
In the Matter of the Compensation of
EMROY G. FLETCHER, Claimant
Own Motion No. 04-0463M
OWN MOTION ORDER
Unrepresented Claimant
SAIF Corporation, Insurance Carrier

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation has submitted claimant's request to reopen his claim for a worsening claim for his accepted right knee condition. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. SAIF recommends against reopening contending, among other issues, that claimant's compensable condition does not require any medical treatment that qualifies his claim for reopening. Based on the following reasoning, we deny claim reopening.

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*, 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; (2) "hospitalization" is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. 54 Van Natta at 2542.

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. *Id.* at 54 Van Natta 2546.

Here, claimant sought treatment with Dr. Ushman, his attending physician, for right knee complaints. Dr. Ushman noted “advanced and severe degenerative joint disease in the right knee.” He referred claimant to an orthopedic and fracture clinic to determine if surgery was indicated. (Ex. 10). Dr. Ushman released claimant to regular work. (Ex. 11).

On September 28, 2004, Dr. Kayser, an orthopedic surgeon, examined claimant. Dr. Kayser diagnosed advanced osteoarthritis of both the right and left knees and possibly the hips. He opined that claimant was a “reasonable candidate to have his right knee operated on.” However, Dr. Kayser noted that claimant had a weight problem and that it would be beneficial for him to lose weight to obtain a better recovery. He recommended that claimant attempt to lose weight and return to see him in three months. In the meantime, Dr. Kayser recommended steroid injections as a “temporizing procedure,” while claimant attempted to diet and exercise. (Ex. 13-2).

On October 20, 2004, claimant returned to Dr. Ushman reporting that he was dissatisfied with Dr. Kayser’s assessment and wanted a referral to another orthopedic surgeon. Claimant explained to Dr. Ushman that his pain was too great to wait the six months that Dr. Kayser recommended. Dr. Ushman issued an orthopedic referral for consideration of a total knee replacement. He released claimant to regular work. (Ex. 14).

Read as a whole, we find that Drs. Ushman’s and Kayser’s reports do not presently recommend surgery. Instead, those reports establish that claimant may require surgery at some point in the future. Although a *recommendation* for the requisite medical treatment is sufficient to qualify for claim reopening under ORS 656.278(1)(a) (2001), the *possibility* of such treatment is not. *Theron W. Stiehl*, 56 Van Natta 2267(2004) (“possibility” of surgery insufficient to satisfy the medical treatment requirement for claim reopening under ORS 656.278(1)(a) (2001)); *Jeffrey D. Dugan*, 56 Van Natta 550 (2004) (same); *compare Corey A. Otterson*, 56 Van Natta 363 (2004) (physician’s recommendation that the claimant undergo surgery for compensable condition sufficient, surgery need not have been performed or scheduled to qualify for claim reopening under ORS 656.278(1)(a) (2001)).

Thus, no physician has currently recommended surgery or hospitalization. Furthermore, a recommendation for an orthopedic surgeon examination and prescribed pain medication does not persuasively establish “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) (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); *Mark R. Gescher*, 55 Van Natta 1956 (2003) (same).¹

Based on this record, we are not persuaded that claimant’s condition worsened requiring necessary medical treatment. In other words, this current medical record does not establish that claimant’s condition worsened requiring hospitalization, surgery or curative treatment that was prescribed in lieu of hospitalization that was necessary to enable him to return to work.
ORS 656.278(1)(a) (2001).

Under these circumstances, we conclude that this Own Motion claim for a worsening of claimant’s previously accepted condition does not satisfy the criteria set forth in ORS 656.278(1)(a) (2001).² Consequently, we are unable to authorize the reopening of the Own Motion claim.³

IT IS SO ORDERED.

Entered at Salem, Oregon on February 23, 2005

¹ Additionally, the current record does not indicate that claimant’s current condition has resulted in an “inability to work.” In this particular case, this matter need not be addressed because even if the “inability to work” issue 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 requisite medical treatment and “inability to work” components of the statutory standard that is lacking from the current record, that party may request reconsideration of our decision. ORS 656.278(1)(a) (2001). 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 day period. OAR 438-012-0065(2).

³ Finally, 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