
In the Matter of the Compensation of
JARED L. BLEDSOE, Claimant
WCB Case No. 17-02447, 17-02259
ORDER ON REVIEW
Paul B Meadowbrook, Claimant Attorneys
Bohy Conratt LLP, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Martha Brown's order that declined to authorize an offset for alleged overpaid temporary disability benefits. On review, the issue is offset. We reverse.

FINDINGS OF FACT

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

In November 2014, the employer accepted claimant's Post Traumatic Stress Disorder (PTSD) claim. (Exs. 7, 8).

A March 2016 Notice of Closure (NOC) awarded temporary disability benefits and found claimant's accepted condition medically stationary on November 12, 2014. (Ex. 57-1).

In April 2016, an Order on Reconsideration rescinded the NOC based on insufficient closing information. (Ex. 66-2).

In early August 2016, Dr. Heck, a psychiatrist who examined claimant at the employer's request, determined that claimant's PTSD condition was in remission at or around August 2015. (Ex. 73-27).

In late August 2016, Dr. Thompson, claimant's attending physician, disagreed with Dr. Heck's opinion that claimant was not impaired, noting that claimant was unable to perform his regular work duties. (Ex. 79). Dr. Thompson agreed with the remainder of Dr. Heck's report. (*Id.*)

A September 2016 NOC awarded temporary disability benefits. (Ex. 81). The NOC found that claimant's condition was medically stationary on August 1, 2015. (*Id.*)

In November 2016, an Order on Reconsideration found that claimant's medically stationary status was unclear and that the employer had not provided an accurate job description. (Ex. 86-2). Consequently, the reconsideration order rescinded the September 2016 closure notice as premature. (Ex. 86-3).

On February 17, 2017, Dr. Thompson continued to agree with Dr. Heck's analysis regarding the medically stationary status of the accepted PTSD condition. (Ex. 90-1). Dr. Thompson rated claimant's permanent impairment as Class II. (Ex. 90-2).

On February 27, 2017, a NOC awarded 23 percent permanent impairment, 26 percent work disability benefits, and temporary total disability (TTD) benefits from September 10, 2014 to March 22, 2015, and April 17, 2015 to July 17, 2015. (Ex. 92). Finding claimant's condition medically stationary as of August 1, 2015, the NOC authorized the employer to deduct overpaid benefits from any current or future benefits due under ORS 656.268. (*Id.*)

On March 2, 2017, the employer notified claimant of a temporary disability overpayment from August 5, 2015 to November 27, 2015, and from November 30, 2015 to February 14, 2017. (Ex. 94). The employer indicated that the overpayment would be deducted from his permanent disability awards. (*Id.*)

The employer's payment records indicate that it paid temporary disability payments benefits from August 5, 2015 to November 27, 2015, and from November 30, 2015 to February 14, 2017. (Ex. 95-1)

On March 13, 2017, claimant requested reconsideration of the February 2017 NOC, asserting that his attending physician did not concur with Dr. Heck's medically stationary date and that the claim was prematurely closed. (Ex. 96). He also expressed disagreement with his permanent impairment findings and requested a medical arbiter examination. (*Id.*) He did not indicate disagreement with the periods of temporary disability benefits granted by the NOC. (*Id.*)

On March 20, 2017, Dr. Thompson clarified that he agreed with Dr. Heck's opinion that claimant's condition was medically stationary. (Ex. 97). However, he disagreed with the medically stationary date in Dr. Heck's report and instead agreed with Dr. Taylor, a treating psychologist, that the medically stationary date was "now." (*Id.*)

On May 8, 2017, Dr. Dodson, the medical arbiter, examined claimant and determined that he had Class II mild impairment related to the accepted PTSD condition. (Ex. 98).

On May 22, 2017, an Order on Reconsideration modified claimant's medically stationary date from August 1, 2015 to February 17, 2017 (the date of Dr. Thompson's response to the employer's inquiry), and affirmed the permanent disability awards. (Ex. 99-3-4). The reconsideration order stated that the "Notice of Closure dated February 27, 2017, is affirmed," and did not adjust the TTD award dates. (Ex. 99-4).

The employer requested a hearing from the Order on Reconsideration, raising the issues of claimant's medically stationary date and offset. Claimant also requested a hearing from the Order on Reconsideration, seeking temporary disability benefits (on both a procedural and substantive basis) through February 17, 2017.

CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the Order on Reconsideration's medically stationary date. Based on that finding, the ALJ reasoned that claimant was entitled to the temporary disability benefits that were previously paid by the employer. Consequently, the ALJ concluded that there was no overpayment of temporary disability benefits and declined the employer's offset request.

On review, the employer challenges the ALJ's denial of its offset request. In doing so, the employer contends that the ALJ, in essence, addressed claimant's entitlement to substantive temporary disability benefits, which was an issue that was not raised during the reconsideration proceeding. *See* ORS 656.268(9). In response, claimant asserts that the temporary disability dispute arose out of the reconsideration order, and, as such, can be considered. *Id.*; *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000) (the hearing before the ALJ is limited to the issues raised on reconsideration and those issues "arising out of the reconsideration order"). As explained below, we agree with the employer's contention.

ORS 656.268(5)(c) requires a party who objects to a Notice of Closure to first seek reconsideration by the Director. Issues not raised by a party to the reconsideration may not be raised at hearing unless the issue arises out of the reconsideration order itself. ORS 656.268(9); ORS 656.283(6); *see Pressing Matters v. Carr*, 248 Or App 41, 48 n 3, 49 (2012) (a party requesting

reconsideration of a closure notice must raise challenges at reconsideration in aid of that party's own burden of proof in order to preserve those challenges for hearing). "Taken together, those statutes preclude a claimant from raising an issue at hearing if that issue stems from an objection to a Notice of Closure that was not preserved by mandatory reconsideration." *Venetucci v. Metro*, 155 Or App 559, 563 (1998). If an issue is not manifest in the Notice of Closure, mandatory reconsideration does not preclude later review of that issue. *Id.* at 564.

In *SAIF v. Coburn*, 159 Or App 413, 419, *rev den*, 329 Or 527 (1999), the court explained that there is no statutory definition of "overpayment," but "the pertinent statutory and administrative provisions imply the obvious: that an overpayment occurs when an amount is paid in excess of the compensation to which the worker is entitled." See *Justin D. Rhodes*, 58 Van Natta 3011, 3017 (2006). A carrier "may offset any compensation payable to the worker to recover an overpayment from a claim with the same insurer or self-insured employer." ORS 656.268(14)(a). A carrier is statutorily authorized to recover overpaid compensation from a claimant's future benefits without prior authorization. See ORS 656.268(14)(a); *Dan L. Prociw*, 62 Van Natta 1041, 1043 (2010); *Melvin R. Johnson*, 59 Van Natta 2155, 2161 n 6 (2007); *Kenneth Pray*, 55 Van Natta 4253, 4256 n 2 (2003).

Here, claimant's request for reconsideration of the NOC specified that the only issues for resolution were premature closure, the medically stationary date, and disagreement with the impairment findings used to determine permanent disability. (Ex. 96). The reconsideration order modified claimant's medically stationary date from August 1, 2015 to February 17, 2017, but did not address or modify the TTD awards granted in the NOC. Although the request for reconsideration form had a "temporary disability" box, claimant did not select that issue for consideration.

In requesting a hearing, the employer raised the issues of "medically stationary date" and offset. In doing so, it did not seek modification of claimant's temporary disability award. Instead, asserting that it had paid temporary disability benefits beyond the period for which claimant's temporary disability benefits had been granted, the employer sought confirmation of its statutory right to offset its overpayment against claimant's permanent disability award. Thus, the employer's request for hearing did not encompass a temporary disability issue arising from a reconsideration order.

Claimant contends that the Order on Reconsideration addressed the "temporary disability" issue, because the "medically stationary" issue necessarily included whether he was entitled to ongoing temporary disability benefits beyond

the dates listed in the NOC. However, as previously stated, there was no express dispute during the reconsideration proceeding that claimant was entitled to additional temporary disability benefits.¹ See *Steve Meadows*, 67 Van Natta 1598, 1598 n 1 (2015) (the claimant’s challenge to “temporary disability” dates in a reconsideration order was not addressed because the only issue identified in the claimant’s request for reconsideration was the “medically stationary” date). As reasoned in *Medows*, the issues of “medically stationary” status and “temporary disability” dates in a NOC are not synonymous terms. *Id.*

Further support for our conclusion is found in *Annette M. Lane*, 69 Van Natta 1537 (2017). There, the claimant’s claim was closed by a “post-ATP” NOC, which awarded temporary disability benefits to a specific date, as well as permanent disability benefits. Both parties disagreed with the impairment findings. Although a reconsideration order modified the “medically stationary” date to a date prior to the date that the NOC terminated the claimant’s temporary disability benefits, the reconsideration order did not modify the claimant’s temporary disability award.

After the reconsideration order became final, the carrier attempted to recover the “overpaid” temporary disability benefits (*i.e.*, the post-medically stationary date time loss). The claimant requested a hearing. On review, reasoning that the reconsideration order had neither adjusted the temporary disability dates listed on the NOC nor indicated that an offset was authorized based on the medically stationary date, we concluded that the carrier must provide the temporary disability benefits listed in the NOC (as unchanged by the final reconsideration order) and could not offset those benefits.

Similarly, in *Chester J. Dzienis, Jr.*, 66 Van Natta 1090 (2014), the carrier issued a NOC, indicating that the claimant’s condition was medically stationary on a specific date and awarded permanent disability benefits. The claimant requested reconsideration, which resulted in an order that changed the medically stationary date to a date several months beyond that granted by the NOC (but did not modify the NOC’s TTD award), and increased the permanent disability award. The claimant timely requested a hearing from the reconsideration order, asserting that he was entitled to additional temporary disability benefits based on the modified “medically stationary” date.

¹ Moreover, whether claimant is entitled to temporary disability benefits (*i.e.*, released from work for his accepted claim) is a separate and distinct issue from whether his condition is no longer reasonably expected to materially improve from medical treatment or the passage of time. *Id.*

In rendering our determination, we noted that the Order on Reconsideration did not modify the claimant's temporary disability benefits as granted in the NOC. Consequently, we concluded that the reconsideration order did not entitle him to additional temporary disability benefits, because the order did not grant such an award.

Here, as in *Lane* and *Dzienis*, although the reconsideration order changed the medically stationary date found in the NOC, claimant's temporary disability award was not modified. Consequently, under these particular circumstances, because the entitlement to substantive temporary disability benefits did not flow from the "medically stationary" date, but instead from claimant's uncontested TTD award, we conclude that the temporary disability issue did not arise out of the Order on Reconsideration.²

Thus, we conclude that claimant's entitlement to "substantive" temporary disability benefits (*i.e.*, such benefits resulting from the claim closure) was not raised in the reconsideration proceeding and did not arise out of the reconsideration order. As such, the ALJ was not authorized to modify claimant's temporary disability award.³

Accordingly, we reverse the ALJ's decision declining to authorize the employer's offset. Because it is undisputed that the employer paid temporary disability benefits beyond July 17, 2015 (the date that claimant's award of such benefits ended), until February 14, 2017, the record establishes the existence of an overpayment. *See* ORS 656.268(14)(a). Consequently, the overpayment may be recovered in the manner prescribed by OAR 436-060-0170. Finally, in light of this determination, we reverse the ALJ's attorney fee award.

² We further note that OAR 436-030-0115(7) provides that the Director "will review those issues raised by the parties and the requirements under ORS 656.268(1)." Here, claimant did not raise the temporary disability issue in the reconsideration proceeding. Although he had an opportunity to identify that as an issue, he did not do so on the reconsideration request form. Moreover, as previously explained, the "medically stationary" issue does not encompass the TTD award. Consequently, there was no error in the Appellate Review Unit's decision that did not modify the TTD award. *See* ORS 656.283(6); *Callow*, 171 Or App at 183.

³ Moreover, to the extent that claimant contends that he is entitled to additional "procedural" temporary disability benefits, we are not authorized to award such "procedural" benefits in excess of a final "substantive" determination (*i.e.*, the Order on Reconsideration that did not address or alter claimant's TTD award). *Darnell M. Lucas*, 54 Van Natta 1158, 1159 (2002).

ORDER

The ALJ's order dated October 10, 2017 is affirmed in part and reversed in part. That portion of the ALJ's order that declined to authorize an offset for overpaid temporary disability benefits is reversed. The ALJ's \$5,000 attorney fee award is also reversed. The employer is authorized to recover its overpayment in accordance with ORS 656.268(14)(a) and OAR 436-060-0170. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 9, 2018