
In the Matter of the Compensation of
KURT GROTEWOLD, Claimant
WCB Case No. 16-00172
ORDER ON REVIEW
Randy M Elmer, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) found that claimant's hearing request concerning the SAIF Corporation's denial of his injury claim for bilateral hernia conditions was untimely filed; and (2) dismissed claimant's hearing request. On review, the issue is whether claimant's hearing request was timely filed.

We adopt and affirm the ALJ's order with the following supplementation.¹

Claimant filed a claim for bilateral hernias on October 1, 2015. (Ex. 5). SAIF denied the claim on December 9, 2015. (Ex. 17). Claimant received the denial by certified and regular mail, one or two days after the mailing date. (Tr. 55).

On January 13, 2016, claimant's attorney filed a hearing request form on the Board's website portal. (Ex. 22E-1). The form indicated that a hearing was requested regarding the temporary disability rate and seeking temporary disability benefits, a penalty, and an attorney fee. (*Id.*) The form did not refer to the denial or a compensability issue. An attached cover letter, addressed to the Board, stated that a hearing request had been filed "online with the WCB Web Portal." (Ex. 22E-6). The cover letter did not refer to the denial or a compensability issue.

On February 8, 2016, SAIF filed a "Response to Issues" form. SAIF checked the boxes on the form that denied that claimant was paid temporary disability benefits at an incorrect rate, denied that claimant was entitled to a penalty, and denied attorney fees. (Ex. 22J). SAIF did not check the box that denied a work-related accidental injury or occupational disease or refer to the denial or any other issue.

¹ SAIF's motion to strike claimant's appellant's brief for untimely filing was granted. SAIF did not file a respondent's brief.

On February 17, 2016, SAIF wrote to Dr. Kim, claimant's physician, stating that the claim denial was "final as the denial * * * was not appealed." (Ex. 22K). SAIF provided a copy of the letter to claimant's attorney.

On February 22, 2016, claimant's attorney filed a second request for hearing form on the Board's website portal. (Ex. 22-1). This form indicated that a hearing was requested for the December 9, 2015 denial, "compensability," "other - clarification of previous request for hearing," and an attorney fee. (*Id.*) A cover letter, addressed to the Board, stated that the enclosed "amended" hearing request was filed online through the portal. (Ex. 22M-4).

SAIF filed a response form to the issues identified in the second request for hearing. SAIF checked the box on the form that denied that claimant sustained a work-related accidental injury or occupational disease. (Ex. 22P). SAIF also asserted that claimant's request for hearing on compensability was untimely. (*Id.*)

At hearing, claimant withdrew the temporary disability issues and proceeded with his challenge to the denial. (Tr. 2). Contending that the January 13, 2016 hearing request satisfied the requirements in ORS 656.283(2), and was filed within the 60-day time limit pursuant to ORS 656.319(1)(a), he contended that the Hearings Division had jurisdiction to consider the merits of the denial.² (Tr. 7, 8). He argued that the statutes do not require a request for hearing to identify the denial. To the extent that *Guerra v. SAIF*, 111 Or App 579 (1992), and *Naught v. Gamble, Inc./Pepsi Cola, Inc.*, 87 Or App 145 (1987), have been cited for that proposition, claimant asserted that the holdings of those cases have been misinterpreted or that the cases are distinguishable. (*Id.*)

The ALJ disagreed with claimant's arguments for the reasons stated in *Peggy J. Barnett*, 60 Van Natta 843 (2008), *aff'd without opinion*, 232 Or App 439 (2009) (a hearing request for "TTD/TPD [temporary total disability/temporary partial disability]" that did not raise the issue of compensability or identify the carrier's compensability denial as an issue did not constitute an effective request for hearing regarding the denial). Because the January 13, 2016 request for hearing did not identify SAIF's denial or raise the issue of compensability, the ALJ concluded that it did not constitute an effective request for hearing regarding SAIF's compensability denial. The ALJ further determined that the February 22, 2016 request for hearing was not filed within the requisite 60-day period from the

² Claimant did not claim that he had a "good cause" defense for an untimely hearing request pursuant to ORS 656.319(1)(b). (Tr. 12).

denial. *See* ORS 656.319(1)(a). Concluding that the Hearings Division did not have jurisdiction to determine the merits of the denial, the ALJ dismissed claimant's requests for hearing.

For the following reasons, we agree with the ALJ's analysis.

Regarding a denial of a claim for compensation, ORS 656.262(9) provides, that "[t]he worker may request a hearing pursuant to ORS 656.319." ORS 656.283(1) states that, "[s]ubject to ORS 656.319, any party * * * may at any time request a hearing on any matter concerning a claim * * *."

ORS 656.283(2) provides that "[a] request for hearing may be made by a 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 656.319(1)(a) states that, "[w]ith respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless * * * [a] request for hearing is filed not later than the 60th day after the mailing of the denial to the claimant[.]"

In *Barnett*, we explained that, while ORS 656.283(2) provides the requirements for requesting a hearing in general, ORS 656.319(1) provides specific requirements for requesting a hearing regarding a denial. *Id.* at 845. Thus, we reasoned that, when a claimant objects to a denial, he must comply with the specific requirements of ORS 656.319(1).

It is well understood that a claimant has an obligation to request a hearing in response to a denied claim in order to place the denial before the ALJ. *Naught*, 87 Or App at 149; *Barnett*, 60 Van Natta at 846. In other words, a request for hearing challenging a denial must refer to the denial. *Guerra*, 111 Or App at 584; *Barnett*, 60 Van Natta at 848; *Phil E. Morey*, 50 Van Natta 2120 (1998). To determine whether a hearing request is referable to a 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, claimant's January 13, 2016 request for hearing form and cover letter did not refer to the denial or a compensability issue. The form identified only temporary disability, penalty, and attorney fee issues. (Ex. 22E-1).

A request for hearing regarding temporary disability compensation does not involve a compensability issue because a claimant may be entitled to temporary disability compensation (*i.e.*, interim compensation) even if the claim is not compensable. *Barnett*, 60 Van Natta at 849 (citing *Bono v. SAIF*, 298 Or 405, 410 (1984)). Here, there were “temporary disability” issues when claimant filed the January 13, 2016 hearing request. In withdrawing those issues at hearing, claimant’s attorney explained that claimant’s wage documents had been reviewed, and, as a result, claimant was no longer contesting the temporary disability rate or seeking a penalty. (Tr. 2).

Under these circumstances, we do not consider claimant’s hearing request for temporary disability compensation, penalties, and attorney fees to constitute an effective request for hearing regarding the 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, did not raise the issue of that denial); *cf. Victoria L. Springer*, 46 Van Natta 2419, 2420 n 1 (1994) (where the claimant’s hearing request identified the only outstanding denial by an incorrect date, the hearing request referred to the denial); *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).

Claimant’s subsequent hearing request (which was filed on February 22, 2016) challenged the denial, but was filed after the expiration of the 60-day period in ORS 656.319(1)(a). Claimant described the February 22, 2016 hearing request as a “clarification” or an “amended” request for hearing. (Ex. 22M-1, -4). In closing argument, he further asserted that the Board’s policy of allowing amendments to the issues permitted him to challenge the denial by “amending” his request for hearing after the expiration of the 60-day period in ORS 656.319(1)(a). We disagree with that assertion.

The Board’s rules (*i.e.*, OAR 438-005-0035(5) and OAR 438-006-0031(2)) presume the filing of a timely and effective request for hearing and a listing of issues *before* amendments are allowed. As such, these rules do not “create” jurisdiction. *Barnett*, 60 Van Natta at 849.

In sum, claimant did not file an effective request for hearing from the compensability denial before the expiration of the 60-day period under ORS 656.319(1)(a). Therefore, we agree with the ALJ's conclusion that the Hearings Division did not have jurisdiction to determine the merits of the denial. Accordingly, we affirm.

ORDER

The ALJ's order dated June 8, 2016 is affirmed.

Entered at Salem, Oregon on January 5, 2017