

In the Matter of the Compensation of
ALBERT A. AHLBERG, Claimant
WCB Case No. 02-08306, 02-03551
ORDER ON REVIEW

Swanson Thomas & Coon, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Bock, and Biehl. Member Biehl
dissents.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) concluded that claimant's occupational disease claim for a bilateral hearing loss condition was not barred; and (2) set aside its denial. On review, the issues are claim preclusion and compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," except for the "Ultimate Findings of Fact," with the following supplementation and brief summary.

On December 13, 1984, claimant filed a hearing loss claim with SAIF. SAIF denied the claim on February 5, 1985, stating:

"Based on a thorough review of all information in your file, we must inform you that we are unable to accept your claim for hearing loss. The audiogram we have available and the test results we have available indicate your hearing loss is not in the compensable range. Therefore, as you have no compensable hearing loss, we must deny your claim for hearing loss." (Ex. 1Da).

Claimant did not request a hearing regarding this denial and it became final.

In January 2002, claimant filed another claim with SAIF's insured for bilateral hearing loss, claiming deafness due to 42 years of working around loud machinery. (Ex. 3). On March 14, 2002, SAIF denied the claim. (Ex. 5).

Claimant requested a hearing, arguing that the March 14, 2002 denial should be set aside. SAIF responded that the current claim was barred by claim preclusion, based on the unappealed 1985 denial of bilateral hearing loss.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the denial. First, the ALJ concluded that claimant's occupational disease claim for bilateral hearing loss was not barred by claim preclusion. Second, the ALJ concluded that claimant's bilateral hearing loss was compensable. In so doing, the ALJ found the opinion of Dr. Lipman, claimant's attending physician, to be the most persuasive because it was the most complete and well reasoned.

On review, SAIF argues that the unappealed 1985 denial of claimant's hearing loss precludes relitigation of industrial hearing loss from before the date of that denial. SAIF asserts that because claimant filed a claim for the same condition in 1984, and the denial of that condition became final, the denied condition is a noncompensable preexisting condition for purposes of a later claim for the same condition. Contending that claimant's work activities *after* 1985 were not the major contributing cause of his combined condition and of a pathological worsening of the preexisting hearing loss, SAIF argues that claimant's hearing loss claim is not compensable. We agree with SAIF's contentions.

Claim preclusion bars future litigation of "every claim that could have been alleged under the same aggregate of operative facts" as the previously denied claim. *Million v. SAIF*, 45 Or App 1097, *rev den* 289 Or 337 (1980). An uncontested denial bars future litigation of the denied condition unless the condition has changed and the claimant presents new evidence to support the claim that could not have been presented earlier. *Popoff v. J. J. Newberrys*, 117 Or App 242 (1992); *Liberty Northwest Ins. Corp. v. Bird*, 99 Or App 560, 563-64 (1989), *rev den* 309 Or 645 (1990). A worsening of the denied condition is considered a "changed" condition. *Kepford v. Weyerhaeuser*, 77 Or App 363, 365, *rev den* 300 Or 722 (1986).

Thus, claimant is barred from seeking recovery for his hearing loss that was the subject of the unappealed 1985 denial, unless that condition worsened following that denial. In other words, claimant's current bilateral hearing loss claim is properly characterized as a claim for a worsening of a preexisting noncompensable condition. *See Mary L. Miller*, 46 Van Natta 369, 370 (1994) (because the claimant did not appeal a denial of a right carpal tunnel syndrome (CTS) claim, her CTS condition was not compensable as of the date of the denial and her current CTS claim was properly characterized as a claim for a worsening of a preexisting noncompensable condition).

Claimant argues that the 1985 denial only pertained to no “cognizable” hearing loss. Nevertheless, the letter unequivocally *denied* the hearing loss claim.¹ Therefore, because the denial was not timely appealed, the denial established that, as of the date of the denial, claimant did not have a compensable hearing loss claim.

Accordingly, any “pre-1985 denial” employment exposure to claimant’s hearing loss that was considered in the medical opinions cannot be included for purposes of establishing the compensability of claimant’s current occupational disease claim for his hearing loss condition. In other words, the effect of the 1985 denial was not to bar a new claim for hearing loss, but rather to bar a claim that includes the hearing loss that was earlier denied; *i.e.*, the hearing loss in existence at the time of the 1985 denial is a noncompensable preexisting condition. *See Linda D. Lang*, 53 Van Natta 956 (2001) (where an unappealed denial of a right wrist condition asserted “no diagnosable condition,” the “pre-denial” condition constituted a preexisting, noncompensable condition and, as such, the claimant was required to prove that “post-denial” work activities were the major contributing cause of a pathological worsening of the preexisting condition); *Howard W. Lankin*, 35 Van Natta 849 (1983), *aff’d mem* 69 Or App 53, *rev den* 298 Or 470 (1984) (uncontested denial of heart condition not a bar to future litigation of job-related worsening of that condition).

Where, as here, claimant is trying to prove an occupational disease claim with a preexisting condition, he must prove by a preponderance of the evidence that his work activities were the major contributing cause of the combined condition *and* pathological worsening of the disease since the 1985 denial. *See* ORS 656.802(2); *Richard F. Weaver*, 55 Van Natta 79 (2003).

Turning to the medical record, Dr. Lipman and Dr. Hodgson (who examined claimant on behalf of SAIF) both reported increased levels of hearing loss in

¹ The dissent cites *Larry R. Burnside*, 47 Van Natta 2040 (1995), contending that SAIF is bound by the express language of its denial. We believe that *Burnside* is distinguishable. In that case, the sole basis for the insurer’s denial of the claimant’s psychological condition was the absence of objective evidence of a “diagnosable” condition. Finding that causation was neither contested in the denial nor raised at the hearing, we concluded that the carrier could not contest whether the claimed psychological condition was caused by the compensable injury. Here, in contrast, the issue is the effect of an *unappealed* denial of a hearing loss claim on a subsequent hearing loss claim where the prior claim was denied based on “no compensable hearing loss.” In other words, the compensability of the prior hearing loss claim was unequivocally denied, conclusively establishing that there was no compensable hearing loss as of the date of the unappealed denial.

claimant's ears when they examined him in 2002. However, neither Dr. Hodgson nor Dr. Lipman indicated in their reports that claimant's "post-1985" employment exposure was the major contributing cause of his hearing loss condition or that claimant's "pre-1985" hearing loss condition had pathologically worsened. (Exs. 4; 6). Absent such evidence, we conclude that claimant's bilateral hearing loss condition is not compensable.

In conclusion, because the medical evidence supporting compensability includes claimant's "pre-denial" work exposure in supporting a causal relationship between his hearing loss and his work exposure, the statutory requirement for compensability cannot be established. Accordingly, SAIF's March 14, 2002 denial is upheld.

ORDER

The ALJ's order dated March 3, 2003 is reversed. The SAIF Corporation's denial is reinstated and upheld. The ALJ's attorney fee award is also reversed.

Entered at Salem, Oregon on January 23, 2004

Board Member Biehl dissenting.

The majority concluded that claimant's bilateral hearing loss condition is not compensable. Because I conclude that the majority errs in finding that the hearing loss in existence at the time of the 1985 denial should be treated as a noncompensable preexisting condition, I respectfully dissent.

SAIF asserts that when it denied claimant's claim in 1985 because claimant's hearing loss was "not in the compensable range," this was analogous to a denial stating that the major contributing cause of claimant's condition was not his industrial exposure. However, SAIF is bound by the express language of its denial. *See Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351-52 (1993).

SAIF denied the 1985 claim for the express reason that the degree of hearing loss did not rise to the compensable level. Despite SAIF's current assertion, there is no language in the 1985 denial regarding causation as it related to claimant's work activities. *See Larry R. Burnside*, 47 Van Natta 2040 (1995) (where the basis for the insurer's denial was limited to an allegation that the claimant's claim for depression was not compensable because of no objective evidence of a "diagnosable" psychological condition, the Board determined that, because the insurer is bound by the express language of its denial (citing *Tattoo v. Barrett*

Business Service, 118 Or App 348 (1993)), it could not litigate causation since no issue of causation was expressly raised by its denial).

As such, claimant's hearing loss prior to the 1985 denial is not a "preexisting noncompensable condition." Because claimant's hearing loss is now severe enough to meet compensability standards and this increased degree of hearing loss is a fact that could not have been litigated earlier, claimant is not barred from litigating compensability of his hearing loss for the periods before 1985.

In sum, I agree with the ALJ that claimant's occupational disease claim for bilateral hearing loss is not precluded by the 1985 denial. Furthermore, I conclude that claimant's hearing loss in existence at the time of the 1985 denial should not be treated as a preexisting condition for purposes of the present litigation. In light of this, I agree with the ALJ's analysis of the medical evidence and ultimate conclusion that the claim is compensable on the merits. Accordingly, I would affirm the ALJ's order. Because the majority concludes otherwise, I respectfully dissent.