

In the Matter of the Compensation of
TODD R. FERGUSON, Claimant
Own Motion No. 08-0133M
OWN MOTION ORDER OF DISMISSAL
Unrepresented Claimant
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The SAIF Corporation has submitted a Carrier's Own Motion Recommendation against the reopening of claimant's 1999 injury claim for a "worsening" of his previously accepted lumbar condition. *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. SAIF opposed reopening, contending that claimant's compensable conditions do not require any medical treatment that qualifies for claim reopening. Based on the following reasoning, we dismiss this matter for lack of jurisdiction.

FINDINGS OF FACT

Claimant was compensably injured on December 17, 1999. SAIF accepted a "lumbar strain." (Ex. 4). Subsequently, SAIF modified its acceptance to include "1 cm right disc herniation at L5-S1." (Ex. 21). Claimant's aggravation rights expired on February 16, 2005.

On April 18, 2007, claimant sought treatment with Dr. Khallouf for low back pain. Dr. Khallouf recommended lifestyle changes, physical therapy and prescribed pain medications. (Ex. 31).

On May 10, 2007, Dr. Rabang treated claimant. Diagnosing lumbar disc disease and possibly an aggravation of his previous injury, Dr. Rabang recommended conservative management including oral analgesics, anti-inflammatory, and a nerve modulator. (Exs. 32, 33). Dr. Rabang released claimant from work until "cleared/condition improved." (Ex. 33A).

On May 23, 2007, claimant sent a written request to SAIF for medical benefits and time loss benefits related to the previously accepted L5-S1 disc herniation. (Exs. 33B, 35-1). On June 15, 2007, SAIF responded that a decision had not yet been made regarding payment of medical treatment. (Ex. 35B).

On July 24, 2007, Dr. Teal conducted a records review on behalf of SAIF. He noted that claimant's current conditions were "herniated disc at L4-5 with impingement on the left and degenerative disc disease at L5-S1." Ex. 36-5). Dr. Teal opined that the accepted "lumbar strain" and "L5-S1 disc herniation" required no further medical treatment. (Ex. 36-6).

Subsequently, claimant requested that SAIF accept "post-aggravation rights" new/omitted medical conditions (degenerative disc disease and L5-S1 disc bulge). On August 22, 2007, SAIF issued a denial regarding those conditions on which claimant requested a hearing. (WCB Case No. 07-06687). Thereafter, claimant also raised the issues of a *de facto* denial of a "worsened condition" (medical services) claim, temporary disability, penalties and penalty-related attorney fees for unreasonable claim processing. (WCB Case No. 07-06687).

On February 19, 2008, Dr. Neumann conducted a records review on behalf of SAIF. (Ex. 39). Diagnosing degenerative disc and degenerative joint disease at L4-5 and L5-S1, Dr. Neumann stated that claimant's current symptoms were related to his underlying degenerative disease and not to the November 1999 work injury. (Ex. 39-7).

In May 2008, Dr. Lim, treating physiatrist, stated that claimant's ongoing L5-S1 problem was the result of his prior back injury. (Ex. 40). In June 2008, Dr. Flordelis, treating physiatrist, stated that claimant's symptoms were secondary to L5-S1 radiculopathy "most likely due to the 1999 injury as he doesn't have any other history of trauma." (Ex. 41).

On September 29, 2008, Administrative Law Judge (ALJ) Mundorff issued an Opinion and Order that upheld SAIF's August 22, 2007 denial of the "post-aggravation rights" new/omitted medical conditions claim (degenerative disc disease and L5-S1 disc bulge). The ALJ also issued a separate "Own Motion Recommendation" regarding the "worsening" of claimant's accepted herniated disc.

The ALJ's September 2008 opinion and order did not address SAIF's *de facto* denial of claimant's "worsened condition" (medical services) claim for his previously accepted "L5-S1 disc herniation" condition. Instead, the ALJ's separate "Own Motion Recommendation" purported to: (1) find the "worsened condition" (medical services) claim compensable; and (2) award a \$6,000 attorney fee under ORS 656.386 for "prevailing over the *de facto* denial." The ALJ also recommended that the "worsened condition" claim be reopened; but without any award of temporary disability benefits or any assessment of penalties and penalty-related attorney fees for unreasonable claim processing.

The ALJ's Opinion and Order was not appealed.

CONCLUSIONS OF LAW AND OPINION

Disputed medical services related to injuries occurring after 1966 are governed by ORS 656.245 and, as such, are not matters within our Own Motion jurisdiction. ORS 656.278(1)(c), (2)(c); OAR 438-012-0001(2)(c); OAR 438-012-0020(7); OAR 438-012-0037. In addition, a dispute requiring a determination of whether a sufficient causal relationship exists between medical services and an accepted claim is a matter concerning a claim. ORS 656.704(3)(b)(C). Jurisdiction over such matters rests with the ALJ in the first instance. *See AIG Claim Services v. Cole*, 205 Or App 170, *rev den*, 341 Or 244 (2006); *Vicki L. Mangum*, 52 Van Natta 1006 (2000) (Board's jurisdiction is limited to resolution of disputes over the compensability of medical conditions and whether medical treatment is causally related to the compensable injury).

Here, in May 2007, claimant made a medical services claim related to his previously accepted L5-S1 disc herniation. (Exs. 33B, 35-1). When SAIF did not timely accept or deny that claim, claimant requested a hearing regarding a *de facto* denial.

Consistent with the aforementioned points and authorities, the ALJ was required to resolve the compensability of the disputed medical services for claimant's accepted "L5-S1 disc herniation" condition in an Opinion and Order, not provide an Own Motion Recommendation. That order would necessarily include the appropriate appeal rights to the Board in its "regular" jurisdiction. ORS 656.289; ORS 656.295; ORS 656.704(3)(b)(C). Although the ALJ's separate Opinion and Order properly addressed compensability of the "post-aggravation rights" new/omitted medical conditions (degenerative disc disease and L5-S1 disc bulge), that Opinion and Order did not address SAIF's *de facto* denial of claimant's "worsened condition" (medical services) claim for his previously accepted "L5-S1 disc herniation" condition. The Opinion and Order was not appealed and became final by operation of law.

We acknowledge that the ALJ also issued an "Own Motion Recommendation" that purported to: (1) find the "worsened condition" (medical services) claim compensable; and (2) award a \$6,000 attorney fee under ORS 656.386 for "prevailing over the *de facto* denial."¹ However, as explained

¹ The "Own Motion Recommendation" also recommended that the "worsened condition" claim be reopened; but without any award of temporary disability benefits or any assessment of penalties and penalty-related attorney fees for unreasonable claim processing. OAR 438-007-0027. As explained

above, we have no jurisdiction under our Own Motion authority to address compensability of this medical services claim. Therefore, the compensability issue arising from SAIF's *de facto* denial of claimant's "worsened condition" (medical services) claim has not been resolved by means of a final, appealable order.

The ALJ's "Own Motion Recommendation" cannot be considered a final, appealable order regarding the medical services claim because it does not contain a notice of appeal rights. *See Oldham v. Plumlee*, 151 Or App 402, 404 (1997) (an order that contains no appeal rights or incorrect appeal rights is not final); *Delbert Shay*, 52 Van Natta 1924, *on recons* 52 Van Natta 2020 (2000) Because the compensability issue regarding claimant's medical services claim remains unresolved, authority to resolve that issue rests with the ALJ.²

In reaching this decision, we find *Scott A. Sheraden, Sr.*, 61 Van Natta 124 (2009), instructive. There, in a final, appealable order upholding a subsequent carrier's denial of the claimant's occupational disease claim, the ALJ also addressed another carrier's responsibility regarding a "post-aggravation rights" new/omitted medical condition. However, rather than resolving that carrier's responsibility in the appealable order, the ALJ instead issued a separate Own Motion Recommendation.

In an interim order, applying *James W. Jordan*, 58 Van Natta 34 (2006), we found that the ALJ had jurisdiction over the compensability/responsibility issues in the first instance (including the responsibility denial regarding the "post-aggravation rights" new/omitted medical condition claim). *Sheraden*, 61 Van Natta at 125. In addition, we noted that the ALJ's order contained the appropriate rights of appeal and that the claimant had timely requested review of that order. Under those circumstances, we reasoned that we were authorized to proceed with our appellate review of all of the issues litigated at hearing and arising from the timely appealed ALJ's order (including the responsibility issue).

A common thread runs through both *Sheraden* and the present case. Both cases involved inappropriately issued Own Motion Recommendations that purported to address compensability/responsibility issues that were not in the Board's Own Motion jurisdiction and, instead were in the Hearings Division's

below, because the "worsened condition" (medical services) claim has not yet been determined to be compensable, there is no Own Motion "worsened condition" claim before us at this time. Therefore, the ALJ's recommendation regarding any such claim is moot.

² Because the order regarding the claim assigned to WCB Case No. 07-06687 is final, the ALJ should assign a new WCB case number to this matter when issuing his final, appealable order regarding the compensability issue concerning claimant's denied medical services claim.

jurisdiction in the first instance, with appeal to the Board in its “regular” jurisdiction and to the courts. ORS 656.289; ORS 656.295; ORS 656.298. Likewise, both cases address the question of where the “matter concerning a claim” issue rests when the ALJ’s order neglects to resolve that issue. In *Sheraden*, we determined that such authority rested with us because the ALJ’s order had been timely appealed and was pending appellate review.

Here, the ALJ’s order that neglected to resolve the “matter concerning a claim” issue (*i.e.*, compensability of the *de facto* denied medical services) was not appealed. Instead, we have before us only the Own Motion Recommendation that contains no appeal rights and purports to address a compensability issue that is not in our Own Motion jurisdiction. Thus, the “matter concerning a claim” issue has not been finally determined by an appealable order. Because the compensability issue regarding claimant’s medical services claim remains unresolved, authority to resolve that issue rests with the ALJ.

Finally, based on the following reasoning, we dismiss this Own Motion matter as premature. In *Jimmie L. Taylor*, 58 Van Natta 75, 77 (2006), we noted that, effective January 1, 2006, if a disputed “current condition” or medical services claim related to a “worsened condition” is never “determined to be compensable” under the amended rules, the carrier’s responsibility for the processing of the “worsened condition” claim does not materialize. See OAR 438-012-0001(2)(a), (3).

Here, claimant’s worsened condition claim was based on his medical services claim for his current condition. As previously explained, the basis of claimant’s worsened condition claim, *i.e.*, his current condition and medical services claim, has not been determined to be compensable.

Consistent with the *Taylor* holding, because claimant’s “worsened condition” has not been determined to be compensable, there is no request for Own Motion relief to be processed. Consequently, SAIF’s Own Motion recommendation regarding this “worsened condition” claim has become moot.³

Accordingly, this Own Motion matter is dismissed.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 17, 2009

³ We recognize that SAIF’s Own Motion recommendation was filed in response to an inquiry from the Board’s staff. Nevertheless, as explained above, after further review of this complex procedural matter, we have determined that such a recommendation at this point in the process is premature.