
In the Matter of the Compensation of
STANLEY J. BIRCH, Claimant
Own Motion No. 03-0490M
OWN MOTION ORDER
Claimant Unrepresented
JCI - Sedgwick CMS, Insurance Carrier

Reviewing Panel: Members Biehl and Langer.

The self-insured employer has submitted claimant's request for claim reopening based on a worsening of his accepted right foot and ankle conditions. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. The employer opposed reopening, contending that claimant's compensable condition does not require any medical treatment that qualifies his claim for reopening. Based on the following reasoning, we find that claimant's claim does not qualify for reopening.

Pursuant to ORS 656.278(1)(a) (2001), there are three requirements for the reopening of an Own Motion claim for a worsening of a compensable injury. First, the worsening must result in the partial or total inability of the worker to work. Second, the worsening must require hospitalization, surgery (either inpatient or outpatient), or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the worker to return to work. Third, the worker must be in the work force at the time of disability as defined under the criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989).¹ *James J. Kemp*, 54 Van Natta 491 (2002).

In *Larry D. Little*, 54 Van Natta 2536 (2002), we concluded that if any one of the three qualifying medical treatments listed in ORS 656.278(1)(a) (2001) is satisfied, a "worsening condition" claim meets the medical treatment requirement for reopening in Own Motion. We defined the three qualifying medical treatments listed in ORS 656.278(1)(a) (2001) in the following manner: (1) "Surgery" is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) "hospitalization" is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar

¹ In *Dawkins*, the Court concluded that a claimant is in the work force at the time of disability if he or she is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and seeking work; or (3) not employed, but willing to work and is not seeking work because a work-related injury has made such efforts futile. *Dawkins v. Pacific Motor Trucking* 308 Or at 258.

facility. The third type of qualifying treatment requires establishment of three elements: (a) curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery); (b) prescribed in lieu of (in the place of or instead of) hospitalization; and (c) that is necessary (required or essential) to enable the injured worker to return to work. *Id.* at 54 Van Natta 2542, 2546.

Furthermore, we held that the issue of whether a worsening of the compensable injury requires hospitalization, inpatient or outpatient surgery, or “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work” presents a medical question that must be addressed by persuasive medical evidence in the record. *Little*, 54 Van Natta at 2542-43. In other words, the Board cannot infer that a treatment involves one of the above medical treatment requirements under ORS 656.278(1)(a) (2001). *SAIF v. Calder*, 157 Or App 224, 227-28 (1998); *Little*, 54 Van Natta at 2543; *Kemp*, 54 Van Natta at 509.

Here, the medical treatment provided by claimant’s physician does not satisfy the definition of any of the three qualifying medical treatments. In September 2003, claimant sought medical treatment for pain in his right foot. Dr. Matthews noted that claimant has chronic degenerative changes. Claimant underwent an intraarticular cortisone injection. This injection does not qualify as “surgery” or as “hospitalization.” See *Larry D. Little*, 54 Van Natta at 2543 (epidural steroid injection did not constitute hospitalization, surgery or other curative treatment prescribed in lieu of hospitalization that was necessary to enable the claimant to return to work where medical evidence did not establish that the injection was provided in lieu of hospitalization or regarded as necessary to enable the claimant to return to work); *John Denton*, 50 Van Natta 1073 (1998).

Dr. Matthews also referred claimant to Dr. Laxson, a podiatrist, for a consultation. In October 2003, claimant was examined by Dr. Laxson, who recommended that claimant obtain an ankle-foot orthosis, which is a brace that would assist him in stabilizing his ankle joint. Dr. Laxson noted that if bracing were to fail, claimant may have to undergo surgery.

Dr. Laxson’s bracing recommendation was prescribed in efforts to avoid a possible surgical approach. There is no evidence that Dr. Laxson’s recommendation for the ankle-foot orthosis was prescribed in lieu of hospitalization that was necessary to enable claimant to return to work. Consequently, the bracing that claimant received did not qualify as curative

treatment prescribed “in lieu of hospitalization.” *Danny L. Johnson*, 56 Van Natta 129 (2004); *Cathy A. McCausland*, 55 Van Natta 3039 (2003); *Larry D. Little*, 54 Van Natta at 2547; *but see Peter B. Wallen*, 55 Van Natta 1905 (2003) (medical treatment requirement under ORS 656.278(1)(a) (2001) satisfied by physician’s unrebutted statement that epidural injections the claimant underwent were curative treatment prescribed in lieu of hospitalization for surgery that was necessary to enable the claimant to return to work).

Thus, this medical record does not establish that claimant’s condition required hospitalization, surgery or other curative treatment that was prescribed in lieu of hospitalization that was necessary to enable him to return to work. Under these circumstances, we conclude that claimant’s Own Motion claim for a worsening of his previously accepted right foot and ankle conditions does not satisfy the criteria set forth in ORS 656.278(1)(a) (2001).² Consequently, we are unable to authorize a reopening of the Own Motion claim.

Accordingly, the request for Own Motion relief is denied.³ Claimant’s entitlement to medical expenses pursuant to ORS 656.245 regarding his accepted right foot and ankle conditions is not affected by this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 3, 2004

² If a party obtains medical evidence that addresses the statutorily required medical treatment (*i.e.*, hospitalization, surgery or curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work) that is lacking from the current record, that party may request reconsideration of our decision. However, because our authority to reconsider this decision expires within 30 days after the mailing date of the Own Motion Order, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).

³ Inasmuch as claimant is unrepresented, he may wish to consult the Workers’ Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers’ Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS’ COMPENSATION OMBUDSMAN
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405