

In the Matter of the Compensation of
GREGORY RAY, Claimant
Own Motion No. 05-0123M
OWN MOTION ORDER
Unrepresented Claimant
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The SAIF Corporation 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. SAIF opposes reopening the claim, contending that: (1) claimant's compensable conditions do not require any medical treatment that qualifies his claim for reopening; and (2) claimant was not in the work force at the time of disability. Based on the following reasoning, we find that the claim does not qualify for reopening.

FINDINGS OF FACT

On February 5, 1979, claimant sustained a compensable burn injury. The claim was accepted as disabling and the first closure was on January 16, 1984. Thus, claimant's aggravation rights expired on January 16, 1989.

In 2002, claimant sought treatment with Dr. Pulito, his attending physician, for multiple sores on his body. Dr. Pulito recommended scar revision and skin graft surgery. Claimant underwent several surgeries beginning in June 2002 through September 2004.

On December 16, 2003, SAIF voluntarily reopened the claim for a "worsening" of claimant's previously accepted conditions ("extensive burns about the face, arms, thorax and trunk relative to injury of February 5, 1979"). SAIF found claimant's condition medically stationary as of October 21, 2004, and issued a December 3, 2004 Notice of Closure. Claimant did not seek Board review of that closure.

On January 11, 2005, claimant returned to Dr. Pulito, who recommended further surgery to relieve neck contracture due to tight scarring from previous burns and skin grafting. On January 17, 2005, claimant underwent a "release of neck contracture, full thickness skin graft transferred from the back to the anterior neck." This was done under general anesthesia and involved removing a full-thickness section of skin from claimant's back, suturing that area, releasing the

area of tension and contracture scar in the neck, and suturing the skin graft to that area. The surgery required inpatient hospitalization, with admittance on January 17, 2005, and discharge on January 18, 2005.

In February 2005 and March 2005, Dr. Pulito reported that the surgery to release the contracture of claimant's neck was curative treatment. He explained that the neck scarring and contracture caused claimant's lower eyelids to pull down, causing dryness and irritation in the eyes. Dr. Pulito opined that the surgery successfully released the contracture and would be considered curative care for problems claimant was having with his lower eyelids. Dr. Pulito also opined that the surgery was due to the 1979 injury.

On March 31, 2005, SAIF submitted its Own Motion recommendation against claim reopening, contending that claimant was not in the work force at the time of the current worsening. Subsequently, SAIF also contended that claimant did not satisfy the medical treatment requirement under ORS 656.278(1)(a) (2001).

In response, claimant detailed the surgeries and grafts he has had to undergo. Claimant also submitted a May 24, 2005 letter from Dr. Pulito and requested that temporary disability compensation be paid until his doctor released him to work.

In his May 24, 2005 letter, Dr. Pulito stated that, as a result of scarring due to the 1979 burn injury, claimant has limitations affecting his ability to work. These limitations include increased sensitivity to heat and cold, increased fragility of the skin, and sensitivity to chemical irritants, chemical vapors, fine dust, dirt, and grime, all of which could cause breakdown and open sores on the burn areas. Dr. Pulito also discussed claimant's medical condition and treatment over the last few years, and his previous determination that claimant had reached medical stationary status. That previous determination apparently resulted in SAIF's December 3, 2004 Notice of Closure.

Dr. Pulito noted that, in January 2005, claimant underwent surgery for release of his neck contracture with a full thickness graft. This surgery was performed to provide claimant improved neck range of motion. Although claimant's range of motion improved, the graft did not survive, which meant that he needed further treatment for the contracture, in addition to needing resurfacing of chronic skin ulcers. Dr. Pulito opined that claimant cannot return to the job he was performing when he returned for treatment in 2003, which included using a sander to work on recreational vehicles. Dr. Pulito stated that claimant needed to be "reeducated into a position that he can do and that falls within the realms of his impairment."

Based on his continued need for additional procedures, claimant believes that it would be “futile” for him to seek work “just to be back into the hospital in a couple of weeks.” Claimant also contends that his condition has not been declared medically stationary since the January 2005 surgery and that he has not been released to work.

In August 2005, Dr. Pulito reported that claimant’s more recent job, working with fiberglass, exacerbated his compensable condition causing lacerations, chronic ulcers, *etc.* As such, Dr. Pulito opined that claimant could not return to that position because “it was not reasonable for him to work in that type of environment.” Dr. Pulito reported that he had been treating claimant “over the past year and one-half or two years” and stated that claimant “would have been able to go back to work during some of those time periods but not at the job he was in” because he could not tolerate the “job of sanding and working on RVs with fiberglass.”

CONCLUSIONS OF LAW AND OPINION

ORS 656.278(1)(a) (2001) establishes three requirements for the reopening of an Own Motion claim for a worsening of a compensable injury. First, the worsening must result in a partial or total 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.

We examine these requirements in the order listed. 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 official notice of technical facts within its specialized knowledge”); *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 burn condition worsened resulting in an inability to work. ORS 656.278(1)(a) (2001).

Here, we find that the medical evidence establishes that claimant's compensable condition worsened resulting in the partial inability to work. In this regard, on May 24, 2005, Dr. Pulito noted that claimant had "limitations" due to his scarring and had a sensitivity to chemical irritants. He further noted that claimant could not return to his regular job working with fiberglass and needs to be "reeducated into a position that falls within the realm of his impairments."

Under these circumstances, we interpret Dr. Pulito's opinion to mean that claimant was capable of "modified work;" *i.e.*, claimant had limitations that prevented him from returning to regular work. Such a modified work release represents a partial inability to work. *See Jama Jarrell*, 55 Van Natta 2755 (2003). Therefore, we conclude that this Own Motion claim for a worsened condition satisfies the "inability to work" criteria required under ORS 656.278(1)(a) (2001).

Likewise, we conclude that the January 2005 surgery and inpatient hospitalization satisfies the "medical treatment" requirement. In this regard, the "medical treatment" requirement under ORS 656.278(1)(a) (2001) includes "surgery," which is defined as an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker, and "hospitalization," which is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. *Larry D. Little*, 54 Van Natta 2536 (2002).

Here, claimant underwent surgery to repair his neck contracture. This surgery involved general anesthesia, incisions, and sutures to remove scar tissue and graft skin. In addition, claimant required hospitalization overnight. Finally, Dr. Pulito explained that the neck contracture repair surgery was curative treatment.

SAIF relies on Dr. Pulito's opinion that some of the grafting procedures were intended to "palliate" some chronic ulcerations to argue that claimant's compensable conditions did not require any medical treatment that satisfies the statutory requirement. We disagree.

As discussed above, Dr. Pulito stated that the neck contracture repair surgery was curative, not palliative, treatment. Although some treatment for chronic ulcerations may be palliative treatment, the statute does not require that *all* treatment be curative in order to satisfy the "medical treatment" requirement under ORS 656.278(1)(a) (2001).

Based on Dr. Pulito's unrebutted opinions, we find that claimant's compensable condition worsened to the extent that an invasive procedure was undertaken that resulted in temporary disability. In addition, claimant required

inpatient hospitalization. Based on these findings, we conclude that claimant satisfied the medical treatment requirement under ORS 656.278(1)(a) (2001). *Bonnie M. Price*, 53 Van Natta 1535 (2001); *Roy G. Wells*, 49 Van Natta 1557 (1997) (several minor surgical procedures were provided to treat the claimant's condition; surgeries were found to be invasive procedures for a worsened compensable condition under ORS 656.278(1)); *Fred E. Smith*, 42 Van Natta 1538 (1990).

As for the "work force" issue, based on the following reasoning, we conclude that claimant has not established that he was in the work force at the time of his disability. 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.

The "date of disability" for the purpose 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, 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. *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

Here, claimant underwent surgery on January 17, 2005. However, the first medical opinion regarding claimant's ability to work occurred on May 24, 2005, when Dr. Pulito noted that claimant had a "partial" inability to work due to his compensable condition. Therefore, we conclude that May 24, 2005 is the "date of disability" for the purpose of determining whether claimant was in the work force. *Andrea D. Hall*, 57 Van Natta 1028 (2005). Thus, the relevant time period for which claimant must establish he was in the work force is the time prior to May 24, 2005, when his condition worsened resulting in an inability to work and requiring surgery. *See generally SAIF v. Blakely*, 160 Or App 242 (1999); *Mitchell*, 54 Van Natta at 2618; *Paul M. Jordan*, 49 Van Natta 2094 (1997).

As summarized above, 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 at 258; *Kemp*, 54 Van Natta 502-03.

Here, prior to May 24, 2005, claimant was not engaged in regular gainful employment. Therefore, he must establish that he was in the work force under the second or third *Dawkins* criteria.

In order to be considered in the work force at the time of his current disability, claimant must show that he was in the work force *prior* to his May 24, 2005 worsening. During the five-month period prior to May 24, 2005, the record does not establish that claimant was employed or making reasonable efforts to find employment. Therefore, claimant does not satisfy the second *Dawkins* criteria.

In order to satisfy the third *Dawkins* criterion, claimant must first establish that he was willing to work. In the absence of evidence demonstrating his willingness to work, claimant would not be considered a member of the work force, and thus, would not be entitled to temporary disability compensation. *See Stephen v. Oregon Shipyards*, 115 Or App 521 (1992); *John M. Rutherford*, 56 Van Natta 3261 (2004).

Here, claimant submitted a written statement, representing that it was futile for him to seek work following the December 2004 claim closure because surgery was recommended and scheduled in January 2005, and the time frame did not allow for “re-training.” We interpret claimant’s statement to mean that he would have been willing to work had surgery not been proposed so quickly after the closure of his claim. Based on such an interpretation, we are persuaded that claimant was willing to work.

Finally, claimant contends that his compensable condition made it futile for him to work or look for work during the five months period between December 2004 and May 2005. However, no medical evidence is submitted to support that contention.

Whether it would be futile for claimant to seek work is not a subjective standard; rather it is an objective standard determined from the record as a whole, especially considering persuasive medical evidence regarding claimant’s ability to work and/or seek work. *Jackson R. Shrum*, 51 Van Natta 1061 (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); *Janet F. Berhorst*, 50 Van Natta 1578 (1998) (same; Board cannot infer futility). In short, the question is whether the compensable injury made it futile for claimant to make reasonable efforts to seek work, not whether he reasonably believes it to be futile.

Although Dr. Pulito reported that claimant could not return to his job working with fiberglass and needed to be retrained into a position “within the realms of his impairments,” this observation does not represent a medical opinion that it was *futile* for claimant to seek work at the time of his current worsening. To the contrary, in August 2005, Dr. Pulito reported that he had been treating claimant “over the past year and one-half or two years” and stated that claimant “would have been able to go back to work during some of those time periods but not at the job he was in” because he could not tolerate the “job of sanding and working on RVs with fiberglass.” This statement does not support a finding that it would have been *futile* for claimant to seek work at the time of disability; *i.e.*, prior to May 24, 2005. There are no other medical opinions regarding this “futility” issue.

Thus, no medical opinion supports claimant's “futility” contentions, nor does the medical record demonstrate that it would have been futile for him to work or seek work at the time of disability. In conclusion, the record lacks persuasive medical evidence establishing that claimant was unable to work and/or seek work due to his compensable condition. *Stuart T. Valley*, 55 Van Natta 475 (2003).

Consequently, the record does not establish that claimant was in the “work force” at the time of disability. Accordingly, we are unable to authorize the reopening of claimant's 1979 claim. ORS 656.278(1)(a) (2001).^{1 2}

IT IS SO ORDERED.

Entered at Salem, Oregon on November 4, 2005

¹ If a party obtains further medical evidence that addresses the “work force” 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).

² 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