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In the Matter of the Compensation of  
**ANITA L. MCCLURE, Claimant**  
Own Motion No. 04-0332M  
OWN MOTION ORDER  
Cary et al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation has submitted claimant's request to reopen her claim for a worsened compensable bilateral shoulder condition. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. SAIF opposes reopening the claim, contending that claimant was not in the work force at the time of disability. Based on the following reasoning, we decline to authorize the reopening of claimant's claim.

FINDINGS OF FACT

On February 10, 1997, claimant sustained bilateral shoulder injuries, which were accepted as disabling "bilateral rotator cuff tendinitis/overuse syndrome and left shoulder impingement syndrome." (Ex. 4). Claimant's 1997 claim was first closed on April 16, 1998, and her aggravation rights expired five years later, on April 16, 2003. (Ex. 6).

On January 21, 2003, claimant sought treatment from Dr. Bailey for shoulder pain. (Ex. 15). At that time, claimant was working as an activity assistant at a retirement facility. Dr. Bailey noted that claimant was working with the elderly about 20 hours per week and did not wish to give this up. He also noted that this work required claimant to "push wheelchairs and such," which hurt her shoulders. He diagnosed "rotator cuff tendonitis from repetitive use, work," prescribed ice, heat, and stretching, and "suggest[ed], if possible, [that claimant] get into a less manually stressful work." (*Id.*) Dr. Bailey's chart notes do not indicate that claimant was seen in February, March, or April 2003. (*Id.*)

In May 2003, claimant quit her job as an activity assistant. She did not attempt to find other employment thereafter.

An undated 827 Form changed claimant's attending physician to Dr. Moore and indicated that she first treated claimant on January 15, 2004. (Ex. 17). Dr. Moore noted that claimant had right shoulder pain that was worse over the past

year. She did not indicate claimant's work ability status, although she wrote "n/a" next to "physical limitations, if any." (*Id.*)

On January 29, 2004, claimant returned to Dr. Moore for follow-up for low back pain and right shoulder pain. (Ex. 18). Regarding the latter, Dr. Moore diagnosed right shoulder impingement syndrome and recommended continued ibuprofen and stretching exercises because claimant had been allergic to corticosteroid injections. She also referred claimant to an orthopedist for further evaluation. (*Id.*)

On February 2, 2004, Dr. Macha, an orthopedist, examined claimant. (Ex. 19). Claimant reported that, while employed as an activity director, she developed increased, recurrent right shoulder pain and "requested palliative care from her primary doctor in March of 2003 but was not sent to any therapy, quit work in May of 2003, but has had persistent difficulties . . . since that time." (Ex. 19-1). Dr. Macha recommended treatment in the form of heat and physical therapy. (Exs. 19-2, 19A). On a Form 827, Dr. Macha released claimant to regular work. (Ex. 19A).

On April 6, 2004, Dr. Shapiro, an orthopedic surgeon, examined claimant on referral from Dr. Macha. Dr. Shapiro diagnosed a subacromial impingement syndrome on the right side. Believing that surgery was probably inevitable on the right shoulder, Dr. Shapiro recommended that claimant undergo further diagnostic studies to determine whether to proceed with conservative treatment or surgery. (Ex. 21).

On May 26, 2004, Dr. Shapiro completed a Form 827, noting that the reason for the change in attending physician was "surgery." (Ex. 22). Dr. Shapiro further noted that "no work [was] authorized," commencing April 6, 2004. (*Id.*) On May 27, 2004, Dr. Shapiro requested authorization for right shoulder surgery. (Ex. 22A). Claimant underwent arthroscopic surgery on June 17, 2004. (Ex. 23).

On June 28, 2004, Dr. Shapiro noted that claimant was making excellent progress following her surgery. He scheduled a follow-up examination in eight weeks and recommended "no work until then." (Ex. 23A).

In an August 12, 2004 written statement, claimant reported that she had made "an appointment with Dr. Douglas Bailey in March 2003" and asked him for palliative care on her right shoulder. (Ex. 25-2). She reported that after examining her shoulder, Dr. Bailey told her that she "needed to quit [her] job, that palliative

care would not help as long as [she] was working that job.” (*Id.*). She stated that she “continued to work for 3 months before finally giving in to the pain and quitting.” (*Id.*). She applied for Social Security Disability benefits because she “needed some kind of income,” and believed that she would not qualify for unemployment benefits because she “couldn’t work because of medically being unable.” (*Id.*). Claimant asserted that she was anxious to heal and begin working again, stating that she would “find something that [she] *can* do with the assistance of professionals.” (*Id.*). (Emphasis in original).

On August 23, 2004, Dr. Shapiro concluded that claimant was unable to work from the date of surgery forward and, at this point, she was able to do some light duty. (Ex. 26-2). He indicated that claimant would probably be medically stationary in approximately six to nine months after surgery.

On September 1, 2004, SAIF submitted a Carrier’s Own Motion Recommendation against reopening claimant’s worsening claim. SAIF contended that claimant was not in the work force at the time of disability.

In response, claimant submitted various documents in support of her work force status at the time of the current worsening. Among those documents, claimant submitted a September 21, 2004 letter from Dr. Moore, who opined that it was “unlikely that [claimant] would have been able to be successfully employed from January 29, 2004 to June 2004 when she underwent right shoulder surgery because of her impairment in both shoulders and ongoing low back pain.” (Ex. 29). Dr. Moore concluded that claimant’s right shoulder impairment had a “large part” to do with her inability to work during that time but it was “likely that her ongoing left shoulder pain and low back pain would have also played a role.” (*Id.*).

### CONCLUSIONS OF LAW AND OPINION

The issue is whether claimant’s Own Motion claim qualifies for reopening for a worsening of her compensable injury under ORS 656.278(1)(a) (2001). There are three requirements for the reopening of such a claim. 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 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, 503 (2002).

Under the *Dawkins* criteria, 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 is making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

Here, claimant meets the first two requirements for the reopening of an Own Motion claim for a worsening of a compensable injury. In this regard, Dr. Shapiro recommended surgery and released claimant from work due to a worsening of her compensable right shoulder condition. Thus, claimant's compensable right shoulder condition worsened resulting in the inability to work and requiring surgery. However, claimant must also establish that she was in the work force at the "time of disability" as defined under the *Dawkins* criteria.

The "date of disability" for the purposes of determining work force status for a worsened condition claim in Own Motion status is the date the claimant's claim worsened: (1) resulting in a partial or total inability to work; and (2) 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 injury worker to return to work. *David L. Hernandez*, 55 Van Natta 30 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

The relevant time period for which the claimant must establish he/she was in the work force is the time prior to the "date of disability," when his/her condition worsened resulting in an inability to work and requiring requisite medical treatment under ORS 656.278(1)(a). See generally *Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Stuart T. Valley*, 55 Van Natta 475 (2003); *Paul M. Jordan*, 49 Van Natta 2094 (1997).

Here, on May 26, 2004, Dr. Shapiro recommended surgery for claimant's right shoulder condition and authorized time loss. (Ex. 22). Based on Dr. Shapiro's comments, we conclude that, as of May 26, 2004, claimant's compensable right shoulder condition worsened resulting in an inability to work and requiring surgery. Therefore, May 26, 2004, is the "date of disability" for the purpose of determining whether claimant was in the work force.

However, as of May 26, 2004, claimant was not engaged in regular gainful employment or seeking employment. Therefore, she must establish that she was in the work force under the third *Dawkins* criteria.

In order to satisfy the third *Dawkins* criterion, claimant must first establish that she was willing to work. On August 12, 2004, claimant submitted a statement asserting that she is “anxious to heal and begin working again.” She further stated that she “will find something that [she] can do with the assistance of professionals that know far more than [her] and can assist [her] in finding a job.” (Emphasis in original). Based on claimant’s un rebutted assertions, we are persuaded that she is willing to work.

Claimant must also satisfy the “futility” element of the third *Dawkins* criterion, in order to be found in the work force. Based on the following reasoning, we find that claimant has not proven this element.

The resolution of the futility issue is a medical question that must be answered by persuasive medical evidence. *Jack M. Sanders*, 55 Van Natta 1642, *on recon* 55 Van Natta 2019 (2003); *Stuart T. Valley*, 55 Van Natta at 476. In other words, we cannot infer that it would have been futile for a claimant to work and/or seek 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”); *Janet F. Berhorst*, 50 Van Natta 1578 (1998) (Board cannot infer futility). Instead, the record must include persuasive medical evidence from a physician indicating that it would have been futile for claimant to work and/or seek work at the date of disability. *Jeffrey L. Coefield*, 53 Van Natta 614 (2001); *Jackson R. Shrum*, 51 Van Natta 1062 (1999) (Board denied request for Own Motion relief where the record lacked persuasive medical evidence establishing that the claimant was unable to work and/or seek work due to the compensable injury).

As of May 26, 2004, the date of disability, claimant had not worked or looked for work since May 2003, when she quit her job as an activity assistant. Claimant contends that she was medically unable to work due to a worsening of her compensable condition when she quit her job in May 2003, and that she remained unable to work. She relies on her written statement to this effect.

However, the medical record does not support claimant’s contention. Claimant contends that Dr. Bailey examined her in March 2003 and advised her to quit her job because palliative care would not be effective as long as she was

working at that job. But the only examination by Dr. Bailey occurred in January 2003, and although he suggested that claimant find “less manually stressful work,” he did not find her medically unable to work. (Ex. 15). In addition, Dr. Bailey’s chart note indicates that he did not examine claimant in February, March, or April of 2003, although it was noted that she was a “no show” for an April 21, 2003 appointment. (*Id.*)

Claimant next sought medical treatment in January 2004 from Dr. Moore. (Exs. 17, 18). At that time, Dr. Moore did not indicate any work restrictions and noted “n/a” next to “physical limitations, if any” on a Form 827. (Ex. 17). In February 2004, Dr. Macha examined claimant and released her to regular work. (Ex. 19A). Dr. Shapiro’s May 26, 2004 Form 827 contained the first mention of any inability to work. (Ex. 22). As noted above, at that time, Dr. Shapiro recommended surgery and released claimant from work.

Claimant argues that Dr. Moore’s September 21, 2004 letter establishes that she was unable to work due to the compensable injury from January 29, 2004 to the date of surgery on June 17, 2004, and that Dr. Shapiro’s opinion establishes that she remained unable to work following the surgery.

There are several problems with this argument. First, at the time Dr. Moore examined claimant in January 2004, she did not indicate any limitations on claimant’s ability to work. There is no record of any subsequent treatment with Dr. Moore, who almost nine months later opined that claimant was unable to work as of January 29, 2004.<sup>1</sup> Moreover, on February 2, 2004, Dr. Macha examined claimant and released her to regular work. (Ex. 19). We find Dr. Macha’s contemporaneous opinion regarding claimant’s ability to work more persuasive.

Thus, the medical record does not support claimant’s argument that she was medically unable to work from the time she quit her job in May 2003. Although Dr. Bailey suggested that claimant find less manually stressful employment,

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<sup>1</sup> In addition, SAIF argues that the record does not establish that claimant’s inability to work was due to her compensable injuries. In her September 2004 correspondence, Dr. Moore indicated that claimant was unable to work from January 29, 2004 to June 2004 due to impairment in both shoulders and ongoing low back pain. (Ex. 29). She opined that claimant’s right shoulder impairment had a “large part to do with her inability to be employed during that period of time but it is likely that her ongoing left shoulder pain and low back pain would also have played a role.” (*Id.*) Claimant’s compensable injury includes both shoulders; however, the low back pain is not part of the compensable injury. Nevertheless, even assuming without deciding that claimant’s inability to work was due to her compensable injuries, for the reasons explained in the body of our opinion, we do not find that claimant has established that she was in the work force at the time of disability.

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claimant did not seek any employment after quitting her job. In addition, in February 2004, Dr. Macha released claimant to regular work. Based on this record, we find that claimant withdrew from the work force when she quit her job in May 2003 and had not reentered the work force by the time Dr. Shapiro released her from work in May 2004. Therefore, claimant has not established that she was in the work force prior to the date of disability. *Stuart T. Valley*, 55 Van Natta at 477 (the claimant did not establish that he was in the work force *prior* to his “date of disability” where there was no evidence that claimant was employed or making reasonable efforts for find employment during six month period prior to “date of disability” and no medical evidence of “futility”).

Accordingly, we decline to authorize the reopening of claimant’s claim under ORS 656.278(1)(a) (2001).

IT IS SO ORDERED.

Entered at Salem, Oregon on October 27, 2004