In the Matter of the Compensation of
RONALD K. FLITCROFT, Claimant
Own Motion No. 08-0055M
INTERIM OWN MOTION ORDER POSTPONING ACTION ON REVIEW OF CARRIER CLOSURE
Martin J McKeown, Claimant Attorneys
John M Pitcher, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant requests review of the April 4, 2008 Notice of Closure that: (1) determined that September 20, 2007 was his medically stationary date; and (2) awarded 21 percent (31.5 degrees) scheduled permanent disability for his "post-aggravation rights" new/omitted medical condition ("right knee osteoarthritis"). On review, claimant contends that his condition was not medically stationary. Alternatively, he requests an increased permanent partial disability (PPD) award and seeks the appointment of a medical arbiter.

FINDINGS OF FACT

On November 21, 1990, claimant sustained a compensable right knee injury. His aggravation rights have expired.

On March 19, 2007, claimant underwent a right total knee arthroplasty. (Ex. 13). On May 7, 2007, the self-insured employer voluntarily reopened his claim for "post-aggravation rights" new medical condition ("right knee osteoarthritis"). ORS 656.278(5); ORS 656.278(1)(b).

On September 20, 2007, Dr. Hobson, his attending physician, noted that claimant's "post-aggravation rights" new medical condition ("right knee osteoarthritis") exhibited no functional deficit and that claimant had no further right knee complaints. Dr. Hobson commented that claimant's current problems related to his left knee for which surgery was pending. (Ex. 16). That surgery was performed in October 2007.[1]

[T] The surgery report refers to "right knee end-stage osteoarthritis." Nevertheless, other portions of the report mention left knee arthroplasty and "end-stage osteoarthritis." Under such circumstances, we interpret the references to the right knee to be a typographical error. Such an interpretation is also consistent with a recent letter from the employer, clarifying this misunderstanding.

An April 4, 2008 Own Motion Notice of Closure: (1) declared claimant's right knee condition medically stationary as of September 20, 2007; and (2) awarded 21 percent (31.5 degrees) scheduled permanent disability.

Claimant has requested review of the April 2008 Notice of Closure. He contends that his condition was not medically stationary and requests additional permanent disability. In addition, he seeks the appointment of a medical arbiter.

CONCLUSIONS OF LAW AND OPINION

Premature Closure

In seeking review, claimant contends that his compensable condition is not medically stationary. We interpret his position to be that his claim was prematurely closed.

Under ORS 656.278(6) and OAR 438-012-0055, the propriety of closure turns on whether claimant's condition was medically stationary at the time of the April 4, 2008 Notice of Closure, considering his condition at that point and not subsequent developments. *Sullivan v. Argonaut Ins. Co.*, 73 Or App 694 (1985); *Dale M. Ackler*, 55 Van Natta 3783, 3785 (2003); *Donald B. Huege*, 55 Van Natta 1952 (2003).

"Medically stationary" means that no further material improvement would reasonably be expected from medical treatment, or the passage of time. ORS 656.005(17). The issue of a claimant condition's medically stationary status is primarily a medical question to be decided based on competent medical evidence. *Harmon v. SAIF*, 54 Or App 121, 125 (1981); *Thomas L. Bishop*, 55 Van Natta 147, 149 (2003).

Here, on September 20, 2007, Dr. Hobson concluded that claimant's compensable right knee condition required no further treatment. Dr. Hobson's opinion is unrebutted. Thus, the record supports a conclusion that, as of September 20, 2007, no further material improvement would reasonably be expected from medical treatment or the passage of time for claimant's compensable "post-aggravation rights" new/omitted medical condition.[2]

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[2] We acknowledge that Dr. Hobson reported that claimant requires surgery to treat his *left* knee condition, which has been performed. However, claimant's Own Motion claim was not reopened for a *left* knee condition. Under such circumstances, any need for treatment regarding claimant's *left* knee condition is not relevant to the "medically stationary" issue concerning his Own Motion claim for his compensable right knee condition.

Consequently, we conclude that the April 4, 2008 Notice of Closure was not premature.[3]

Permanent Disability

Alternatively, claimant requests review of the employer's claim closure based on his disagreement with the impairment findings used to rate his disability. In addition, he requests the appointment of a medical arbiter. *See John S. Ross*, 56 Van Natta 3369 (2004); *Edward A. Miranda*, 55 Van Natta 784 (2003).

Consistent with the procedures set forth in *Miranda*, we postpone our review of the Own Motion claim closure pending receipt of a medical arbiter's report. We also refer the claim to the Director to appoint a medical arbiter. 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 medical condition ("right knee osteoarthritis"), the only condition for which claimant is presently entitled to a rating of PPD benefits under ORS 656.278(1)(b) and ORS 656.278(2)(d).[4]

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 May 23, 2008

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[3] To the extent that claimant's "medically stationary" reference indicates his disagreement with his temporary disability award, we defer review on that issue until the issuance of an arbiter's report and the implementation of a briefing schedule. At that time, the parties can present their respective arguments, if any, concerning a temporary disability issue.

[4] The Appellate Review Unit (ARU) is requested to provide the Board with a copy of the entire written record (including any cover letter or questions to the arbiter from ARU) that it forwards to the medical arbiter.