
In the Matter of the Compensation of
BRADLEY J. FRENCH, Claimant
Own Motion No. 05-0247M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Ransom Gilbertson Martin et al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Kasubhai and Lowell.

Claimant requests review of the May 13, 2005 Own Motion Notice of Closure that: (1) awarded temporary disability from October 7, 2004 through November 6, 2004; and (2) awarded no additional permanent disability for a “worsened condition.” Claimant challenges the temporary and permanent disability awards and requests the appointment of a medical arbiter. Based on the following reasoning, we affirm the Notice of Closure.¹

FINDINGS OF FACTS

On January 17, 1996, claimant sustained a compensable left foot injury. (Ex. 4). The claim was first closed on March 28, 1996, and claimant’s aggravation rights expired on March 28, 2001. (Ex. 7).

On October 14, 2003, we authorized the reopening of claimant’s 1996 claim for a “post-aggravation rights” new medical condition claim (“left foot stress reaction”). (Ex. 78). On November 7, 2003, the insurer issued a Notice of Closure awarding no additional permanent disability for the “post-aggravation rights” new medical condition. (Ex. 80). This closure was not appealed.

In February 2004, claimant sought treatment for increased low back and left foot pain. Dr. Kallgren, claimant’s attending physician, diagnosed chronic neuropathic pain of the left foot, lumbar degenerative disc disease, lumbar dystonia/myofascial pain syndrome and chronic mood disorder with anxiety features. (Ex. 84). He referred claimant to Dr. Gellman for peripheral nerve stimulation.

¹ Claimant’s January 17, 1996 claim was accepted as a disabling claim and was first closed on March 28, 1996. Thus, claimant’s aggravation rights expired on March 28, 2001. Therefore, when claimant sought claim reopening in October 2004, the claim was within our Own Motion jurisdiction. ORS 656.278(1) (2001). Consistent with our statutory authority, on January 5, 2005, we issued our Own Motion Order authorizing the reopening of the claim and noted that when claimant was medically stationary, the insurer should close the claim pursuant to OAR 438-012-0055. (WCB Case No. 04-0389M). On May 13, 2005, the insurer issued its Notice of Closure.

Dr. Gellman recommended the implantation of a peripheral nerve stimulator implantation and noted that claimant would be off work for 3-4 weeks following the surgery. Claimant underwent surgery on October 7, 2004. (Exs. 89, 91).

On January 5, 2005, we authorized the reopening of claimant's claim for a "worsened" condition. (Ex. 95).

In a May 4, 2005 closing report, Dr. Kallgren noted that claimant was released to regular work and declared his condition medically stationary as of January 21, 2005. (Ex. 97).

On May 13, 2005, the insurer issued a Notice of Closure, awarding temporary disability from October 7, 2004 through November 6, 2004 and declaring claimant's condition medically stationary as of January 21, 2005. The closure notice awarded no permanent disability.

Claimant seeks review of the May 2005 Notice of Closure, disputing his , temporary and permanent disability awards, and requests the appointment of a medical arbiter.

CONCLUSIONS OF LAW AND OPINION

Temporary Disability

A claim may not be closed unless claimant's condition is medically stationary. *See* OAR 438-012-0055(1). "Medically stationary" means that no further material improvement would reasonably be expected from medical treatment, or the passage of time. ORS 656.005(17). The issue of a claimant's medically stationary status is primarily a medical question to be decided based on competent medical evidence. *Harmon v. SAIF*, 54 Or App 121, 125 (1981); *Thomas L. Bishop*, 55 Van Natta 147, 149 (2003).

Claimant does not contend that his medically stationary date is incorrect or that he was not medically stationary when the insurer closed his claim. In any event, the record would not support such a contention.² Rather, claimant seeks review of the temporary disability award. We interpret claimant's request as a contention that he is entitled to additional temporary disability benefits.

² In his closing report, Dr. Kallgren declared claimant's condition to be medically stationary as of January 21, 2005. Dr. Kallgren's opinion is un rebutted. Based on the uncontroverted medical evidence, we find that claimant's accepted conditions under his worsening claim were medically stationary on the date his claim was closed.

Based on the following reasoning, we conclude that he is not entitled to temporary disability benefits in excess of those benefits awarded by the Notice of Closure. Claimant underwent surgery on October 7, 2004. Dr. Gellman noted that claimant would be off work for 3-4 weeks following the surgery. The insurer paid temporary disability benefits from October 7, 2004 through November 6, 2004. The record lacks further medical evidence establishing that claimant was unable to work due to his compensable injury after November 6, 2004 and prior to being declared medically stationary on January 21, 2005. *See Lynne E. Hilsendager*, 56 Van Natta 2245 (2004). (No additional temporary disability granted in absence of a further authorization from attending physician beyond the initial authorization and prior to the claimant's medically stationary date).

Under such circumstances, we are not persuaded that claimant is entitled to additional temporary disability. Accordingly, we affirm the Notice of Closure's temporary disability award.

Permanent Disability

When a claim has been reopened pursuant to our Own Motion authority for a "worsened condition" under ORS 656.278(1)(a) (2001), the subsequent closure of that claim pertains only to the reopened "worsened condition" claim. *Dennis D. Kessel*, 55 Van Natta 3651 (2003); *Clayton L. Sutherland*, 55 Van Natta 2694 (2003); *Ginney E. Etherton*, 55 Van Natta 2216 (2003).

Here, on January 5, 2005, we authorized the reopening of the claim for worsened compensable conditions that were in Own Motion status. *See* ORS 656.278(1)(a) (2001). Also, there is no indication that claimant initiated a new or omitted medical condition claim since the claim was reopened in October 2003 and closed in November 2003 for the "post-aggravation rights" new medical condition ("left foot post-traumatic arthrosis"). This closure was not appealed and has become final as a matter of law. Finally, the insurer neither voluntarily reopened the claim for a "post-aggravation rights" new or omitted medical condition nor submitted a Carrier's Own Motion Recommendation for or against reopening such a claim since the prior reopening and closure. In the absence of such events, the May 13, 2005 Notice of Closure is limited to the "worsening" claim that was reopened by Board order on January 5, 2005. *See Ginny E. Etherton*, 55 Van Natta at 2217; *Arvin D. Lal*, 55 Van Natta 816 (2003).

Consequently, because the claim was reopened for worsened compensable conditions that were in Own Motion status, claimant is not statutorily entitled to a permanent disability award. *See Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recon* 54 Van Natta 1552 (2002), *aff'd Dougan v. SAIF*, 193 Or App 767 (2004), *vacated* 339 Or 1 (July 8, 2005).³

Finally, because claimant's request for the appointment of a medical arbiter is based on his contention that he is entitled to permanent disability compensation attributable to a worsened condition, it is denied. *See Ronald J. Reynolds*, 55 Van Natta 3597, 3602 (2003); *Arvin D. Lal*, 55 Van Natta 815, 824 (2003).

Accordingly, we affirm the May 13, 2005 Notice of Closure in its entirety.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 15, 2005

³ On review, the *Dougan* Court vacated the Court of Appeals decision and dismissed the claimant's petition for review, finding that, pursuant to ORS 656.278(4), a claimant is not entitled to judicial review of an Own Motion order that does not diminish or terminate a former award.