
In the Matter of the Compensation of
BENJAMIN A. VANDEMAN, Claimant
Own Motion No. 14-00025M
OWN MOTION ORDER
Ransom Gilbertson Martin et al, Claimant Attorneys
Liberty Mutual Ins, Carrier

Reviewing Panel: Members Johnson and Weddell.

Claimant requests Own Motion relief, seeking temporary disability benefits for this reopened “post-aggravation rights” new/omitted medical condition claim. He also seeks penalties and attorney fees for the insurer’s allegedly unreasonable claim processing.¹ Based on the following reasoning, we deny claimant’s requests.

FINDINGS OF FACT²

On September 16, 2003, claimant compensably injured his right shoulder while working as a carpenter. (Ex. C7-1). The insurer ultimately accepted right shoulder sprain, ganglion cyst, right shoulder anterior and posterior labral tears, chronic rotator cuff syndrome with impingement of the right shoulder and recurrent superior labral anterior posterior tear of the right shoulder. (Exs. X1, X2, X4). To date, claimant has been awarded 15 percent (48 degrees) unscheduled permanent partial disability benefits for the right shoulder. (Exs. X3, X5). His aggravation rights expired on January 25, 2013.

In August 2009, claimant completed an authorized training program (ATP) for vocational training as “Micro Computer Support Specialist, Technical Support Specialist, and Network Technician.” (Ex. X5A-1). On May 3, 2010, he began employment as a “Help Desk Agent.” (*Id.*) This was an office job that primarily involved typing. (Ex. X5D-1).

¹ In addition, claimant requested a “fact finding” hearing. However, because the parties have been afforded several opportunities to submit evidence supporting their respective positions and because the record is sufficiently developed to conduct our review, referral of this matter for a fact finding hearing is not warranted. *See* OAR 438-012-0040(3); *Glen G. Lovitt*, 65 Van Natta 283, 284 n 3 (2013).

² These facts are taken from the following sources. As addressed below, on January 15, 2014, we issued an Own Motion Order of Dismissal. (WCB Case No. 13-0121M); *Benjamin A. Vandeman*, 66 Van Natta 82 (2014). We have considered the record developed for that case in making these findings. When citing to that record, we precede the exhibit numbers with an “X.” On April 15, 2014, claimant submitted several unnumbered exhibits. We identify those exhibits as “CL.” On May 12, 2014, the insurer submitted five exhibits; we precede those exhibit numbers with an “A.” On June 4, 2014, claimant submitted eight exhibits; we precede those exhibit numbers with a “B.” On July 1, 2014, claimant submitted three exhibits; we precede those exhibit numbers with a “C.”

In May 2011, claimant reported increased right shoulder pain and was referred to Dr. Russo for pain management treatment. (Exs. X5D, X5E, X5F). Dr. Russo, claimant's former attending physician, first examined him in October 2011, and listed his permanent restrictions as light duty, with a restriction of five pound overhead activities. (Ex. X5F-1). At that time, claimant was working at the help desk position. (*Id.*)

Dr. Russo continued to treat claimant for shoulder pain. (Exs. X5G, X5H). Claimant worked at the help desk position until April 24, 2012. (Exs. X5J-1, X6, X7-1). Thereafter, for reasons that are not entirely clear, he did not return to work.

In April and May 2012, claimant reported to Dr. Rigert (treating physician in the same pain management clinic as Dr. Russo) that he was not working because of increased right shoulder pain. (Exs. X5J-1, X6). In November 2012, he reported to PA Jones that he had too much pain to continue in the position for which he was retrained. (Ex. B8-1, X8-1). In January 2013, claimant reported that he would love to be back in the workforce, but any use of his right arm exacerbated his pain. (Ex. X9-1). Although claimant continued to treat with Drs. Russo and Rigert through January 2013, they did not address his work status or restrictions.

On April 29, 2013, claimant requested acceptance of "post-aggravation rights" new/omitted medical conditions ("adjustment reaction with depressed mood and major depression"). (Ex. X10-2). He requested a hearing on the insurer's *de facto* denial of these conditions. In a December 9, 2013 stipulation, the parties agreed that the insurer would accept these conditions, and the hearing request would be dismissed.³ (Exs. X10, X11).

On December 26, 2013, the insurer accepted the "post-aggravation rights" new/omitted medical conditions ("adjustment reaction with depressed mood and major depression"). (Ex. X12). On December 27, 2013, the insurer voluntarily reopened claimant's Own Motion claim for those new/omitted medical conditions.⁴ (Ex. X13).

³ On April 18, 2013, claimant made a "post-aggravation rights" new/omitted medical condition claim for chronic regional pain syndrome (CRPS), which the insurer denied on May 16, 2013. (Ex. X10-2). Claimant requested a hearing on that denial. (*Id.*) In the December 9, 2013 stipulation, the parties agreed that this denial of CRPS would remain in full force and effect. (Exs. X10-2, X11).

⁴ The insurer also submitted a "Carrier's Own Motion Recommendation" and a cover letter recommending against the reopening claimant's Own Motion claim for "post-aggravation rights" new/omitted medical conditions ("adjustment reaction with depressed mood and major depression"). Finding that the "post-aggravation rights" new/omitted medical conditions ("adjustment reaction with

Meanwhile, in August 2013, claimant began treating with Dr. Fulper, his current attending physician, for depression and right shoulder pain.⁵ (Exs. CL, C6-1). On August 13, 2013, Dr. Fulper noted that claimant was not working and it was unclear why he had left the job he had obtained following vocational retraining. Dr. Fulper prescribed medication and released claimant from work until his next appointment. (Ex. CL). Thereafter, Dr. Fulper continued treating claimant for depression and right shoulder pain. After each appointment, he prescribed medication and released claimant from work until his next appointment. (Exs. CL, A4).

On February 26, 2014, Dr. Karmy, consulting orthopedist, examined claimant. (Ex. A5). Claimant reported that he continued to have pain but worked until 2012. When Dr. Karmy asked why he stopped working, claimant responded that “it was unrelated to his shoulder.” (Ex. A5-1).

On June 16, 2014, Dr. Fulper reported that, since August 2013, claimant was unable to maintain employment and any reasonable effort to obtain employment would have been futile due to a combination of shoulder pain and depression. (Ex. C6-1). He also reported that treatment for depression with a psychologist that began in April 2014 and prescription medication (Prozac) that began in May 2014 was curative treatment. (*Id.*)

In a June 27, 2014 affidavit, claimant attested that he was willing to work. (Ex. C7-2).

On June 30, 2014, Dr. Russo reported that, in April 2012, claimant’s shoulder pain severely limited his ability to return to his “job at injury” and that, without vocational retraining, his ability to return to his “job at injury” would be characterized as “futile.” (Ex. C8-1). He also stated that, around August 2012, claimant was incapacitated by depression, which would have severely limited his ability to perform his “job at injury.” (*Id.*). Finally, he reported that the treatment for depression with prescription medication (Citalopram) that began in August 2012 was curative treatment. (*Id.*).

depressed mood and major depression”) qualified for Own Motion claim reopening and, in fact, the claim was voluntarily reopened by the insurer, we dismissed this Own Motion claim reopening matter. *Benjamin A. Vandeman*, 66 Van Natta 82 (2014).

⁵ Dr. Fulper also referred to “RSD” and “CRPS” in various chart notes. However, as noted above, CRPS is not a compensable condition in this claim, and RSD is unclaimed and unaccepted.

CONCLUSIONS OF LAW AND OPINION

Claimant seeks temporary disability benefits from August 13, 2013 forward based on his attending physician's, Dr. Fulper's, authorization for such benefits. The insurer responds that he is not entitled to temporary disability benefits because he is not in the workforce. Based on the following reasoning, we are unable to find that claimant is entitled to temporary disability benefits.

There are several requirements for the payment of temporary disability benefits for a claim reopened under ORS 656.278(1)(b). First, the claimant must require (including a physician's recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment (treatment that relates to or is used in the cure of disease, tends to heal, restore to health, or to bring about recovery). 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, 689 (2012); *James M. Kleffner*, 57 Van Natta 3071 (2005); *David L. Hernandez*, 56 Van Natta 2441 (2004).

Additionally, temporary disability compensation is not payable "for periods of time during which the claimant did not qualify as a 'worker' pursuant to ORS 656.005(30)." ORS 656.278(2)(b); OAR 438-012-0035(2). ORS 656.005(30) defines "worker" and provides, in relevant part:

"worker" means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *. For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, 'worker' does not include a person who has withdrawn from the workforce during the period for which such benefits are sought."

Workforce status is determined at the time of disability. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989); *Weyerhaeuser Co. v. Kepford*, 100 Or App 410, 414, *rev den* 310 Or 71 (1990). The relevant time period for which claimant must be in the workforce is the time before the "date of disability."

See generally SAIF v. Blakely, 160 Or App 242 (1999); *Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *Donald W. Wagner*, 63 Van Natta 441, 444 (2011).

The “date of disability” for the purposes of determining workforce status in an Own Motion claim for a “post-aggravation rights” new/omitted medical condition is the date the claimant’s condition: (1) resulted in a partial or total inability to work; and (2) required (including a physician’s recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment. ORS 656.278(1)(b); *Butcher*, 247 Or App at 689-90; *Henry D. Desamais*, 64 Van Natta 652, 653 (2012). The “date of disability” is the date on which both of these factors are satisfied. *Arthur D. Kiser*, 57 Van Natta 1128, 1130 (2005); *Robert J. Simpson*, 55 Van Natta 3801 (2003).

Here, Dr. Russo reported that, as of August 2012, claimant required curative treatment (prescription medication) for depression. (Ex. C8-1). Subsequently, the insurer accepted “post-aggravation rights” new/omitted medical conditions (“adjustment reaction with depressed mood and major depression”) and voluntarily reopened claimant’s Own Motion claim for those new/omitted medical conditions. (Exs. X10, X11). Thus, as of August 2012, the prescription medication constituted “other curative treatment” for those new/omitted medical conditions.

On August 13, 2013, Dr. Fulper, claimant’s current attending physician, prescribed medication and released claimant from work. (Ex. CL). As addressed above, as of August 2012, Dr. Russo’s prescription medication constituted “other curative treatment” for the “post-aggravation rights” new/omitted medical condition (“adjustment reaction with depressed mood and major depression”). Therefore, as of August 13, 2013, claimant’s condition resulted in a partial or total inability to work and required other curative treatment. Thus, August 13, 2013 is the “date of disability” for determining claimant’s workforce status.

Under the *Dawkins* criteria, claimant is in the workforce at the time of disability if he is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and is making reasonable efforts to obtain employment; or (3) not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins*, 308 at 258.

Here, claimant last worked on April 24, 2012. (Exs. X5J-1, X6, X7-1). Thereafter, he was not engaged in regular gainful employment. Therefore, he must establish that he was in the workforce under the second or third Dawkins criteria.

In order to be considered in the workforce at the time of his current disability, claimant must show that he was in the workforce before August 13, 2013, his “date of disability.” Yet, during the period between April 24, 2012 and August 13, 2013, the record does not establish that he was making reasonable efforts to find employment. Consequently, claimant has not satisfied the second *Dawkins* criterion.

In order to satisfy the third *Dawkins* criterion, claimant must first establish that he was willing to work. If unable to demonstrate his willingness to work, claimant would not be considered a member of the workforce, and thus, not entitled to temporary disability compensation. *See Stephen v. Oregon Shipyards*, 115 Or App 521 (1992); *John M. Rutherford*, 56 Van Natta 3261 (2004).

In January 2013, claimant reported that he would love to be back in the workforce, but any use of his right arm exacerbated his pain. (Ex. X9-1). In addition, claimant attested in a June 2014 affidavit that he was willing to work. (Ex. C7-2). Based on claimant’s un rebutted assertions, we are persuaded that he was willing to work.

Finally, to the extent that claimant contends that his compensable conditions made it futile for him to work or look for work during the period between April 24, 2012 and August 13, 2013, the record lacks medical evidence to support that contention. Whether it would be futile for claimant to seek work is not a subjective standard; rather it is an objective standard determined from the record as a whole, especially considering persuasive medical evidence regarding claimant’s ability to work and/or seek work. *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); *Janet F. Berhorst*, 50 Van Natta 1578 (1998) (same; Board cannot infer futility). In short, the question is whether the compensable conditions made it futile for claimant to make reasonable efforts to seek work, not whether he reasonably believes it to be futile.

On August 13, 2013, Dr. Fulper noted that claimant was not working and it was unclear why he had left the job he had obtained following vocational retraining. (Ex. CL). Subsequently, Dr. Fulper reported that, since August 2013, claimant was unable to maintain employment and any reasonable effort to obtain employment would have been futile due to a combination of shoulder pain and depression. (Ex. C6-1). However, Dr. Fulper's opinion does not address claimant's ability to work during the relevant period; *i.e.*, the time before August 13, 2013, his "date of disability." See *Wagner*, 63 Van Natta at 444.

Claimant treated with Drs. Russo and Rigert during the time he last worked in April 2012 through January 2013. However, their chart notes do not document any change in claimant's work restrictions. Dr. Russo's June 2014 opinion letter noted that claimant was "very incapacitated by his depression" in August 2012, and that "his mood disturbance would have severely limited his ability" to perform "his job at injury." (Ex. C8-1). Dr. Russo did not address whether claimant was disabled from performing all work, however. *Dawkins*, 308 at 258. Moreover, claimant was not released from work until August 13, 2013 (his "disability date"), over a year after he quit working.

Finally, claimant states that, before his date of disability, Dr. Russo "had noted that [he] was not able to work." Claimant argues that, under the reasoning in *Timothy A. Hall*, 62 Van Natta 709 (2010), Dr. Russo's observation establishes that he was in the work force before the date of disability. We disagree.

Hall is distinguishable. In *Hall*, the claimant's attending physician released him from work about four months before the "date of disability" due to the claimant's severe low back pain, which eventually required surgery. That work release was not retracted before the claimant's date of disability. Under those circumstances, we found that it would have been futile for the claimant to work and/or seek work before the date of disability. Consequently, we found that the claimant was in the "work force" on the date of disability. *Id.*, at 714.

Here, in contrast, Dr. Russo did not authorize temporary disability benefits or release claimant from work before August 13, 2013, the date of disability. Instead, Dr. Russo recorded *claimant's report* that he was not working. (Exs. X7-1, B3-1, B7-1). In the absence of an express authorization or opinion from the physician, we consider such a notation in the "history" section of the physician's report insufficient to satisfy the "futility" component of this "work force" analysis.

Under such circumstances, we are unable to find that it was futile for claimant to seek work prior to August 13, 2013 (his “disability date”). Consequently, the record does not establish that he was in the “workforce,” and he is not entitled to temporary disability benefits.^{6 7}

IT IS SO ORDERED.

Entered at Salem, Oregon on September 24, 2014

⁶ In light of this determination, we conclude that penalties and attorney fees are not warranted.

⁷ If a party wishes to submit additional evidence that addresses the “work force” and “inability to work” components of the statutory standard, that party may request reconsideration of our decision. However, because our authority to reconsider this decision expires within 30 days after the mailing date of the Own Motion Order, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).