
In the Matter of the Compensation of
MICHAEL D. PICKETT, Claimant
Own Motion No. 03-0278M
OWN MOTION ORDER ON RECONSIDERATION
Scott M Mcnutt Sr, Claimant Attorneys
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Reviewing Panel: Members Langer and Biehl.

On September 17, 2003, we withdrew our September 5, 2003 Own Motion Order, which declined to authorize the reopening of claimant's 1976 claim for a "worsening" of his previously accepted condition because he failed to prove that he was in the work force at the time of disability. ORS 656.278(1)(a) (2001). We took this action to consider claimant's request for reconsideration and submission of documents and to permit the SAIF Corporation the opportunity to respond. Having received SAIF's response, we proceed with our reconsideration.

SAIF opposed the reopening of this "worsening" condition claim, contending that: (1) claimant had withdrawn from the work force; and (2) claimant's compensable condition does not require any medical treatment that qualifies his claim for reopening because the recommended treatment was palliative, rather than curative.

ORS 656.278(1)(a) (2001) establishes three prerequisites 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). *James J. Kemp*, 54 Van Natta 491 (2002). If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

We examine these requirements in the order listed. The first issue is whether claimant's compensable right knee condition worsened resulting in the partial or total inability to work. The resolution of this issue is a medical question that must be addressed by medical evidence. In other words, we cannot infer that a worsening (or a particular medical treatment) will result in an inability to work. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) ("[t]he Board is not an agency

with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”); *Todd R. Greer*, 55 Van Natta 4053 (2003); *Kemp*, 54 Van Natta at 509. Instead, the record must include medical evidence that claimant’s compensable right knee conditions worsened resulting in an inability to work. ORS 656.278(1)(a) (2001).

Here, no medical provider addresses that issue. Under these circumstances, we conclude that this Own Motion claim for a worsened compensable right knee condition does not satisfy the inability to work criteria required under ORS 656.278(1)(a) (2001).¹

Next, we address the issue of whether claimant satisfies the medical treatment requirement under ORS 656.278(1)(a) (2001). That is, whether claimant’s compensable right knee condition worsened requiring 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. *Id.*

These three qualifying medical treatments are defined as follows: (1) “surgery” is an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) “hospitalization” is a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. *Larry D. Little*, 54 Van Natta 2536, 2542 (2002).

The third type of qualifying treatment requires establishment of three elements: (1) 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); (2) prescribed (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) that is necessary (required or essential) to enable (render able or make possible) the injured worker to return to work. *Id.* at 54 Van Natta 2546.

Here, Dr. Bert, claimant’s attending physician, prescribed medication (Celebrex and Relafen). On March 26, 2003, examined claimant, obtained an x-ray, and found that claimant’s right knee had no joint space or patellofemoral

¹ If a party obtains medical evidence that addresses the “inability to work” component of the statutory standard 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).

space left, noting that claimant “gets around remarkably well, considering.” Dr. Bert advised claimant that “scoping” his knee or Synvisc injections would not do much at this point. He also stated that he “would recommend a knee replacement only when [claimant] is unable to function.”

On May 9, 2003, Dr. Bert requested authorization from SAIF to perform a right knee arthroscopy. On June 3, 2003, Dr. Bert reported that claimant was adamant about not having a total knee replacement at this point. He noted that, although he advised claimant that another arthroscopy “would probably be palliative only,” claimant wanted to proceed with an arthroscopy because he was not ready to have a total knee replacement.

On this record, claimant has not established a qualifying medical treatment under ORS 656.278(1)(a) (2001). In this regard, the only medical opinion characterizes the arthroscopy as “palliative,” not curative. As explained above, as used in ORS 656.278(1)(a) (2001), “surgery” is an invasive procedure undertaken for a *curative* purpose that is likely to temporarily disable the worker. Because the arthroscopy described in this case is “palliative,” it does not qualify as “surgery” or “other *curative* treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work” under ORS 656.278(1)(a) (2001).

In addition, there is no evidence that the arthroscopy was prescribed in lieu of hospitalization and is necessary to enable claimant to return to work. *Little*, 54 Van Natta at 2546. Finally, although Dr. Bert discussed the possibility of total knee replacement surgery, it is not clear that he recommended such surgery at this time, and claimant is adamant about not pursuing such surgery at this time. Therefore, we find that claimant does not satisfy the medical treatment requirement for a “worsening” condition claim under ORS 656.278(1)(a) (2001).

In light of our determinations regarding the “inability to work” and the required medical treatment issues, it is unnecessary to address the issue of whether claimant was in the “work force” on the “date of his disability.” In reaching this conclusion, we reiterate that the record fails to establish that claimant’s condition worsened resulting in an inability to work and requiring (including a physician’s recommendation for) hospitalization or 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, the two factors necessary to determine the “date of disability.”

Under such circumstances, the “date of disability” for establishing the “work force” factor cannot be determined. *Robert J. Simpson*, 55 Van Natta 3801 (2003) (“date of disability” is date the worsening both resulted inability to work and required requisite medical treatment under ORS 656.278(1)(a) (2001)); *Mitchell*, 54 Van Natta at 2616. Without such a determination, we are unable to decide whether claimant remained in the work force at the “date of disability.”

For all of the above reasons, we find that the record does not satisfy the requirements for reopening claimant’s “worsening” condition claim under ORS 656.278(1)(a) (2001). Consequently, we are unable to authorize the reopening of this Own Motion “worsening” claim.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our September 5, 2003 order. The parties’ rights of appeal and reconsideration shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 29, 2004