

In the Matter of the Compensation of
JUAN M. VILLANUEVA, Claimant

Own Motion No. 12-0131M

OWN MOTION ORDER

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Reviewing Panel: Members Lanning and Langer.

Claimant seeks Own Motion relief, contending that he is entitled to: (1) temporary disability benefits from May 19, 2008 through April 5, 2011, on his reopened “post-aggravation rights” new/omitted medical condition claim (“lumbar radiculopathy right, sciatica, lumbago, and failed back syndrome”); and (2) penalties and attorney fees for the insurer’s allegedly unreasonable claim processing. Based on the following reasoning, we decline claimant’s request.

FINDINGS OF FACT

On December 10, 2001, claimant sustained a compensable low back injury, which the insurer accepted for lumbosacral strain, L4-5 and L5-S1 intradiscal disruption, and L4-5 disc herniation. (Exs. 1, 3, 5). In 2005, he underwent an L4-5 posterior laminectomy and fusion. (Exs. 6-2, 9-1, 22-2). He has not worked since his injury.

Claimant’s aggravation rights expired on July 2, 2008. The insurer subsequently accepted “pseudoarthrosis at L4-5 disc and L5-S1 disc” and “lumbar radiculopathy right, sciatica, lumbago, and failed back syndrome” as “post-aggravation rights” new/omitted medical conditions. (Exs. 15, 32).

On May 19, 2008, Dr. Silver, claimant’s attending physician, signed a Form 827, which did not release claimant to work; no beginning or end date for the release was specified.¹ (Ex. 8).

On November 7, 2008, Dr. Silver diagnosed failed back syndrome, prior back surgeries with fusion, and radicular pain. Dr. Silver did not mention a work release. (Ex. 9).

¹ Dr. Silver also listed ICD-9-CM codes “724.2” and “724.3” as diagnoses. (*Id.*)

On December 16, 2008, Dr. Kitchel opined that claimant's pain was coming from the lack of anterior solid arthrodesis and cantilever motion at L4-5 and L5-S1. Consequently, Dr. Kitchel concluded that claimant would benefit from an anterior lumbar fusion at L4-5 and L5-S1. (Ex. 22-3).

On March 9, 2009, Dr. Silver commented, "I understand there is some question about whether [claimant] has a pseudoarthrosis * * * as a result of a failed fusion. [He] continues to hold out hope for a curative surgical procedure, and I think this is quite unlikely." (Ex. 13).

On April 10, 2009, Dr. Silver reported that "[claimant] is eager to have some improvement from his pain which prevents him for [sic] working." (Ex. 14).

Sometime before November 2009, the insurer denied claimant's request for the proposed L4-5 and L5-S1 fusion surgery. On December 14, 2009, the Workers' Compensation Division's (WCD's) Medical Resolution Team (MRT) upheld the insurer's denial. That order was appealed. (Ex. 23-1).

On October 28, 2010, an ALJ issued a Proposed and Final Order affirming the MRT's December 14, 2009 order denying claimant's fusion surgery request. The Director affirmed the order on February 4, 2011. (Ex. 23).

On June 30, 2011, Dr. Kranenburg (orthopedic surgeon) recommended another lumbar fusion surgery. (MRT Administrative Order, September 8, 2011, p 7).² On July 7, 2011, he faxed an authorization request to the insurer. (*Id.* at 8).

On July 14, 2011, Dr. Silver stated that, based on Dr. Kranenburg's evaluation, he believed that an anterior interbody fusion at L4-5 and L5-S1 was "reasonable." (Ex. 29-1). He further stated that "with regard to the L4-5 and L5-S1 conditions," claimant had been and still was excused from performing his regular work. (Ex. 29-2).

² We take administrative notice of the MRT's order. See *Carmen Mendoza*, 51 Van Natta 1986 (1999) (Board took administrative notice of WCD's Order on Reconsideration); *Brian M. Eggman*, 49 Van Natta 1835 (1997) (Board took administrative notice of WCD's Administrative Order). In reaching this conclusion, we note that, despite the MRT's order's relevance to this case, neither party submitted a copy for our review. In the future, the parties are reminded of their respective obligations to provide us with all relevant claim processing documents.

On September 8, 2011, the MRT found the insurer liable for the proposed fusion surgery as requested by Dr. Kranenburg on July 7, 2011. (MRT Administrative Order, September 8, 2011, p 10).

On November 22, 2011, Dr. Kranenburg performed an L5-S1 fusion surgery. (Ex. 35).

On January 6, 2012, an ALJ determined that claimant was entitled to temporary disability for his accepted pseudoarthrosis condition beginning April 5, 2011.³ (Ex. 33-8). In reaching that conclusion, the ALJ found that Dr. Silver's May 19, 2008 "open-ended" work release was not for pseudoarthrosis, but was limited to "lumbago ('low back pain')" and "sciatica ('sciatic neuritis)," the conditions diagnosed by Dr. Silver on the Form 827. (Ex. 33-7). That order was not appealed.

In August 2012, we reopened claimant's Own Motion claim for "pseudoarthrosis at L4-5 disc and L5-S1 disc" and "lumbar radiculopathy right, sciatica, lumbago, and failed back syndrome" as "post-aggravation rights" new/omitted medical conditions. *Juan M. Villanueva*, 64 Van Natta 1397, *recons*, 64 Van Natta 1560 (2012).⁴

CONCLUSIONS OF LAW AND OPINION

Claimant seeks temporary disability benefits on part of his reopened "post-aggravation rights" new/omitted medical condition claim ("lumbar radiculopathy right, sciatica, lumbago, and failed back syndrome") from May 19, 2008 through April 5, 2011.⁵ Based on the following reasoning, we are not persuaded that claimant is entitled to the requested temporary disability benefits.

³ The parties litigated temporary disability regarding an Own Motion claim before the Hearings Division. Nonetheless, the ALJ did not have authority to directly resolve such issues. Rather, the ALJ should have issued a recommendation pursuant to OAR 438-007-0027, which then would have been referred to the Board for a decision under ORS 656.278. See *Jesus M. Rubio*, 62 Van Natta 38 n 1 (2010); *Noel G. Brown*, 61 Van Natta 2944, 2948 (2009); *George M. Moore*, 60 Van Natta 2777 (2008).

⁴ On September 27, 2012, we assessed a penalty and attorney fee under ORS 656.262(11)(a) for the insurer's untimely Own Motion recommendation for the reopening of claimant's Own Motion claim for "post-aggravation rights" new/omitted medical conditions ("pseudoarthrosis at L4-5 disc and L5-S1 disc" and "lumbar radiculopathy right, sciatica, lumbago, and failed back syndrome"). *Juan M. Villanueva*, 64 Van Natta 1871 (2012).

⁵ Apparently, the insurer began paying temporary disability on April 5, 2011, based on the ALJ's January 6, 2012 order.

Entitlement to temporary disability benefits under ORS 656.278(1)(b) begins when the following requirements are satisfied. First, the claimant must require (including a physician's recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment. Second, temporary disability benefits are payable from the date the attending physician authorizes temporary disability related to the hospitalization, surgery, or other curative treatment, which may be the date the requisite treatment is recommended. Third, temporary disability benefits are payable under ORS 656.210, ORS 656.212(2), and ORS 656.262(4). *Butcher v. SAIF*, 247 Or App 684 (2012); *David L. Hernandez*, 56 Van Natta 2441 (2004) (temporary disability commences with surgery recommendation and attending physician authorization; applying *Mark A. Cavazos*, 55 Van Natta 3004 (2003)).

Here, on May 19, 2008, Dr. Silver (attending physician) released claimant from work for his lumbago and sciatica. (Ex. 8; *see* Ex. 33-7). It is undisputed that this release was open-ended.⁶ *See Charlene Y. Pearce*, 55 Van Natta 728, 730 (2003) (physician's authorization was "open-ended" because it was not limited to a specific period, or until the occurrence of a specific event).

At the time of his May 2008 work release, Dr. Silver was prescribing pain medication for claimant's low back symptoms. (Ex. 22-2). However, the record does not establish that this prescription constituted hospitalization, surgery, or other curative treatment. *See Jeramy W. Sitzman*, 64 Van Natta 586 (2012) (no medical evidence that prescription pain medication, recommendation for physical therapy, or epidural steroid injection constituted "hospitalization, surgery, or other curative treatment"); *Christopher R. McQuaw*, 57 Van Natta 3201, 3203 (2005) (no medical evidence that prescription pain medication and MRI constituted "other curative treatment"). To the contrary, Dr. Silver specifically explained that claimant was prescribed pain medication as "palliative therapy." (Ex. 24-2).

Thus, claimant's entitlement to temporary disability benefits concerning this reopened Own Motion claim does not begin on May 19, 2008. *See George Sweet*, 60 Van Natta 663 (2008) (physicians' opinions did not constitute approval excusing the claimant from work for the surgery, hospitalization, or other curative treatment where those opinions only addressed his inability to work as of certain date); *Robert Dubray*, 57 Van Natta 2035, *recons*, 57 Van Natta 2279 (2005)

⁶ During the prior proceeding regarding entitlement to temporary disability for claimant's new/omitted pseudoarthrosis condition, the insurer did not dispute that Dr. Silver's May 19, 2008 time loss authorization was open-ended. (Ex. 33-7).

(recommendation for surgery not sufficient to satisfy requirement for payment of temporary disability under ORS 656.278(1)(b); requirement not satisfied until attending physician authorized time loss for the claimant's surgery).

Before January 2010, Dr. Silver stated that he “d[i]dn’t think there is a curative surgery,” and that “curative surgical procedure * * * is quite unlikely.” (Exs. 12, 13). On June 23, 2010, Dr. Silver concluded that the proposed lumbar fusion surgery was “reasonable.” (Ex. 22-4). However, the insurer denied claimant’s request for the fusion surgery and that denial has been upheld. Because Dr. Silver’s June 23, 2010 surgery recommendation pertained to a noncompensable surgery, claimant is not entitled to temporary disability benefits based on that recommendation.

Another fusion surgery was recommended on June 30, 2011 (by Dr. Kranenburg). (MRT Administrative Order, September 8, 2011, p 7). Nevertheless, by that time, claimant had already been awarded temporary disability benefits. Consequently, he is not entitled to the additional temporary disability benefits that he seeks. In addition, because temporary disability benefits are not due for the requested period, there is no basis for penalties or attorney fees under ORS 656.262(11)(a). Accordingly, claimant’s request for Own Motion relief is denied.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 19, 2013