
In the Matter of the Compensation of
JOHN C. FOWLER, Claimant
Own Motion No. 07-0162M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
J Michael Casey, Claimant Attorneys
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Reviewing Panel: Members Biehl and Langer.

Claimant requests review of the August 31, 2007 Notice of Closure that did not award permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical condition (“1992 left L4-5 disc herniation”).¹ Based on the following reasoning, we affirm the Notice of Closure.

FINDINGS OF FACT

On August 7, 1992, claimant sustained a compensable low back injury. The employer accepted an “acute low back strain.” (Ex. 10). His aggravation rights have expired.

On May 10, 1993, claimant’s then-attending physician, Dr. Kitchell, performed low back surgery that included a left-sided L4-5 hemilaminotomy and hemidiscectomy. (Ex. 37). Dr. Kitchell released claimant to full work duty as of September 9, 1994, and ordered a Physical Capacities Evaluation (PCE), which claimant underwent on October 18, 1994. (Exs. 51, 53). Claimant returned to his at-injury job as a police officer. Using the PCE findings, the employer issued an October 27, 1994 Notice of Closure, which awarded 13 percent unscheduled PPD. (Exs. 53, 54). This award represented a combined impairment value of 13 percent (9 percent for the lumbar surgery and 4 percent for loss of lumbar range of motion), with no value for social/vocational factors. (Ex. 54).

On April 19, 2007, Dr. Lewis, claimant’s attending physician at the time of the current claim closure, performed additional low back surgery, specifically, a left L4-5 disc excision. (Ex. 111).

¹ Claimant’s August 7, 1992 claim was accepted as a disabling claim and was first closed on October 27, 1994. (Ex. 54). Thus, claimant’s aggravation rights expired on October 27, 1999. Therefore, when claimant sought reopening in August 2007, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On August 17, 2007, the self-insured employer voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (“1992 left L4-5 disc herniation”). On August 31, 2007, the employer issued its Notice of Closure.

Dr. Kitchell opined that claimant's August 1992 work injury caused a left L4-5 disc herniation. (Ex. 118-1). Dr. Kitchell also concluded that the condition was medically stationary as of September 9, 1994, and that the L4-5 disc herniation caused permanent impairment as outlined in the October 1994 PCE. (Ex. 118-2).

Dr. Rosenbaum examined claimant at the employer's request. Dr. Rosenbaum agreed with Dr. Kitchell that claimant's 1992 left L4-5 disc herniation was medically stationary on September 9, 1994, with impairment as outlined in the October 1994 PCE. (Ex. 125-8). Dr. Rosenbaum separately diagnosed a "recurrent" left L4-5 disc herniation, which he believed was not caused by the August 1992 injury. Dr. Lewis concurred with Dr. Rosenbaum's report. (Ex. 127).

Claimant requested acceptance of a "post-aggravation rights" new/omitted medical condition. (Ex. 119). The employer subsequently advised claimant that it interpreted his request as seeking acceptance for both a "1992 left L4-5 disc herniation" and a "recurrent left L4-5 disc herniation." (Ex. 121-2). The employer accepted the "1992 left L4-5 disc herniation," but denied the "recurrent left L4-5 disc herniation." (Exs. 121, 122, 123). In a February 12, 2009 order, we upheld the denial of the "recurrent left L4-5 disc herniation." *John C. Fowler*, 61 Van Natta 329 (2009).

On August 17, 2007, the employer voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition ("1992 left L4-5 disc herniation"). (Ex. 124). ORS 656.278(1)(b). An August 31, 2007 Notice of Closure awarded no temporary disability or PPD for claimant's "post-aggravation rights" new/omitted medical condition claim ("1992 left L4-5 disc herniation"). (Ex. 126).

Claimant requested review of the closure notice and the appointment of a medical arbiter. On February 12, 2009, we issued an Interim Own Motion Order Postponing Action on Review of Carrier Closure, which referred the claim to the Director for the appointment of a medical arbiter. *John C. Fowler*, 61 Van Natta 319 (2009).²

² We also found that the employer's claim closure was not premature, and deferred further review until after the issuance of a medical arbiter's report. *See id.*

On March 10, 2009, the Appellate Review Unit (ARU) referred the claim to the medical arbiter, Dr. Gallagher. In doing so, the ARU listed the following accepted conditions: acute low back strain, disabling lumbar strain and “1992 left L4-5 disc herniation.” The ARU informed Dr. Gallagher that his examination was to address only the newly accepted “1992 left L4-5 disc herniation.”

On June 25, 2009, Dr. Gallagher examined claimant and made impairment findings. He attributed his findings both to the “1992 left L4-5 disc herniation,” and to “the newly accepted condition,” which he identified as the “recurrent disc herniation and radiculopathy in the left leg.”

CONCLUSIONS OF LAW AND OPINION

The claim was voluntarily reopened for the processing of a “post-aggravation rights” new/omitted medical condition (“1992 left L4-5 disc herniation”). (Ex.124). Such a claim may qualify for payment of permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

The PPD limitation set forth in ORS 656.278(2)(d) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.” *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). The first step is to determine whether the conditions that require application of the ORS 656.278(2)(d) limitation are satisfied. If those conditions are satisfied, the Director’s standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate “post-aggravation rights” new/omitted medical condition claims.

Here, at the time of the October 1994 Notice of Closure, the only accepted condition was an “acute low back strain.” (Exs. 10, 123). Based on the October 1994 PCE, the employer awarded 13 percent unscheduled PPD for that accepted condition. (Exs. 53, 54).

Subsequently, Dr. Kitchell, claimant’s attending physician for his low back condition at the time of the 1994 claim closure, concluded that: (1) the 1992 work injury caused a left L4-5 disc herniation; (2) this herniation was medically stationary as of September 9, 1994; and (3) this herniation caused permanent impairment as outlined in the October 1994 PCE. (Ex. 118). In addition, Dr. Lewis, claimant’s current attending physician, concurred with Dr. Rosenbaum’s report that, in part, agreed with Dr. Kitchell conclusions

regarding the 1992 L4-5 disc herniation. (Exs. 125-8, 127). Thus, Dr. Lewis, claimant's attending physician at the time of the current claim closure, agreed that the 1992 left L4-5 disc herniation caused permanent impairment as outlined in the October 1994 PCE.

Therefore, all three factors under ORS 656.278(2)(d) are satisfied. Pursuant to the October 1994 PCE, Drs. Kitchell and Lewis found decreased low back ROM, which qualifies for an impairment award. Moreover, claimant's "post-aggravation rights" new medical condition involves the same "injured body part" (low back) that was the basis of his previous unscheduled PPD award. Therefore, the limitation in ORS 656.278(2)(d) applies to claimant's unscheduled PPD. However, before application of the statutory limitation, we redetermine claimant's unscheduled PPD pursuant to the Director's standards. *Nielsen*, 55 Van Natta at 3207.

Claimant's claim was closed by Own Motion Notice of Closure dated August 31, 2007. Thus, the applicable standards are found in WCD Admin. Order 05-074 (eff. January 1, 2006). *See* OAR 436-035-0003(1).

For the purpose of rating claimant's impairment, only the findings of claimant's attending physician, or any findings with which he or she concurred, or a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995). Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *John E. Harp*, 61 Van Natta 1520, 1523 (2009).

Claimant requests additional PPD based on the medical arbiter's evaluation. The employer responds that the medical arbiter's report is not persuasive because it was ambiguous and did not sufficiently attribute claimant's impairment due to the newly accepted new/omitted medical condition ("1992 left L4-5 disc herniation"). We agree with the employer's contention, reasoning as follows.

Dr. Gallagher, the medical arbiter, recorded reduced lumbar range of motion (ROM). Dr. Gallagher also concluded that claimant was significantly limited in the repetitive use of his spine "due to a diagnosed chronic and permanent medical condition arising out of the newly accepted condition." However, Dr. Gallagher then identified that condition as "recurrent disc herniation and radiculopathy in the

left leg * * *.” Yet, as previously noted, claimant’s “recurrent left L4-5 disc herniation” is not a compensable condition. Dr. Gallagher also stated that his findings were valid and “due to the 1992 left L4-5 disc herniation.”

Collectively, therefore, Dr. Gallagher attributed the permanent impairment findings to both the newly accepted new/omitted medical condition (“1992 left L4-5 disc herniation”), as well as to a noncompensable denied condition (“recurrent disc herniation”). Under such circumstances, we find that Dr. Gallagher’s ambiguous report is not sufficient to establish that claimant’s impairment findings were “due to the compensable industrial injury[.]” See ORS 656.214(1)(a). Therefore, we do not apply Dr. Gallagher’s impairment findings to rate claimant’s “post-aggravation rights” new/omitted medical condition (“1992 left disc herniation”). See *Khrul v. Foremans Cleaners*, 194 Or App 125, 131 (2004) (although in the absence of other medical opinion, the Board is required to use a medical arbiter’s rating of impairment, it must nonetheless be satisfied that the report rates impairment caused by the compensable condition); *George M. Strawn*, 58 Van Natta 200, 202 (2006) (declining to rely on medical arbiter’s report containing unexplained inconsistencies whether the impairment findings were due to accepted conditions).

In contrast, Dr. Lewis, claimant’s attending physician at the time of claim closure, concurred with Dr. Rosenbaum’s findings that claimant’s 1992 L4-5 disc herniation was medically stationary on September 9, 1994, with impairment as set forth in the October 1994 PCE. (See Exs. 125-8, 127). Under such circumstances, we conclude that a preponderance of the medical evidence establishes that the different findings, with which claimant’s attending physician concurred, are more accurate than the ambiguous findings of the medical arbiter, and should be used to rate claimant’s impairment. Therefore, we find persuasive evidence to disregard the medical arbiter’s findings. OAR 436-035-0007(5); *Khrul*, 194 Or App at 131 (Board must be satisfied that the medical arbiter’s report rates impairment caused by the compensable condition).

The October 1994 PCE measured the following lumbar ROM: 12 degrees extension; and 24 degrees right lateral flexion. Accordingly, claimant receives the following lumbar ROM values: 4.2 percent for extension; and 0.2 percent for right lateral flexion.³ OAR 436-035-00360(9), (10). These values are added for a total of 4.4 percent, then rounded for a total value of 4 percent for decreased lumbar ROM. OAR 436-035-0011(4), OAR 436-035-0360(11).

³ Claimant receives a value of zero for the 60 degrees flexion and 30 degrees left lateral flexion. See OAR 436-035-0360(8), (10).

In May 1993, claimant underwent “left-sided L4-L5 hemilaminotomy” and “left-sided L4-L5 hemidiscectomy,” which receives a value of 9 percent. OAR 436-035-0350(2). Although claimant underwent additional surgery in April 2007 (“excision of the L4-5 disc, left”), Dr. Lewis did not relate that surgery to the work injury or the new/omitted medical condition (“1992 left L4-5 disc herniation”). (Exs. 111, 120). In addition, Dr. Lewis concurred with Dr. Rosenbaum’s opinion that the second surgery was unrelated to the first. (Exs. 125-11, 127).

There are no other ratable findings of physical impairment. Therefore, combining the ROM and surgery values results in a 13 percent impairment value. OAR 436-035-0360(12).

At the time of the August 2007 Own Motion Notice of Closure, Dr. Lewis concurred with Dr. Rosenbaum’s August 2007 opinion that, based on the compensable condition, claimant could return to his at-injury job as a police officer. (Exs. 125-11, 127). Under such circumstances, claimant is not entitled to social/vocational factors. ORS 656.214(5) (Or Laws 1999, ch 876, § 2); ORS 656.726(4)(f)(D) (Or Laws 2003, ch 811, § 17).

Consequently, claimant’s total award is 13 percent (41.6 degrees) unscheduled PPD for the low back. However, claimant has received a prior award of 13 percent unscheduled PPD for the low back. (Ex. 23). As addressed above, the limitation in ORS 656.278(2)(d) applies to claimant’s unscheduled PPD award. Therefore, claimant is entitled to additional unscheduled PPD only to the extent that the PPD rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant’s prior 13 percent unscheduled PPD award for the low back is the same as his current 13 percent unscheduled PPD for the low back. Consequently, claimant is not entitled to any additional unscheduled PPD.

Accordingly, we affirm the August 2007 Own Motion Notice of Closure.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 17, 2009