

In the Matter of the Compensation of
JOSE L. OLVERA-CHAVEZ, Claimant

WCB Case No. 11-03936

ORDER ON REVIEW

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Reviewing Panel: Members Weddell and Langer.

The insurer requests review of Administrative Law Judge (ALJ) Otto's order that: (1) found that claimant's low back claim was prematurely closed; (2) assessed penalties under ORS 656.268(5)(d); and (3) awarded a \$2,500 insurer-paid attorney fee under ORS 656.382(1). In his respondent's brief, claimant seeks an increase in the ALJ's attorney fee award. On review, the issues are premature closure, temporary disability, penalties, and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and "Findings of Ultimate Fact," with the following summary.

As a result of a 2007 work injury, the insurer accepted claimant's disabling lumbar strain and L5-S1 disc protrusion. On November 12, 2009, Dr. Cockcroft, claimant's attending physician, opined that claimant's condition had become medically stationary on September 11, 2009. (Ex. 7A-3). He also noted various physical restrictions resulting from the work injury and opined that, as a result, claimant could not return to his job at injury and needed to be retrained for a less physically demanding occupation. (Ex. 7A-1-4).

The insurer issued a Notice of Closure on December 1, 2009. Claimant was awarded temporary disability, 18 percent whole person impairment, and 33 percent work disability. (Ex. 9-1-2).

Pursuant to a stipulation, the insurer agreed to pay temporary disability for certain periods through April 5, 2010. Claimant began an authorized training program (ATP) on April 5, 2010. Due to concerns regarding the suitability of the ATP, training ended on December 17, 2010. (Ex. 9H-4).

On April 13, 2011, claimant agreed to an occupational skills ATP, to begin at a training employer's location on April 27, 2011. (Ex. 11-2, -5). However, due to the training employer's nonparticipation, a vocational counselor issued a Notice of End of Training on May 16, 2011. (Exs. 13-1, 16-3).

On May 25, 2011, the insurer issued a Notice of Closure that awarded temporary disability from April 5, 2010 through December 17, 2010, and April 27, 2011 through May 16, 2011. (Ex. 14-1). The Notice of Closure stated that claimant had become medically stationary on September 11, 2009. (*Id.*) Claimant requested reconsideration.

A July 20, 2011 Order on Reconsideration found that the claim was not prematurely closed and affirmed the Notice of Closure's temporary disability award. (Ex. 19-2). However, finding claimant's Specific Vocational Preparation (SVP) to be different from that used in the Notice of Closure, the Order on Reconsideration increased claimant's work disability to 43 percent. (Ex. 19-2-3). The Order on Reconsideration also noted that claimant's previous 18 percent whole person impairment award remained unchanged. (Ex. 19-3). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Finding that the employer did not obtain information regarding claimant's medically stationary status or sufficient information to determine the extent of claimant's permanent disability at the time of closure, the ALJ determined that the claim was prematurely closed. Concluding that the closure was unreasonable, the ALJ awarded a penalty under ORS 656.268(5)(d) and a \$2,500 attorney fee under ORS 656.382(1). Finally, reasoning that the temporary disability issue was not ripe, the ALJ did not award such benefits.

On review, the insurer contends that the Notice of Closure should be reinstated because the claim automatically qualified for closure upon the end of the ATP. Addressing temporary disability before the date of the closure, the insurer concedes that claimant was entitled to temporary disability from May 17, 2011 through May 25, 2011, but contends that claimant was not entitled to temporary disability from December 18, 2010 through April 26, 2011, because he was not enrolled and actively engaged in training during that time. Finally, the insurer contends that claimant's attorney fee award should be proportionate to the week of temporary disability benefits that it now concedes is due. In his respondent's brief, claimant contends that the ALJ should have awarded a \$3,690 fee under ORS 656.382(1) for his attorney's services at the hearing level.

Premature Closure

Under ORS 656.268(9) (2007),¹ when a worker ceases to be enrolled and actively engaged in training, the carrier “shall again close the claim pursuant to this section if the worker is medically stationary or if the worker’s accepted injury is no longer the major contributing cause of the worker’s combined or consequential condition or conditions pursuant to ORS 656.005(7).” At that time, permanent disability compensation “shall be redetermined for work disability only.”

The requirements for claim closure are set forth in ORS 656.268(1)(a)-(d). Under ORS 656.268(1)(a), a carrier shall close a claim if the claimant is not enrolled and actively engaged in training when the claimant “has become medically stationary and there is sufficient information to determine disability.”² Likewise, OAR 436-030-0020(1)(a) provides for claim closure when “Medical information establishes there is sufficient information to determine the extent of permanent disability under ORS 656.245(2)(b)(C), and indicates the worker’s compensable condition is medically stationary.”

Thus, claim closure requires medical information establishing that there is sufficient information to determine the extent of permanent disability and indicating that the compensable conditions are medically stationary. “Sufficient information” to determine the extent of disability may be provided by a written statement from an authorized nurse practitioner, podiatrist, chiropractor, naturopathic physician, physician assistant, or attending physician clearly indicating that there is no permanent impairment, residuals, or limitations attributable to the accepted conditions and there is no reasonable expectation of loss of use or function, changes in the worker’s physical abilities or permanent impairment attributable to the acceptable conditions, so long as the record does not reveal otherwise. OAR 436-030-0020(2)(a). Alternatively, “sufficient information” may be provided by a closing medical examination. OAR 436-030-0020(2)(b).

¹ In 2011, the legislature amended ORS 656.268. Or Laws 2011, ch 99, § 1. In doing so, the legislature renumbered ORS 656.268(9) to ORS 656.268(10), but did not otherwise change the statute. *Id.* That change applies to requests for reconsideration made on or after the effective date of the act, January 1, 2012. *Id.* at § 5. Here, claimant requested reconsideration on June 23, 2011. (Ex. 17-3). Therefore, ORS 656.268 (2007) applies.

² The insurer does not contend that claim closure was justified under ORS 656.268(1)(b), (c), or (d).

Here, the record does not contain a written statement satisfying the requirements of OAR 436-030-0020(2)(a). To the contrary, the most recent medical evidence indicates that claimant is permanently impaired by the accepted conditions. (Ex. 7A-1-4). Further, the record does not contain a closing examination satisfying the requirements of OAR 436-030-0020(2)(b).³

The insurer contends that there is nevertheless “sufficient information” to determine the extent of permanent disability because ORS 656.268(9) provides that permanent disability may be redetermined “for work disability only,” and a closing examination would not be helpful in determining work disability. We disagree with the employer’s contention.

“Work disability” is impairment modified by “age, education, and adaptability.” ORS 656.214(1)(e); OAR 436-030-0005(13); OAR 436-035-000(5)(20). The adaptability factor is a comparison of the worker’s Base Functional Capacity (BFC) (*i.e.*, his demonstrated physical capacity before the date of injury) to his maximum Residual Functional Capacity (RFC) (*i.e.*, his remaining ability to perform work-related activities despite impairment resulting from the accepted compensable condition). OAR 436-035-0012(7), (8)(a), (8)(b). RFC is established by the attending physician’s release unless a preponderance of medical opinion describes a different RFC. OAR 436-035-0012(10)(a). Thus, redetermination of work disability is based, in part, on claimant’s remaining ability

³ The closing medical examination must describe in detail all measurements and findings regarding any permanent impairment, residuals, or limitations attributable to the accepted conditions. OAR 436-030-0020(2)(b). Further, because claimant was not released to regular work, the closing medical examination must also describe:

“(A) An accurate description of the physical requirements of the worker’s job held at the time of injury, which has been provided by certified mail to the worker and the worker’s legal representative, if any, either before closing the claim or at the time the claim is closed;

“(B) The worker’s wage established consistent with OAR 436-060;

“(C) The worker’s date of birth;

“(D) Except as provided in OAR 436-030-0015(4)(d), the worker’s work history for the period beginning five years before the date of injury to the mailing date of the Notice of Closure, including tasks performed or level of SVP, and physical demands; and

“(E) The worker’s level of formal education.” *Id.*

to perform work-related activities, despite impairment resulting from the accepted compensable condition, as determined by the attending physician's release or a preponderance of medical opinion. Therefore, although ORS 656.268(9) limits the "post training" closure's redetermination of permanent disability to work disability, redetermination of work disability requires consideration of claimant's abilities in light of his impairment. Accordingly, we conclude that a closing examination was required.

Further, ORS 656.268(1) provides that the carrier shall close the claim "as prescribed by the Director," who has defined "sufficient information" by OAR 436-030-0020(2). Because the requirements of OAR 436-030-0020(2) have not been met, there is not "sufficient information" to determine the extent of permanent disability.

The insurer further contends that "sufficient information" to determine the extent of disability is not required. As noted above, ORS 656.268(9) prescribes the closure of a claim after the worker ceases to be enrolled and actively engaged in training "if the worker is medically stationary." ORS 656.268(9) also provides for the claim to be closed "pursuant to this section" (*i.e.*, ORS 656.268). Therefore, we conclude that the other requirements of ORS 656.268, including the "sufficient information" requirement of ORS 656.268(1), apply. Further, because ORS 656.268(1) requires closure to occur as prescribed by the Director, the "sufficient information" requirements of OAR 436-030-0020(1) and (2) also remain applicable to "post-training" closures.

The insurer also cites OAR 436-030-0020(13), which provides that if, after claim closure, a claimant becomes enrolled and actively engaged in training, "a new Notice of Closure must be issued consistent with the following:

"(a) In claims with dates of injury on or after January 1, 2005, the insurer must redetermine work disability when:

"(A) The worker has ended training; and either

"(B) The worker's condition is medically stationary; or

"(C) The claim otherwise qualifies for closure in accordance with these rules."

Yet, this rule does not remove the other requirements for claim closure specified in OAR 436-030-0020. Therefore, the “sufficient information” requirement of OAR 436-030-0020(1) and (2) apply.

Finally, even if the “sufficient information” requirement did not apply, the “medically stationary” requirement would still apply. This record does not establish that claimant’s condition was medically stationary when the claim was closed on May 25, 2011.

As noted above, Dr. Cockcroft opined, on November 12, 2009, that claimant’s condition had been medically stationary since September 11, 2009. That opinion was the basis for the December 2009 claim closure. However, the record contains no subsequent medical information relating to claimant’s medically stationary status. In the absence of current medical information indicating that claimant’s condition was medically stationary at the time of the May 2011 claim closure, we conclude that the “medically stationary” requirement has not been satisfied.

Because there was insufficient information to determine the extent of claimant’s permanent disability and because the record does not establish that his compensable condition was medically stationary before the May 2011 claim closure, we agree with the ALJ’s conclusion that the May 2011 Notice of Closure was premature.

Temporary Disability/Penalty

Having found the claim prematurely closed, and the Notice of Closure unreasonable, the ALJ assessed a penalty under ORS 656.268(5)(d) equal to “25 percent of all compensation determined to be then due.” However, reasoning that claimant’s entitlement to temporary disability would be addressed in the processing and closure of the claim, the ALJ did not address that issue.

The parties disagree on the amounts “then due.” The insurer concedes that claimant was entitled to “post-training” temporary disability from May 17, 2011 (the day after the end of claimant’s occupational skills ATP) through May 25, 2011 (the date of the Notice of Closure), and that a penalty is due on that amount. *See Kerry K. Hagen*, 64 Van Natta 316 (2012) (penalty awarded under ORS 656.268(5)(d) where the carrier’s Notice of Closure failed to award “post-training” temporary disability). However, the insurer contends that no temporary disability was due from December 18, 2010 through April 26, 2011, because claimant was

not enrolled and actively engaged in training during that time. The insurer also asserts that no temporary disability was due from May 26, 2011 onward because the claim was not prematurely closed.

Claimant contends that, under OAR 436-060-0040, the insurer was required to pay temporary disability continuously from the beginning of training on April 5, 2010 through the date of claim closure. Thus, claimant argues that the penalty should be based on the amount ultimately awarded at claim closure.

After considering the parties' positions, we modify the ALJ's penalty assessment. We reason as follows.

The penalty under ORS 656.268(5)(d) for an unreasonable notice of closure is "an amount equal to 25 percent of all compensation determined to be then due the claimant." The amount "due" is the amount that claimant was entitled to be paid, and not the amount awarded. *Johnson v. SAIF*, 219 Or App 82, 86 (2008). The penalty is based on the amount "then due" as of the date the hearing record closed, which was January 9, 2012. *See Guy E. Bales, recons*, 64 Van Natta 1599 (2012). Therefore, the penalty is equal to 25 percent of the amount that claimant was entitled to be paid as of the January 9, 2012 closure of the hearing record.

Consistent with ORS 656.268(9) and OAR 436-060-0040(4), when a worker completes or ends training, if the worker is medically stationary, the carrier must stop temporary disability compensation and resume any payments of permanent disability due to work disability that had been suspended during the training.⁴ However, if no award payment remains due, temporary disability compensation payments must continue until the subsequent claim closure. OAR 436-060-0040(4); *Atchley v. GTE Metal Erectors*, 149 Or App 581, 586, *rev den*, 326 Or 133 (1997); *see also Timothy R. Gilbert*, 64 Van Natta 818 (2012) (where the claimant's condition was not medically stationary, the carrier was authorized to continue to suspend permanent disability payments and pay temporary disability under OAR 436-060-0040(4)).

Here, the insurer did not close the claim after the end of the first ATP on December 17, 2010, and the record does not indicate that any suspended work disability remained due. Under such circumstances, claimant was entitled to the

⁴ ORS 656.268(9) provides that any permanent disability payments due for work disability shall be suspended, and the worker shall receive temporary disability compensation and any permanent disability payments due for impairment, while the worker is enrolled and actively engaged in training.

payment of “post-training” temporary disability benefits beginning December 18, 2010. Similarly, claimant was entitled to the payment of “post-training” temporary disability benefits beginning May 17, 2011, after the end of the second ATP.⁵

Therefore, the amount “then due,” on which the 25 percent ORS 656.268(5)(d) penalty is based, includes “post-training” temporary disability benefits from December 18, 2010 through April 26, 2011, and from May 17, 2011 through January 9, 2012 (the date the hearing record closed).

Attorney Fees

We adopt and affirm the ALJ’s \$2,500 assessed attorney fee award.

Claimant’s attorney is entitled to an assessed fee for services on review regarding the premature closure and temporary disability issues. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review regarding these issues is \$3,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by claimant’s fee submission), the complexity of the issues, and the value of the interests involved. Claimant’s attorney is not entitled to an award for services on review regarding the penalty and attorney fee issues. *See Saxton v. SAIF*, 80 Or App 631, 633-34 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986); *Amador Mendez*, 44 Van Natta 736 (1992).

ORDER

The ALJ’s order dated January 23, 2012 is affirmed in part and modified in part. The ALJ’s order is modified to award temporary disability benefits from December 18, 2010 through April 26, 2011, and from May 17, 2011 until the claim is closed or the insurer is otherwise authorized to terminate such benefits pursuant to law. The ALJ’s “out-of-compensation” attorney fee award shall be modified accordingly. The ALJ’s penalty assessment is modified to be based on “amounts then due” as of January 9, 2012, as a result of this order. The remainder of the ALJ’s order is affirmed. For services on review regarding the premature closure and temporary disability issues, claimant’s attorney is awarded an assessed fee of \$3,500, payable by the insurer.

Entered at Salem, Oregon on September 11, 2012

⁵ Because the insurer’s Notice of Closure was rescinded as premature, claimant’s entitlement to “post-training” temporary disability benefits will continue until the insurer closes the claim or is otherwise authorized to terminate such benefits pursuant to law.