
In the Matter of the Compensation of
THOMAS D. CASON, Claimant
WCB Case No. 00-08034
ORDER ON REVIEW
Merkel & Associates, Claimant Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that dismissed his request for hearing based on an unjustified delay of the hearing. *See* OAR 438-006-0071(1). With his brief, claimant has submitted an affidavit. We treat such a submission as a motion for remand. On review, the issues are the propriety of the dismissal order and remand.

We deny the motion for remand and adopt and affirm the ALJ's order with the following supplementation.

Claimant filed a claim with the SAIF Corporation in August 2000, for a low back injury. In a letter dated September 4, 2000, SAIF informed claimant that it had scheduled an insurer-arranged medical examination for October 13, 2000. On October 11, 2000, claimant informed SAIF that he was unable to attend the medical examination as he was incarcerated. On October 11, 2000, SAIF denied claimant's claim. Thereafter, claimant requested a hearing contesting SAIF's denial. The hearing was scheduled for January 23, 2001, but was deferred due to claimant's incarceration.

Claimant retained his former attorney on June 8, 2001. In October 2001, claimant's former counsel advised the Hearings Division that claimant had been released from incarceration and requested that the matter be docketed for hearing. Claimant's former counsel reiterated his request to have the matter scheduled for hearing in a letter dated February 1, 2002.

On March 11, 2002, SAIF wrote to claimant at his last known address and informed him that an insurer-arranged medical examination had been scheduled for April 24, 2002. A Notice of Hearing dated April 17, 2002 was also mailed to claimant's last known address, scheduling the hearing for May 31, 2002.

Claimant did not attend the April 24, 2002 medical examination. No explanation was given. Thereafter, SAIF requested that the May 31, 2002 hearing

be postponed based on claimant's failure to attend the April 24, 2002 medical examination. The request was granted.

In a letter dated April 25, 2002, SAIF informed claimant that an insurer-arranged medical examination was scheduled for June 5, 2002. Claimant did not attend that examination. No explanation was given for claimant's failure to attend.

In June 2002, SAIF moved for dismissal of claimant's request for hearing pursuant to OAR 438-006-0071(1).¹ In his August 27, 2002 Order of Dismissal, the ALJ concluded that, even assuming that claimant did not receive notification of any or all of the medical examinations, claimant was required to cooperate and to assist SAIF in the investigation of his claim, including keeping SAIF advised of his current mailing address. Because claimant had not done so, the ALJ concluded that claimant had engaged in conduct that resulted in an unjustified delay of the hearing for more than 60 days and dismissed claimant's hearing request. *See* OAR 438-006-0071(1); *see also, Ronald C. Fuller*, 49 Van Natta 2067 (1997).

Our review is limited to the record developed at hearing. ORS 656.295(5). With his appellant's brief, claimant has submitted an affidavit that was not admitted into evidence. We treat this submission as a motion for remand to the ALJ for further development of the hearings record. *See Judy A. Britton*, 37 Van Natta 1262 (1985).

We may remand to the ALJ should we find that the hearings record has been "improperly, incompletely or otherwise insufficiently developed." *Id.* Remand is appropriate only upon a showing of good cause or other compelling basis. *Kienow's Food Stores v. Lyster*, 79 Or App 416 (1986). To merit remand for consideration of additional evidence, it must clearly be shown that the evidence was not obtainable with due diligence at the time of the hearing and that the evidence is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 249 (1988).

Here, even assuming that the affidavit was unavailable at the time of the hearing, we conclude, for the following reasons, that consideration of the affidavit would not change the result of this case.

¹ OAR 438-006-0071(1) provides: "A request for hearing may be dismissed if an Administrative Law Judge finds that the party that requested the hearing has abandoned the request for hearing or has engaged in conduct that has resulted in an unjustified delay in the hearing of more than 60 days."

In the affidavit, claimant asserts that, following his incarceration, his former attorney was aware of his new address and that he presumed that SAIF was also aware of it. Claimant further states that he was unaware of the April 24, 2002 and June 5, 2002 medical examinations until following the issuance of the ALJ's dismissal order.

In his affidavit, claimant does not assert that he advised SAIF or the Hearings Division of his new address following his release from incarceration. Thus, even assuming that claimant did not receive notice of the medical examinations, this was directly caused by claimant's failure to advise SAIF of his new address.² Under such circumstances, we conclude that claimant's affidavit is unlikely to affect the outcome of this case. *Compton*, 301 Or at 646. Accordingly, we deny claimant's motion for remand.

Moreover, for the reasons expressed by the ALJ, we agree that claimant has engaged in conduct that has resulted in an unjustified delay in the hearing of more than 60 days. Accordingly, we affirm the ALJ's dismissal order.

ORDER

The ALJ's order dated August 27, 2002 is affirmed.

Entered at Salem, Oregon on March 21, 2003

² To the extent that claimant contends that his former attorney is at fault because he did not advise SAIF of his new address, that is a matter between claimant and his former attorney and is not a matter within this forum's authority.