In the Matter of the Compensation of
SANDRA L. SANCHEZ, Claimant
Own Motion No. 07-0078M
SECOND INTERIM OWN MOTION ORDER POSTPONING ACTION ON REVIEW OF CARRIER CLOSURE
Hollander & Lebenbaum, Claimant Attorneys
Radler Bohy & Replogle LLP, Defense Attorneys

Reviewing Panel: Members Beihl and Lowell.

Claimant requested review of the self-insured employer's June 1, 2007 Notice of Closure that did not award permanent disability for her "post-aggravation rights" new/omitted medical condition ("L4-L5 disc herniation"). On August 9, 2007, we referred the claim to the Director to appoint a medical arbiter. *Sandra L. Sanchez*, 59 Van Natta 1937 (2007). In doing so, we found that there were no impairment findings to rate claimant's "post-aggravation rights" new/omitted medical condition ("L4-L5 disc herniation").

Subsequently, the Appellate Review Unit (ARU) advised us that the scheduling of two medical arbiter examinations had been unsuccessful. A briefing schedule was establish to allow the parties to address the effect the aforementioned events had on our prior order.

Claimant explains that she missed the first appointment because one of her employees was unable to come to work due to a family emergency. She recounts that, immediately upon learning of this emergency, she contacted the medical arbiter. Claimant represents that she missed the second examination because she had not received notice of the appointment. Asserting that her explanations provide "good cause" for her nonattendance, claimant continues to seek a medical arbiter examination.

The employer responds that claimant has not demonstrated "good cause." It contends that claimant's first cancellation notice to the medical arbiter did not give a reason. As such, the employer asserts that her current explanation of "work emergencies" is suspect. Regarding the second cancellation, the employer argues that claimant's excuse is unsubstantiated. Furthermore, the employer notes that claimant's attorney received the notice, and that claimant's notice was mailed to her correct address, and was not returned to ARU as undeliverable.

As explained in our prior order, when a worker objects to a carrier's closure of a "post-aggravation rights" new or omitted medical condition claim, we apply the Director's standards in determining the appropriateness of a permanent disability award. *See Edward A. Miranda, Sr.*, 55 Van Natta 784 (2003). In order for us to evaluate a claimant's permanent impairment under the Director's standards, the claimant's attending physician must make medical findings of impairment at the time of claim closure or the attending physician must concur with the impairment findings from another physician. OAR 436-035-0007(5), (6) (WCD Admin. Order 05-074, eff. January 1, 2006); *Koitzsch v. Liberty Northwest Insurance Corp.*, 125 Or App 666, 670 (1994); *Miranda*, 55 Van Natta at 793.

Consistent with our authority under ORS 656.278(6), when the record lacks sufficient medical information to rate the claimant's "post-aggravation rights" new/omitted medical condition under the Director's standards, and the claimant asserts that he/she has ratable impairment, it is appropriate to obtain the necessary medical information needed to rate the claimant's impairment through a medical arbiter. *Michael P. Hannen*, 55 Van Natta 1508, 1517 (2003).

Here, there are no impairment findings made by an attending physician at the time of claim closure, or by other physicians with whom the attending physician concurred. Therefore, on this record, there are no impairment findings from which we may rate claimant's "post-aggravation rights" new/omitted medical condition ("L4-L5 disc herniation") under the Director's standards.

Accordingly, consistent with *Hannen*, we refer the claim to the ARU to reschedule a medical arbiter examination. The parties shall provide the Director with whatever information the Director deems necessary to assist the medical arbiter, including identification of the accepted "post-aggravation rights" new/omitted medical condition ("L4-L5 disc herniation"), the only condition for which claimant is entitled to a rating of permanent disability benefits under ORS 656.278(1)(b) and 656.278(2)(d). The ARU should also advise the medical arbiter that, should claimant not attend this examination, an arbiter's report should nevertheless be prepared based on a review of the medical record.

In directing the ARU to reschedule the medical arbiter's examination, we acknowledge the parties' arguments regarding the issue of whether claimant had "good cause" for not attending prior appointments. However, because of the special circumstances of this claim in which no impairment findings exist, it is particularly important to obtain a medical arbiter report. Moreover, there is no Board rule or case that addresses the consequences of a claimant not attending a

medical arbiter examination in the context of an "Own Motion" claim. Therefore, despite claimant's lack of attendance of prior scheduled examinations, we conclude that another medical arbiter examination should be scheduled.[1]

Following completion of the medical arbiter process, and the Board's receipt of a copy of the medical arbiter report, a supplemental briefing schedule will be implemented to allow the parties an opportunity to address the effect, if any, the arbiter's report has on claimant's request for review of the closure notice. After completion of that schedule, we will proceed with our review.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 7, 2008

[1] Inherent with this, as well as any, referral of an Own Motion claim to ARU, it is assumed that ARU will follow its standard operating procedures in scheduling examinations. Logically, these procedures would also include ARU's standard analysis for determining whether a "missed" examination should be rescheduled or whether an arbiter should simply issue a report based on the documentary record. In the future, we assume that ARU will follow its standard procedures whenever it is processing Own Motion claims for "post-aggravation rights" new or omitted medical conditions.