
In the Matter of the Compensation of
KEN KILLIAN, Claimant
Own Motion No. 06-0040M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Westmoreland & Mundorff, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of the February 16, 2006 “Notice of Closure: Own Motion Claim” that awarded 20 percent (64 degrees) unscheduled permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical condition (“left L4-5 disc herniation with left L5 nerve root impingement”).¹ Claimant contends that he is entitled to an increased unscheduled PPD award.

We modify the Notice of Closure to award an additional 12 percent (38.4 degrees) unscheduled PPD for the low back. With this modification, claimant’s total unscheduled PPD award to date is 32 percent (102.4 degrees).

FINDINGS OF FACT

On November 26, 1993, claimant sustained a compensable low back injury, which the SAIF Corporation accepted as a “lumbar strain.” (Exs. 1; 3). Claimant’s aggravation rights expired on November 26, 1998. ORS 656.273(4)(b).

On January 12, 2000, Dr. Brett performed a left L4-5 lumbar decompressive laminectomy and foraminotomy. (Ex. 19).

In June 2005, claimant requested the acceptance of “post-aggravation rights” new/omitted medical conditions (“left L4-5 disc herniation with left L5 nerve root impingement”). (Ex. 29).

On August 18, 2005, SAIF voluntarily reopened claimant’s claim for “post-aggravation rights” new/omitted medical conditions (“left L4-5 disc herniation with left L5 nerve root impingement”). (Ex. 35).

¹ Claimant’s November 26, 1993 claim was accepted as a nondisabling claim. Thus, claimant’s aggravation rights expired on November 26, 1998. ORS 656.273(4)(b). Therefore, when claimant sought claim reopening in August 2005, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On August 18, 2005, pursuant to ORS 656.278(1)(b), SAIF voluntarily reopened the claim for the “post-aggravation rights” new/omitted medical condition (“left L4-5 disc herniation with left L5 nerve root impingement”). On February 16, 2006, SAIF issued its Notice of Closure.

On January 6, 2006, Dr. Lorber performed a closing examination.² (Ex. 42). Claimant's lumbar ranges of motion (ROM) were: 60 degrees flexion; 35 degrees extension; 30 degrees right lateral flexion; and 20 degrees left lateral flexion. (Ex. 42-5). Dr. Lorber noted that "triplicate range of motion was not performed for any motion with the exception of left lateral bend which was consistently 20 degrees noting the other motions were within normal limits." (*Id.*) He agreed with Dr. Brett that claimant was permanently restricted from lifting more than 35 pounds. (Ex. 42-6).

On February 16, 2006, SAIF closed the claim with an Own Motion Notice of Closure that awarded 20 percent (64 degrees) unscheduled PPD for the "post-aggravation rights" new/omitted medical condition.³ (Ex. 45). Thereafter, claimant requested Board review of the Notice of Closure and the appointment of a medical arbiter.

On April 11, 2006, we issued an "Interim Own Motion Order Postponing Action on Review of Carrier Closure," referring the claim to the Director to appoint a medical arbiter.

On May 19, 2006, Dr. Williams performed a medical arbiter examination. Dr. Williams found lumbar ROM of 36 degrees flexion, 18 degrees extension, 19 degrees right lateral flexion, and 12 degrees left lateral flexion.

Dr. Williams indicated that claimant had not met the straight leg raising (SLR) validity test because the tightest straight-leg raising was not equal to or within 10 degrees of the total midsacral motion. However, Dr. Williams concluded that claimant's lumbar flexion finding was valid because the "maximum mid-sacral motion actually exceeds the tightest straight leg raise, whereas the conclusion for invalidity is usually drawn with the opposite result." Additionally, Dr. Williams explained that the findings would suggest that claimant "cooperated with the range of motion but was guarding a bit during the straight leg raise evaluation. The test of straight leg raise could likely have been pushed further, but it was not the goal of the evaluation to create untoward discomfort." As such, Dr. Williams considered claimant's findings valid and appropriate for rating impairment.

² Dr. Barry, claimant's attending physician, concurred with Dr. Lorber's report in its entirety. (Ex. 44).

³ According to the Notice of Closure worksheet, claimant received a 20 percent unscheduled PPD award based on an award of 10 percent for impairment (9 percent for surgery combined with 1 percent for decreased ROM) plus a value of 10 for social/vocational factors. (Ex. 45-2).

Dr. Williams found no loss of sensation on the plantar surface of claimant's feet and no loss of muscle strength in the lower extremities. Dr. Williams opined that claimant was significantly limited in the repetitive use of his low back due to the injury and associated surgery.

Regarding claimant's residual functional capacity (RFC), Dr. Williams stated that claimant could occasionally lift 25 pounds, frequently lift no more than 20 pounds, and constantly lift no greater than 10 pounds. He also reported that claimant was limited to 2 hours of continuous sitting, standing and walking, and should avoid frequent reaching, crouching, twisting, and balancing. Dr. Williams also suggested that claimant work no more than six hours a day.

Finally, Dr. Williams opined that all of the findings were due to the 1993 injury.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of a "post-aggravation rights" new/omitted medical condition ("left L4-5 disc herniation with left L5 nerve root impingement"). (Ex. 35). Such claims may qualify for payment of permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *Jimmy O. Dougan*, 54 Van Natta 1213, *on recons*, 54 Van Natta 1552 (2002), *aff'd*, 193 Or App 767 (2004), *vac'd*, 339 Or 1 (2005).⁴

The PPD limitation set forth in ORS 656.278(2)(d) applies where there is (1) "additional impairment" to (2) "an injured body part" that has (3) "previously been the basis of a permanent partial disability award."⁵ *Cory L. Nielsen*, 55 Van

⁴ 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. Effective January 1, 2006, the legislature amended ORS 656.278(4) to permit any party to appeal an Own Motion order. See House Bill 2294 (2005), sections 2, 4.

⁵ ORS 656.278(2)(d) provides:

“(2) Benefits provided under subsection (1) of this section:

“* * * *

“(d) May include permanent disability benefits for additional impairment to an injured body part that has previously been the basis of a permanent partial disability award, but only to the extent that the permanent partial disability rating exceeds the permanent partial disability rated by the prior award or awards.”

Natta 3199, 3206-07 (2003). If all three requirements are satisfied, the Director's standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate "post-aggravation rights" new or omitted medical condition claims. Thus, we redetermine the claimant's permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d). *Id.*; *Karen A. Grandon*, 58 Van Natta 1011 (2006) (ORS 656.278(2)(d) "limitation" applied - no additional permanent disability where prior "lumbar" permanent disability award exceeded current "lumbar" permanent disability rating); *Jesse C. Day*, 58 Van Natta 367 (2006) (ORS 656.278(2)(d) "limitation" applied to some new medical conditions, but not others).

Here, all three factors of ORS 656.278(2)(d) are not satisfied. In that regard, claimant has not previously received an award of unscheduled PPD for the low back. Accordingly, because the limitation in ORS 656.278(2)(d) does not apply, the permanent disability for claimant's "post-aggravation rights" new/omitted medical condition is rated under the Director's standards *without* "redetermination" of disability. *See David J. Swanson*, 58 Van Natta 2297 (2006) (ORS 656.278(2)(d) "limitation" did not apply; new medical condition rated without "redetermining" disability); *Terry J. Rasmussen*, 56 Van Natta 1136 (2004) (same).

We now proceed with our determination of claimant's unscheduled PPD. Claimant's claim was closed by an Own Motion Notice of Closure dated February 16, 2006. Thus, the applicable standards are found in WCD Admin. Order 05-074 (eff. January 1, 2006). *See* OAR 436-035-0003(1).

For the purpose of rating claimant's PPD, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(B); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

Here, the parties do not dispute the impairment findings of the medical arbiter, Dr. Williams. Additionally, Dr. Williams performed a thorough and complete examination. Consequently, we rely on Dr. Williams' May 19, 2006 report to rate claimant's unscheduled PPD.

Dr. Williams' lumbar ROM findings were: flexion, 36 degrees; extension, 18 degrees; right lateral flexion, 19 degrees; and left lateral flexion, 12 degrees. Although claimant's SLR test did not meet the validity criteria of the AMA

Guides, Dr. Williams provided a written rationale for why the lumbar ROM findings were valid and could be used for determining impairment. Additionally, Dr. Williams' findings are ratable because failure of the SLR validity test cannot be the sole criteria for invalidating a lumbar ROM finding. *See* OAR 436-035-0007(12);⁶ *James R. Hampton*, 57 Van Natta 457, 463 (2005); *Kyle S. Wilson*, 56 Van Natta 2619 (2004) (although the claimant failed the SLR validity test, the medical arbiter reported that the findings were valid; the arbiter's findings were ratable because failure of the SLR validity test could not be the sole criteria for invalidating a lumbar ROM finding).

Accordingly, claimant receives the following percentages for the loss of lumbar ROM measured by Dr. Williams: 4 percent for flexion, 2.4 percent for extension, 1.2 percent for right lateral flexion, and 2.6 percent for left lateral flexion. OAR 436-035-0360 (8), (9), (10). Adding these values results in a total of 10.2 percent, which is then rounded to a value of 10 percent for decreased lumbar ROM. OAR 436-035-0011(4)(a); OAR 436-035-0360(11).

Dr. Williams also opined that claimant was significantly limited in the repetitive use of his lumbar spine. Thus, claimant receives an impairment value of 5 percent for a chronic condition of the low back. OAR 436-035-0019(1)(h).

On January 12, 2000, claimant underwent surgery consisting of a left L4-5 lumbar decompressive laminectomy and foraminotomy. (Ex. 19). Claimant receive a value of 9 percent for this surgery. OAR 436-035-0350(2).

⁶ OAR 436-035-0007(12) provides:

“validity is established for findings of impairment according to the criteria noted in the **AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev., 1990**, unless the validity criteria for a particular finding is not addressed in this reference, is not pertinent to these rules, or is determined by physician opinion to be medically inappropriate for a particular worker. Upon examination, findings of impairment which are determined to be ratable under these rules are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid. When findings are determined invalid, the findings receive a value of zero. If the validity criteria are not met but the physician determines the findings are valid, the physician must provide a written rationale, based on sound medical principles, explaining why the findings are valid. *For purposes of this rule, the straight leg raising validity test (SLR) is not the sole criterion used to invalidate lumbar range of motion findings.*” (Emphasis added).

There are no other ratable findings of impairment. Therefore, we combine the ratable impairment as follows: 10 percent (ROM) combined with 9 percent (surgery) equals 18 percent; 18 percent combined with 5 percent (chronic condition) equals 22 percent impairment. OAR 436-035-0011(6)(a).

The February 16, 2006 Notice of Closure awarded claimant a value of 10 for the social/vocational factors. (Ex. 45-2). The parties do not dispute this value and we agree that claimant is entitled to a total value of 10 for the social/vocational factors.⁷

Adding the impairment value of 22 percent to the social/vocational value of 10 results in a total unscheduled permanent disability award of 32 percent (102.4 degrees). OAR 436-035-0008(2)(b).

The February 16, 2006 Notice of Closure awarded claimant 20 percent (64 degrees) unscheduled PPD. Accordingly, the Notice of Closure is modified to award claimant an additional 12 percent (38.4 degrees) unscheduled PPD, for a total award to date of 32 percent (102.4 degrees) unscheduled PPD for the low back.

Because our decision results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (the 12 percent increased unscheduled PPD award), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(2); OAR 438-015-0080(2).

IT IS SO ORDERED.

Entered at Salem, Oregon on October 27, 2006

⁷ This is based on a value of 1 for age (42 years); a value of 0 for formal education (high school diploma); and a value of 1 for claimant's SVP of 7 for his job-at-injury as a "Plumber" (DOT 862.381-030). These are added for an age/education total of 2. Claimant's Base Functional Capacity (BFC) is "heavy" based on his job-at-injury (DOT 862.381-030). Based on Dr. Williams' physical restrictions, claimant's Residual Functional Capacity (RFC) is "light." Heavy to light results in an adaptability factor of 5. 2 times 5 equals 10.