In the Matter of the Compensation of
CHRISTIAN R. LUNDBLAD, Claimant
WCB Case No. 12-04551
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
Heidi M Havercroft, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) declined to award additional temporary disability benefits; and (2) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are claim processing, temporary disability (TTD), penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant began an authorized training program (ATP) on September 27, 2010. (Ex. A). Before he completed the program, the SAIF Corporation found him ineligible for further vocational assistance and ended the ATP, effective April 5, 2011. (Exs. 1, 2). On May 29, 2012, the Workers' Compensation Division (WCD) reinstated claimant's return-to-work plan and eligibility for vocational assistance. (Ex. 13A, 13B).

In the meantime, SAIF closed the claim on April 22, 2011, awarding temporary partial disability (TPD) from November 22, 2010 through April 21, 2011. (Ex. 5). An Order on Reconsideration modified claimant's temporary disability award to coincide with his ATP period (September 27, 2010 to April 5, 2011). (Ex. 10). Claimant requested a hearing, seeking additional TTD benefits. (Ex. 11). The Order on Reconsideration was affirmed by ALJ and Board orders. *See Christian R. Lundblad*, 65 Van Natta 28 (2013). The Board's order is presently on claimant's appeal to the court.

Once WCD's decision became final, SAIF began processing claimant's eligibility for vocational assistance. (Ex. 13E). A new training plan, to complete the previously approved training, was developed and approved on October 8, 2012. (Ex. 17). SAIF authorized training to start and reinstated TTD benefits on October 15, 2012. (Exs. 19, 25).

Claimant requested a hearing, seeking TTD from April 22, 2011 through October 14, 2012, and a penalty and attorney fee for SAIF's allegedly unreasonable refusal to pay that compensation. (Tr. 1). Determining that applicable statutes, rules and case law did not require payment of TTD benefits after the claim closed and before the start date of the new ATP, the ALJ denied claimant's request for additional TTD benefits.

On review, claimant contends that, when WCD reinstated his eligibility for vocational services, SAIF was required to reopen the claim and to pay TTD benefits from April 22, 2011 (when the claim closed) until the claim again qualified for closure. We disagree.

ORS 656.268(10)[1] provides for payment of temporary disability compensation after claim closure when a worker is "enrolled and actively engaged in training." We have determined that "enrolled" in training means that a worker is registered in a training program or return-to-work plan. *See Robert E. Charbonneau*, 577 Van Natta 591, 596-97 (2005) (the claimant was "enrolled" in training when he signed a "return-to-work" plan and the carrier issued a "Notice of Authorized Training"). If a worker is no longer eligible for vocational assistance, he would no longer be "enrolled" in an approved training program. *Id.* at 597.

---

[1] ORS 656.268(10) provides:

> "If, after the notice of closure issued pursuant to this section, the worker becomes enrolled and actively engaged in training according to the rules adopted pursuant to ORS 665.340 and 656.726, any permanent disability benefits due for work disability under the closure shall be suspended, and the worker shall receive temporary disability compensation and any permanent disability payments due for impairment while the worker is enrolled and actively engaged in training. When the worker ceases to be enrolled and actively engaged in training, the insurer or self-insured employer shall again close the claim pursuant to this section if the worker is medically stationary or if the worker's accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS 656.005(7). The closure shall include the duration of temporary total or temporary partial disability compensation. Permanent disability compensation shall be redetermined for work disability only. If the worker has returned to work or the worker's attending physician has released the worker to return to regular or modified employment, the insurer or self-insured employer shall again close the claim. This notice of closure may be appealed only in the same manner as other notices of closure under this section."

Here, claimant signed a return-to-work plan, and SAIF initially authorized training to start on September 27, 2010. (Ex. A). Thus, claimant was "enrolled" in training in September 2010. When SAIF sent a Notice of End of Eligibility for Vocational Assistance and a Notice of Training End on April 5, 2011, claimant was no longer "enrolled" in an ATP. SAIF closed the claim as required by ORS 656.268(10).

When WCD ordered reinstatement of claimant's return-to-work plan and eligibility for vocational assistance, SAIF restored eligibility and, after developing another program, approved a new ATP, effective October 15, 2012. Therefore, claimant became "enrolled and actively engaged in training" again in October 2012. *See Tricia A. Batchler*, 64 Van Natta 1436, 1441 (2012) (where the claimant was "actively engaged in training" and the carrier closed the claim on completion of the training and then approved a second ATP, the claimant was not "actively engaged in training" between the end of the first ATP and the beginning of the second ATP).

Claimant contends that, because WCD reinstated his return-to-work plan and eligibility for vocational assistance, the original training plan never ended. He argues that, despite the ATP termination, he remained actively engaged in training by independently completing the academic portions of his original plan. (Tr. 18-19). We disagree.

OAR 436-120-0443(12) provides that "a worker actively engaged in training must receive temporary disability compensation under ORS 656.268 and ORS 656.340." OAR 436-120-0005(20) defines "training" to mean "a vocational rehabilitation service provided to a worker who is enrolled and actively engaged in an approved 'Return-to-Work Plan; Training' as documented on Form 1081."

Here, a Form 1081 Return-to-Work Plan started on September 27, 2010 and ended on April 5, 2011. (Exs. A, 1, 2). A new Form 1081 Return-to-Work Plan started on October 15, 2012. (Exs. 19, 20). Therefore, claimant was "enrolled and actively engaged in 'training'" from September 27, 2010 to April 5, 2011 and on October 15, 2012. In other words, the record does not establish that he was "enrolled and actively engaged in 'training'" from April 6, 2011 to October 14, 2012 when, although independently pursuing the academic portion of his previous plan, an approved Form 1081 Return-to-Work Plan was not in effect.

Claimant contends that WCD's order required SAIF to reopen the claim as of the date of closure and reinstate his TTD benefits until claim closure. Yet, WCD's order did not set aside the Notice of Closure or the Order on

Reconsideration. Rather, consistent with ORS 656.340(16)(d), WCD directed SAIF to reinstate claimant's return-to-work plan and eligibility for vocational assistance. After developing a new vocational program in accordance with OAR 436-120-0443, SAIF did so.

In conclusion, for the aforementioned reasons, we find that claimant was not "enrolled and actively engaged in training" between April 6, 2011 and October 14, 2012. Consequently, we agree with the ALJ's determination that claimant was not entitled to temporary disability compensation for that period.

We turn to claimant's allegation that his TTD benefits were untimely paid after October 15, 2012. Specifically, claimant seeks penalties and an accompanying attorney fee for SAIF's allegedly unreasonable untimely payment of TTD after October 15, 2012. (Tr. 2). Based on the following reasoning, we conclude that penalties and attorney fees are not warranted.

Claimant agreed to receive his TTD benefits by direct deposit. (Tr. 21). He testified that his TTD payments after October 15, 2012, were not timely posted to his account. (Tr. 22; Ex. 29). SAIF's claims adjustor testified that SAIF authorized the release of payments on the dates claimant's TTD benefits were due. (Tr. 33-35; Ex. 28). After considering such evidence, the ALJ determined that SAIF complied with OAR 436-060-0150, governing the timely payment of compensation, and declined to award penalties and an attorney fee. We agree with that decision.

ORS 656.262(11)(a) provides for a penalty of up to 25 percent of the amounts then due if the insurer unreasonably delays or unreasonably refuses to pay compensation. As the proponent of the penalty issue, claimant has the burden of establishing that he is entitled to such an award. *Frank D. Dobson*, 65 Van Natta 1212 (2013).

OAR 436-060-0150(1) provides that benefits are deemed paid when "funds are transferred to a financial institution for deposit" in the worker's account by "approved electronic equivalent."[2]

---

[2] OAR 436-060-0150(1) provides in relevant part: "Benefits are deemed paid when addressed to the last known address of the worker or beneficiary and deposited in the U.S. Mail or when funds are transferred to a financial institution for deposit in the worker's or beneficiary's account by approved electronic equivalent."

Here, according to its claim adjustor's testimony, SAIF approved the release of TTD payments on the dates such benefits were due. In response, claimant presented his bank statements, which indicated that such transfers were posted to his account a day or two after the due date for his TTD benefits. Yet, evidence concerning the "posting" of these direct deposits does not necessarily establish that claimant's TTD payments were not "transferred to a financial institution for deposit in the worker's or beneficiary's account" on the due date for such benefits (as testified by the claim adjustor). *See id*.

Under these circumstances, we are not persuaded that SAIF unreasonably or untimely paid claimant's TTD benefits. Consequently, penalties and attorney fees are not warranted. Accordingly, we affirm.

ORDER

The ALJ's order dated December 18, 2012 is affirmed.

Entered at Salem, Oregon on August 20, 2013