In the Matter of the Compensation of
MARJORIE A. BRUNSCHMID, Claimant
Own Motion No. 08-0159M
OWN MOTION ORDER
Scott M McNutt SR, AAL, Claimant Attorneys
Liberty NW Ins Corp, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

The insurer has submitted claimant's request for reopening of her "worsening" claim for her previously accepted low back conditions. *See* ORS 656.278(1)(a). Claimant's aggravation rights have expired. The insurer opposes the reopening of the claim, contending that claimant was not in the work force at the time of the current disability. Based on the following reasoning, we decline to reopen the claim.

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.

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 making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 Or at 258; *Kemp*, 54 Van Natta at 502-03.

Here, claimant meets the first two "claim reopening" requirements. In this regard, on October 6, 2008, Dr. Bert, claimant's attending physician, sought surgery authorization. (Ex. 6). On October 22, 2008, Dr. Bert agreed that, due to the worsening of claimant's low back condition, she would be unable to work beginning from the date of surgery. (Ex. 9). However, claimant must also establish that she was in the work force at the "time of disability" as defined under the *Dawkins* criteria.

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 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. *Thurman M. Mitchell*, 54 Van Natta 2607 (2002).

Here, Dr. Bert recommended surgery on October 6, 2008. On October 22, 2008, Dr. Bert reported that claimant would be unable to work beginning from the date of the surgery.

Under such circumstances, October 22, 2008 is the "date of disability" for the purpose of determining whether claimant was in the work force. *Robert J. Simpson*, 55 Van Natta 3801 (2003). Thus, claimant must establish that she was in the work force before October 22, 2008 when her condition worsened resulting in an inability to work and requiring surgery. *See Edward J. Fix*, 57 Van Natta 47 (2005); *Gheorghe Morar*, 55 Van Natta 882 (2003); *Mitchell*, 54 Van Natta at 2618.

As summarized above, 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 making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 at 258; *Kemp*, 54 Van Natta 502-03.

The insurer contends that claimant was not in the work force at the time of the current disability. In support of its contention, the insurer submits claimant's completed work questionnaire, which states that: (1) she is in the work force; (2) she is not retired; and (3) she has *not* worked since August 2004 because of "back injury, severe pain."

Based on claimant's response to the insurer's inquiry, we are persuaded that, as of August 2004, she was not engaged in regular gainful employment. Therefore, she must establish that she was in the work force under the second or third *Dawkins* criteria.

Claimant contends that she remains employed and in the work force, but had not worked since August 2004 because of her back injury and severe pain. We interpret claimant's assertions to represent her willingness to work.

However, in order to prove that she 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 are not persuaded that either factor has been satisfied.

As noted above, the relevant time period to determine whether claimant was in the work force is at the time of disability, *i.e.*, October 22, 2008. Claimant acknowledges that she did not work and/or seek work between August 2004 and October 22, 2008. She attributes her situation to severe back pain due to her compensable condition. We interpret claimant's position to be that, due to the work injury, it would have been futile for her to work and/or seek work.

However, 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).

Here, no medical opinion supports claimant's current "futility" contentions, nor does the record demonstrate that it would have been futile for her to work or seek work due to her compensable low back 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).

Consequently, the record does not establish that claimant was in the "work force."[1] Accordingly, we are unable to authorize the reopening of claimant's 1998 claim.[2] ORS 656.278(1)(a). *Steve E. Parker*, 57 Van Natta 522 (2005).

IT IS SO ORDERED.

Entered at Salem, Oregon on December 16, 2008

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[1] If a party obtains evidence that addresses the "work force" component of the standard 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).

[2] The record does not demonstrate that claimant has initiated a "post-aggravation rights" new medical condition claim. Thus, any consideration of "unclaimed" conditions would be premature. *See* ORS 656.267(3); ORS 656.278(1)(b). Instead, our decision is limited to a review of claimant's worsening claim for her previously accepted low back conditions. Furthermore, our decision is premised on a finding that claimant's was not in the work force at the time of disability. Under such circumstances, we are unable to authorize the reopening of claimant's 1998 claim under ORS 656.278(1)(a).

If claimant wishes to initiate a new or omitted medical condition claim, she may request formal written acceptance of the claim from the insurer. ORS 656.267(1). If the insurer receives such a claim, and the claim is "determined to be compensable," it must be processed according to the Board's rules. *See* 438-012-0001(4); OAR 438-012-0030(1); *James W. Jordan*, 58 Van Natta 34, 37 (2006).