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In the Matter of the Compensation of  
**CRAIG SCHOMMER, Claimant**  
WCB Case No. 11-01711  
**ORDER ON RECONSIDERATION**  
Peter O Hansen, Claimant Attorneys  
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

On December 16, 2016, we abated our November 18, 2016 order that, in part: (1) reversed that portion of an Administrative Law Judge's (ALJ's) order insofar as it set aside the insurer's denial of claimant's new/omitted medical condition claim for a combined bilateral hip impingement condition; (2) affirmed that portion of the ALJ's order that upheld the insurer's denial of claimant's "independent" new/omitted medical condition claims for bilateral hip impingement syndrome and left hip capsular tear; and (3) did not award claimant's counsel an attorney fee under ORS 656.382(2). We took this action to consider claimant's challenge to those findings. Having received the insurer's response, we proceed with our reconsideration. For the following reasons, we adhere to our previous decision.

On reconsideration, claimant challenges our reasoning that discounted the opinions of Drs. Puziss and Wagner regarding the existence of his bilateral hip impingement syndrome and, instead, relied on Dr. Bald's opinion that the condition did not exist.<sup>1</sup>

Having considered the matter further, and having once more reviewed the relevant medical opinions, we continue to find Dr. Bald's opinion that claimant's bilateral impingement syndrome did not exist to be more persuasive than those of Drs. Puziss and Wagner, for the reasons expressed in our prior order.

Claimant contends that Dr. Bald's opinion did not take into consideration imaging studies, history, and course of treatment in rendering his "existence" opinion, but merely relied on examination, which was based on inadequate testing. Claimant further asserts that, contrary to our finding, Dr. Puziss did respond to Dr. Bald's opinion on the existence of impingement.

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<sup>1</sup> Regarding the left hip capsular tear condition, we adhere to our determination that the claimed condition is not compensable based on the reasoning expressed in the ALJ's order, as we previously adopted. Our conclusion was not based on the lack of existence of the condition, as alluded to in claimant's argument on reconsideration, but rather on a finding that there was no persuasive medical opinion sufficient to establish the work-relatedness of that condition to a reasonable degree of medical probability. On reconsideration, we find no persuasive reason to alter our prior analysis.

We disagree with claimant's assessments and continue to find Dr. Bald's opinion persuasive. The record does not corroborate claimant's assertion that Dr. Bald's examination or testing of claimant was inaccurate or insufficient to determine whether the diagnosed impingement existed. We are not an agency with specialized medical knowledge and are not entitled to make our own medical conclusions. *See 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).

Here, our review of the record confirms that Dr. Bald based his opinion on a thorough examination of claimant, a complete and accurate history of his symptoms and treatment (which included his injection responses), and a consideration of the findings on his imaging studies. (Exs. 48, 56). Moreover, while Dr. Puziss addressed the existence of impingement, he did not respond to Dr. Bald's actual findings and reasoning. Finally, Dr. Puziss explained that diagnosing impingement depended on how one tested for it, but he did not criticize Dr. Bald's examination or testing methods. (Ex. 144-10).

Accordingly, after considering claimant's arguments on reconsideration, as well as the insurer's response, we adhere to our conclusion that claimant has not persuasively established the compensability of his new/omitted left hip capsular tear, combined bilateral hip impingement, and "independent" bilateral hip impingement syndrome conditions.

Next, claimant requests that we reconsider our conclusion that he was not entitled to an attorney fee on review because he did not file a respondent's brief concerning the insurer's unsuccessful appeal of the ALJ's compensability decision regarding the combined bilateral hip strain condition. In our prior order, noting that claimant's respondent's/cross-appellant's brief was untimely filed, we declined to award an attorney fee under ORS 656.382(2) for claimant's counsel's services on review. *See Shirley M. Brown*, 40 Van Natta 879 (1988). On reconsideration, claimant contends that a fee under that statute is mandatory when a claimant prevails on Board review, and asserts that our decision in *Brown* was wrongly decided. Alternatively, he asserts that he is entitled to an attorney fee under ORS 656.386, even in the absence of a brief, because that statute requires a fee in all cases involving a denial.

We disagree with claimant's contentions. Our reasoning follows.

First, we decline to disavow or revisit our *Brown* decision and adhere to its reasoning that no attorney fee is available under ORS 656.382(2) when no brief is filed or when a brief is not considered due to untimely filing. Moreover, we have extended that rationale to situations otherwise warranting a fee under ORS 656.386(1). See, e.g., *Kenneth Brandon*, 62 Van Natta 1020 (2010); *April F. Newman*, 59 Van Natta 1847 (2007); *Barbara J. Hayes*, 46 Van Natta 676 (1994); *Daral T. Morrow*, 49 Van Natta 1979, *recons*, 49 Van Natta 2105 (1997), *aff'd Barrett Bus. Servs. v. Morrow*, 164 Or App 628 (1998). Therefore, regardless of whether ORS 656.386(1) or ORS 656.382(2) applied, claimant would still not be entitled to an attorney fee for services on review regarding the combined bilateral hip strain condition because his brief was untimely filed.<sup>2</sup>

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our November 18, 2016 order. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on February 27, 2017

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<sup>2</sup> Even if claimant had timely filed his brief, claimant's attorney would not be entitled to an attorney fee pursuant to ORS 656.386 for his initial services on review. In *Shoulders v. SAIF*, 300 Or 606, 615-16 (1986), the court explained that ORS 656.386 only authorizes an attorney fee when a claimant prevails finally before a forum in which he or she was the initiating party. The court expressly held that a claimant may not receive attorney fees under ORS 656.386(1) where the carrier, rather than the claimant, initiates Board review from an order accepting the claim. *Id.* Here, because the insurer initiated review of the ALJ's order setting aside its denial of claimant's combined bilateral hip strain condition, any attorney fee for services on review in defending that decision is subject to ORS 656.382(2), not ORS 656.386(1). See *William J. Lefave*, 59 Van Natta 427, 429 n 2 (2007); *Burl R. Hayes*, 56 Van Natta 3564, 3570 n 4 (2004) (where the claimant did not request review of the ALJ's order, the claimant's counsel was not entitled to an attorney fee for services on review under ORS 656.386(1) because one of the statutory requirements for such an award had not been satisfied).