”). ORS 656.278(1)(b) (2001). SAIF recommends against reopening contending, among other reasons, that claimant’s current condition is not causally related to the compensable condition.

Claimant requested a hearing before the Hearings Division raising, among other issues, a *de facto* denial of the new medical condition claim. (WCB Case No. 03-08662). A hearing is set before an Administrative Law Judge (ALJ) on March 2, 2004.

Under ORS 656.278(1)(b) (2001), there are two requirements regarding claim reopening for a “post-aggravation rights” new or omitted medical condition claim. First, the new or omitted medical condition claim must have been initiated after the expiration of the claimant’s aggravation rights under ORS 656.273. Second, the new or omitted medical condition must be accepted or compensable. *See Kemp*, 54 Van Natta at 507-08 (2002).

SAIF indicates that claimant initiated a “post-aggravation rights” new medical condition claim (“L4-5 disc condition”). SAIF recommended against the reopening of this new medical condition claim, contending that the “post-aggravation rights” new medical condition is not compensably related to the accepted condition. In addition, SAIF contends that a September 1998 denial is final by operation of law for the L4-5 level.

Claimant asks that this matter be referred to the Hearings Division for a fact finding hearing to be conducted in conjunction with the pending litigation. SAIF concurs with claimant’s referral request.

Because this claim involves a “pre-September 1, 2003” “post-aggravation rights” new medical condition claim and considering the potential complexities of the medical, legal, and factual issues arising from this dispute, we conclude that it

would be appropriate to consolidate the Own Motion matter concerning the “post-aggravation rights” new or omitted medical condition claim with the pending litigation.¹ *Andrew B. Speck*, 55 Van Natta at 103, 105 (2003); *Jesse C. Day*, 54 Van Natta 2382 (2002); *Sheila R. Hedrick*, 54 Van Natta 2354 (2002). That consolidated proceeding may be conducted in any manner that the ALJ deems achieves substantial justice.

In addition to an order in WCB Case No. 03-08662, the ALJ is directed to forward to the Board a separate, unappealable recommendation with respect to any Own Motion matters and a copy of the order issued in WCB Case No. 03-08662.² In that recommendation, the ALJ shall make findings of fact and conclusions of law regarding whether claimant’s “post-aggravation rights” new/omitted medical condition claim qualifies for reopening under ORS 656.278(1)(b) (2001), as summarized above, including addressing SAIF’s contentions regarding that claim. In addition, if the matter is resolved by stipulation or Disputed Claim Settlement, the ALJ is directed to submit a copy of the settlement document to the Board. After issuance of the recommendation and order (or settlement document), the parties should advise the Board of their respective positions regarding the Own Motion matters.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 15, 2004

¹ SAIF represents that the claim was initiated on July 23, 2003. We have amended our Own Motion rules to provide for acceptances and denials of “post-aggravation rights” new or omitted medical condition claims and for a hearing on appeal of denials, resulting in a Proposed and Final Own Motion Order on the merits by an ALJ that is final and enforceable unless timely appealed to the Own Motion Board. *See* WCB Admin. Order 2-2003; OAR 438-012-0001(4); OAR 438-012-0024; OAR 438-012-0070; OAR 438-012-0075; OAR 438-012-0090; OAR 438-012-0095. However, these amended rules apply to Own Motion claims filed or initiated on or after September 1, 2003. *Keith A. Broeckel*, 55 Van Natta 3572 (2003); *Gary S. Fox*, 55 Van Natta 3026, 3033 fn3 (2003).

Here, because claimant’s claim was filed *before* September 1, 2003, these amended rules do not apply to his claim. Consequently, the requirement that a carrier issue a denial of a “post-aggravation rights” new or omitted medical condition claim with a notice of appeal to the Hearings Division, when it is contesting the compensability/responsibility of the claim, does not apply. OAR 438-012-0070; OAR 438-012-0075. As such, we retain original authority to refer this claim for a fact finding hearing. *See* OAR 438-012-0040(3); *Andrew B. Speck*, 55 Van Natta 103 (2003). Therefore, the ALJ is directed to issue an unappealable Own Motion recommendation pursuant to OAR 438-012-0040(3) (2002).

² If SAIF subsequently issues a Form 3501, announcing that it is voluntarily reopening this currently disputed claim, the parties should notify the Board. In the event that the issuance of the voluntary claim reopening form comes to our attention, we will consider dismissal of this Own Motion matter. *See Jesse C. Day*, 55 Van Natta 2366, 2369-70 (2003).