
In the Matter of the Compensation of
LOUIS J. RALSTON, Claimant
WCB Case No. 03-01244
ORDER ON REVIEW
Malagon Moore et al, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Hoguet's order that dismissed his request for a hearing regarding an assessed attorney fee arising from a "post-aggravation rights" new or omitted medical condition claim. On review, the issues are jurisdiction and (potentially) attorney fees.

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

In 1992, claimant compensably injured his neck and he had an anterior cervical discectomy at C4-5 and C5-6. (Ex. 2). SAIF accepted a disc herniation at C5-6. (Ex. 3).

In May 1994, the Board approved a Claim Disposition Agreement (CDA) between the parties that provided for a release of claimant's future workers' compensation benefits, except medical services, for his compensable injury. (Ex. 4).

In November 2002, Dr. Hacker reported that claimant's symptoms had worsened. (Ex. 8). He diagnosed cervical myelopathy with progression due to spinal stenosis at C3-4 and C4-5, and recommended surgery. (*Id.*)

Claimant requested that SAIF amend its acceptance to include spinal stenosis at C3-4 and C4-5. (Exs. 9, 10-1). On January 23, 2003, SAIF denied the claim for C3-4 and C4-5 stenosis. (Ex. 12). Claimant requested a hearing regarding SAIF's denial. On May 8, 2003, SAIF notified claimant's attorney that it would rescind the January 23, 2003 denial and that the only remaining issue was entitlement to an attorney fee. The parties proceeded to a hearing on that issue.

The ALJ found that claimant's claim for C3-4 and C4-5 stenosis was a "post-aggravation rights" new or omitted medical condition claim that was under the Board's Own Motion jurisdiction. Citing OAR 438-007-0027, the ALJ

declined to resolve the attorney fee issue, determining that entitlement to an assessed attorney fee was a matter within the Board's Own Motion jurisdiction.

Claimant argues that the ALJ had jurisdiction under OAR 438-007-0027(1) and that he did not exercise discretion within the parameters of the governing law. He contends that the ALJ erroneously concluded that he did not have jurisdiction to decide this matter. On the other hand, SAIF argues that the ALJ acted within his discretionary authority under OAR 438-007-0027 by dismissing claimant's request for hearing.

OAR 438-007-0027(1) provides:

“Where the Administrative Law Judge determines that an issue(s) raised by a party is within the Board's Own Motion jurisdiction, the Administrative Law Judge may proceed with a fact-finding hearing or other proceeding that the Administrative Law Judge deems achieves substantial justice (without notifying or requesting permission from the Board prior to going forward with such a fact-finding hearing or other proceeding) for the purpose of providing an unappealable recommendation to the Board regarding the issue(s) within the Board's Own Motion jurisdiction.”

Thus, OAR 438-007-0027(1) provides that where an ALJ determines that an issue raised by a party is within the Board's Own Motion jurisdiction, the ALJ “*may* proceed with a fact-finding hearing or other proceeding[.]” (Emphasis supplied). Under OAR 438-007-0027(1), the decision to proceed with a fact-finding hearing or other proceeding is committed to the discretion of the ALJ. We review the ALJ's ruling for abuse of discretion. *See SAIF v. Kurcin*, 334 Or 399, 405 (2002) (because Board's continuance rule stated that an ALJ “*may*” continue a hearing for further proceedings, Board's standard of review of ALJ's continuance ruling was for an abuse of discretion).

The statutory scheme set forth in ORS 656.278(1)(b) (2001) regarding the processing of new or omitted medical conditions related to an Own Motion claim requires satisfaction of the following requirements for reopening the claim: (1) the new or omitted medical condition claim must have been initiated after the expiration of the claimant's aggravation rights under ORS 656.273; and (2) the new or omitted medical condition must be accepted or compensable. *See William*

E. Hartzog, 54 Van Natta 593 (2002); *James J. Kemp*, 54 Van Natta 491, 507-08 (2002).

We agree with SAIF that the ALJ acted within his discretionary authority under OAR 438-007-0027 by dismissing claimant's request for hearing. Among other reasons, the ALJ determined that entitlement to an assessed attorney fee was a matter within the Board's Own Motion jurisdiction. Although the ALJ was also authorized to address the disputed issue and to provide an Own Motion recommendation on the subject, we find no abuse of discretion by the ALJ in declining to conduct a fact-finding hearing or other proceeding pursuant to OAR 438-007-0027.¹ See *SAIF v. Kurcin*, 334 Or at 405.

ORDER

The ALJ's order dated June 9, 2003 is affirmed.

Entered at Salem, Oregon on November 25, 2003

¹ We note that claimant is not precluded from seeking relief under the Board's Own Motion jurisdiction. Should claimant submit a request to the Own Motion Board seeking relief under ORS 656.278 and OAR Division 012, the Board will consider that request and the issues arising therefrom under its statutory authority regarding such claims.