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

Reviewing Panel: Members Lowell and Biehl.

On December 8, 2005, we reconsidered and adhered to our November 4, 2005 Own Motion Order that declined to reopen claimant's 1979 injury claim for a worsened condition under ORS 656.278(1)(a) (2001). In making this determination, we found that, although claimant had established the other requirements for reopening his Own Motion claim for a worsening of a compensable injury, he did not establish that he was in the "work force" at the time of disability.

We have since received claimant's request that the matter be referred for a hearing. Based on the following reasoning, we decline to grant that request.

As we explained in our prior orders, under the facts of this case, claimant must establish that he was in the work force prior to May 24, 2005, the "date of disability." In addition, as we previously explained, because claimant was neither engaged in regular gainful employment nor making reasonable efforts to find employment prior to May 24, 2005, he must prove that, although not employed, he was willing to work and was not making reasonable efforts to obtain employment because the compensable injury made such efforts futile. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989); *James J. Kemp*, 54 Van Natta 491, 502-03 (2002).

As we found in our prior orders, claimant's written statement established that he was willing to work. However, whether a work-related injury has made work search efforts futile is a *medical question* that must be answered by *persuasive medical evidence*. *Karon A. Hall*, 56 Van Natta 57 (2004) (futility is a medical question that must be answered by persuasive medical evidence); *Stuart T. Valley*, 55 Van Natta 475, 477 (2003) (same). Because the resolution of such a question is dependent on *medical evidence*, we cannot infer that a compensable condition has made a claimant's work search efforts futile. See *Janet F. Berhorst*, 50 Van Natta 1578 (1998) (Board cannot infer futility).

In our prior orders, we offered claimant the opportunity to submit *written medical evidence* on the “futility” issue. Specifically, we explained that, if he obtained a *written medical opinion* persuasively establishing that the compensable condition made a reasonable work search futile for the period prior to May 24, 2005, he could submit that opinion and request reconsideration of our decision within 30 days after the mailing date of our order. Although claimant has timely requested reconsideration twice, he has not submitted any *written medical opinion* on the “futility” issue with either reconsideration request. Instead, in his current request for reconsideration, claimant requests referral for a hearing.

If we conclude that a record is insufficiently developed, we are authorized to refer matters to the Hearings Division for an evidentiary hearing. OAR 438-012-0040(3). However, as addressed above and in our prior orders, the only issue that remains unresolved in this particular case is whether the compensable injury made it “futile” for claimant to seek work. The “futility” issue can only be resolved by *expert medical evidence*. Therefore, claimant’s testimony at hearing will not resolve the “futility” issue. Under these circumstances, we conclude that an evidentiary hearing is not justified. *See Stuart T. Valley*, 55 Van Natta 2521 (2003) (because question of whether the compensable injury made a work search futile can only be answered by expert medical evidence and not by presentation of testimony at hearing, we declined the claimant’s request for a hearing on that question); *Roy Hansen*, 44 Van Natta 764 (1992) (request for hearing denied where medical evaluation required). Accordingly, we deny claimant’s request for hearing.

In conclusion, because the record contains evidence that sufficiently addresses the willingness to work and futility issues, we conclude that the case is adequately developed for us to resolve the parties' dispute. Therefore, we turn to the merits of claimant's request for reconsideration. In our November 4, 2005 order, as reconsidered on December 8, 2005, we found that the medical documentation contained in the record did not satisfy claimant's burden of proving that it would have been futile for him to work or seek work prior to May 24, 2005, the date of disability.¹ *Dawkins*, 308 Or at 258. On reconsideration, we continue

¹ We again offer claimant the opportunity to obtain and submit *written medical evidence* on the sole issue that remains in dispute. Specifically, if claimant obtains a *written medical opinion* persuasively establishing that the compensable condition made a reasonable work search futile for the period prior to May 24, 2005, he may submit that opinion and 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).

to adhere to our previous findings. Because a statutory requirement for reopening of claimant's worsening condition claim has not been satisfied, we are not authorized to grant him the relief he seeks.

Accordingly, we withdraw our prior orders. On reconsideration, as supplemented herein, we republish our November 4, 2005 Own Motion Order, as reconsidered on December 8, 2005. The parties' rights of reconsideration and appeal shall begin to run from the date of this order.²

IT IS SO ORDERED.

Entered at Salem, Oregon on January 6, 2006

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