

In the Matter of the Compensation of
SHERRIAN M. STEPHENS, Claimant

WCB Case Nos. 08-02848, 08-02250

ORDER ON REVIEW

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Reviewing Panel: Members Biehl, Langer, and Herman. Member Langer dissents.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Riechers' order that: (1) upheld the SAIF Corporation's *de facto* denial of claimant's new/omitted medical condition claim for coccydynia; (2) affirmed an Order on Reconsideration that awarded no permanent disability for claimant's lumbar strain and lumbar contusion; and (3) did not assess a penalty based on SAIF's allegedly unreasonable claim processing. SAIF cross-requests review of that portion of the order that awarded a "penalty-related" attorney fee based on its allegedly unreasonable claim processing. On review, the issues are compensability, claim processing, extent of permanent disability, and penalties and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable injury on June 13, 2007, when she fell on stairs at work. SAIF accepted a lumbar contusion and lumbar strain. Claimant's primary ongoing complaint was pain over her tailbone.

Dr. Kelly became claimant's treating physician. She diagnosed "coccygodynia."

SAIF closed the claim with no award of permanent disability on December 11, 2007. On January 31, 2008, claimant asked SAIF to accept "coccydynia." On March 28, 2008, SAIF accepted a "coccyx bone bruise."

Claimant requested a hearing, contesting SAIF's alleged *de facto* denial of the new or omitted medical condition claim for coccydynia, contending that the condition is compensable, and seeking penalties and attorney fees based on SAIF's allegedly unreasonable claim processing. Claimant also appealed the Order on Reconsideration, seeking a permanent disability award.

"Coccydynia" Claim

The ALJ found that the claim for coccydynia was deemed *de facto* denied, because SAIF did not respond to it. Based on the medical evidence and a medical dictionary definition, the ALJ concluded that coccydynia is "pain in the coccyx." Reasoning that no medical evidence established that claimant's pain is a condition, not merely a symptom, the ALJ upheld SAIF's *de facto* denial. We disagree and reverse that portion of the ALJ's order, reasoning as follows.

To prove her new or omitted medical condition claim, claimant must first establish that the coccydynia condition exists. *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005); compare *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (in an initial claim, the claimant need not prove a specific diagnosis if the symptoms are attributable to work).

Dr. Kelly, attending physician, provided the medical evidence addressing the nature and etiology of claimant's condition. Dr. Kelly diagnosed coccydynia and provided treatment beginning on July 31, 2007.¹ She also responded to questions posed by SAIF, indicating that coccydynia is defined as "pain in the coccyx" and the etiology of the "*condition*" is "trauma." (Ex. 29-1) (emphasis added). Dr. Kelly also stated that coccydynia is a diagnosis, rather than "a symptom of some other *condition*." (*Id.*) (emphasis added). She concurred that the mechanism of claimant's injury was consistent with the development of the coccydynia *condition* and that the *condition* was materially related to the work injury. (*Id.*) Dr. Kelly also recommended additional treatment specifically for the "*condition* of 'coccydynia'." (*Id.* at 2) (emphasis added).

Considering the doctor's responses in the context of the questions posed, we conclude that the coccydynia *condition* existed. In reaching this conclusion, we are particularly persuaded by Dr. Kelly's identification of coccydynia as a "diagnosis," rather than a symptom of "some other condition." See *Young v.*

¹ Coccygodynia and coccydynia are synonymous. Stedman's Electronic Medical Dictionary, Version 7.0 (2007).

Hermiston Good Samaritan, 223 Or App 99, 106 (2008) (approving Board’s distinction between a “condition” -- “the physical status of the body as a whole * * * or one of its parts” – and symptoms).

We acknowledge that later (after SAIF expanded its acceptance to include a “coccyx bone bruise”), Dr. Kelly checked a box indicating agreement that the bruise “can” be considered the underlying condition that is causing the coccydynia or “pain in the coccyx.” (Ex. 35). Considering this response in light of Dr. Kelly’s prior opinions, we are not persuaded that the coccydynia diagnosis represents nothing more than symptoms of a bruise.² Instead, we conclude that the diagnosis represents a physical status of claimant’s body. *See Young*, 223 Or App at 106; *Raymond A. Graves*, 50 Van Natta 1520, 1522, *on recons*, 50 Van Natta 1827 (1998) (to qualify as a claim for a condition that must be processed in accordance with ORS 656.262(7)(a), the claim must be for a ‘physical status’ of the body or one of its parts), *aff’d without opinion*, *Graves v. Thomas H. Ireland, Inc.*, 166 Or App 551 (2000).

In addition, based on Dr. Kelly’s un rebutted opinion (which we find persuasive), we find that claimant’s compensable injury was at least a material cause of her need for treatment/disability for her coccydynia condition. Because we further find that the claim is supported by objective findings, we set aside SAIF’s *de facto* denial.³ ORS 656.005(7)(a).

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review related to the claim for coccydynia. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services at hearing and on review related to this issue is \$6,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record and claimant’s appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that claimant’s counsel may go uncompensated.

² In reaching this conclusion, we specifically note that Dr. Kelly mentioned “mild bruising in the coccyx area” only once in her chart notes, but she consistently diagnosed coccydynia (or coccygodynia). (*See* Ex. 21).

³ We acknowledge that Dr. Kelly at one point indicated that claimant did not have the “objective findings” to support the coccydynia diagnosis. (Ex. 29-1). However, because Dr. Kelly’s chart notes include objective findings supporting her diagnosis, we conclude that the claim is, in fact, supported by objective findings. ORS 656.005(19). (*See* Exs. 12, 17, 21).

Finally, because our order issues after the effective date of *amended* ORS 656.386(2) and OAR 438-015-0019, and because claimant has finally prevailed over the denied claim, we consider it appropriate to award reasonable expenses and costs to claimant for records, expert opinions, and witness fees related to the “coccydynia claim.” *See Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *on recons*, 60 Van Natta 139 (2008).

Consequently, in accordance with the aforementioned statute and rule, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

Penalties/Attorney Fees

We adopt the ALJ’s “Conclusions of Law and Opinion” on this issue, with the following comment and modification.

Insofar as the coccydynia diagnosis *includes* symptoms, those symptoms were not symptoms of the accepted lumbar contusion and lumbar strain. Consequently, SAIF was required to process (and timely accept or deny) the new or omitted medical condition claim for coccydynia under ORS 656.262(7)(a). *Compare John J. O’Brien*, 58 Van Natta 2714, 2716 (2006) (where the record established that the new medical condition claim for coccydynia was in fact a claim for symptoms of the accepted sacral fracture -- rather than for a condition distinguishable from the accepted condition – the carrier was not required to process and accept the new claim). Consequently, claimant is entitled to a penalty (as well as the attorney fee assessed by the ALJ) under ORS 656.262(11)(a) -- based on SAIF’s unreasonable failure to accept or deny the claim.

Permanent Disability

We adopt the ALJ’s “Conclusions of Law and Opinion” on this issue.

ORDER

The ALJ's order dated August 26, 2008 is reversed in part and affirmed in part. The SAIF Corporation's *de facto* denial of claimant's claim for coccydynia is set aside and the claim is remanded to SAIF for processing according to law. Claimant is awarded a 25 percent penalty under ORS 656.262(11) to be based on amounts then due as of the date of hearing as a result of this order. The remainder of the ALJ's order is affirmed. For services at hearing and on review regarding the denial issue, claimant's attorney is awarded an assessed fee of \$6,500, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on April 10, 2009

Board Member Langer, dissenting.

The majority directs SAIF to accept claimant's new/omitted medical condition claim for coccydynia, reasoning that the coccydynia diagnosis represents a "physical status" of claimant's body or one of its parts. *See Raymond A. Graves*, 50 Van Natta 1520, 1522, *on recons*, 50 Van Natta 1827 (1998) (to qualify as a claim for a condition that must be processed in accordance with ORS 656.262(7)(a), the claim must be for a 'physical status' of the body or one of its parts), *aff'd without opinion*, *Graves v. Thomas H. Ireland, Inc.*, 166 Or App 551 (2000).

However, the undisputed medical evidence unambiguously establishes that coccydynia is nothing more than "pain in the coccyx." Moreover, SAIF voluntarily *accepted* the condition causing the coccyx pain symptoms – a "coccyx bone bruise." (*See Exs. 31, 35*). SAIF is simply not required to accept symptoms in addition to the condition causing the symptoms. In short, the record does not support a conclusion that "pain in the coccyx" represents a physical status of claimant's body or one of its parts independent of the already accepted "condition."⁴ *See Young v. Hermiston Good Samaritan*, 223 Or App 99,

⁴ SAIF provided Dr. Kelly with statements referring to coccydynia as a "condition." (Ex. 35). However, Dr. Kelly's concurrences with those statements do not transform an undisputed diagnosis of pain into a physical status of the body – absent supporting medical evidence. The majority relies on the fact that Dr. Kelly apparently distinguished coccydynia as a "diagnosis," from symptoms of "some other condition." However, there is no medical evidence indicating that a "diagnosis" necessarily represents a physical status. Moreover, Dr. Kelly also unequivocally agreed that claimant's coccyx bone bruise *can*

107 (2008) (because the claimant did not request acceptance of a “condition,” as opposed to symptoms of a previously accepted condition, denial was upheld); *John J. O’Brien*, 58 Van Natta 2714 (2006) (denial of a claim for a symptom upheld because the symptom was not a “condition”); *Terrance W. Heurung*, 51 Van Natta 1272 (1999) (same); *Steven J. Clum*, 51 Van Natta 1019 (1999) (same); *Billy W. Wilson*, 50 Van Natta 1747 (1998) (same).

Thus, neither the record nor the caselaw supports the majority’s reasoning and conclusion that SAIF must accept claimant’s “coccydynia.” Under these circumstances, I respectfully dissent.

be considered the cause of the coccydynia diagnosis. (Ex. 35). These statements taken together do not support a conclusion that coccydynia is a physical status of claimant’s body. *See Young v. Hermiston Good Samaritan*, 223 Or App 99, 106 (2008) (approving Board’s distinction between a “condition” -- “the physical status of the body as a whole * * * or one of its parts” – and symptoms).