

In the Matter of the Compensation of
MARJORIE A. BRUNSCHMID, Claimant
Own Motion No. 08-0159M
THIRD OWN MOTION ORDER ON RECONSIDERATION
Scott M McNutt Sr, Claimant Attorneys
Liberty NW Ins Corp, Carrier

Reviewing Panel: Members Langer and Weddell.

On February 26, 2009, we withdrew our January 27, 2009 order, which reconsidered our December 16 and December 31, 2008 orders, which declined claimant's request to reopen her Own Motion claim for a "worsened condition" under ORS 656.278(1)(a). *Marjorie A. Brunschmid*, 60 Van Natta 3406, *on recons*, 60 Van Natta 3517 (2008), *on recons*, 61 Van Natta 190 (2009). In reaching our prior conclusions, we found that claimant had not established that she was in the work force at the time of disability. We abated these decisions to consider claimant's submission of additional medical documentation. Having received the insurer's response, we proceed with our reconsideration.

In our prior orders, we explained that, although claimant had established the other requirements for reopening her Own Motion claim for a worsening of a compensable injury, she did not establish that she was in the "work force" at the time of disability. Specifically, we reasoned that claimant did not establish that it would have been futile for her to look for work at the time of her disability, *i.e.*, the period prior to October 22, 2008. In doing so, we stated that the question of whether a work-related injury makes work or a reasonable work search futile is a medical question, which must be answered by persuasive medical evidence. *George Sweet*, 59 Van Natta 2210 (2007); *Jackson R. Shrum*, 51 Van Natta 1061 (1999) (Board denied request for Own Motion relief where the record lacked persuasive medical evidence establishing that the claimant was unable to work and/or seek work due to the compensable injury). Finally, we noted that, if claimant obtained a written medical opinion persuasively establishing that the compensable condition made a reasonable work search futile for the period prior to October 22, 2008, she could submit that opinion and request reconsideration.

In response to our decision, claimant submits Dr. Groves' February 17, 2009 letter and chart notes between July 31, 2007 and February 19, 2009. In offering this submission, claimant asserts that she should be considered to be in the "work force" on the date of her disability (October 22, 2008) because, as a result of her injury, any efforts to obtain work would have been futile. Based on the following reasoning, claimant's submission does not persuasively satisfy her "work force/futility" requirement.

Dr. Groves opined as follows:

“In summary, it is my opinion that [claimant’s] L4-5 disc problem has persisted since her original injury and [she] was unable to hold any type of gainful employment during the time period between August 2004 and August 2008, *both due to physical, psychological, and medication related issues.*” (Emphasis supplied).

Claimant’s compensable injury is limited to her previously accepted low back conditions (“low back strain and L4-5 herniated disc”). Dr. Groves supports the proposition that claimant was unable to work during the relevant time period; *i.e.*, October 22, 2008 (her disability date). Nevertheless, Dr. Groves’ opinion does not establish that this inability was due solely to her compensable low back injury. Rather, in addition to claimant’s “physical” issue, Dr. Groves refers to “psychological and medication related issues.”¹ At most, Dr. Groves’ statement attributes claimant’s inability to work during the relevant time period to a number of issues, only one of which was her compensable injury.

Dr. Groves’ opinion does not persuasively establish that the work-related injury is the cause of claimant’s inability to work or seek work. *Donald L. Duquette*, 60 Van Natta 797 (2008); *Konnie Sprueill*, 45 Van Natta 541 (1993) (the claimant did not meet burden of proving work search futile where, at most, the attending physician’s opinion established that a combination of several problems, including the compensable injury, resulted in the claimant’s inability to work).

Finally, Dr. Groves’ chart notes indicate that claimant’s treatments, at least from July 2007, were related to a chronic low back pain and depression. Only Dr. Groves’ November 11, 2008 chart note addresses claimant’s ability to work. On that date, Dr. Groves reports that claimant had discussed surgery with Dr. Bert and was “unable to work.” Considering that this note occurred *after* claimant’s “disability date” (October 22, 2008), Dr. Groves’ comment does not persuasively support a conclusion that it was futile for claimant to seek work *before* October 22, 2008. If anything, Dr. Groves’ note pertains to claimant’s current ability to work.

¹ Dr. Groves identified “major depressive disorder and opioid dependence” as conditions also afflicting claimant. These conditions have not been accepted.

Accordingly, as supplemented herein, we adhere to and republish our prior orders. The parties' rights of reconsideration and appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 20, 2009