
In the Matter of the Compensation of
THOMAS E. ANDERSON, Claimant
Own Motion No. 06-0038M
OWN MOTION ORDER
Unrepresented Claimant
Fremont Ins, Insurance Carrier

Reviewing Panel: Members Langer and Kasubhai.

The insurer has submitted claimant's request for claim reopening for his "worsened condition" claim for a previously accepted right ankle condition. *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. The insurer opposes the reopening of the claim, contending that claimant was not in the work force at the time of the current disability. Claimant acknowledges that he has retired from the work force.

Pursuant to ORS 656.278(1)(a), 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).¹ *Id.* If a claimant meets these requirements, his or her Own Motion claim qualifies for reopening either by the Board or the carrier.

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 injured worker to return to work. *David L. Hernandez*, 55 Van Natta 30 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

¹ Pursuant to the Court's reasoning in *Dawkins*, 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 seeking work; or (3) not employed, but willing to work and is not seeking work because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258.

On October 21, 2005, claimant sought medical treatment from Dr. Davitt for his compensable right ankle condition. (Ex. 4). Dr. Davitt recommended surgery, which claimant decided to postpone until February 2006 due to prior plans. There is no evidence regarding 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”); *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 ankle condition worsened resulting in an inability to work. ORS 656.278(1)(a).

Nevertheless, assuming without deciding that the “date of disability” is October 21, 2005, the record does not establish that claimant was in the work force as of that date. In response to a questionnaire from the insurer, claimant stated that he had retired from the work force in June 2002, had no current employer, was not receiving unemployment benefits, and was receiving Social Security benefits.² Therefore, based on claimant's representations, we find that he was not in the “work force” at the time of disability.

Accordingly, the request for reopening of claimant's “worsened condition” claim is denied.³ Claimant's entitlement to medical expenses pursuant to ORS 656.245 is not affected by this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 5, 2006

² Given claimant's other representations regarding his work force status, these Social Security benefits apparently represent retirement benefits rather than disability benefits. There is no evidence that claimant is receiving Social Security disability benefits. See *Seferino C. Hernandez*, 58 Van Natta 821 (2006) (work force status not proved by receipt of Social Security disability benefits where such benefits were not due to compensable injury).

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