In the Matter of the Compensation of
STEPHEN H. MOORE, Claimant
WCB Case No. 13-00192
ORDER ON RECONSIDERATION
Dale C Johnson, Claimant Attorneys
Thom R Nash, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Lanning.

On May 7, 2014, we vacated an Administrative Law Judge's (ALJ's) order that dismissed claimant's hearing request regarding the SAIF Corporation's alleged *de facto* denial of his medical services claim for psychiatric treatments. In doing so, we found that the disputed medical bills were causally related to claimant's accepted post-traumatic stress disorder (PTSD) and that claimant's counsel was entitled to a $5,000 "contingent" attorney fee award for services rendered at the hearing level and on Board review regarding the medical services issue. Contending that our order neglected to address a penalty and related attorney fee issue regarding SAIF's processing of this claim and asserting that our attorney fee award regarding the medical services issue was insufficient, claimant seeks reconsideration of our decision. In response, while preserving the "causation" issue, SAIF argues that we are not authorized to award a "contingent" attorney fee award under ORS 656.386(1). Based on the following reasoning, we adhere to our previous decision.

Before addressing the parties' arguments, we provide the following background information. In filing his request for hearing, claimant sought penalties and attorney fees. In addition, he raised penalties and attorney fees for unreasonable claim processing as issues at the hearing. (1 Tr. 1).[1] Nonetheless, on review, claimant confined his argument to the ALJ's dismissal of his hearing request. In doing so, he asserted that the medical services dispute constituted a "matter concerning a claim" under ORS 656.704(3)(b)(C) because SAIF had disallowed his medical bills based on the proposition that the medical services were not related to his compensable condition. Furthermore, noting that SAIF had arranged for an insurer-arranged medical examination (but had not advised the examining physician of claimant's accepted PTSD condition) and asserting that his attending physician had renewed psychiatric treatments for his accepted condition

[1] The record includes transcripts from April 11, 2013 and October 18, 2013. We refer to the April 11, 2013 and October 18, 2013 transcripts as "1 Tr." and "2 Tr.," respectively.

(for which he had previously received a permanent disability award), claimant argued that SAIF's response to his medical bills amounted to a *de facto* denial on the basis that the medical services were unrelated to his accepted condition. Consequently, claimant requested that the ALJ's order should be "reversed" and the matter "reset for hearing on the merits."

After considering claimant's arguments and SAIF's response, we held that the ALJ was authorized to address the causation issue between claimant's medical services claim and his accepted condition. *See* ORS 656.704(3)(b)(B); *AIG Claim Servs., Inc. v. Cole*, 205 Or App 170, 173-74 (2006). Reasoning that the ALJ had made a "demeanor-based" credibility finding regarding claimant's testimony, we further determined that it was unnecessary to return the case to the Hearings Division. Consequently, we turned to "the merits" of the case; *i.e.*, the "causation" issue. Analyzing the competing medical evidence, we found the opinion expressed by claimant's attending physician to be the most persuasive.

Accordingly, based on that persuasive opinion, we determined that the disputed medical services were causally related to claimant's accepted PTSD condition. In addition, we awarded a "contingent" insurer-paid attorney fee for claimant's counsel's services at the hearing level and on review of $5,000. Noting that SAIF appeared to also be challenging the "propriety" of the medical services, but finding the record unclear whether a "propriety" dispute was pending before the Workers' Compensation Division (WCD), we stated that our award would remain "contingent" on an eventual WCD decision in claimant's favor, unless no such dispute was pending before WCD or filed with WCD within 30 days of our order.

In seeking reconsideration of our decision, claimant requests penalties and attorney fees for SAIF's allegedly unreasonable claim processing. Although he raised such an issue at the hearing level, he made no mention of the issue on review. Rather, after asserting that SAIF's position constituted a denial of his medical services claim on the basis that the services were unrelated to his accepted condition, he sought remand for a hearing "on the merits."

Under these particular circumstances, we consider the issues on review to have been confined to jurisdiction and "causation" concerning the disputed medical services claim. As such, claimant's request for penalties and related attorney fees seeks to raise an issue for the first time on reconsideration. We are not inclined to consider such a request at this late date. *Vogel v. Liberty Northwest Ins. Corp.*, 132 Or App 7, 13 (1994) (Board need not address on reconsideration issues not raised earlier on review).

In any event, even if the issue is considered, we would not find a penalty and attorney fee award to be warranted. At the hearing level, claimant contended that SAIF had no legitimate doubt that his PTSD condition continued to be a material contributing cause of his need for treatment. (2 Tr. 5). Yet, as summarized in our order, Dr. Heck, a psychiatrist who examined claimant at SAIF's request, expressed an opinion that several of the symptom criteria for PTSD had not been met. (Ex. 12-15). He opined that claimant suffered from "Adjustment Disorder with Anxiety," which was unrelated to the accepted PTSD condition. (Ex. 12-15-16). Thus, he concluded that there was no causal relationship between the accepted condition and the disputed medical services. (Ex. 12-17).

Although we have ultimately found that opinion to have been outweighed by the more thorough opinion of Dr. Henderson, claimant's attending physician, that conclusion does not mean that SAIF had no legitimate doubt for contesting the causal relationship between the medical bills and claimant's accepted PTSD condition.[2] Under such circumstances, we would not have considered SAIF's "causation" position to have been unreasonable.

The parties' remaining arguments concern our "contingent" attorney fee award. Claimant challenges the amount of our award and SAIF questions our statutory authority to grant such an award. After considering the parties' positions, we adhere to our previous determination, but we offer the following additional comments.

On reconsideration, SAIF notes that claimant had previously filed a request for WCD resolution of the disputed medical bills and that WCD has transferred that matter to the Hearings Division. (WCB Case No. 13-06239). In light of such circumstances, that portion of our "contingent" attorney fee award addressing its effect if no request for WCD review was filed within 30 days of our order has become moot. Instead, our attorney fee award remains "contingent" on claimant eventually prevailing in the pending WCD dispute.

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[2] Claimant argues that SAIF's closing argument supports his position that it lacked legitimate doubt of its liability. SAIF did acknowledge that it had accepted claimant's PTSD and that "[i]f jurisdiction does lie with the Hearings Division and there is actually an accepted condition of PTSD, then claimant has met his burden." (2 Tr. 7). Nevertheless, it also argued that the medical evidence showed that the accepted PTSD condition no longer existed and that claimant's treatment was related to a different condition. (*Id.*) Thus, SAIF disputed its liability based on the medical evidence.

Finally, SAIF challenges our statutory authority to grant this "contingent" attorney fee award and claimant contests the amount of such an award. Because our award is consistent with existing case precedent, we decline to revisit this area to consider SAIF's arguments. *See Antonio L. Martinez*, 58 Van Natta 1814, 1823-24 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or App 182 (2008). Likewise, after reviewing claimant's counsel's representations on reconsideration, we adhere to our previous determination of a reasonable attorney fee award.[3]

Accordingly, we withdraw our May 7 order. On reconsideration, as supplemented, we republish our May 7 order. The parties' statutory 30-day rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 29, 2014

[3] In doing so, we acknowledge the risk that claimant's counsel might go uncompensated regarding this procedurally complex medical services dispute. We further observe that claimant's counsel submitted the approximately 35 exhibits that were admitted into evidence. Nonetheless, the hearing consisted of a 24-page transcript, including one witness and the subsequent closing arguments (on a later date) were presented in a 10-page transcript. Moreover, claimant's appellant's argument offered a brief analysis regarding the physicians' "causation" opinions and no reply brief was filed. Finally, the value of the interest involved was approximately $4,005 in medical bills. Under these particular circumstances (and considering that claimant's counsel is not entitled to an attorney fee regarding the penalty/attorney fee issues), we continue to find a $5,000 "contingent" attorney fee award concerning the medical services claim to be reasonable.