
In the Matter of the Compensation of
SAMUEL GOODWIN II, Claimant
WCB Case No. 14-05977
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) found that claimant timely filed a hearing request from the employer's denial of his injury claim for a C5-6 disc condition; (2) set aside the employer's denial; and (3) awarded penalties and attorney fees for an allegedly unreasonable denial. On review, the issue is timeliness of claimant's hearing request and, potentially, compensability, penalties, and attorney fees. We vacate the ALJ's order and dismiss claimant's hearing request.

FINDINGS OF FACT

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

On August 1, 2014, claimant initiated a new/omitted medical condition claim for "right C6 foramen disc rupture, however termed" associated with his accepted January 24, 2013 work-related injury. (Ex. 79).

On September 30, 2014, the employer denied the claim, asserting that claimant had not attended an employer-requested medical examination and there was insufficient information that the claimed condition was compensable. (Ex. 83). The denial advised claimant that he "continued to be entitled to medical benefits that are compensable and reasonably related to [his] accepted 'neck and thoracic sprains.'" (*Id.*) It also included the statement of hearing rights required for a denial under OAR 438-005-0055(1).¹ (*Id.*)

On November 17, 2014, claimant sent a letter to the Workers' Compensation Division (WCD). (Ex. 92A). The letter described his work injury and cervical surgery, and a letter written by Dr. Ferguson (his attending physician) at the

¹ The record does not show when claimant received the denial letter.

request of the employer's counsel. (Ex. 92A-2, -3). Claimant asked for an investigation of the employer's processing agent and Dr. Ferguson for "corruption" regarding the claim. (Ex. 92A-3). Claimant also denied that he had "abandoned" his medical rights, and he reported having constant pain in his neck and numbness in his hands and fingers. (*Id.*) He asked for "help * * * with resolving these issues[.]" (*Id.*) He enclosed copies of work releases, medical appointments, physical therapy exercises, and a consent form for mental health treatment. (Ex. 92A).

The WCD received claimant's letter and documents on November 20, 2014 and routed them to its Ombudsman's office on November 26, 2014. (Tr. 35, 36).

On December 1, 2014, Ms. Benavidez, a senior assistant ombudsman, called claimant about his letter. (Tr. 37, 39). Claimant confirmed that the intent of his letter was to appeal the employer's denial, whereupon Ms. Benavidez explained the appeal process and advised him to write to the Board, within 60 days (or 180 days if he could show "good cause"), specifically appealing the denial.² (Tr. 37, 40, 51).

The 60-day appeal period for the September 30, 2014 denial expired on December 1, 2014. The Board did not receive a hearing request specifically appealing the denial by December 1, 2014.

In a letter dated December 3, 2014, claimant submitted to the WCD a document entitled "Appeal and Object." (Ex. 91). The WCD received the document on December 5, 2014. (Ex. 91-1). The document referred to a July 31, 2014 Notice of Closure and objected "to any and all closings" and "any decisions regarding the July 31, 2014 notice of closure." (*Id.*) It also referred to a suspension notice and postponement of the reconsideration proceeding. (*Id.*) It did not refer to the September 30, 2014 denial. (*Id.*)

² Ms. Benavidez spoke with both claimant and his father on December 1, 2014. (Tr. 38, 40). She testified that she told claimant that he should write a letter to the Board specifically appealing the denial. (Tr. 41). Claimant confirmed that Ms. Benavidez "said we had just the amount of time to do it in, and had to get it there." (Tr. 51). Claimant's father testified that Ms. Benavidez did not say that the deadline for appealing the denial was December 1, 2014. (Tr. 68).

On December 5, 2014, Ms. Benavidez hand-delivered claimant's November 17, 2014 letter and enclosures and the December 3, 2014 document to the Board's Salem office.³ (Tr. 37; Ex. 92A-1).

The Board's "hearing" file contains the original letter, envelope, and the enclosures mailed on November 17, 2014, bearing the WCD's November 20, 2014 perforated date stamp. The file also contains a copy of the letter and envelope mailed on December 3, 2014, bearing the WCD's December 5, 2014 date stamp. Lastly, the file contains a copy of the September 30, 2014 denial, bearing the WCD's October 15, 2014 date stamp and the Board's ("WCB-Salem hand delivered") December 5, 2014 date stamp.⁴

At hearing, claimant and his father testified that it was claimant's intention to appeal the denial. (Tr. 18, 51). Neither claimant nor his father testified that they enclosed a copy of the denial with either the November 17, 2014 letter or the December 3, 2014 submission.

Ms. Benavidez initially testified that she did not open the "second envelope" and did not know what was in it.⁵ (Tr. 38). She later testified that she forwarded the second letter without reading it. (Tr. 42). She then stated, "There was a lot of stuff that was in there, including a copy of the denial letter and so forth." (Tr. 42).

CONCLUSIONS OF LAW AND OPINION

In finding that the Hearings Division had jurisdiction to decide the merits of the employer's denial, the ALJ determined that claimant's November 17, 2014 letter constituted a hearing request. In reaching that conclusion, the ALJ interpreted claimant's plea for help in "resolving these issues" as a hearing request on the "denial letter that was enclosed." The ALJ also reasoned that claimant's letter discussed his surgery, which was directed at the disputed condition.

On review, the employer contends that claimant did not timely file a hearing request concerning its compensability denial. For the following reasons, we agree.

³ Ms. Benavidez acknowledged that she did not get claimant's initial letter and documents to the Board "on time." (Tr. 37).

⁴ The documents received by the WCD on November 20, 2014 bear the WCD's perforated stamp of that date. (Hearing File). In contrast, the denial letter bears a copy of the WCD's October 15, 2014 date stamp, but not the perforated date stamp of November 20, 2014. (Hearing File).

⁵ The "second envelope" refers to claimant's December 3, 2014 submission.

To object to a denied claim, a claimant must request a hearing with 60 days (or 180 days with “good cause”) of the mailing of the denial. ORS 656.319(1)(a). The request for hearing “may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the Workers’ Compensation Board.” ORS 656.283(2). Where a hearing request is timely filed with the WCD, but should have been filed with the Board, the dispute is transferred and considered timely if the original filing was completed within the prescribed time. *See* ORS 656.704(5).

Claimant has an obligation to request a hearing in response to a denied claim in order to place the denial before an ALJ. *See* ORS 656.262(9); ORS 656.283(3); ORS 656.319(1); OAR 438-050-0070; *Naught v. Gamble, Inc.*, 87 Or App 145, 149 (1987). In other words, a request for hearing must be referable to a particular denial. *See Guerra v. SAIF*, 111 Or App 579, 584 (1992); *Peggy J. Barnett*, 60 Van Natta 843, 848 (2008), *aff’d without opinion*, 232 Or App 439 (2009) (a hearing request that did not raise the issue of compensability or identify the denial as an issue was not an effective request for hearing regarding the denial); *Phil E. Morey*, 50 Van Natta 2120 (1998) (same). To determine whether a hearing request is referable to a particular denial, we consider the request itself, read as a whole and in the context in which it was submitted. *Kevin C. O’Brien*, 44 Van Natta 2587, 2588 (1992), *recons*, 45 Van Natta 97 (1993).

Here, assuming for the sake of argument that claimant’s November 17, 2014 letter was a “hearing request,” it did not refer to the disputed denial or raise compensability as an issue. (Ex. 92A-2, -3). We do not consider claimant’s reference to his cervical surgery to constitute an effective request for hearing from the employer’s compensability denial. *See Barnett*, 60 Van Natta at 849 (the claimant’s hearing request for “TTD/TPD” did not constitute an effective request for hearing regarding the employer’s compensability denial); *Morey*, 50 Van Natta at 2121 (the claimant’s hearing request, which designated penalties and attorney fees as the sole issues and did not identify a denial in any manner, did not raise the issue of that denial); *cf. O’Brien*, 44 Van Natta at 2588 (the claimant’s hearing request, which did not identify a carrier’s denial but was accompanied by an affidavit identifying the carrier as having denied compensability, constituted an adequate hearing request from the carrier’s denial).

Moreover, after conducting our review, we are not persuaded that the denial was enclosed with claimant’s initial November 17, 2014 letter. (Ex. 92A; Hearing File). The November 17, 2014 letter and enclosed documents were stamped as received by the WCD on November 20, 2014 and bear the original

perforations from the date stamp. (Hearing File). The denial does not bear those perforations. (*Id.*) Moreover, there was no testimony that the denial letter was enclosed with the November 17, 2014 letter. Finally, Exhibit 92A, which was submitted by claimant's counsel and described as "materials delivered to WCB by [Ms.] Benavidez," did not include the denial. (Ex. 92A). Therefore, the evidence does not establish that the denial was enclosed with the November 17, 2014 letter.

Under these circumstances, we conclude that claimant's November 17, 2014 letter was not an effective hearing request from the September 30, 2014 compensability denial. Moreover, the December 3, 2014 letter did not raise compensability as an issue or refer to the denial. In any event, because the December 3, 2014 letter was mailed after the 60-day appeal period expired, claimant did not file a timely hearing request.⁶

Therefore, neither the Board nor the ALJ has authority to consider the merits of the denial, or any other related issues. *See* ORS 656.319(1). Accordingly, claimant's hearing request is dismissed and the employer's denial stands as untimely appealed. *See Matthew A. Loos*, 65 Van Natta 94 (2013) (where the claimant's request for hearing from the carrier's denial was not timely filed, the Board declined to address the compensability issue, dismissed the hearing request, and the denial stood as untimely appealed).

ORDER

The ALJ's order dated September 16, 2015 is vacated. Claimant's hearing request is dismissed. The employer's denial is reinstated. The ALJ's penalty and attorney fee awards (totaling \$13,462) are vacated.

Entered at Salem, Oregon on May 13, 2016

⁶ Claimant's respondent's brief asserts that he established "good cause" for any late appeal based, in part, on his limited education and inability to read. Yet, at hearing, he contended that his hearing request was timely filed and did not alternatively assert that he had "good cause" based on limited education or inability to read. Under such circumstances, we decline to consider claimant's "good cause" contentions. *See Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing); *Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing).