In the Matter of the Compensation of
WCB Case No. 15-00391
BRIAN S. PATRICK, Claimant
ORDER ON REVIEW
Ransom Gilbertson Martin et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Jacobson's order that: (1) found that permanent total disability (PTD) had not been raised as an issue during the reconsideration proceeding; and (2) affirmed an Order on Reconsideration that did not award PTD benefits. On review, the issues are scope of issues and, potentially, PTD.

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

In 2007, claimant sustained a compensable right shoulder injury, which was accepted for right shoulder conditions and depression. (Ex. 17).

On August 28, 2014, the SAIF Corporation issued a Notice of Closure awarding 61 percent whole person impairment and 75 percent work disability. (Ex. 36).

On September 3, 2014, SAIF requested reconsideration of the closure notice. (Ex. 37A). Consistent with ORS 656.268(5)(c), the request identified impairment findings used to rate permanent impairment as the only issue for which a carrier could request reconsideration. *See* ORS 656.268(5)(c) (request for reconsideration by a carrier may be based only on disagreement with the findings used to rate impairment).

The 60-day period to request reconsideration expired on October 27, 2014. *See* ORS 656.268(5)(c) (a request for reconsideration by a worker must be made within 60 days of the date of the notice of closure). Claimant requested reconsideration on November 14, 2014.[1] (Ex. 37B).

[1] Claimant's request for reconsideration checked the "issue" boxes for premature/improper claim closure, medically stationary date, temporary disability dates, and impairment findings. (Ex. 37B).

A medical arbiter panel performed an examination on December 22, 2014. (Ex. 40). The panel opined that claimant's examination findings were not valid for the purpose of rating impairment.[2] (Ex. 40-6). The psychiatrist member of the panel concluded that claimant had Class II, mild, psychological impairment. (Ex. 42-9).

On January 19, 2015, under a cover letter referencing "Supplemental Request for Reconsideration," claimant submitted several "post-closure" reports. (Ex. 42C). Those reports are summarized as follows.

Dr. Rice, a consulting psychiatrist, reported that he had seen claimant on two occasions, but had not completed an evaluation.[3] (Ex. 36A-1). Dr. Rice opined that claimant was "very disabled" by a "very complex mix of unique individual psychodynamics, unique pain related psychodynamics, primary gain, secondary gain and years of frustration." (Ex. 36A-1). Dr. Rice recommended "permanent disability and engag[ing] him in very long term psychotherapy with Dr. Condon[.]" (Ex. 36A-2).

On December 16, 2014, Dr. Condon, claimant's treating psychologist, performed an evaluation in response to SAIF's request for an updated detailed treatment plan. (Ex. 38A-1). Dr. Condon observed that claimant "seemed to have a setback in terms of his motivation to look for employment" following a separation from his wife. (*Id.*)

On January 17, 2015, Dr. Szumski, claimant's family physician, opined hat claimant's depression condition was not medically stationary and required additional medical treatment. (Ex. 42A-1, -2, -3). Dr. Szumski concluded that, in the absence of such treatment, claimant "is permanently and totally disabled and unable to re-enter the employment field." (Ex. 42A-3). Dr. Szumski

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[2] The panel reported that claimant was unable or unwilling to engage in testing for shoulder range of motion. (Ex. 40-5). Likewise, the panel reported that it was unable to obtain a valid evaluation of claimant's right shoulder strength. (Ex. 40-6). Finally, the panel opined that claimant was not significantly limited in the ability to repetitively use his right shoulder due to the accepted conditions and/or direct medical sequelae. (*Id.*)

[3] Dr. Rice did not state when the appointments took place. His records were not included in the reconsideration record. On June 23, 2014, Dr. Goranson, a psychiatrist who performed a file review at SAIF's request, reported that on April 28, 2014, May 5, 2014, and May 27, 2014, claimant told Dr. Szumski and Dr. Condon, respectively, that he had an appointment with Dr. Rice. (Ex. 32-8, -9). On July 10, 2014, Dr. Wicher, a psychologist who performed a file review at SAIF's request, reported that, on May 28, 2014, claimant told Dr. Condon that the psychiatric assessment by Dr. Rice had been deferred. (Ex. 33-11). The record does not describe any further appointments with Dr. Rice before claim closure on August 28, 2014.

recommended that claimant's claim be reopened for the completion of treatment with Dr. Condon. (Ex. 42A-4).

On January 20, 2014, based on the medical arbiter panel's impairment findings, an Order on Reconsideration reduced claimant's whole person impairment award to 42 percent and his work disability award to 54 percent. (Ex. 43-6). In doing so, the Appellate Review Unit (ARU) noted that claimant's request for reconsideration was untimely filed under ORS 656.268(5)(e) and that the issue raised by SAIF's request was disagreement with the impairment findings and extent of whole person impairment. (Ex. 43-2, -3). The ARU further identified Dr. Adams as claimant's attending physician at the time of claim closure and, therefore, did not consider the "post-closure" reports from Drs. Rice, Condon, and Szumski. (Ex. 43-1, -2).

Claimant requested a hearing. His hearing request checked the boxes for "Order on Reconsideration," "permanent partial disability," "penalty," "attorney fee," and "costs." (Hearing File). Claimant also submitted a second hearing request, which checked the aforementioned boxes, as well as the box for "permanent total disability." (*Id.*)

The ALJ affirmed the Order on Reconsideration. Even if claimant's request for reconsideration was timely, the ALJ determined that claimant had not raised a PTD issue during the reconsideration proceeding.

On review, citing *Darlene L. Sparling*, 67 Van Natta 85 (2015), claimant contends that his cross-request for reconsideration and evidentiary submission raised the PTD issue during the reconsideration proceeding. For the following reasons, we disagree with claimant's contention.

ORS 656.268(5)(c) requires a party who objects to a Notice of Closure to first seek reconsideration by the Director. Issues not raised by a party during the reconsideration proceeding may not be raised at hearing unless the issue arises out of the reconsideration order itself. ORS 656.268(9); ORS 656.283(6); *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000) (the hearing before the ALJ is limited to the issues raised on reconsideration and those issues "arising out of the reconsideration order").

A claimant's request for reconsideration must be made within 60 days of the date of the Notice of Closure. ORS 656.268(5)(c). Here, the 60-day appeal period from the August 28, 2014 Notice of Closure expired on October 27, 2014.

Claimant submitted his request for reconsideration on November 14, 2014. (Ex. 37B). Therefore, his request was untimely filed.

Pursuant to ORS 656.268(5)(c), ORS 656.268(8)(a), and OAR 436-030-0145(1)(b), SAIF's request for reconsideration of the Notice of Closure was limited to impairment findings and triggered a medical arbiter examination. Those authorities do not allow a carrier to raise a permanent disability issue beyond a challenge to the findings used to rate permanent impairment. Thus, SAIF's reconsideration request did not raise a PTD issue. *See David A. Fulcer*, 65 Van Natta 979, 981 (2013) (pursuant to ORS 656.268(5)(c), carrier's request for reconsideration did not raise a temporary disability issue); *cf. SAIF v. Malheur County Sch. Dist.*, 251 Or App 704, 711 (2012) (given the absence of any statutory limitation on the claimant's right to seek reconsideration, the scope of reconsideration may include a challenge to any of the substantive benefits that must be included in the closure notice).

As previously noted, claimant asserts that the *Sparling* rationale supports his position that his reconsideration request raised the "PTD" issue during the reconsideration proceeding. Even if we could consider claimant's request, we would disagree. In *Sparling*, the claimant's reconsideration request checked the "issue" box indicating that she disagreed with the "rating of permanent disability" and provided "additional clarifying information." 67 Van Natta at 86. That "information" included the claimant's affidavit describing her functional limitations and her desire and efforts to return to work, her attending physician's opinion affirming those limitations and ascribing them to the accepted conditions, and a vocational counselor's opinion assessing PTD. *Id.*

Under such circumstances, concerning the procedural issue of whether the claimant's submission was sufficient to have raised "PTD" as an issue during the reconsideration proceeding, a majority of the Board found that "PTD" had been raised. Nonetheless, regarding the merits of the "PTD" claim, a different majority of the Board concluded that the record did not support the claimant's entitlement to PTD benefits. *Id*. at 89 n. 3.

Here, claimant's untimely reconsideration request precluded consideration of whether claimant's submission was sufficient to have raised a "PTD" issue during the reconsideration proceeding. Furthermore, even if claimant's submission could be considered, it did not raise "PTD." Unlike *Sparling*, claimant's reconsideration request did not check the "issue" box indicating that he disagreed with the "rating of permanent disability."

Additionally, his supplemental submission did not request "PTD"; rather, the physicians' reports requested claim reopening and additional treatment. (Exs. 36A-2, 37B, 42A-3, -4).

In response to these submissions, the Order on Reconsideration found claimant's reconsideration request untimely, reviewed the claim closure pursuant to OAR 436-030-0115(5), and addressed the issue raised by SAIF's reconsideration request. (Ex. 43-3). *See* OAR 436-030-0115(5) (the director reviews those issues raised by the parties and the requirements under ORS 656.268(1)). Accordingly, the ARU found that the preponderance of the evidence supported the medically stationary date stated in the Notice of Closure and that there was sufficient information to close the claim. The ARU further reviewed the findings of impairment and, relying on the findings provided by the medical arbiter panel, reduced claimant's whole person impairment award to 42 percent and work disability benefit to 54 percent (in lieu of the 61 percent whole person impairment award and 75 percent work disability benefit granted by the Notice of Closure).[4] (Ex. 43-5). Finally, the ARU did not address a "PTD" issue. Under such circumstances, a "whole person impairment/work disability" issues arose out of the reconsideration order, but a "PTD" issue did not.

In summary: (1) claimant's reconsideration request was untimely filed; (2) even if his "submission" during the reconsideration proceeding could be considered, the "PTD" issue was not raised; and (3) the "PTD" issue did not arise out of the reconsideration order itself. Consequently, the ALJ was not authorized to consider the "PTD" issue at the hearing level. *See* ORS 656.268(9); ORS 656.283(6). Accordingly, we affirm.

ORDER

The ALJ's order dated August 19, 2015 is affirmed.

Entered at Salem, Oregon on March 11, 2016

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[4] Although a carrier's request for reconsideration may not dispute the work disability benefit, the ARU's review is not restricted to the issues posed by the party seeking reconsideration. *See Edwina D. Wilson*, 61 Van Natta 973 (2009) (ORS 656.268(5)(c) did not preclude the ARU from reducing claimant's permanent impairment and work disability award, even though the carrier had requested reconsideration); *Gilbert A. Parra*, 61 Van Natta 853 (2009) (ORS 656.268(5)(c) did not preclude the ARU from reviewing a claimant's residual functional capacity, even though the carrier had requested reconsideration).