
In the Matter of the Compensation of
MATTHEW S. BURNETT, Claimant
Own Motion No. 08-0131M
OWN MOTION ORDER
Swanson Lathen et al, Claimant Attorneys
Liberty NW Ins Corp, Carrier

Reviewing Panel: Members Lowell and Biehl.

The insurer has submitted claimant's request to reopen his claim for a worsened condition. ORS 656.278(1)(a). Claimant's aggravation rights have expired. The insurer opposes reopening the claim, contending that claimant was not in the work force at the time of disability. Based on the following reasoning, we decline to authorize reopening of claimant's "worsened condition" claim.

FINDINGS OF FACT

On July 6, 1988, claimant sustained a compensable left fingers injury. Claimant's aggravation rights have expired.

On July 16, 2008, claimant sought treatment with Dr. Foglesong, his attending physician for left finger pain. Diagnosing osteomyelitis and painful nonfunctional PIP and DIP arthrodesis, Dr. Foglesong recommended surgical intervention. (Ex. 4).

On August 10, 2008, claimant completed a work questionnaire, stating that: (1) he is not in the work force; (2) he last worked in March 2007; (3) the reason for his unemployment is that the company went out of business; and (4) he has been turned down for jobs until he gets his finger fixed "because its infected and draining in two places." (Ex. 5).

On August 14, 2008, Dr. Foglesong concurred that claimant would have an inability to work. (Ex. 6). Claimant underwent surgery on August 25, 2008. (Ex. 7).

CONCLUSIONS OF LAW AND OPINION

The issue is whether claimant's Own Motion claim qualifies for reopening for a worsening of his previously accepted conditions under ORS 656.278(1)(a). There are three requirements for the reopening of such a claim. First, the worsening must result in the partial or total inability of the worker to work.

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. 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); *James J. Kemp*, 54 Van Natta 491, 503 (2002).

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 at 502-503.

Here, claimant meets the first two requirements for the reopening of an Own Motion claim for a worsening of a compensable injury. In this regard, Dr. Fogleson recommended surgery and noted that claimant would have an inability to work. Thus, claimant's compensable condition worsened resulting in the inability to work and requiring surgery. However, claimant must also establish that he was in the work force at the "time of disability" as defined under the *Dawkins* criteria.

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 relevant time period for which claimant must be in the work force is the time before the "date of disability," when his condition worsened resulting in an inability to work and requiring the requisite medical treatment under ORS 656.278(1)(a). See generally *Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Stuart T. Valley*, 55 Van Natta 475 (2003).

Here, on July 16, 2008, Dr. Fogleson recommended surgery. On August 14, 2008, Dr. Fogleson concurred that claimant would have an "inability to work."

Based on such evidence, we conclude that, as of August 14, 2008, claimant's compensable condition worsened resulting in an inability work and requiring surgery. Therefore, August 14, 2008, is the "date of disability" for the purposes of determining whether claimant was in the work force.

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. Here, based on claimant's response to the insurer's inquiry, he was last employed in March 2007. As such, as of that time, we are persuaded that he was not engaged in regular gainful employment. Therefore, he must establish that he was in the work force under the second or third *Dawkins* criteria.

The insurer contends that claimant did not satisfy any of the *Dawkins* criteria. Claimant's attorney responds that claimant continued to seek work after March 2007, when the company he was working for went out of business. Furthermore, claimant's attorney asserts that claimant remained in the work force because he was "actively seeking employment until approximately late June 2008." Based on the following reasoning, we agree with the insurer's position.

It is claimant's burden to prove that he remained in the work force. ORS 656.266(1); *Donald L. Duquette*, 60 Van Natta 797 (2008); *Evalyn V. Stevens*, 59 Van Natta 1906 (2007). We have previously found that an attorney's assertions, in the absence of supporting evidence, are insufficient to establish a component of the "work force" issues. *Robert W. Wilcox*, 53 Van Natta 1093 (2001); *Earl J. Prettyman*, 46 Van Natta 1137 (1994); *Larry R. Ruecker*, 45 Van Natta 933 (1993).

Furthermore, the record does not satisfy the "futility" factor of the third *Dawkins* criterion. We reason as follows.

As noted above, the relevant time period to determine whether claimant was in the work force is at the time of disability, *i.e.*, August 14, 2008. Claimant acknowledges that he did not work because he needed to "get [his] finger fix[ed]." We interpret claimant's position to be that it would have been futile for him to work.

Whether it would be futile for claimant to seek work is not a subjective test viewed through the eyes of claimant; it is an objective test 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); *Jacqueline M. Lampkin*, 55 Van Natta 2592 (2003) (same); *Janet F. Berhorst*, 50 Van Natta 1578 (1998) (same; Board cannot infer futility).

Here, claimant does not offer a medical opinion that would support his "futility" contentions, nor does the record demonstrate that it would have been futile for him to work before the time of disability, *i.e.*, August 14, 2008, while he was awaiting surgery. *Stuart T. Valley*, 55 Van Natta 475 (2003). Dr. Foglesong concurred that claimant would have an "inability to work" due to the recommended surgery. However, that opinion does not address whether it was futile for claimant to work between March 2007 and August 14, 2008, the date of disability.

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 1988 claim. ORS 656.278(1)(a).² *Steve E. Parker*, 57 Van Natta 522 (2005).

IT IS SO ORDERED.

Entered at Salem, Oregon on October 22, 2008

¹ If a party obtains evidence that addresses the "work force" component of the statutory 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 his previously accepted left finger condition.

If claimant wishes to initiate a new or omitted medical condition claim, he 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).