In the Matter of the Compensation of
EMMA R. TRANER, Claimant
WCB Case No. 11-04729
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
David Runner, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman. Member Lowell concurs in part and dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) upheld the SAIF Corporation's "denial" of her new/omitted medical condition claim for right shoulder chronic arthralgia; and (2) did not award penalties or attorney fees for allegedly unreasonable claim processing. On review, the issues are claim processing, compensability, penalties, and attorney fees. We affirm in part, modify in part, and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Interpreting SAIF's April 12, 2011 response to claimant's new/omitted medical condition claim as a "denial," the ALJ concluded that the denial should be upheld because the claimed "condition" was a symptom of a previously accepted condition(s). (Ex. 61). In reaching this conclusion, the ALJ did not address the reasonableness of SAIF's claim processing.

On review, claimant contends that SAIF's response to her claim constituted a *de facto* denial, and seeks penalties and fees for alleged unreasonable claim processing. Claimant further argues that Dr. Yoshinaga's diagnosis of "arthralgia" establishes the existence of a "condition," and that it should be found compensable.

Based on the following reasoning, we affirm the ALJ's decision regarding compensability, but find that SAIF "*de facto*" denied the claim and that its claim processing was unreasonable. We address the issues in turn.

Compensability

A "condition" has been defined as "the physical status of the body as a whole * * * or one of its parts." *SAIF v. Stephens*, 247 Or App 107, 113 (2011); *Young v. Hermiston Good Samaritan*, 223 Or App 99, 105 (2008). The determination of whether a specific claimed condition is a claim for a medical "condition" is a question of fact, the resolution of which depends on the medical evidence. *Id*. at 107.

Here, the only medical evidence regarding whether claimant's right shoulder arthralgia is a symptom or a condition comes from Dr. Yoshinaga. Dr. Yoshinaga stated that the term "arthralgia" means "pain," and describes a symptom and not a condition. (Ex. 68). He further noted that a condition would be supported by objective evidence, whereas a symptom (like claimant's pain) is subjective and based on what a patient describes that he or she is feeling. (Ex. 70-7).

Claimant contends that Dr. Yoshinaga's "diagnosis" of right shoulder chronic arthralgia is supported by *legal*, if not *medical*, objective findings. Specifically, claimant argues that her pain complaints satisfy the legal definition of an "objective finding" because pain is "reproducible, measurable, and observable." *See* ORS 656.005(19). Nevertheless, even if claimant's pain is considered an "objective finding" as defined by statute, Dr. Yoshinaga's uncontested opinion supports a conclusion that "arthralgia" is a symptom. (Ex. 68).

Therefore, on this record, we are unable to conclude that claimant has established that the claimed "right shoulder chronic arthralgia" is a "condition." *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record). Consequently, claimant's claim is not compensable.[1]

Claim Processing

Since the issuance of *Rose v. SAIF*, 200 Or App, 654, 662 (2005), it has been settled that if a claimant files a claim pursuant to ORS 656.267 by clearly requesting formal written acceptance of a new/omitted medical condition, the

[1] For the reasons described in the following "Claim Processing" section, in affirming the ALJ's compensability decision, we are upholding SAIF's "*de facto* denial" of claimant's new/omitted medical condition claim, rather than a "denial" of that claim, as stated by the ALJ's order.

carrier must respond by written notice of acceptance or denial within 60 days; mere letters of "clarification," or "no-perfected-claim" letters do not suffice. *See Stephens*, 247 Or App at 112; *Crawford v. SAIF*, 241 Or App 470 (2011). We pronounced this principle in *Francisco G. Rodriguez*, 59 Van Natta 2422, 2425 (2007), and have periodically repeated it since. *E.g.*, *Penny I. Cooper*, 64 Van Natta 437 (2012); *Joyce A. Dietrich*, 64 Van Natta 153 (2012); *Patsy M. Sanborn*, 63 Van Natta 2214 (2011);[2] *Juli R. Steward*, 61 Van Natta 291 (2009); *see also Michael L. Long*, 63 Van Natta 2300 (2011). Furthermore, the failure of a carrier to respond to a new/omitted condition claim by either accepting or denying it within 60 days is a procedural deficiency that gives rise to a *de facto* denied claim. *Stephens*, 247 Or App at 112; *see also Crawford*, 241 Or App at 481; *Casey H. Erickson*, 62 Van Natta 2772, 2775 (2010).

In *Sanborn*, the claimant made a written request for "pedal edema" associated with her compensable right patella fracture. The carrier responded that the claimant's request did not qualify as a claim under ORS 656.267 because she sought acceptance of a body part, procedure, and/or symptom, which was not a new or omitted medical condition. 63 Van Natta at 2215.

On review, we determined that the claimant's written request constituted a perfected claim for a new medical condition, requiring timely acceptance or denial. *Id*. Because the carrier had not accepted or denied the claim within the statutory period, the claim was *de facto* denied. We explained that, whether the claimant's request described a condition, as opposed to merely a symptom, was a question to be resolved when determining compensability of the claim. *Id*. at 2216.

Here, claimant complied with the statutory requirements by initiating her new/omitted medical condition claim for "right shoulder chronic arthralgia" on March 9, 2011, thus triggering SAIF's claim processing obligations under ORS 656.262(7)(a). SAIF did not accept or deny claimant's claim within the statutorily required 60-day period. Instead, it issued a letter stating that the "condition" was a "symptom," and advising claimant that if she wished to "clarify [her] request" she could do so in writing, at which time her request would be processed. The letter also included "Notice of Hearing Rights" paragraphs in bold capital letters. (Ex. 61).

[2] In its respondent's brief, SAIF requests that we disavow *Sanborn*. Because we adhere to the reasoning expressed in *Sanborn*, we decline SAIF's request.

As in *Sanborn*, SAIF neither cites, nor are we aware of, any statutory or regulatory authority for its "clarification letter" in response to claimant's new/omitted medical condition claim.[3] To the contrary, the law is clear and unambiguous; any response, other than an acceptance or denial, is not legally valid. Moreover, SAIF's response was not a denial. It did not state that it was a denial and did not comply with the requirements of ORS 656.262(9) and OAR 438-005-0055. Because it is not a denial, it has no legal significance.[4]

Under such circumstances, because claimant's new/omitted medical condition claim for right shoulder chronic arthralgia was not accepted or denied within 60 days, the claim was *de facto* denied. Thus, we disagree with the ALJ's characterization of SAIF's "letter" as a "denial."

Penalties/Attorney Fees

Regardless of the compensability of the disputed claim, if SAIF's claim processing is determined to be unreasonable, claimant is potentially entitled to penalties and a penalty-related attorney fee pursuant to ORS 656.262(11)(a).[5] Relying on the court's reasoning in *Stephens* "that given the confused state of the law concerning an insurer's obligation to respond to a new or omitted medical condition claim," the carrier's "failure to respond by accepting or denying the new or omitted medical condition claim was not unreasonable," SAIF contends that its conduct was not unreasonable. *See* 247 Or App at 114. For the following reasons, we disagree.

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[3] SAIF's letter strongly resembles the "no perfected claim" letter rejected in *Rodriguez*, with one accoutrement. Specifically, the letter included a paragraph (in bold print) advising claimant of her rights to request a hearing. In that respect, the letter was similar to a "denial," but did not use such terminology. Likely because of the letter's structure, claimant, as well as the ALJ, described the letter as a "denial." Indeed, in some portions of its written closing argument, SAIF's counsel also referred to the letter as a "denial."

[4] We are not stating that a carrier cannot seek clarification of a claimant's new/omitted medical condition claim. However, when a carrier chooses to do so by means of a written clarification letter, it should not do so in a form that appears to be a denial (particularly with "notice of hearing" rights in bold print). Moreover, if the carrier chooses to issue a clarification letter, that action does not supplant its obligations to timely issue an acceptance or denial of the claim.

[5] ORS 656.262(11)(a) provides for a penalty if a carrier unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim. The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991).

As we stated in *Joyce A. Dietrich*, 64 Van Natta 153 (2012), because the *Stephens* court cited to *Crawford*, it was apparently relying on its own case law precedent in determining whether the carrier's claim processing was reasonable. However, since 2007, we have held that a "no perfected claim" or "clarification" letter is not a statutorily authorized response to a new/omitted medical condition claim. *Rodriguez*, 59 Van Natta at 2425.

In *Rodriguez*, we determined that the claimant's written request for acceptance of "chronic chest wall pain" constituted a "perfected" claim for a new medical condition, and thus required timely acceptance or denial, as opposed to a "no perfected claim" letter. Relying on our decision in *Denise L. Rose*, 58 Van Natta 1602, 1606 (2006) (on remand), we concluded that because the carrier had not accepted or denied the claim within the statutory period, the claim was *de facto* denied.[6] *Id.*; *see also Dietrich*, 64 Van Natta at 154.

Moreover, we have assessed penalties for a carrier's unreasonable claim processing in similar circumstances. *See Sanborn*, 63 Van Natta at 2216 (because the carrier did not accept or deny the claim within the statutorily required 60-day period, its claim processing was unreasonable); *Nicholas Otzoy-Mejia*, 61 Van Natta 2555, 2556 (2009) (regardless of whether the carrier had legitimate doubt for its liability for a new/omitted medical condition claim, it was required to accept or deny the claim within 60 days of its receipt); *Peter D. Bass*, 60 Van Natta 2936, 2939 (2008) (when the carrier did not offer an explanation for its failure to accept or deny a new/omitted medical condition claim, its conduct was unreasonable).

Here, based on the aforementioned case law precedent, we find that, regardless of whether SAIF had a legitimate reason to doubt its liability for the claimed condition, it was required to accept or deny the condition within 60 days of receipt of the claim.

Furthermore, claimant's March 9, 2011 letter was not merely seeking clarification of the Notice of Acceptance. Rather, she specifically asked SAIF to accept a "right shoulder chronic arthralgia" condition as part of her claim. (Ex. 52). SAIF responded on April 12, 2011, by saying that it was unable to process her request because it could not accept a "body part, procedure, and/or symptom." (Ex. 61). SAIF's April 12, 2011 letter was essentially a "no perfected claim" letter, which we have previously determined is not a statutorily authorized

[6] We note that SAIF was the carrier in both *Rose* and *Rodriguez*.

response to a new/omitted medical condition claim. SAIF's issuance of a letter containing "hearing rights," without any legal support for such a document, and in direct contravention of case law requiring the carrier to either accept or deny such a claim, constitutes an unreasonable lapse in its claim processing responsibilities.[7]

Based on the aforementioned reasoning, we find SAIF's claim processing to have been unreasonable. *See* ORS 656.262(11)(a); *Sanborn*, 63 Van Natta at 2216; *Otzoy-Mejia*, 61 Van Natta at 2556-57. However, because SAIF's *de facto* denial is upheld, there are no "amounts then due" on which to base a penalty for that claim. Nevertheless, an attorney fee under ORS 656.262(11)(a) is not contingent on the assessment of a penalty, and such a fee may be awarded in the absence of "amounts then due." *Juanita Murillo*, 62 Van Natta 1779, 1785 (2010); *Nancy Ochs*, 59 Van Natta 1785, 1793 (2007).[8]

An attorney fee under ORS 656.262(11)(a) shall be awarded in a reasonable amount that is proportionate to the benefit to claimant and that takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case. OAR 438-015-0110(1) and (2).

After considering the factors set forth in OAR 438-015-0110 and OAR 438-015-0010(4), we find that a reasonable attorney fee under ORS 656.262(11)(a) for SAIF's unreasonable delay in denying claimant's claim is $1,500, payable by SAIF. In reaching this conclusion, we have given primary consideration to the benefit to claimant, the results achieved and the time devoted to the case (as represented by the record).[9]

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[7] As noted above, while there is no legal prohibition against a carrier seeking clarification of a new/omitted medical condition claim in the form of a letter, if such a letter is issued, the carrier *must* also accept or deny the claim within the statutorily prescribed 60-day period. It is the inclusion of appeal rights with such a letter that is problematic, not the sending of the letter in and of itself.

[8] We decline SAIF's invitation to disavow *Ochs*.

[9] In reaching this conclusion, we emphasize that SAIF's actions deprived claimant of her legal right to know, within 60 days of her claim, whether her claim was either accepted or denied. The fact that her counsel promptly requested a hearing that eventually led to a clarification that SAIF was denying the claim does not dilute the significance of SAIF's infringement of claimant's statutory rights. Likewise, her counsel's efforts in seeking a hearing (as well as ongoing efforts, including the submission of written closing arguments) and ultimately soliciting an express position from SAIF regarding her new/omitted medical condition claim were of significant benefit to claimant. Under these particular circumstances, despite the absence of amounts "then due" upon which to base a penalty, we find the aforementioned attorney fee award to be justified.

ORDER

The ALJ's order dated November 2, 2011 is affirmed in part, modified in part, and reversed in part. In lieu of the ALJ's "upholding" of SAIF's "denial," SAIF's *de facto* denial of the new/omitted medical condition claim is upheld. Claimant's counsel is awarded an assessed attorney fee of $1,500, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 29, 2012

Member Lowell concurring in part and dissenting in part.

I agree with the majority's decision to uphold SAIF's *de facto* denial of claimant's new/omitted medical condition for right shoulder chronic arthralgia. However, under the particular facts of this case, I part company with the majority's assessment of a penalty-related attorney fee under ORS 656.262(11). *See Nancy Ochs*, 59 Van Natta 1785 (2007) (Member Lowell concurring).

The majority first observes that the ALJ did not address the reasonableness of SAIF's claims processing. This is not surprising, because claimant did not argue that issue at the hearings level. The parties elected to hold this hearing "on the record," without convening a live hearing. In claimant's opening argument, she said that penalties under ORS 656.262(11)(a) were raised in the request for hearing. However, she also said "I would like to preserve the alternative argument of an attorney fee award under this section should you find that SAIF's April 12, 2011 denial is only an 'encompassed condition' denial. Obviously whether this is appropriate will depend upon SAIF's closing argument."

After SAIF responded with its closing argument, claimant submitted her reply, which argued the merits of the case, but did not mention penalties or attorney fees under ORS 656.262(11). In light of the "contingent" nature of claimant's request for penalties and attorney fees under ORS 656.262(11), and her failure to assert or argue for them in final argument, the ALJ may have concluded that claimant abandoned her request for penalties and attorney fees. That would be a reasonable conclusion under the circumstances.

Nonetheless, SAIF does not object to claimant raising the issue of an attorney fee under ORS 656.262(11) on review. Therefore, I agree that the issue is properly before us.

Under that statute, an attorney fee may be awarded if an insurer "unreasonably delays acceptance or denial of the claim." Nowhere in claimant's arguments on review does she assert that there was an "unreasonable delay." In fact, claimant was clearly aware that SAIF was not going to accept the "arthralgia" claim, and timely requested a hearing on the matter. The time span between claimant's request for acceptance and the request for hearing was 63 days. While I agree with the majority that SAIF's response letter was legally deficient, it did not in this case cause an "unreasonable delay" in the processing or litigation. Claimant does not argue that it did.

Furthermore, claimant provides no evidence, representation, assertion or argument that there was any "benefit" to her to which an attorney fee would be "proportionate." The majority describes the claimant attorney's efforts as a "significant benefit" to claimant, apparently for obtaining SAIF's express position on the "arthralgia" claim.[10] Claimant does not make that argument, however, and I am unable to speculate as to any "benefit" (tangible or otherwise) to her under the particular facts of this case. Therefore, I dissent in part.

[10] Claimant's attorney did provide a significant benefit to claimant in requesting and obtaining acceptance of "right shoulder traumatic arthropathy" and "right AC joint post-trauma osteoarthrtitis," among other conditions, in prior proceedings.