
In the Matter of the Compensation of
ROGER D. HOUSER, Claimant
Own Motion Nos. 06-0062M, 06-0063M
OWN MOTION ORDER
Merkel & Associates, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation has submitted two Carrier's Own Motion Recommendations against the reopening of claimant's "worsening" claims regarding his left and right knee conditions. (WCB Case Nos. 06-0062M (left knee); 06-0063M (right knee)). *See* ORS 656.278(1)(a). Claimant's aggravation rights in both claims have expired. SAIF opposes the reopening of the claims, contending that claimant was not in the work force at the time of the current disability. Claimant contends that but for his compensable injuries, he would be in the work force. Based on the following reasoning, we deny claim reopening.

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.¹

Under the *Dawkins* criteria, 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.

¹ As for the requirements regarding payment of benefits, where such a worsening is established, the worker may receive temporary disability benefits under ORS 656.210, ORS 656.212(2) and ORS 656.262(4) from the time the attending physician authorizes such benefits for the hospitalization, surgery, or other curative treatment until the worker becomes medically stationary, provided that the worker is in the work force during the period for which such benefits are sought. ORS 656.005(30); ORS 656.278(1)(a); *Kemp*, 54 Van Natta at 505.

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). The “date of disability” is the date on which *both* of these factors are satisfied. *Robert J. Simpson*, 55 Van Natta 3801 (2003).

On November 14, 2005, Dr. Hanley, claimant’s attending physician, recommended an exploration of the left knee peroneal nerve. On December 8, 2005, Dr. Hanley, recommended right knee arthroscopic surgery. Thus, claimant has established that his compensable conditions have worsened requiring surgery.

However, as addressed above, claimant must also prove that the worsening resulted in the inability to work and that he was in the work force under the *Dawkins* criteria. Whether a worsening of the compensable injury results in an “inability to work” presents a medical question that must be addressed by medical evidence. In other words, we cannot infer that the surgery will result in an inability to work. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“[t]he Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”); *Kemp*, 54 Van Natta at 509.

Here, the record lacks medical evidence that claimant’s compensable conditions have worsened resulting in his inability to work. In other words, in the absence of a supporting medical opinion, claimant’s surgeries are insufficient to establish an “inability of the worker to work” under ORS 656.278(1)(a). *Andrew J. Duby*, 57 Van Natta 833 (2005).

Moreover, the record does not establish that claimant remained in the work force under the *Dawkins* criteria, as summarized above. In order to prove that he is a member of the work force, claimant must also satisfy either the “seeking work” factor of the second *Dawkins* criterion or the “futility” factor of the third *Dawkins* criterion. Based on the following reasoning, we find that claimant has not satisfied this requirement.

Whether it would be futile for claimant to seek work is not a subjective standard; rather it is an objective standard determined from the record as a whole, especially considering persuasive medical evidence regarding claimant’s ability to work and/or seek work. *Karon A. Hall*, 56 Van Natta 57 (2004) (request for Own

Motion claim reopening denied where record lacked persuasive medical evidence establishing that the claimant was unable to work and/or seek work due to the compensable injury); *Jackson R. Shrum*, 51 Van Natta 1062 (1999) (same). In short, the question is whether the compensable injury made it futile for claimant to make reasonable efforts to seek work, not whether he reasonably believes it to be futile.

Here, no medical opinion supports claimant's current "futility" contentions, nor does the record demonstrate that it would have been futile for him to work or seek work due to his compensable bilateral knee conditions. In short, there is no medical documentation that demonstrates that it would have been futile for claimant to seek work. *Stuart T. Valley*, 55 Van Natta 475 (2003).²

In conclusion, lacking evidence regarding the "inability to work" and the "work force" factors, we are unable to authorize claim reopening. ORS 656.278(1)(a). Accordingly, the requests for Own Motion relief are denied. 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 October 26, 2006

² Finally, the burden of proof to establish claimant's request for compensation rests with him. ORS 656.266. Claimant's attorney asserts that claimant would be in the work force, "but for the industrial injuries and their physical consequences." Yet, claimant submitted no medical evidence to support this assertion. Moreover, a claimant's attorney's unsupported and challenged assertions are insufficient to satisfy his burden of proving that he was in the work force. *Dustin L. Crompson*, 50 Van Natta 92 (1998); *Earl J. Prettyman*, 46 Van Natta 1137 (1994).