

In the Matter of the Compensation of
ANDREW J. DUBY, Claimant
Own Motion No. 05-0051M
OWN MOTION ORDER
Unrepresented Claimant
Liberty NW Ins Corp, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

The insurer has submitted claimant's request to reopen his claim for a worsening of his accepted conditions. ORS 656.278(1)(a) (2001). Claimant's aggravation rights have expired. The insurer opposes claim 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 an inability of the worker to work. *See James J. Kemp*, 54 Van Natta 491 (2002). 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. *Id.* 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). *Id.* If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

The medical evidence does not establish that claimant's left foot condition has worsened resulting in a partial or total inability to work. *See Redeena M. Monroe*, 55 Van Natta 3730 (2003). Rather, the record demonstrates that claimant underwent foot surgery on February 4, 2005, by Dr. Densmore. Noting that a dorsal bony spur was causing discomfort and removal of the spur would cure that discomfort, Dr. Densmore opined that the treatment was curative in nature.

This medical evidence does not address whether claimant's worsening resulted in a total or partial inability to work. The resolution of the inability to work 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) ("the Board is not an agency with specialized medical expertise entitled to take

office notice of technical facts within its specialized knowledge”)¹; *Reba F. Tibbetts*, 54 Van Natta 1032, *on recon* 54 Van Natta 1432 (2002). Instead, the record must include medical evidence that claimant’s compensable left foot condition worsened resulting in an inability to work. ORS 656.278(1)(a) (2001).

Under these circumstances, we conclude that this Own Motion claim for a worsened compensable left foot condition does not satisfy the inability to work criteria required under ORS 656.278(1)(a) (2001).² Accordingly, we are not authorized to reopen this Own Motion claim for a worsening of claimant’s previously accepted left foot condition.^{3 4}

IT IS SO ORDERED.

Entered at Salem, Oregon on March 30, 2005

¹ With his response to the insurer’s recommendation and contentions, claimant submitted various medical records including an x-ray. In the absence of a physician’s interpretation of the x-ray, the submission of the x-ray provides no probative evidentiary value to us in conducting our review of this claim reopening question.

² In light of our conclusion, we need not address the insurer’s contention that the recommended medical treatment is not “curative.” ORS 656.278(1)(a) (2001). In this particular case, this matter need not be addressed because even if the medical treatment 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). See *Bradley French*, 56 Van Natta 3701 (2004); *Ronald L. Self*, 56 Van Natta 62 (2004).

³ If a party obtains further medical evidence that addresses the “inability to work” component of the statutory standard, 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).

⁴ 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