
In the Matter of the Compensation of
ROBERT R. OTIS, Claimant
WCB Case No. 01-07099
ORDER ON REVIEW
Kryger et al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Bock. Member Biehl chose not to sign the order.

The insurer requests review of Administrative Law Judge (ALJ) Poland's order that: (1) found that claimant had established "good cause" for his untimely filed hearing request from the insurer's denial of his injury/occupational disease claim for a left shoulder condition; and (2) set aside its denial. On review, the issues are good cause and compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We do not adopt the ALJ's "Ultimate Findings of Fact" as they pertain to the "good cause" issue.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant had established good cause for his failure to timely request a hearing within 60 days of the insurer's denial. Specifically, the ALJ concluded that claimant had used due diligence and acted reasonably in relying on Fred Meyer to fax his hearing request to the Board by the 60th day (August 28, 2001).¹

On review, the insurer contends that claimant failed to establish "good cause" for his failure to timely request a hearing from its denial. For the following reason, we agree.

¹ The ALJ concluded that, based on demeanor, claimant's testimony that he had arranged to file a request for hearing by fax before the August 28, 2001 deadline was credible. Although we generally defer to an ALJ's demeanor-based credibility finding, we need not disturb the ALJ's credibility finding in this case because, even if claimant's testimony was credible, he is unable to show "good cause" for filing an untimely hearing request. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (the Board generally defers to an ALJ's demeanor-based credibility finding).

Pursuant to ORS 656.319, a request for hearing from a denial must be filed² with the Board not later than: (1) the 60th day after the mailing of the denial to the claimant; or (2) the 180th day after the mailing of the denial to the claimant if the claimant establishes that there was good cause for not filing the request by the 60th day. “Good cause” under ORS 656.319 means “mistake, inadvertence, surprise or excusable neglect.” *Hempel v. SAIF*, 100 Or App 68, 70 (1990). Claimant has the burden of proving good cause. *Cogswell v. SAIF*, 74 Or App 234, 237 (1985). Lack of diligence does not constitute good cause. *Id.*

Claimant testified that he gave his hearing request to a Fred Meyer clerk (Scappoose location) to be faxed, and that the fax was sent to the Board (Salem office) on August 27, 2001. In support of this contention, claimant submitted an undated Fred Meyer fax transmittal page on which he had handwritten a date of “August 27, 2001.” (Ex. 22A).³ However, no computer-generated “fax sent date” was on the page and no other corroborating evidence, such as a Fred Meyer receipt, was submitted by claimant.⁴ Claimant did not contact the Board to see if the fax transmission had been successfully received until weeks later.

On September 11, 2001, the Board (Salem office) eventually received a facsimile transmittal from claimant wherein he requested a hearing to dispute the denial of his claim. (Ex. 24). In this fax, claimant mentioned that he had previously sent a fax to the Board “on the 24th or 25th of August,” but that he had recently contacted the Board and had learned that there was no record of the Board receiving such a request. *Id.*

Because the September 11, 2001 request for hearing was filed more than 60 days, but fewer than 180 days, following the insurer’s denial, the merits of his claim can be considered only if claimant establishes “good cause” for his failure to timely file a request for hearing. *See Cogswell*, 74 Or App at 237. Based on

² “Filing” includes the submission of a request for hearing to any permanently staffed office of the Board by means of a telephone facsimile communication device (fax) provided that: (1) the document transmitted indicates at the top that it has been delivered by fax; (2) the Board’s facsimile transmission number is used; and (3) the Board receives the completed fax-transmitted document by 11:59 p.m. of a non-holiday weekday. *See OAR 438-005-0046(1)*.

³ Claimant testified that he wrote the date on the fax transmittal page. (Tr. 33, 52-53).

⁴ As discussed below, a later facsimile transmission from claimant listed the date of his “attempted fax” at several dates *prior to* August 27, 2001. (*See Ex. 24*).

the following reasoning, we are not persuaded that the “good cause” requirement has been satisfied.

Here, it is uncontested that claimant knew that he was required to file a hearing request with the Board within 60 days from the denial. Likewise, there is no contention that claimant was confused regarding his responsibilities in this regard. Furthermore, the record lacks any documentation or corroborating evidence to support claimant’s assertion that the fax was actually sent to the Board by Fred Meyer prior to August 28, 2001. No computer-dated transmittal page, no receipt, and no copy of the “faxed” hearing request were provided.⁵

Finally, claimant did not attempt to contact the Board to confirm its receipt of the faxed hearing request by the expiration of the 60th day. The fact that he checked with the Board a few weeks later and eventually succeeded in sending a hearing request does not support his claim that he had “good cause” for the untimely filing of his hearing request. To the contrary, had claimant chosen to contact the Board at the time he alleges that he initially faxed the request, he would have been alerted to the filing omission and could have taken steps to remedy the situation.

Thus, we are persuaded that claimant could have filed a timely hearing request had he exercised reasonable diligence in ensuring that his request was received by the Board before August 28, 2001. *See, e.g., Gerardo T. Ramirez*, 54 Van Natta 2252 (2002) (a claimant who failed to notify the insurer of his new address did not have good cause for an untimely filed hearing request because there was no evidence that the claimant had exercised reasonable diligence in advising the insurer of his address change). Under these circumstances, we find that the untimely filing of claimant’s hearing request was attributable to a lack of diligence. Consequently, we do not find “good cause” for his late hearing request. Accordingly, the ALJ’s order is reversed, the insurer’s denial is reinstated, and claimant’s hearing request is dismissed.

⁵ We note that claimant did produce documentation, such as a receipt and computer-dated transmittal page, in support of his faxes sent to the Board in September 2001. (Exs. 24A; 25). This evidence shows that dated documentation is available from Fred Meyer after a fax has been successfully completed.

ORDER

The ALJ's order dated March 22, 2003 is reversed. The insurer's denial is reinstated. The ALJ's attorney fee award is reversed. Claimant's request for hearing is dismissed.

Entered at Salem, Oregon on October 6, 2003