
In the Matter of the Compensation of
DAREN L. JOHNSON, Claimant
Own Motion No. 06-0143M
OWN MOTION ORDER
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Reviewing Panel: Members Langer and Biehl.

The SAIF Corporation has submitted claimant's request for claim reopening for his compensable right knee injury claim. ORS 656.278(1)(a). Claimant's aggravation rights have expired. SAIF opposes reopening, contending, among other issues, that claimant's compensable condition does not require any medical treatment that qualifies his claim for reopening. Based on the following reasoning, we find that claimant's claim does not qualify for reopening.

FINDINGS OF FACT

On November 9, 1988, claimant sustained a compensable right knee injury. The claim was first closed on May 2, 1990. (Ex. 6). His aggravation rights expired May 2, 1995. ORS 656.273.

On September 27, 2006, claimant sought medical treatment for right knee pain with Dr. North, his attending physician. Diagnosing right knee early degenerative joint disease, Dr. North prescribed steroid injections and released claimant from work. (Ex. 19).

On October 12, 2006, in response to inquiry from SAIF, Dr. North provided the following opinions: (1) the proposed injections were palliative treatment "to decrease the degenerative symptomatology;" (2) claimant's condition had worsened and might require surgical intervention if the recommended injections were not successful; and (3) further intervention would not be considered for 4-6 weeks following the last injection. (Ex. 22).

In November 2006, Dr. North reported that: (1) the injections were palliative and intended for material improvement to avoid a total knee replacement; (2) there was no "worsening" that required any of the statutory requisite medical treatments; (3) claimant was capable of sedentary work; and (4) there had been no material worsening since claimant's 2005 surgery.

In January 2007, Dr. North explained that claimant's medical treatment included several modalities that were considered:

“necessary for ‘remedial treatment,’ also defined as ‘curative’ in Webster’s Dictionary, in order to ‘improve’ [claimant’s] condition and hopefully, his ability to return to work. This would be considered curative in lieu of surgery.”

Finally, Dr. North reported that claimant's condition was not medically stationary and recommended a physical capacities evaluation “to close” his claim.

CONCLUSIONS OF LAW AND OPINION

Pursuant to ORS 656.278(1)(a), among the requirements for the reopening of an Own Motion claim for a worsening of a compensable injury is a requirement that 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. *Health A. Wiltfong*, 57 Van Natta 3108 (2005).

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. *Larry D. Little*, 54 Van Natta 2536 (2002). The three qualifying medical treatments listed in ORS 656.278(1)(a) are defined as follows: (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. *Little*, 54 Van Natta at 2542. The third type of qualifying treatment requires 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) 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 record does not establish that claimant’s compensable condition worsened requiring one of the specific types of medical treatment required under ORS 656.278(1)(a). No physician recommended surgery or hospitalization.¹ In addition, although Dr. North stated that the recommended treatment was curative and necessary to enable claimant to return to work, he also stated that this treatment was “in lieu of surgery,” whereas the statute explicitly requires that qualifying curative treatment be prescribed in “lieu of *hospitalization*.” ORS 656.278(1)(a). (Emphasis supplied). Surgery and hospitalization are not the same thing. Furthermore, surgery does not necessarily require hospitalization; *e.g.* outpatient surgery would not result in hospitalization. *See Roy L. Merwin*, 56 Van Natta 2334 (2004) (epidural injections prescribed in lieu of surgery insufficient under ORS 656.278(1)(a)); *Stanley J. Birch*, 56 Van Natta 366 (2004); *Little*, 54 Van Natta at 2547 (ORS 656.278(1)(a) not satisfied where, even assuming that treatment (epidural steroid injections) 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); *compare Peter B. Wallen*, 55 Van Natta 1905 (2003) (attending physician’s un rebutted opinion established that the claimant’s epidural injections were curative treatment prescribed in lieu of hospitalization for lumbar surgery that was necessary to enable him to return to work).

Thus, this medical record does not establish that claimant’s condition required hospitalization, surgery or other curative treatment that was prescribed in lieu of hospitalization that was necessary to enable him to return to work. Under

¹ In October 2006, Dr. North opined that claimant might require surgical intervention if the injections were unsuccessful. However, Dr. North’s opinion regarding future surgery is couched in terms of possibility, which is not legally sufficient or persuasive. Instead, persuasive medical opinions must be based on medical probability, rather than possibility. *Gormley v. SAIF*, 52 Or App 1055 (1981) (opinion in terms of medical possibility rather than medical probability are not persuasive); *Timothy S. Adams*, 58 Van Natta 1135 (2006) (“possibility” of medical treatment insufficient); *Jeffrey D. Dugan*, 56 Van Natta 550 (2004) (“possibility” of surgery insufficient under ORS 656.278(1)(a)).

these circumstances, we conclude that claimant's Own Motion claim for a worsening of his previously accepted right knee conditions does not satisfy the criteria set forth in ORS 656.278(1)(a).²

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 March 16, 2007

² If a party obtains medical evidence that addresses the statutorily required medical treatment (*i.e.*, hospitalization, surgery or curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work) that is lacking from the current record, that party may 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).