
In the Matter of the Compensation of
ROGER A. FRANK, Claimant
WCB Case No. 05-06186
ORDER ON REVIEW
Kryger et al, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Kasubhai and Langer.

The self-insured employer requests review of Administrative Law Judge (ALJ) Brazeau's order that: (1) found that claimant's occupational disease claim for bilateral hearing loss was not precluded by a prior denial; and (2) set aside the employer's denial of that claim. On review, the issue is claim preclusion and, potentially, compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following supplementation.

On August 21, 2001, the employer denied claimant's claim for bilateral hearing loss. (Ex. 6). The denial became final.

On June 23, 2005, claimant filed another claim for bilateral hearing loss. (Ex. 17). The employer denied the claim and claimant requested a hearing. (*See* Ex. 24).

CONCLUSIONS OF LAW AND OPINION

Claimant retired on November 1, 2005, after working for the employer for 41 years. He was often exposed to loud noise at work and bilateral hearing loss was diagnosed in 1972.

In 2001, claimant filed a claim for bilateral hearing loss, which the employer denied. The denial became final.

On June 23, 2005, claimant filed another claim for bilateral hearing loss. The employer denied the claim and claimant requested a hearing from the denial.

The ALJ stated that claimant's unappealed 2001 denial did not preclude him from having his entire employment exposure considered to determine the

compensability of his hearing loss. (Opinion and Order, p. 4).¹ Further finding that the persuasive medical evidence proved claimant's occupational disease claim under ORS 656.802, the ALJ set aside the employer's denial.

On review, the employer argues that claimant's claim is barred by the unappealed 2001 denial. We agree, based on the following reasoning.

In *Ahlberg v. SAIF*, 199 Or App 271 (2005), the court held that the claimant could rely on any and all working conditions to prove his occupational disease claim for worsened hearing loss, even though he had not challenged a prior denial of a claim for hearing loss. *Id.* at 276-77. However, before reaching the compensability issue, the court explained:

“Claimant's first claim for hearing loss became final when he chose not to request a hearing after employer denied it. *See Drews v. EBI Companies*, 310 Ore. 134, 795 P.2d 531 (1990). Under the general rules of claim preclusion, claimant would be precluded from relitigating the compensability of his hearing loss in a subsequent claim. There are exceptions, however. If claimant's condition has changed and the claim is supported by new facts that could not have been presented earlier, then claim preclusion is not a bar. *Id.* at 142 (citing *Kepford v. Weyerhaeuser Co.*, 77 Ore. App. 363, 713 P.2d 625, *rev den*, 300 Ore. 722, 717 P.2d 630 (1986)) (claim preclusion rules against splitting a claim do not apply where basis for later claim did not yet exist at time of earlier decision); *Liberty Northwest Ins. Corp. v. Bird*, 99 Ore. App. 560, 564, 783 P.2d 33 (1989), *rev den*, 309 Ore. 645, 789 P.2d 1387 (1990); *Liberty Northwest Ins. Corp. v. Rector*, 151 Ore. App. 693, 950 P.2d 387 (1997). The worsening of a denied condition is a change in the condition that will support the relitigation of a previously denied claim. *Kepford*, 77 Ore. App. at 367.” *Ahlberg*, 199 Or App at 274-75.

¹ The ALJ stated, “Because claimant's condition was denied in 2001 and the denial was not appealed, it is also necessary to look at the effect, if any, of the unappealed denial.” The ALJ did not further address this issue, except to say that the denial was not preclusive.

In *Ahlberg*, because the claimant's hearing loss had worsened after the prior denial, he was not barred from proving his later claim. *Id.* In other words, under *Ahlberg* and the rule of claim preclusion, a final denial of a hearing loss condition prevents a claimant from relitigating the compensability of the condition, unless the "condition has changed and the claim is supported by new facts that could not have been presented earlier." *Id.* at 275. Thus, the threshold question, for claim preclusion purposes, is whether claimant's condition changed after the prior final denial.

We emphasize that the common law rule of claim preclusion does not impose a causation standard of proof, such as the "major contributing cause" standard imposed by ORS 656.802(2). Instead, where there is a prior final denial, the rule imposes a threshold requirement *before* litigation regarding compensability. That is, the worker must establish that the condition (subject to the prior denial) has changed and the current claim is supported by new facts that could not have been presented earlier. If that requirement is satisfied, the relevant statutory burdens apply.

Here, in 2005, Dr. Hodgson reported claimant's history of feeling "that his hearing loss symptoms had increased mildly" since his February 12, 2001 examination. (Ex. 21-2; *see* Ex. 3).² However, considering claimant's test results, Dr. Hodgson opined: "There has been very little change between now [2005] and 2001, although the left ear has progressed a small amount at a few frequencies. This change can be within test/re-test variability however." (Ex. 21-7). Thus, in our view, although claimant's test results could have indicated worsened left ear hearing, Dr. Hodgson attributed them to "test/re-test variability" rather than a changed condition. While there is evidence of work-related noise exposure after the April 2001 denial, the record does not support a conclusion that claimant's hearing loss *condition* changed after the April 2001 denial.

Accordingly, because the record does not establish that claimant's hearing loss condition changed after the prior final denial, the claim for hearing loss is precluded. *See Ahlberg*, 199 Or App at 275; *Justin T. Follett*, 52 Van Natta 1566, 1568 (2000) (claim precluded where the claimant sought medical treatment for the same condition that had been previously and finally denied). Consequently, we reverse the ALJ's order and reinstate the employer's denial.

² Although claimant's perception could support a conclusion that his condition changed since the April 2001 denial, we find it insufficient support for such a conclusion in this medically complex case. (*See e.g.*, Ex. 21-7)

ORDER

The ALJ's order dated January 13, 2006 is reversed. The self-insured employer's denial is reinstated and upheld. The ALJ's \$4,500 assessed attorney fee award is reversed.

Entered at Salem, Oregon on June 9, 2006