
In the Matter of the Compensation of
RONALD J. SCHLAPPIE, Claimant
Own Motion No. 09-0159M
OWN MOTION ORDER
Unrepresented Claimant
Liberty NW Ins Corp, Insurance Carrier

Reviewing Panel: Members Biehl and Lowell.

The insurer has submitted claimant's request for reopening of his "worsening" claim for his previously accepted left shoulder 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 August 28, 2009, Dr. Woolley, claimant's attending physician, sought surgery authorization. (Ex. 7). On October 12, 2009, Dr. Woolley agreed that, due to the worsening of claimant's left shoulder condition, he would be unable to work beginning from the date of surgery. (Ex. 9). 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 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. Woolley recommended surgery on August 28, 2009. On October 12, 2009, Dr. Woolley reported that claimant would be unable to work beginning from the date of the surgery.

Under such circumstances, October 12, 2009 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 he was in the work force before October 12, 2009, when his 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.

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 work questionnaire (completed on September 1, 2009), which states that: (1) he is not in the work force; and (2) he last worked on May 26, 2009 because his “company close[d] up.” (Ex. 8-1). The insurer also submitted a copy of a July 3, 2009 paystub for a pay period ending June 27, 2009. (Ex. 8-2).

Based on claimant’s response to the insurer’s inquiry, we are persuaded that, as of June 2009, 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 record lacks evidence concerning claimant’s willingness to work. Nonetheless, even if claimant satisfied the “willingness to work” requirement, we are not persuaded that either the “seeking work” factor of the second *Dawkins* criterion or the “futility” factor of the third *Dawkins* criterion has been satisfied. We reason as follows.

As noted above, the “date of disability” is October 12, 2009. Thus, claimant must establish that he was in the work force in the time period before October 12, 2009. *See Jeffrey L. Coefield*, 53 Van Natta 614 (2001) (seven to nine week period

between prior claim closure/medically stationary date and subsequent worsening not so brief so as to relieve the claimant of the burden of proving that he remained in the work force at “date of disability”); *Robert D. Peck*, 45 Van Natta 2202 (1993) (same - five to seven week period); *compare Mitchell T. Buselle*, 61 Van Natta 625 (2009) (one-week period between the claimant becoming unemployed and the “disability date” was insufficient to establish that he had withdrawn from the work force); *Rodney M. Waldrip*, 56 Van Natta 1516 (2004) (worker had not withdrawn from work force where there was a two-week period between last employment and attending physician’s release to modified work).

Considering the 15-week gap between claimant’s June 27 departure from work and his October 12 disability date, we are not persuaded that his employment through June 27 persuasively establishes that he was in the work force before his October 12 date of disability. *See Dwayne L. Minner*, 61 Van Natta 1919, *recons*, 61 Van Natta 2544 (2009) (12-week gap between last employment and subsequent worsening not so brief so as to relieve the claimant of the burden of proving that he remained in the work force at “date of disability”).

Furthermore, 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, including any lay and medical evidence. *Seferino C. Hernandez*, 58 Van Natta 821, 822 (2006); *Jackson R. Shrum*, 51 Van Natta 1062, 1063 (1999). In other words, the question is whether the compensable injury made it futile for claimant to make reasonable efforts to seek work at the relevant time, not whether he believes it to be futile.

The record does not demonstrate that it would have been futile for claimant to work before the time of disability, *i.e.*, October 12, 2009. Dr. Woolley opined that claimant could not work as of October 20, 2009. However, that opinion does not address whether it was futile for claimant to work *before* October 12, 2009, 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 his Own Motion 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 2, 2009

¹ If a party obtains evidence that addresses the “work force” component of the requirement for reopening 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 Finally, inasmuch as claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers, whose job it is to assist injured workers. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

OMBUDSMAN FOR INJURED WORKERS
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405