

In the Matter of the Compensation of
THERON W. STIEHL, Claimant
Own Motion No. 04-0201M
OWN MOTION ORDER
Heather Holt, Claimant Unrepresented
SAIF Corporation, Insurance Carrier

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation has submitted claimant's request for claim reopening based on a worsening of his accepted left knee condition and for a "post-aggravation rights" new/omitted medical condition claim ("right knee condition"). ORS 656.278(1)(a), (b) (2001). Claimant's aggravation rights have expired. SAIF opposes reopening of the "worsening" claim, contending that claimant's compensable condition does not require any medical treatment that qualifies his claim for reopening and that he was not in the work force. SAIF also opposes reopening of the "post-aggravation rights" new/omitted medical condition claim, contending that the new medical condition claim is not compensably related to his previously accepted conditions. SAIF issued a Notice of Denial under OAR 438-012-0070.

Based on the following reasoning, we deny reopening on either basis.

"Post-Agravation Rights" New/Omitted Medical Condition Claim

On April 22, 2004, SAIF issued a denial regarding a "post-aggravation rights" new medical condition ("right knee condition"), contending that the aforementioned condition was not compensable. OAR 438-012-0070; OAR 438-012-0090. Claimant did not timely appeal that denial. *See* OAR 438-012-0070. Consequently, as a matter of law, the denied condition is not compensable. *Rory L. Sandusky*, 56 Van Natta 956 (2004).

Under such circumstances, we are not authorized to reopen the claim for the "post-aggravation rights" new medical condition ("right knee condition") under ORS 656.278(1)(b) (2001). Accordingly, the request for "post-aggravation rights" new/omitted medical condition claim reopening is denied.

Worsened Condition Claim

In December 2004, claimant sought medical treatment for bilateral knee pain. Dr. Townsend, claimant's attending physician, diagnosed medial compartment degenerative joint disease and recommended lateral heel wedges. He also recommended that claimant undergo a series of Synvisc injections (hyaluronic acid injections) in order to avoid knee replacement. (Ex. 21).

Explaining that the proposed injections were "primarily used to decrease symptoms to hold off on knee replacement," Dr. Townsend opined that the treatment was considered palliative. He further noted that claimant would be unable to work until at least a week after the third injection.

In April 2004, claimant attended an insurer-arranged medical examination (IME) with Dr. Marble, who reported that the injections had resulted in some improvement. He noted that the improvement was greater than he would have anticipated given the amount of degeneration in claimant's left knee. Dr. Marble further noted that he would recommend a total joint arthroplasty only after claimant had achieved a "significant weight loss." (Ex. 22). Dr. Townsend concurred with Dr. Marble's conclusions. (Ex. 23).

Among the requirements for claim reopening under ORS 656.278(1)(a) (2001), there must be a worsening that requires 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. 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. In *Little*, 54 Van Natta at 2542, 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 facility.

We also found that the third type of qualifying treatment required 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. *Little* at 54 Van Natta 2546.

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 medical evidence. In other words, we cannot infer that a treatment involves 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.” *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”); *Terry L. Smith*, 55 Van Natta 2763 (2003). This question must be answered by persuasive medical evidence.

Based on our review, the record does not establish that claimant’s condition worsened requiring hospitalization, surgery or other curative treatment that was prescribed in lieu of (instead of or in place of) hospitalization that was necessary to enable him to return to work. ORS 656.278(1)(a) (2001); *Larry D. Little*, 54 Van Natta at 2546. No physician recommended surgery or hospitalization. Nor is there any evidence that the joint injections constituted “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” See *Stephen Jackson*, 55 Van Natta 2421, 2422 (2003); *Mark R. Gescher*, 55 Van Natta 1956 (2003) (ORS 656.278(1)(a) (2001) not satisfied where, although treatment (prescription medication) was arguably curative and necessary to enable the claimant to return to work, there was no evidence that the treatment was prescribed in lieu of hospitalization).

Drs. Townsend’s and Marble’s reports suggest the possibility that claimant might need surgery. However, the “possibility” of surgery is insufficient to satisfy the medical treatment requirement under ORS 656.278(1)(a) (2001). *Jeffrey D. Dugan*, 56 Van Natta 550 (2004). Drs. Townsend’s and Marble’s opinions do not establish a recommendation for surgery or hospitalization at this time.

Under these circumstances, we conclude that this Own Motion claim for a worsening of claimant’s previously accepted conditions (left knee strain) does not satisfy the criteria set forth in ORS 656.278(1)(a) (2001) to qualify this worsening claim for reopening.¹

¹ Additionally, SAIF contends that claimant was not in the work force at the time of the current disability. In this particular case, this matter need not be addressed because even if the work force issue

Consequently, we deny the reopening of the Own Motion “worsening” claim.²

IT IS SO ORDERED.

Entered at Salem, Oregon on July 20 , 2004

was found in claimant’s favor, the record would still be insufficient to support a claim reopening under ORS 656.278(1)(a) (2001).

² If a party obtains medical evidence that addresses the “curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return 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 along with any additional medical evidence must be filed within that 30-day period. OAR 438-012-0065(2).