
In the Matter of the Compensation of
PASCUAL SIQUINA-TASEJ, Claimant
WCB Case No. 16-00382, 15-05907
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) declined to find a *de facto* denial of his "pre-acceptance" new/omitted medical condition claim for an L4-5 annular tear and disc bulge related to a July 2013 work injury accepted by the SAIF Corporation; (2) declined to assess penalties and penalty-related attorney fees for SAIF's allegedly unreasonable claim processing; and (3) upheld SAIF's denial of his occupational disease claim for low back and right knee conditions. On review, the issues are claim processing, compensability, penalties, and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW

New/Omitted Medical Condition Claim

The ALJ found that claimant's August 26, 2013 request for acceptance of an L4-5 annular tear and mild disc bulge as new/omitted medical conditions resulting from the July 2013 work injury was not a valid new/omitted medical condition claim because it was made before SAIF's October 16, 2013 Notice of Acceptance of the initial claim. Reasoning that SAIF's claim processing duties under ORS 656.262 were not triggered, the ALJ concluded that there was no *de facto* denial of the claimed L4-5 conditions. Alternatively, the ALJ found that, even assuming that SAIF was required to process claimant's new/omitted medical condition claim, claimant's January 26, 2016 request for hearing concerning SAIF's failure to process that claim was not filed within two years after the alleged inaction occurred as required by ORS 656.319(6).

We adopt and affirm that portion of the ALJ's order that found no *de facto* denial of the claimed L4-5 annular tear and mild disc bulge, with the following supplementation.

Claimant initially filed an 801 claim form for a right knee strain related to a July 26, 2013 work injury while unloading and lifting cases/boxes of meat. (Exs. 1, 3). On August 8, 2013, Dr. Hall stated that, “[a]lthough [claimant] initially noticed pain in the right upper thigh, it appears that this pain is radiation from a low back injury from heavy lifting.” (Ex. 2-3). On August 26, 2013, based on a right knee MRI, Dr. Hall diagnosed a lumbosacral strain with right sciatica and L4-5 annulus tear with mild disc bulge. (Exs. 6, 7). That same day, claimant signed and filed an 827 form, checking the box “Request for acceptance of a new or omitted medical condition on an existing claim” and listing the conditions as an L4-5 annular tear and mild disc bulge. (Ex. 7A).

On October 16, 2013, SAIF issued an initial Notice of Acceptance for a nondisabling lumbar strain. (Ex. 8A). On January 26, 2016, claimant filed a request for hearing for a “[p]artial denial after a claim acceptance,” alleging a *de facto* denial of his injury claim and seeking penalties and attorney fees for unreasonable claim processing. (Hearing File).

In *Ernest R. Lyons*, 69 Van Natta 668 (2017), a decision issued subsequent to the ALJ's order, we found that the carrier's identification of the accepted conditions in its initial Notice of Acceptance did not constitute a *de facto* denial of other conditions identified in the claimant's “pre-acceptance” 827 form for a “new/omitted medical condition claim” because a carrier is not statutorily required to process a new/omitted medical condition claim that was made before any conditions were accepted. *Id.* at 692-93. In reaching that conclusion, we acknowledged that ORS 656.267(1) allows the worker to initiate a new or omitted medical condition claim “at any time,” and that ORS 656.262(6)(d) also allows the worker to “initiate objection to the notice of acceptance at any time.” *Id.* at 691 n 2. Nevertheless, we explained that a new/omitted medical condition claim under ORS 656.267(1) depends on the prior issuance of an acceptance notice, and that an “objection to the notice of acceptance” pursuant to ORS 656.262(6)(d) depends on the existence of a notice of acceptance. *Id.* Because the carrier's Notice of Acceptance in *Lyons* issued after its receipt of the claimant's initial injury claim and alleged “new/omitted medical condition” claim forms, we reasoned that its acceptance notice, in effect, responded to both claims. *Id.*

We also found that, because the claimant neither first communicated in writing to the carrier his objection to the Notice of Acceptance, nor clearly requested formal written acceptance of the omitted medical conditions following the issuance of the Notice of Acceptance, his “pre-acceptance” 827 form did not satisfy the communication requirements under ORS 656.262(6)(d), ORS 656.262(7)(a), or ORS 656.267(1). *Id.* at 693. Therefore, we concluded that, pursuant to ORS 656.262(6)(d) and (7)(a), a *de facto* denial could not be considered because the claimant did not comply with the statutory “pre-hearing request” written communication requirements. *Id.* at 693-94.

Here, as in *Lyons*, SAIF’s Notice of Acceptance issued after its receipt of both claimant’s “801” and “827” claim forms and, therefore, the acceptance notice effectively responded to both claims. (Exs. 1, 7A, 8A). Because claimant’s “new/omitted medical condition claim” was made before any conditions were accepted for his initial claim, SAIF was not required to process such a claim. *Lyons*, 69 Van Natta at 692-93. Therefore, we find no *de facto* denial of the alleged “new/omitted medical condition” claim. *Id.*; see *Kenneth Hawes*, 54 Van Natta 1915 (2002) (the carrier’s failure to respond to the claimant’s request for acceptance of conditions before the carrier had accepted any conditions was not a “denied claim”).

Moreover, if claimant was dissatisfied with the scope of SAIF’s initial acceptance and believed that additional conditions should have been accepted, he was statutorily required to *first* communicate in writing to SAIF his objections to the notice, and clearly request formal written acceptance of the omitted medical conditions, following the issuance of the Notice of Acceptance. See ORS 656.262(6)(d), (7)(a); ORS 656.267(1). Claimant did not comply with the statutory directive to initiate a new/omitted medical condition claim pursuant to ORS 656.267 before he filed a hearing request raising a *de facto* denial, penalties, and attorney fees. In accordance with the aforementioned case precedent and statutory scheme, he may not allege a *de facto* denial of a condition based on information in the Notice of Acceptance. *Id.*; *Lyons*, 69 Van Natta at 694.¹

¹ Claimant also contends that he is entitled to penalties and related attorney fees for SAIF’s allegedly unreasonable claim processing regarding the 2013 “new/omitted medical condition claim.” However, because claimant’s January 26, 2016 request for hearing seeking such penalties and attorney fees was not filed within two years after the “alleged action or inaction occurred,” as statutorily required under ORS 656.319(6), it was untimely. See *Robert B. Reese*, 58 Van Natta 1972, 1981 n 6, *recons*, 58 Van Natta 2625 (2006) (citing *French-Davis v. Grand Central Bowl*, 186 Or App 280, 285 (2003)). Moreover, even if the penalty and attorney fee issues could be considered, we would not find SAIF’s claim processing conduct to be unreasonable based on the reasoning expressed in the *Lyons* decision.

Occupational Disease Claim

We adopt and affirm that portion of the ALJ's order that found that claimant did not establish the compensability of his occupational disease claim with the following supplementation.

In upholding SAIF's denial of his occupational disease claim, the ALJ found that claimant did not persuasively establish that his work activities were the major contributing cause of his low back and right knee conditions. The ALJ reasoned that Dr. Hall's opinion did not sufficiently explain the causal contribution from claimant's work activities and did not adequately address the contrary opinion of Dr. Bald.

On review, claimant argues that the opinions of Dr. Saldua and Dr. Hall persuasively support the compensability of his occupational disease claim for low back and right knee conditions. For the following reasons, we disagree.

To establish a compensable occupational disease claim, claimant must prove that employment conditions were the major contributing cause of his low back and right knee conditions. ORS 656.266(1); ORS 656.802(2)(a). The major contributing cause is the cause, or combination of causes, that contributed more than all other causes combined. *McGarrah v. SAIF*, 296 Or 145, 166 (1983). This is a complex medical question that must be resolved on the basis of expert medical opinion. *Uris v. Comp. Dep't*, 247 Or 420 (1967); *SAIF v. Barnett*, 122 Or App 279, 283 (1993). We give more weight to medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Saldua opined that the mechanism of claimant's July 26, 2013 work injury "can be consistent with the diagnosis of a lumbar sprain[.]" and concluded that, at the time claimant first sought medical treatment following his work injury, "the primary reason or the major contributing cause was the work injury of a lumbar strain/sprain." (Ex. 8-9-10). However, to the extent that Dr. Saldua attributed claimant's lumbar strain/sprain condition solely to the specific work injury, without noting any contribution from employment conditions, his opinion does not establish a compensable occupational disease. *Ryan S. Henderson*, 62 Van Natta 1189 (2010) (an occupational disease claim was not compensable where the medical evidence was more consistent with a condition attributable to a specific injurious event rather than a result of the claimant's ongoing work activities); *Michael G. O'Connor*, 58 Van Natta 689 (2006), *aff'd*

without opinion, 215 Or App 358 (2007) (where the medical evidence attributed the claimant's condition to two distinct injuries, and did not establish that it was related to his work activities in general or in combination with the work injuries, the occupational disease claim was not compensable).

Moreover, we agree with the ALJ's determination that Dr. Hall did not persuasively explain how claimant's work activities and 2013 work injury were the major contributing cause of his low back and right knee conditions. (Exs. 15, 18). In particular, Dr. Hall disagreed with Dr. Bald's contrary opinion and noted that Dr. Bald did not mention the heavy lifting requirements of claimant's job, which involved long hours and lifting and transporting boxes using a hand truck. (Ex. 15). According to Dr. Hall, claimant's work activities "can cause low back and knee pain and is the major contributing cause of [claimant's] pain." (Ex. 15-2).

However, Dr. Bald acknowledged that claimant's job involved heavy lifting and transferring boxes onto a hand truck, but explained that his work activities led him to experience symptoms, but were not the major contributing cause of his underlying low back and right knee conditions. (Ex. 16). Moreover, Dr. Bald stated that he might think differently if claimant "had to actually carry these boxes rather than handtrucking them, but since he's using a handtruck, that does not put much stress on the knees or the back." (Ex. 16-2). Under these particular circumstances, we do not find Dr. Hall's opinion that claimant's heavy job activities were the major contributing cause of his low back and right knee conditions to be well reasoned or persuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Based on the foregoing reasoning, in addition to the reasons expressed in the ALJ's order, claimant has not met his burden of establishing the compensability of his occupational disease claim. ORS 656.266(1); ORS 656.802(2)(a). Consequently, we affirm.

ORDER

The ALJ's order dated August 1, 2016 is affirmed.

Entered at Salem, Oregon on May 12, 2017

Member Lanning specially concurring.

For the reasons expressed in the dissenting opinion in *Ernest R. Lyons*, 69 Van Natta 688 (2017), I would find that SAIF's failure to respond to claimant's August 26, 2013, claim for acceptance of an L4-5 annular tear and mild disc bulge to be a *de facto* denial. However, consistent with the doctrine of *stare decisis*, I follow the holding in *Lyons* and concur with the outcome in this case.