

In the Matter of the Compensation of
CHRISTIAN R. LUNDBLAD, Claimant

WCB Case No. 11-05061

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys
David Runner, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) found that his L5-S1 disc herniation claim was not prematurely closed; and (2) affirmed an Order on Reconsideration that awarded no work disability. On review, the issues are administrative notice, premature closure, and extent of permanent disability (work disability).

We adopt and affirm the ALJ's order with the following supplementation.

Subsequent to the ALJ's order, on May 29, 2012, the Director issued an order setting aside the SAIF Corporation's termination of claimant's vocational program, and reinstating claimant's return to work plan and eligibility for vocational assistance. Claimant requests that we take administrative notice of that order and conclude that the claim was prematurely closed. He acknowledges that we have declined to take administrative notice of subsequent "compensability" decisions in "reconsideration record" cases, but contends that such cases involved a specific statutory provision (ORS 656.262(7)(c)) that supported our refusal to consider "post-closure" litigation orders in cases involving the appeal of a Notice of Closure/Order on Reconsideration. *See* ORS 656.283(6).¹ Here, in contrast, claimant argues that there is no similar statutory or regulatory provision involving the erroneous termination of a vocational program. Based on the following reasoning, we decline to take administrative notice of the Director's order.

¹ ORS 656.283(6) provides, in relevant part:

"Evaluation of the worker's disability by the [ALJ] shall be as of the date of issuance of the reconsideration order pursuant to ORS 656.268. Any finding of fact regarding the worker's impairment must be established by medical evidence that is supported by objective findings. The [ALJ] shall apply to the hearing of the claim such standards for evaluation of disability as may be adopted by the director pursuant to ORS 656.726. Evidence on an issue regarding a notice of closure that was not submitted at the reconsideration required by ORS 656.268 is not admissible at hearing, and issues that were not raised by a party to the reconsideration may not be raised at hearing unless the issue arises out of the reconsideration order itself. * * *"

As claimant notes, we have refrained from taking administrative notice on substantive matters when the appealed order under review pertains to a Notice of Closure/Order on Reconsideration. We take this approach because, under ORS 656.283(6), “[e]vidence on an issue regarding a notice of closure that was not submitted at the reconsideration required by ORS 656.268 is not admissible at hearing * * *.” Based on this explicit statutory evidentiary prohibition, we have not taken administrative notice of “post-reconsideration” matters that would, in effect, constitute consideration of additional evidence. *See Willie L. Frison*, 63 Van Natta 1331 (2011) (declining to take administrative notice of a “post-reconsideration” fact that would, contrary to ORS 656.283(6), require the admission of evidence not in existence or submitted at the reconsideration proceeding); *Richard D. Chick*, 58 Van Natta 91 (2006) (declining to take administrative notice of an earlier reconsideration order involving the same parties because that order was not included in the current reconsideration record); *Crecencie Pavon-Valdez*, 56 Van Natta 4020 n 2 (2004) (declining to take administrative notice of the ALJ’s order in another case involving the claimant as evidence on any issue regarding the present reconsideration order); *Salvador Guevara-Morales*, 52 Van Natta 1427 (2000) (declining to take administrative notice of agency order that was not in reconsideration record in extent of permanent disability case); *Tony D. Houck*, 51 Van Natta 1301 (1999) (administrative notice of a “post-closure” administrative order concerning a medical treatment dispute not taken in “premature closure” case).

In cases where we have declined to take administrative notice of a subsequent ALJ’s compensability decision, we have limited our review to the closure of the accepted portion of the claim that existed at the time of closure. *See Frison*, 63 Van Natta at 1332; *Jonathan E. Ayers*, 56 Van Natta 1470, 1471 (2004). In doing so, we reasoned that our decision did not preclude the worker from receiving a further evaluation of his/her condition (including, for example, a now-again compensable combined condition) because, by virtue of the ALJ’s compensability decision, the carrier would be required to again open, process, and close the claim pursuant to ORS 656.262(7)(c). *See Frison*, 63 Van Natta at 1332; *Ayers*, 56 Van Natta at 1471; *see also Jonathan M. Humphrey*, 61 Van Natta 357, 359-60 (2009). Such reasoning applies to this situation as well.

Here, SAIF closed the claim based on its termination of claimant’s vocational program. Although that termination decision had been initially upheld by the Workers’ Compensation Division’s “administrative review/proposed order” process, the Director has apparently ultimately overturned that termination. As a result, claimant will again be evaluated for vocational training, including the

reopening of his claim for another authorized training program. *See* ORS 656.340. Once such training is completed, his claim will again be closed and his condition rated for work disability benefits. ORS 656.268(10).

Thus, as with the “compensability” cases, claimant will ultimately receive a full evaluation of his accepted conditions through these subsequent claim closure procedures. Considering the unqualified language of the statutory provision against “post-reconsideration” evidence and because claimant’s entitlement to future vocational training has apparently been reinstated (thereby entitling him to future benefits and redetermination of his claim after its “post-training” closure), we find this situation analogous to the “compensability” cases and apply the same rationale.² Accordingly, we decline to take administrative notice of the Director’s order.

Regarding the work disability issue, we agree with the ALJ’s conclusion that claimant has not demonstrated an error in the reconsideration process. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000) (the party challenging an Order on Reconsideration bears the burden of establishing error in the reconsideration process). We reason as follows.

On August 1, 2011, Dr. Fischer, claimant’s attending physician, reported that claimant was seeking removal of his 50-pound lifting restriction so that he could qualify for a job as a forklift operator (which was not his job at injury). Nevertheless, that same day, Dr. Fischer issued an *unequivocal* work release that noted “none” for claimant’s modified work restrictions and expressly stated, “‘permanent’ lifting restriction removed.” (Exs. 34, 35).

² *Eula M. Zarling*, 50 Van Natta 1189 (1998), is distinguishable. In that case, we explained that, although then-ORS 656.283(7) (now ORS 656.283(6)) prohibited the consideration of evidence that was not submitted on reconsideration and made part of the reconsideration record, we would take administrative notice of a subsequent litigation order involving the same claimant that was relevant to the claim, so long as the order was not considered as evidence on any issue regarding the rating of the claimant’s accepted condition. Because the ALJ took official notice of a “post-reconsideration” Opinion and Order not for purposes of rating the claimant’s accepted conditions, but rather to clarify the scope and substance of the carrier’s current condition denials, we agreed that taking official notice of that order was permissible.

Here, unlike *Zarling*, claimant is not seeking administrative notice of the Director’s order for contextual purposes. Rather, his purpose is to establish that the claim was prematurely closed, which is the determinative issue in this appeal. Under such circumstances, administrative notice of the Director’s order is not permissible. *See* ORS 656.283(6); *Houck*, 51 Van Natta at 1302.

Under such circumstances, we are unable to conclude that this record ultimately supports claimant's contention that his attending physician did not release him to his regular "at-injury" work.³ As such, on this record, we are not persuaded that the reconsideration order's award of no work disability was erroneous. *Callow*, 171 Or App at 183. Consequently, we affirm.

ORDER

The ALJ's order dated April 18, 2012 is affirmed.

Entered at Salem, Oregon on January 3, 2013

³ Claimant cites *Vincent D. Drennen*, 48 Van Natta 819, *recons*, 48 Van Natta 969 (1996), in support of his argument that he was not released to his regular work at the time of injury. We find that case distinguishable. In *Drennen*, we concluded that the claimant had not returned to "regular work" because he returned to his job at injury only after asking his treating doctor to release him to regular duty, and he then avoided repetitive bending, stooping, twisting and heavy lifting as much as he could while on the job. Thus, *Drennen* involved the issue of whether the claimant had returned to regular work when he had "self-modified" his post-injury work activities, and the record did not indicate that he could or did perform substantially the same job after his injury as he did before his injury. Here, in contrast, claimant has been released for regular work by virtue of Dr. Fischer's August 1, 2011 release, and the record does not persuasively indicate that he is unable to perform that work.