
In the Matter of the Compensation of
JUDY K. BAYN, Claimant
Own Motion No. 03-0407M
OWN MOTION ORDER
Malagon Moore et al, Claimant Attorneys
Debra Ehrman, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The SAIF Corporation has submitted claimant's request for claim reopening based on a worsening of her previously accepted low back conditions. ORS 656.278(1)(a). Claimant's aggravation rights have expired. SAIF opposes reopening, contending that: (1) it was not responsible for claimant's current low back conditions; and (2) it was unknown whether claimant's compensable conditions require any medical treatment that qualifies her claim for reopening. Based on the following reasoning, we find that claimant's claim does not qualify for reopening under ORS 656.278(1)(a).

FINDINGS OF FACT

On February 26, 1981, claimant sustained a compensable low back injury. The claim was first closed on November 13, 1981. (Ex. 3). Her aggravation rights expired November 13, 1986. ORS 656.273.

On January 28, 2003, claimant sought medical treatment for low back pain with Dr. Jeffrey, her attending physician. Diagnosing degenerative disc disease in the past at L2-3 and L4-5 with retrolisthesis and spinal stenosis at L4-5 in the past and surgical fusion in 1994 for the same, Dr. Jeffrey prescribed pain medication, released claimant from work, and ordered an MRI. (Ex. 65).¹ On February 12 and April 17, 2003, Dr. Jeffrey extended claimant's work release.

Following the February 4, 2003 MRI, claimant saw Dr. Hacker, neurosurgeon, on referral from Dr. Jeffrey. (Exs. 67, 68). Dr. Hacker recommended a nonsurgical approach, with evaluation by a "nonoperative spine specialist" to determine whether conservative therapy, including block techniques, might benefit claimant and determine the source of her pain. (Ex. 67).

¹ In conducting our review, we have considered exhibits contained in WCB Case Nos. 03-07253 and 04-02009.

On April 17, 2003, Dr. Jeffrey examined claimant and noted that Dr. Hacker recommended a “chronic pain specialist for possibility of steroid injection into the back to help localize her pain better.” (Ex. 70).

On April 30, 2003, claimant saw Dr. Goodwin on referral from Dr. Jeffrey. (Ex. 72). After examining claimant and the February 2003 MRI, Dr. Goodwin prescribed physical therapy and anti-inflammatory medication. If there was no improvement in three to four weeks, Dr. Goodwin would consider an epidural steroid injection. Claimant underwent L3 epidural steroid injections on June 24 and July 22, 2003. (Exs. 75, 83).

In June 2003, in response to an inquiry from claimant’s attorney, Dr. Jeffrey agreed that claimant continued to be disabled from her regular work activities, which had continued since her January 2003 visit. Dr. Jeffrey responded “See Notes” to the following query from claimant’s counsel:

“Is [claimant] currently undergoing curative treatment prescribed in lieu of hospitalization or surgery that is necessary to enable her to return to work? When did you prescribe treatment in lieu of hospitalization or surgery? Identify the treatment prescribed and explain what you anticipated from the treatment prescribed.” (Ex. 77-1).

SAIF submitted a “Carrier’s Own Motion Recommendation” against the reopening of this 1981 injury claim based on a worsening of her previously accepted low back conditions. On October 7, 2003, SAIF issued a responsibility denial of claimant’s current worsened condition. Claimant requested a hearing regarding that denial. (WCB Case No. 03-07253). On October 21, 2003, we postponed action on the “claim reopening” issue to await the outcome of the matters before the Hearings Division.

On January 31, 2006, an Administrative Law Judge (ALJ) approved the parties’ stipulation and dismissed claimant’s hearing request. Pursuant to that stipulation, SAIF agreed that it remained responsible for claimant’s current L4-5 condition (lumbar sprain, L4-5 disc herniation, L4-5 spinal stenosis and nerve root entrapment).

CONCLUSIONS OF LAW AND OPINION

Pursuant to the stipulation, SAIF is no longer contesting the responsibility for claimant's current low back condition. Under such circumstances, claimant's current condition has "been determined to be compensable." *See* WCB Admin. Order No. 3-2005, eff. January 1, 2006; OAR 438-012-0001(2)(a), (3); *Jimmie L. Taylor*, 58 Van Natta 75, 77 (2006). As a result, this claim is within our Own Motion jurisdiction and we turn to the question whether the claim qualifies for reopening under ORS 656.278(1)(a).

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

There is no dispute that claimant was in the work force at the time of disability or that her compensable condition worsened resulting in an inability to work. However, among the requirements for claim reopening under ORS 656.278(1)(a), 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) is satisfied, a "worsening condition" claim meets the medical treatment requirement for reopening in Own Motion. In *Little*, 54 Van Natta at 2542, we defined the three qualifying medical treatments listed in ORS 656.278(1)(a) 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; and (2) "hospitalization" is defined as a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility.

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. *Little*, 54 Van Natta at 2546.

Whether a worsening of the compensable injury requires 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” presents a medical question that must be addressed by persuasive medical evidence. In other words, we cannot infer that a treatment involves 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.” *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”); *Terry L. Smith*, 55 Van Natta 2763 (2003). This question must be answered by persuasive medical evidence.

Here, the medical treatment provided by claimant’s physicians does not satisfy the definition of any of the three qualifying medical treatments. Claimant’s treatment consisted of physical therapy, epidural injections and medication. Injections performed on an outpatient basis do not qualify as “surgery” or “hospitalization.” See *Danny L. Johnson*, 56 Van Natta 129 (2004) (epidural steroid injection did not constitute hospitalization, surgery or other curative treatment prescribed in lieu of hospitalization that was necessary to enable the claimant to return to work where medical evidence did not establish that the injection was provided in lieu of hospitalization or regarded as necessary to enable the claimant to return to work); *Little*, 54 Van Natta at 2543 (ORS 656.278(1)(a) not satisfied where, even assuming that treatment (epidural steroid injection) 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).

In response to an inquiry regarding whether claimant was undergoing curative treatment prescribed in lieu of hospitalization to enable her to return to work, Dr. Jeffrey responded, “See Notes.” (Ex. 77-1). However, the various treatment records do not address whether the treatment (physical therapy, epidural injections and medications) constituted curative treatment prescribed in lieu of hospitalization to enable claimant to return to work. Therefore, Dr. Jeffrey’s

reference to those treatment records does not establish that claimant was undergoing curative treatment prescribed in lieu of hospitalization to enable her to return to work.

In conclusion, there is no medical evidence that the treatment claimant was undergoing constituted curative treatment prescribed in lieu of hospitalization to enable her to return to work. *Compare Health A. Wiltfong*, 57 Van Natta 3108 (2005) (an attending physician's un rebutted opinion that the recommended treatment was curative and prescribed in lieu of hospitalization that was necessary to enable him to work was sufficient to meet the medical services criteria for reopening a "worsened" condition claim); *Peter B. Wallen*, 55 Van Natta 1905 (2003) (same); *Shirlette Kenworthy*, 55 Van Natta 2236 (2003) ("other curative treatment prescribed in lieu of hospitalization" requirement satisfied by physician's opinion; *Wallen* followed).

Accordingly, based on the foregoing reasoning, we are not authorized to reopen this "worsening" claim under ORS 656.278(1)(a).

IT IS SO ORDERED.

Entered at Salem, Oregon on February 24, 2006