
In the Matter of the Compensation of
ROBERT M. COLEMAN, JR., Claimant
WCB Case No. 15-05015
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson. Member Lanning specially concurs.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Marshall's order that: (1) awarded an \$8,000 assessed attorney fee for an alleged rescission of its *de facto* denial of claimant's new/omitted medical condition claim for a left medial femoral chondral defect condition; and (2) assessed a penalty and a penalty-related attorney fee for allegedly unreasonable claim processing. On review, the issues are penalties and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

On June 12, 2015, claimant submitted an 801 form for a left knee injury. (Ex. 65).

On June 29, 2015, claimant and Dr. Bowman, his treating orthopedist, signed and submitted an 827 form requesting acceptance of a medial femoral chondral defect as a "new or omitted medical condition on an existing claim." (Ex. 73).

On August 11, 2015, SAIF accepted a left knee strain and a left knee contusion. (Ex. 77).

In an October 6, 2015 chart note, Dr. Bowman stated, "The 827 filed by me on 6/29/15 needs to be addressed [by the] insurance company." (Ex. 80). SAIF received the chart note on October 15, 2015. (*Id.*)

On October 21, 2015, claimant requested a hearing, asserting a "*de facto*" denial/partial denial after a claim acceptance and seeking a penalty and attorney fee. (Hearing File). SAIF's Response to Issues contended that claimant's hearing request was premature. (*Id.*)

At hearing, SAIF argued that the 827 form requesting acceptance of a medial femoral chondral defect as a new/omitted condition was filed before the initial Notice of Acceptance issued and, therefore, there was no *de facto* denial. (Tr. 2). After taking testimony, the ALJ left the record open for a report from Dr. Greenleaf (claimant's surgeon), depositions, and rebuttal evidence. (Tr. 3).

On January 29, 2016, claimant sent a letter to the ALJ "to raise the issue of the *de facto* denial of [his] medial femoral chondral defect" and seeking attorney fees and costs. (Hearing File). Claimant's letter stated, "This request for hearing challenges SAIF's failure to accept the condition, known to SAIF at the time it did accept [a] knee contusion." (*Id.*)

On April 6, 2016, claimant initiated a new/omitted medical condition claim for chondromalacia and left knee medial compartment full thickness chondral cartilage defect. (Hearing File).

On April 29, 2016, SAIF moved to dismiss claimant's request for hearing as "premature." (Hearing File). In a June 2, 2016 interim order, the ALJ held that claimant's "827" request for acceptance of a new/omitted medical condition claim was premature because it was submitted before the expiration of the statutory time period to accept or deny the initial claim. (*Id.*) However, finding that claimant amended his request for hearing on January 29, 2016 and that SAIF had not responded to the "*de facto* denial" allegation therein, the ALJ declined to dismiss claimant's request for hearing. (*Id.*)

On June 7, 2016, SAIF modified its acceptance to include the claimed chondromalacia and left knee full thickness chondral cartilage defect conditions.¹ (Ex. 92).

On June 20, 2016, claimant advised the ALJ that the only remaining issues were penalties and attorney fees. (Hearing File). In his written closing argument, claimant asserted that the 827 form (submitted on June 29, 2015) initiated a "new medical condition" claim, which SAIF had 60 days to accept or deny. (*Id.*) Claimant further asserted that his January 29, 2016 letter to the ALJ "specifically challenged SAIF's failure to include the medial condyle defect condition in the August 11, 2015 notice of acceptance," which triggered SAIF's duty to process the "omitted medical condition" claim. (*Id.*)

¹ The parties do not dispute that SAIF's acceptance, in response to claimant's April 6, 2016 new/omitted medical condition claim, was timely. See ORS 656.262(6)(d); ORS 656.262(7)(a); ORS 656.267(2)(a).

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant's January 29, 2016 letter triggered SAIF's obligation to accept or deny the medial chondral defect condition within 60 days of its receipt of the letter, and that SAIF's failure to properly respond resulted in a *de facto* denial, which SAIF rescinded when it issued the modified acceptance notice approximately three months after the expiration of the 60-day period. The ALJ awarded claimant's counsel an \$8,000 assessed attorney fee under ORS 656.386(1). The ALJ also assessed a 25 percent penalty and a \$2,000 penalty-related attorney fee for unreasonable claim processing under ORS 656.262(11)(a).

On review, SAIF contends that claimant's hearing requests did not comply with the communication requirements of ORS 656.262(6)(d) and ORS 656.262(7)(a). SAIF further asserts that claimant's January 29, 2016 letter to the ALJ did not constitute a claim for a new/omitted medical condition or trigger SAIF's processing obligation under ORS 656.262(6)(d). For the following reasons, we reverse the ALJ's decision.

Under ORS 656.262(6)(a), a carrier has 60 days to accept or deny a claim after having notice or knowledge of the claim. Where a carrier accepts a claim, it must issue an acceptance notice that "specif[ies] what conditions are compensable." ORS 656.262(6)(b)(A).

If a worker is dissatisfied with the scope of a carrier's acceptance or believes that additional conditions should be accepted, the statutory scheme provides for the worker to clearly request formal written acceptance of new/omitted medical conditions. See ORS 656.262(6)(d); ORS 656.262(7)(a); ORS 656.267(1); *Jorge Andrade*, 68 Van Natta 439, 440 (2016); *Joyce A. Dietrich*, 63 Van Natta 2507, 2510 (2011), *recons*, 64 Van Natta 153 (2012); *Shannon E. Jenkins*, 48 Van Natta 1482, 1486 (1995), *aff'd without opinion*, 135 Or App 436 (1997). The carrier has 60 days after it receives the claimant's request to accept or deny such claims. ORS 656.262(6)(d); ORS 656.262(7)(a). A worker who fails to comply with the communication requirements in ORS 656.262(6)(d) and ORS 656.262(7)(a) may not allege a *de facto* denial of a condition based on information in the notice of acceptance. *Id.*

Here, claimant filed an initial claim for a left knee injury on June 12, 2015. (Ex. 65). On June 29, 2015, he submitted an 827 form requesting acceptance of a medial femoral chondral defect as "a new or omitted medical condition on an

existing claim.” (Ex. 73). On August 11, 2015, SAIF timely accepted the initial claim. (Ex. 77). As required by ORS 656.262(6)(b)(A), its Notice of Acceptance specified the accepted conditions it found to be compensable, which it identified as a left knee strain and a left knee contusion. (*Id.*)

Under these circumstances, we conclude that SAIF’s August 11, 2015 Notice of Acceptance satisfied its initial claim processing obligations under ORS 656.262(6)(a). Moreover, claimant’s “pre-acceptance” request for acceptance of a medial femoral chondral defect did not constitute a new/omitted medical condition claim for that condition. *See Ernest R. Lyons*, 69 Van Natta 688, 693 (2017) (the carrier’s initial acceptance of a right shoulder strain did not constitute a *de facto* denial of other right shoulder conditions identified in a “pre-acceptance” 827 form).² Likewise, SAIF’s identification of the accepted conditions did not constitute a *de facto* denial of other conditions identified in claimant’s “pre-acceptance” 827 form. *Id.* at 693; *Dietrich*, 63 Van Natta at 2510 (the carrier’s initial acceptance of a shoulder condition did not constitute a *de facto* denial of a cervical condition identified in the claimant’s “pre-acceptance” 801 and 827 forms).³

Claimant also contends that Dr. Bowman’s October 6, 2015 chart note obligated SAIF to accept/deny the femoral medial chondral defect condition and that its failure to do so resulted in a *de facto* denial on December 15, 2015. Yet, the statutes do not provide for a physician to file a new or omitted medical condition claim on behalf of the worker. *See* ORS 656.262(d) (requiring the worker to communicate his objections to the acceptance notice “pursuant to ORS 656.267”); ORS 656.267(1) (stating that the “worker must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer”); *Andria D. Costello*, 55 Van Natta 498, 504 (2003), *aff’d*

² The *Lyons* decision issued after the ALJ’s order.

³ Claimant contends that SAIF was obligated to process the condition claimed in the “pre-acceptance” 827 form as a “new medical condition” claim. Yet, claimant’s submission involved a condition that was in existence at the time of the initial acceptance, not a “new” condition that came into being following the issuance of the Notice of Acceptance. *See Johansen v. SAIF*, 158 Or App 672, 679, *recons*, 160 Or App 579, *rev den*, 329 Or 527(1999) (“[a] new medical condition (1) arises after acceptance of an initial claim, (2) is related to an initial claim, and (3) involves a condition other than the condition initially accepted”); *Mark A. Baker*, 50 Van Natta 2333 (1998) (defining a “new medical condition” under ORS 656.262(7)(a) (1995) as one that comes into being following the issuance of the Notice of Acceptance). Accordingly, claimant’s 827 form (which was filed *before* the issuance of SAIF’s Notice of Acceptance) did not constitute a “new medical condition” claim requiring acceptance or denial under ORS 656.262(7)(a).

without opinion, 193 Or App 484 (2004) (no legislative intent to allow physicians to file a new or omitted medical condition claim on behalf of a worker). Therefore, Dr. Bowman's October 6, 2015 chart note did not obligate SAIF to accept or deny the condition that had been "claimed" in the "pre-acceptance" 827 form.

We turn to the issue of whether claimant's January 29, 2016 letter to the ALJ initiated an omitted medical condition claim, triggering the statutory 60-day accept/deny period. For the following reasons, we conclude that claimant's letter did not.

To initiate an omitted medical condition claim, the worker must clearly request formal written acceptance of the condition from the carrier. ORS 656.267(1).

Here, the January 29, 2016 letter was not addressed to SAIF, but rather was written to the ALJ (with a copy to SAIF). The letter informed the ALJ and SAIF that claimant was writing to "raise the issue of the *de facto* denial of [his] medial femoral chondral defect." (Hearing File). The letter also stated that "[t]his request for hearing challenges SAIF's failure to accept the condition, known to SAIF at the time it did accept knee contusion." (*Id.*) In other words, claimant continued to challenge the scope of SAIF's acceptance. The letter did not clearly request SAIF's formal written acceptance of the condition; *i.e.*, was not a clear request for formal written acceptance of a new/omitted medical condition pursuant to ORS 656.262(6)(d) and ORS 656.267(1).

Moreover, pursuant to ORS 656.262(6)(d), a worker is required to present his written objections to the acceptance to the carrier *before* filing a request for hearing. Merely filing a hearing request alleging a "*de facto*" denial does not satisfy the "communication in writing" prerequisite in ORS 656.262(6)(d), because the communication must precede the hearing request. Under such circumstances, the worker is precluded from proceeding to hearing on the issue of "*de facto*" denial. *See Lyons*, 69 Van Natta at 694 (a *de facto* denial could not be considered because the claimant did not comply with the "pre-hearing request" written communication requirements of ORS 656.262(6)(d) and ORS 656.267(1)); *Jenkins*, 48 Van Natta at 1486 (where the claimant did not communicate her written objections to the notice of acceptance to the carrier before she requested a hearing alleging "*de facto* denial," she was precluded from alleging at the hearing that the carrier "*de facto*" denied her left knee contusion).

Here, as discussed above, claimant had not previously communicated to SAIF his written objections to the acceptance notice “pursuant to ORS 656.267.” See ORS 656.262(6)(d). Therefore, a “*de facto*” denial could not be considered at the hearing because claimant did not comply with the written communication requirements of ORS 656.262(6)(d) and ORS 656.267(1) before he requested a hearing.

Two months later, on April 6, 2016, claimant initiated a new/omitted medical condition claim for chondromalacia and left knee medial compartment full thickness chondral cartilage defect conditions. (Hearing File). In accordance with its statutory responsibilities, SAIF modified its acceptance to include the requested conditions.⁴ (Ex. 72). See ORS 656.262(6)(a), (d); ORS 656.262(7)(a); ORS 656.267(2)(a).

Under these circumstances, we conclude that an attorney fee award under ORS 656.386(1) for prevailing in a case involving a “denied claim” is not justified. As previously discussed, SAIF’s initial acceptance was timely. Thereafter, it was incumbent on claimant to properly initiate a new/omitted medical condition claim if he objected to the scope of the acceptance. Once he did so, SAIF timely accepted the new/omitted medical conditions. Therefore, claimant has not prevailed over a “denied claim,” *de facto* or otherwise. Accordingly, he is not entitled to an assessed attorney fee award under ORS 656.386(1). See *Lyons*, 69 Van Natta at 694 (the carrier’s claim processing did not result in a “denied claim” under ORS 656.386(1) where, although the carrier did not respond to the claimant’s “pre-acceptance” new/omitted medical condition claim, it accepted the claimant’s “post-acceptance” new/omitted medical condition claim within the statutory 60-day period); *Kenneth Hawes*, 54 Van Natta 1915, 1918 (2002) (the carrier’s failure to respond to the claimant’s letter requesting acceptance of several conditions before any condition had been accepted did not meet the requirements of a “denied claim” under ORS 656.386(1)(b) because the claimant’s letter was not a “claim for compensation” made pursuant to ORS 656.262(6)(d)).

Likewise, we do not consider SAIF’s processing to have been unreasonable. Until claimant properly initiated a new/omitted medical condition claim, there was nothing for SAIF to accept or deny. See *Lyons*, 69 Van Natta at 695 (penalties and attorney fees were not warranted where the claimant did not file an omitted medical condition claim after the carrier’s acceptance and before requesting a

⁴ As previously discussed, the parties do not dispute the timeliness of SAIF’s acceptance insofar as it pertains to claimant’s April 6, 2016 new/omitted medical condition claim.

hearing); *Andrade*, 68 Van Natta at 439 (declining to award penalties or attorney fees for allegedly unreasonable claim processing where the claimant did not communicate in writing to the carrier about any objections to its Notice of Acceptance pursuant to ORS 656.262(6)(d) and ORS 656.267 before filing the hearing request). Consequently, penalties and attorney fees under ORS 656.262(11)(a) are not warranted.

ORDER

The ALJ's order dated September 13, 2016 is reversed. The ALJ's penalty and \$8,000 and \$2,000 attorney fee awards are reversed.

Entered at Salem, Oregon on May 3, 2017

Member Lanning specially concurring.

Consistent with the principles of *stare decisis*, I concur with the outcome in this case. Nonetheless, for the reasons stated in the dissenting opinions in *Ernest R. Lyons*, 69 Van Natta 688 (2016) (Member Weddell dissenting) and *Jorge Andrade*, 68 Van Natta 439 (2016) (Member Weddell dissenting), I believe that those decisions ignored the carrier's statutory responsibility to process claims in a prompt and reasonable manner and impermissibly transferred that responsibility to the claimant, contrary to statute, case law, and policy. Therefore, I offer this special concurring opinion.