
In the Matter of the Compensation of
MICHAEL J. JOSEPH, Claimant
WCB Case No. 01-07818
ORDER ON REVIEW
Malagon Moore et al, Claimant Attorneys
Bruce A Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Martha Brown's order that dismissed claimant's request for hearing regarding the SAIF Corporation's *de facto* denial of claimant's medical services claim. On review, the issues are jurisdiction and, potentially, compensability, and penalties and attorney fees. We modify.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following summary and supplementation.

On October 30, 2000, claimant injured his right arm and shoulder at work. Claimant initially treated with Dr. Balsom, M.D., who diagnosed right biceps strain. (Ex. 5). On November 22, 2000, SAIF accepted the claim as a nondisabling right biceps strain. (Ex. 6). Claimant continued to have problems with his right arm and shoulder. Dr. Balsom referred claimant to Dr. Butters, orthopedist, who became claimant's attending physician. (Ex. 16).

On March 14, 2001, Dr. Butters examined claimant and reported that he had previously resected claimant's left clavicle in 1993. Dr. Butters diagnosed AC arthritis, right shoulder, with possible subacromial symptoms. On April 5, 2001, in response to an inquiry from SAIF, Dr. Butters reported a diagnosis of symptomatic right shoulder AC arthritis with possible impingement. (Ex. 12). After reviewing medical records, Dr. Butters concluded that claimant had preexisting AC joint problems prior to the October 2000 work injury, including AC joint arthritis. He noted that he did not find a biceps strain during his March 14, 2001 examination. Having examined claimant only once at that time, Dr. Butters declined to offer an opinion regarding claimant's medically stationary status or impairment.

On April 19, 2001, in response to an inquiry from SAIF, Dr. Balsom found claimant's right biceps strain medically stationary based on Dr. Butters' March 14, 2001 examination. Claimant continued to treat with Dr. Butters. After claimant failed to respond to injections in the AC joint and the subacromial space, Dr. Butters ordered an MRI of the right shoulder to evaluate the rotator cuff before considering decompression and removal of the distal clavicle.

On June 1, 2001, claimant underwent the MRI. Based on the MRI findings, Dr. Butters recommended right shoulder arthroscopy, arthroscopic subacromial decompression, and resection of the distal clavicle. Dr. Butters requested that SAIF authorize those procedures. (Exs. 18, 19). On August 7, 2001, SAIF responded that it had accepted a right biceps strain that was medically stationary on March 14, 2001 and a claim had not been made for any other condition. (Ex. 19).

On September 5, 2001, claimant's attorney wrote to SAIF to request whether it had issued a formal denial of Dr. Butters' treatment. (Ex. 20). On September 17, 2001, claimant's attorney wrote to SAIF, enclosed a bill for the MRI, and indicated that it was a diagnostic treatment that SAIF should pay. (Ex. 21). He requested that SAIF inform him immediately if it did not intend to pay that bill, and he would take the matter to the Director.

SAIF did not respond to either request. On October 1, 2001, claimant filed a request for hearing.

On October 12, 2001, Dr. Butters reported that it was "medically probable that the pre-existing condition of the AC joint combined with the industrial injury could produce [claimant's] condition." (Ex. 22).

On October 26, 2001, SAIF's attorney wrote to claimant's attorney, referring to his (claimant's attorney's) letter of September 5, 2001, wherein he asked if SAIF had issued a formal denial of Dr. Butters' treatment. (Ex. 23). SAIF's attorney responded that claimant had not formally asked SAIF to accept any new or omitted conditions.

On January 2, 2002, claimant made a written request that SAIF "expand its November 22, 2000 Notice of Acceptance to include a combined condition as a consequence of the October 30, 2000 injury and pre-existing AC joint problems, with the industrial injury constituting the major cause of the need for arthroscopic subacromial decompression and resection of the distal clavicle." (Ex. 24).

The hearing was held and the record closed on January 7, 2002.

CONCLUSIONS OF LAW AND OPINION

Jurisdiction

The ALJ dismissed claimant's hearing request, finding that the Director had jurisdiction over claimant's medical services claim pursuant to ORS 656.704(3)(b)(B).¹ Claimant contends that, because his medical services claim deals with causation issues, the Board has jurisdiction pursuant to ORS 656.704(3)(b)(A) or (3)(b)(C). We agree with claimant that his medical services claim deals with causation issues and that we have jurisdiction over such medical services claims. Thus, under the circumstances of this case, we find that the Hearings Division had jurisdiction under ORS 656.704(3)(b)(A) and (C). However, based on the following reasoning, we find that claimant's medical services claim under ORS 656.704(3)(b)(C) fails and his claim under ORS 656.704(3)(b)(A) is premature and, therefore, that portion of the hearing request should be dismissed.

At the hearing, the parties agreed that the issues were "a *de facto* denial of claimant's MRI and arthrogram services and alleged unreasonable failure to pay

¹ ORS 656.704(3)(b) provides:

"The respective authority of the board and the director to resolve medical service disputes, other than disputes arising under ORS 656.260 [inapplicable here], shall be determined according to the following principles:

"(A) Any dispute that requires a determination of the compensability of the medical condition for which medical services are proposed is a matter concerning a claim.

"(B) Any dispute that requires a determination of whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, or a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c), is not a matter concerning a claim.

"(C) Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim."

for those services and allegedly unreasonable failure to accept or deny the claim and assessed attorney fees.” (Tr. 1). SAIF’s attorney also moved to dismiss the matter on the grounds that jurisdiction did not lie with the Hearings Division. (Tr. 2). Finally, claimant’s attorney noted that SAIF had not responded to his request for hearing and had never informed him as to why it was refusing to pay the medical service billings. (Tr. 2). Regarding the jurisdiction issue, claimant’s attorney noted that the basis for SAIF’s refusal to pay for the medical services “would make all the difference in the world.” (*Id.*).

SAIF’s attorney responded that this was “a matter where, in effect, it’s a medical services denial.” (*Id.*). SAIF’s attorney noted that the matter also involved diagnostic services. SAIF’s attorney acknowledged that claimant was not informed of the basis for SAIF’s refusal to pay the medical service billings until the date of the hearing because he [SAIF’s attorney] “didn’t realize that that was what [he] was going to raise until early this morning.” (Tr. 3). SAIF’s attorney also argued that the issue of compensability was premature because claimant had requested that SAIF accept the condition only five days before the hearing. (Tr. 5, Ex. 24). Finally, SAIF’s attorney stated that, although the issue was premature now, if the shoulder condition became compensable, then SAIF would not have any concern or contention that it does not have to pay for diagnostic services. (Tr. 6).

The Hearings Division’s (and the Board’s) jurisdiction over medical services claims is limited to causation disputes. *See* ORS 656.704(3); *Vicki L. Mangum*, 52 Van Natta 1006 (2000). Thus, if SAIF conceded the causal relationship of claimant’s medical services claim, the Hearings Division would be without jurisdiction over the medical services dispute; *i.e.*, there would be no causation dispute to resolve. ORS 656.704(3); *Daniel B. Proud, Jr.*, 53 Van Natta 720 (2001).

However, SAIF did not concede causation. Instead, SAIF contended that its *de facto* denial was a “medical services denial.” Based on SAIF’s representations at hearing, we conclude that claimant’s medical services claim was expressly “denied” by SAIF. Thus, the parties’ dispute either required a determination of the compensability of a medical condition for which medical services were proposed or required a determination of whether a sufficient causal relationship existed between medical services and an accepted claim to establish compensability. ORS 656.704(3)(b)(A) and (C).

Here, the accepted claim was a right biceps strain. (Ex. 6). However, Dr. Butters reported that he did not find a biceps strain on his evaluation of March 14, 2001. (Ex. 12). Instead, the conditions for which Dr. Butters was treating claimant involved right shoulder AC arthritis, with possible subacromial symptoms and possible impingement, superior labrum lesion, AC joint arthropathy, and partial thickness rotator cuff tendon tear with the possibility of synovitis or anterior capsular stripping. (Exs. 10-2, 12, 18).

There is no medical evidence regarding the causal relationship, if any, between the medical services and the accepted right biceps strain. In this regard, Dr. Butters ordered the MRI of the right shoulder to evaluate the rotator cuff before considering decompression and removal of the distal clavicle. Based on the MRI findings, Dr. Butters recommended right shoulder arthroscopy, arthroscopic subacromial decompression, and resection of the distal clavicle. He offered no opinion regarding the connection between these medical services and the accepted right biceps strain. Therefore, on this record, to the extent that ORS 656.704(3)(b)(C) applies to the medical services claim, the claim fails.

Claimant contends that he is entitled to a penalty under ORS 656.262(11)(a) for SAIF's unreasonable refusal to pay compensation. Because claimant failed to prove his claim under ORS 656.704(3)(b)(C), there is no basis for a penalty assessment.

Moreover, to the extent that ORS 656.704(3)(b)(A) applies to the medical services claim (*i.e.*, the dispute requires a determination of the compensability of the medical condition for which medical services are proposed), the claim is premature.

Five days before the hearing date claimant filed a combined condition claim regarding the underlying conditions for which he is seeking treatment. (Ex. 24). SAIF had 90 days to accept or deny this claim. *See* ORS 656.262(6)(a) (1995). Given claimant's then-recent filing of the combined condition claim, SAIF argued that the issue of compensability was premature. (Tr. 5).

In *Linda J. Lucas*, 53 Van Natta 570 (2001), we found that the ALJ had authority under ORS 656.704(3) and ORS 656.708 to determine compensability of the medical condition for which medical services were proposed. However, because the claimant failed to satisfy the statutory requirements for asserting a new medical condition claim, we concluded that any hearing request would be premature. We found that, although the Hearings Division and the Board have

“jurisdiction” over the “causation” portion of the medical service dispute, jurisdiction does not attach where the basis for the “claim” is an unclaimed, unaccepted, new medical condition and the carrier asserts that proceeding with litigation is procedurally invalid.

We find the circumstances of the present case analogous to *Lucas*. Although there is no contention that claimant failed to satisfy the statutory requirements for asserting a new medical condition claim, the timing of claimant’s combined condition claim renders premature a decision on the compensability of the medical condition for which medical services are proposed. Such a decision would necessarily involve claimant’s current medical condition, for which claimant has made a combined condition claim. At the time of hearing, SAIF had almost 90 days to accept or deny that claim. In addition, SAIF asserted that proceeding with litigation of the compensability issue would be premature, given the timing of the combined condition claim.²

Thus, although we have jurisdiction over the “causation” portion of the medical service dispute pursuant to ORS 656.704(3)(b)(A), based on the circumstances of this case we find that it would be premature to address that issue.³ Because it would be premature to address the compensability issue, we need not address the related penalty and attorney fee issues.⁴

² If SAIF had not contended that it was premature to address “causation,” the ALJ would have been authorized to resolve the merits of the condition/claim. See *Diane S. Hill*, 48 Van Natta 2351, 2356 n2 (1996), *aff’d mem Hill v. Stuart Andersons*, 149 Or App 496 (1997), citing *EBI Companies v. Thomas*, 66 Or App 105 (1983) (parties in a workers’ compensation proceeding may agree to litigate issues not properly raised).

³ Given the posture of the case at hearing, a continuance of the hearing might have been appropriate. That way, any compensability dispute arising out of the new medical condition claim could have been consolidated with this hearing request. However, neither party made such a request. Therefore, under these particular circumstances, dismissal of this portion of the hearing request regarding this issue was justified.

⁴ We note that claimant is not precluded from raising these issues under ORS 656.704(3)(b)(A) at a later date, when the timing of his combined condition claim no longer presents a problem.

ORDER

The ALJ's order dated February 4, 2002 is modified in part and affirmed in part. Insofar as claimant's hearing request pertained to his medical services claim under ORS 656.704(3)(b)(C) regarding his accepted right biceps strain condition, the request is reinstated. Claimant's request for relief under that accepted condition is denied. The remainder of the ALJ's dismissal order is affirmed.

Entered at Salem, Oregon on October 11, 2002