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

Reviewing Panel: Members Lowell and Biehl.

On February 6, 2006, we withdrew our November 4, 2005 Own Motion Order, as reconsidered on December 8, 2005, and January 6, 2006, that denied claimant's request for Own Motion relief. We took this action to consider claimant's request for reconsideration.¹ Having received the parties' submissions, we proceed with our reconsideration.²

In our prior orders, we explained 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. Specifically, claimant did not establish that it would have been futile for him to look for work at the time of disability, *i.e.*, the period prior to May 24, 2005. We also explained that the question of whether a work-related injury makes work or a reasonable work search futile is a medical question, which must be answered by persuasive medical evidence. Finally, we noted that, if claimant 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.

¹ 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

² We acknowledge SAIF's contention that claimant's surgery constituted "palliative" care, as well as its procedural challenge to claimant's submission of Dr. Pulito's February 6, 2006 letter. In our initial order, we found that claimant's January 2005 surgery was curative and satisfied the "medical treatment" requirement under ORS 656.278(1)(a). *See Gregory Ray*, 57 Van Natta 2888, 2891-92 (2005). We have nothing further to add to our prior reasoning and conclusion on that issue. Accordingly, we reject SAIF's contention to the contrary. Moreover, in light of our conclusion that Dr. Pulito's February 6, 2006 letter does not establish that it would have been medically futile for claimant to look for work at the time of disability, we do not address SAIF's procedural challenge to that letter.

Claimant has now submitted Dr. Pulito's February 23, 2006 letter. Dr. Pulito has treated claimant's compensable injury for several years and was the attending physician during the period that claimant's claim was previously reopened. In this regard, 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."

In his February 23, 2006 letter, Dr. Pulito states:

"It would have been very difficult for [claimant] to seek any type of employment during the time that he was released to do so back in December knowing that he was going to be going into surgery the following month. There was only a two to three week window there for which he could have gone out and tried to find a job, and then he would have had to tell his new job that he would be off work for a surgical procedure that would be done on his neck.

"We had planned to have this surgery on his neck back in November of 2004, and one can see that in my chart note I did discuss the tightness in his neck and that we would be addressing that in January of 2005. So, when he did have this window of change in his status in the beginning of December it would have been extremely difficult, if not impossible, for him to find a job that would allow him to start employment and then immediately take time off to have his neck surgery."

Claimant has the burden of proving that he was in the "work force" at the date of disability. ORS 656.266(1). Claimant contends that he is in the work force at the time of disability under the third *Dawkins* criteria; *i.e.*, he was not employed,

but willing to work and was not making reasonable efforts to obtain employment because a work-related 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).

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. *David L. Hernandez*, 55 Van Natta 30 (2003); *Thurman M. Mitchell*, 54 Van Natta 2607 (2002). The “date of disability” is the date on which *both* of these factors are satisfied. *Robert J. Simpson*, 55 Van Natta 3801 (2003). Finally, both of these factors present medical questions that must be answered by persuasive medical evidence. *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); *Larry D. Little*, 54 Van Natta 2536, 2543-44 (2002).

Based on the prior medical evidence, we determined that the “date of disability” was May 24, 2005, which was the date on which both of these factors were satisfied. In this regard, Dr. Pulito recommended surgery on January 11, 2004, but first indicated that claimant’s condition worsened resulting in an inability to work on May 24, 2005. However, Dr. Pulito’s February 23, 2006 letter indicates that claimant would be “off work” as of the date of the surgery; *i.e.*, January 17, 2004. Based on Dr. Pulito’s opinion, we find that claimant’s condition worsened resulting in an inability to work as of January 17, 2004. Therefore, we find that the “date of disability” is January 17, 2004.

Nevertheless, Dr. Pulito’s letter does not persuasively establish that it would have been “futile” for claimant to look for work during the period prior to the “date of disability” (January 17, 2004).³ Specifically, Dr. Pulito’s opinion is not

³ As we previously explained, the relevant time period for which claimant must establish he was in the work force is the time prior to the “date of disability,” when his condition worsened resulting in an inability to work and requiring requisite medical treatment under ORS 656.278(1)(a). *See generally* *Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Stuart T. Valley*, 55 Van Natta 475, 477 (2003); *Paul M. Jordan*, 49 Van Natta 2094 (1997).

“medically-based,” it is “vocationally-based.” In other words, Dr. Pulito’s opinion does not indicate that claimant was “medically” unable to perform (or seek) work due to the work injury prior to January 17, 2004; rather, Dr. Pulito reasons that it would “vocationally” be difficult, if not impossible, for a prospective employer to have hired him, given the pending surgery. *See Jeffrey L. Coefield*, 53 Van Natta 614 (2001) (seven to nine week period between prior claim closure/medically stationary date and worsening not so brief so as to relieve the claimant of the burden of proving work force issue); *Robert D. Peck*, 45 Van Natta 2202 (1993) (same – five to seven week period); *compare Rodney M. Waldrip*, 1516 (2004) (worker had not withdrawn from work force where there was a two week period between last employment and attending physician’s release to modified work).

In conclusion, Dr. Pulito’s opinion is insufficient to satisfy the “medically based” “futility” requirement. That is, there is no evidence that evaluation of employability on non-medical bases is within the scope of Dr. Pulito’s expertise. Accordingly, in the absence of qualified supporting evidence, we find Dr. Pulito’s conclusions regarding matters beyond his training and expertise (*i.e.*, social and vocational factors affecting claimant’s employability) to be unpersuasive. *See Orville L. Baumgardner*, 50 Van Natta 471 (1998); *Larry R. Ruecker*, 45 Van Natta 933, 934 (1993).

Under those circumstances, we cannot say that it would have been futile for claimant to seek work at the time of disability. 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, on reconsideration, as supplemented herein, we republish our November 4, 2005 Own Motion Order, as reconsidered on December 8, 2005, and January 6, 2006. The parties’ rights of reconsideration and appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 7, 2006