
In the Matter of the Compensation of
STEPHEN H. MOORE, Claimant
WCB Case No. 13-00192
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
Thom R Nash, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) McWilliams's order that dismissed his hearing request regarding the SAIF Corporation's alleged *de facto* denial of his medical services claim for psychiatric treatments. On review, the issues are jurisdiction and, potentially, medical services. We vacate the ALJ's order, reinstate claimant's hearing request, and find the medical services claim causally related to his accepted conditions.

FINDINGS OF FACT

As a result of claimant's compensable 1976 injury, SAIF accepted post-traumatic stress disorder (PTSD). (Exs. 1, 5).

On January 7, 2011, claimant's primary care provider, Dr. Paulson, opined that claimant was struggling with depression symptoms, which he attributed partly to the work-related PTSD. (Ex. 7).

On April 7, 2011, Dr. Heck, a psychiatrist who examined claimant at SAIF's request, opined that claimant's PTSD had been in remission since at least 1989. (Ex. 12-14). He opined that claimant suffered from "Adjustment Disorder with Anxiety," which was a different condition, with a different etiology, from the previously-diagnosed PTSD. (Ex. 12-15). He opined that claimant did not require any specific treatment for his occupationally related condition because his PTSD was in remission, and the PTSD did not materially contribute to his current need for psychiatric treatment. (Ex. 12-16).

On April 19, 2011, Dr. Paulson disagreed with Dr. Heck's opinion. (Ex. 13). On April 28, 2011, Dr. Paulson explained that claimant had described nightmares that were specifically related to the work injury and PTSD diagnosis. (Ex. 14-1). He opined that the PTSD was a contributing factor, although he acknowledged that it was difficult to state the exact level of contribution. (*Id.*)

From July 19, 2011 through May 9, 2012, Dr. Henderson treated claimant, diagnosing chronic PTSD. (Exs. 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28). Claimant continued to treat with Dr. Henderson. (1 Tr. 21).¹

On May 24, 2012, May 31, 2012, June 20, 2012, August 20, 2012, and August 29, 2012, SAIF issued Explanations of Benefits stating that payment for various medical services was “Disallowed; service appears to be unrelated to a compensable condition.” (Ex. 30).

On January 10, 2013, claimant requested a hearing regarding a *de facto* denial and unreasonable claim processing. (Ex. 29A).

On April 10, 2013, Dr. Henderson explained claimant’s chronic PTSD diagnosis, stating that his psychiatric treatment of claimant in 2011 and 2012 was “directed in material (substantial) part toward his accepted work-related PTSD.” (Ex. 32-1-2). He attributed 50 percent of claimant’s need for psychiatric treatment to the work-related chronic PTSD condition. (Ex. 32-2).

At the hearing, the parties clarified the issues. (1 Tr. 1-8). Claimant explained that he had requested the hearing to dispute SAIF’s refusal to pay for medical services. (1 Tr. 1). He argued that SAIF had *de facto* denied those medical services because it had not issued a denial with hearing rights attached. (1 Tr. 5). Claimant further noted that SAIF’s responses to the medical bills confirmed that it considered the medical services unrelated to a compensable condition. (*Id.*) Accordingly, claimant argued that the matter was in the jurisdiction of the Workers’ Compensation Board, rather than of the Workers’ Compensation Division (WCD). (*Id.*)

SAIF argued that WCD had exclusive jurisdiction to resolve all disputes concerning medical services. (1 Tr. 8). Furthermore, because the issues had not been adequately clarified until the hearing, SAIF requested a continuance, which the ALJ granted. (1 Tr. 10, 12).

At the initial hearing, claimant testified regarding his injury, symptoms, and treatment. (1 Tr. 15-21).

¹ The record includes transcripts from April 11, 2013 and October 18, 2013. We refer to the April 11, 2013 and October 18, 2013 transcripts as 1 Tr. and 2 Tr., respectively.

When the hearing reconvened, SAIF reiterated its position that the Hearings Division lacked jurisdiction. (2 Tr. 5). Additionally, SAIF's counsel cited Dr. Heck's opinion that claimant's PTSD was in remission and did not require treatment. (2 Tr. 7).

CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that the medical services dispute was not a "matter concerning a claim." Accordingly, the ALJ concluded that WCD, rather than the Hearings Division, had jurisdiction over the dispute. Accordingly, the ALJ dismissed claimant's request for hearing.

On review, claimant contends that this is a "matter concerning a claim" subject to the Board's jurisdiction. As explained below, we agree with claimant's contention. Furthermore, because the record is sufficiently developed for us to conduct our review, we address the issue of whether the disputed medical services were causally related to the accepted PTSD condition.²

Whether jurisdiction over a medical services dispute lies with the Board or WCD depends on whether the dispute is a "matter concerning a claim," in which case it is in the Board's jurisdiction, or not, in which case it is in WCD's jurisdiction. ORS 656.704(3)(a); *AIG Claim Servs., Inc. v. Cole*, 205 Or App 170, 173-74 (2006). A dispute regarding whether a sufficient causal relationship exists between medical services and an accepted claim is in the Board's jurisdiction because it is a "matter concerning a claim." ORS 656.704(3)(b)(C); *Cole*, 205 Or App at 173. However, a dispute regarding whether medical services are excessive, inappropriate, ineffectual, or in violation of the rules regarding the performance of medical services is in WCD's jurisdiction because it is not a "matter concerning a claim." ORS 656.704(3)(b)(B); *Cole*, 205 Or App at 174.

Here, SAIF's response to the medical bills asserted that the disputed medical services were "unrelated to the compensable condition." On review, SAIF concedes that because the medical dispute regarded the causal relationship between the medical services and an accepted condition, it is a "matter concerning a claim" subject to the Board's jurisdiction. (Resp. Br., 3-4).

² If an ALJ resolves a case on procedural grounds, but it is later determined that the merits of the case must be addressed, remand may be necessary for evaluation of the credibility of witnesses. *E.g.*, *Rickey A. Stevens*, 49 Van Natta 2051 (1997). Thus, such "alternative" compensability/credibility findings, although not necessary to the ALJ's analysis, can be helpful to our review. *See Matthew A. Loos*, 65 Van Natta 94 n 1 (2013). Here, although the ALJ ultimately dismissed claimant's hearing request on jurisdictional grounds, the ALJ also made a demeanor-based finding regarding the credibility of claimant's testimony. Thus, remand for additional ALJ findings is unnecessary.

Nonetheless, SAIF argues that claimant's request for hearing was inconsistent with OAR 436-009-0008(2)(b)(A),³ which requires a worker to "request administrative review by the director within 90 days of the date the worker knew, or should have known, there was a dispute over the provision of medical services." However, that requirement time frame applies only to "requests for administrative review before the director under [OAR 436-009-0008]." OAR 436-009-0008(2). OAR 436-009-0008 does not apply to a request for a hearing on a "matter concerning a claim," which is in the Board's jurisdiction.

SAIF asserts that it is not liable for the bills because Dr. Henderson's treatment was excessive, inappropriate, and ineffectual, and because claimant did not timely bring the dispute before WCD. Such "propriety" disputes are in WCD's jurisdiction, and we do not address them. The existence of such disputes, however, does not deprive us (or the ALJ) of jurisdiction to resolve a causation dispute. Because SAIF does not concede causation, but rather disputes it, we have jurisdiction over the issue.⁴

We turn to the merits of the "causation" issue. Claimant bears the burden to prove the causal relationship between the disputed medical services and the accepted PTSD condition. ORS 656.266(1); ORS 656.245(1)(a).⁵ SAIF disputes

³ Because the disputed medical services were rendered from July 19, 2011 through July 31, 2012, the applicable version of OAR 436-009-0008 is found in WCD Admin. Order 10-052 (eff. July 1, 2010). See OAR 436-009-0003.

⁴ SAIF notes that if claimant had requested administrative review before WCD, the case would have been transferred to the Board for resolution of the causation dispute. See ORS 656.704(5) (where a request for hearing or administrative review is filed with either the Board or WCD, but should have been filed with the other, the dispute shall be transferred); OAR 436-009-0008(2)(d) (where there is a denial of the causal relationship between a medical service and an accepted condition, the issue may first be decided by the Board's Hearings Division); *Hazel M. Hand*, 59 Van Natta 1028 (2007) (WCD transferred medical services dispute to the Board to address causal relationship issue that was in the Board's jurisdiction under ORS 656.704(3)(b)(C)). However, the basis for such transfers is that such requests "should have been filed with" the Board, rather than WCD. ORS 656.704(5). Thus, the existence of such a procedure does not disallow the filing of such "medical services/causation related" requests directly with the Board.

⁵ ORS 656.245(1)(a) provides:

"For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the

the causal relationship between the medical services and the accepted PTSD condition based on Dr. Heck's opinion that the PTSD condition was in remission and did not require medical services. If claimant establishes that he currently suffers from the accepted PTSD condition, SAIF does not otherwise dispute that claimant has carried his burden.⁶

The nature of claimant's current condition is a complex medical question that must be answered by expert medical evidence. *See Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement between experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Heck opined, "The diagnosis of PTSD requires that various symptom criteria are met and Claimant does not meet any of the symptom criteria except for nightmares." (Ex. 12-15).

In contrast, Dr. Henderson opined that claimant "has met the full criteria" for PTSD. (Ex. 32-1). He noted the intense fear response, with helplessness and horror, related to claimant's life-threatening work injury. (*Id.*) In addition to recurring nightmares related to the event, he explained that claimant experienced psychological reactivity on exposure to internal or external cues that symbolized or resembled an aspect of the event. (*Id.*) Dr. Henderson also noted that claimant experienced persistent avoidance of associated stimuli and numbing of general responsiveness. (*Id.*) Additionally, he observed that claimant experienced persistent symptoms of increased arousal of the autonomic nervous system, as indicated by increased irritability and difficulty sleeping and concentrating. (*Id.*) Finally, Dr. Henderson detailed that the duration of claimant's symptoms had been greater than three months, and the disturbance caused clinically significant distress that interfered with social and occupational areas of functioning and required treatment with psychotropic medications. (*Id.*)

After weighing Dr. Henderson's opinion against Dr. Heck's, we conclude that Dr. Henderson's more thorough opinion persuasively rebuts Dr. Heck's opinion. Therefore, based on Dr. Henderson's opinion, we conclude that claimant

self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury."

⁶ At hearing, SAIF's counsel explained, "If jurisdiction does lie with the Hearings Division and there is actually an accepted condition of PTSD, then Claimant has met his burden." (*Id.*)

continues to suffer from his accepted PTSD, and that the disputed medical services were for that condition. Accordingly, we conclude that claimant has prevailed in the causation dispute.

ORS 656.386(1) provides for an attorney fee if a claimant “finally prevails” against a denial. Where a medical services denial involves both matters concerning a claim and matters not concerning a claim, the claimant must prevail on both aspects of the medical services claim to prevail finally over the denial. *Cole*, 205 Or App at 179. Here, the record supports a conclusion that SAIF is also challenging the disputed medical bills on grounds subject to WCD’s jurisdiction. Our practice in such cases is to award a “contingent” attorney fee, payable if claimant finally prevails against all aspects of the medical services dispute.⁷ See *Antonio L. Martinez*, 58 Van Natta 1814 (2006), *aff’d*, *SAIF v. Martinez*, 219 Or App 182 (2008).

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable “contingent” fee for claimant’s attorney’s services at hearing and on review is \$5,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (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 counsel may go uncompensated.

Finally, we make a similar contingent award of 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 in the event that claimant finally prevails against all aspects of the medical services dispute. See ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

⁷ The record is not clear regarding the status of any “propriety” dispute concerning the medical services. If a “propriety” dispute is currently pending before WCD, or if a request to resolve such a dispute is filed with WCD within 30 days of this order, our attorney fee award will remain contingent until WCD resolves the “propriety” dispute subject to its jurisdiction. However, if no such dispute is currently pending with WCD or no request to resolve such a dispute is filed with WCD within 30 days of this order, claimant will have finally prevailed against the denial, and our attorney fee award shall become payable.

ORDER

The ALJ's order dated November 18, 2014 is reversed. Claimant's hearing request is reinstated. The disputed medical services claim is causally related to claimant's accepted conditions. For services at hearing and review, claimant's attorney is awarded an assessed attorney fee of \$5,000, payable by SAIF, contingent on claimant prevailing over all aspects of the medical services dispute as described in this order. Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by SAIF, contingent on claimant prevailing over all aspects of the medical services dispute as described in this order.

Entered at Salem, Oregon on May 7, 2014