

In the Matter of the Compensation of
ROGER WILSON, Claimant
WCB Case No. 14-01410
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Sedgwick Claims Management Services (Sedgwick), the assigned claims agent under ORS 656.054(1), requests review of Administrative Law Judge (ALJ) Otto's order that granted claimant permanent total disability benefits, whereas an Order on Reconsideration awarded 56 percent whole person permanent impairment and 86 percent work disability for neck and left shoulder conditions. On review, the issue is permanent total disability (PTD) and, potentially, permanent disability (impairment and work disability).

We adopt and affirm the ALJ's order, except for the footnote on page 12 and the "gainful employment" discussion. In addition, we provide the following supplementation.

On December 4, 2009, claimant, a truck driver, was injured in a motor vehicle accident. (Ex. 10-2). The impact caused his head and left shoulder to strike the driver's side window. (Ex. 10-3).

Sedgwick accepted a neck sprain, left shoulder contusion, subacromial impingement with rotator cuff tear, left shoulder bursitis/tendinitis, cervical radiculitis, and headaches. (Ex. 155).

In July 2010, Dr. Jacobson, an orthopedic surgeon, performed a left shoulder debridement and arthroplasty. (Exs. 59, 91-2). In November 2011, Dr. Jacobson opined that claimant's left shoulder conditions were medically stationary, but noted that his biggest issue continued to be intermittent dizziness. (Ex. 113). Dr. Jacobson did not have an "obvious diagnosis" and recommended that claimant consult a neurologist. (*Id.*)

In January 2012, Dr. Wagner, a specialist in physical medicine and rehabilitation, and the attending physician, observed that claimant did not have dizziness for a while following cervical facet blocks. (Ex. 115-1). In May 2012, Dr. Wagner noted that claimant's headaches were often associated with loss of equilibrium. (Ex. 123-1).

In August 2012, Dr. Jones, an orthopedic surgeon, performed an examination for Sedgwick. Diagnosing headache and dizziness of unknown etiology, Dr. Jones acknowledged that, considering claimant's response to the medial branch blocks, he might have facet syndrome due to the work injury. (Ex. 128-15, -19).

In December 2012, claimant underwent a C3-4 facet radiofrequency ablation procedure. (Ex. 132). Claimant still had headaches and developed some balance issues, which Dr. Wagner described as "not uncommon" with that procedure. (Ex. 133-1). In May 2013, Dr. Wagner diagnosed neck sprain, facet syndrome, cervical spondylosis, and dizziness "directly related" to the work injury with head, neck, and shoulder trauma. (Ex. 138-2).

In September 2013, Ms. Walz, a physical therapist, performed a physical capacities evaluation (PCE). Ms. Walz concluded that claimant could perform restricted sedentary part-time work with left upper extremity reaching, handling, and positional limitations. (Ex. 147-1). Observing that claimant demonstrated significant ataxia during the evaluation, she opined that his dizziness and balance problems made it unsafe for him to work on "uneven ground, heights, etc." (*Id.*) Dr. Wagner agreed with the PCE findings. (Ex. 151).

An October 2013 Notice of Closure awarded 49 percent whole person impairment (for left shoulder, neck and headache conditions) and 79 percent work disability. (Ex. 154).

In December 2013, Dr. Wagner opined that claimant's vertigo and dizziness were direct medical sequelae to the accepted neck strain and cervical radiculitis. (Ex. 156-2).

In January 2014, Dr. Wagner opined that claimant could return to restricted sedentary part-time work with the limitations imposed by Ms. Walz. (Ex. 161-2). However, Dr. Wagner considered claimant's return to work not realistic, given the multiple limitations resulting from the work injury. (*Id.*) Consequently, Dr. Wagner concluded that job seeking activities for claimant would be futile. (*Id.*)

In January 2014, Ms. Broten, a vocational consultant, concluded that claimant was eligible for vocational training, explaining that thorough occupational research had not identified "suitable occupations" (*i.e.*, work that paid at least 80 percent of his adjusted weekly wage at injury). (Ex. 162-11). Claimant expressed his willingness to work with Ms. Broten to identify retraining opportunities. (Ex. 162-12).

In February 2014, a medical arbiter panel opined that claimant was “unable to stoop because of balance problems, but not because of the work injury.” (Ex. 163-9). Noting that claimant’s disequilibrium/dizziness was not an accepted condition, the panel recommended further evaluation. (Ex. 163-10).

In February 2014, Ms. Broten and Drs. Jacobson and Wagner opined that if dizziness/vertigo related limitations were excluded from consideration, claimant could regularly perform certain proposed jobs. (Exs. 165, 167).

A March 3, 2014 reconsideration order awarded 56 percent whole person impairment and 86 percent work disability. (Ex. 169-6). Claimant requested a hearing, raising PTD (among other issues). (Hearing File).

The ALJ awarded PTD benefits under the “odd lot” doctrine. In doing so, the ALJ relied on Dr. Wagner’s opinion that claimant’s dizziness and vertigo were direct medical sequelae to the accepted conditions. *See* ORS 656.268(15). The ALJ also reasoned that the proposed jobs did not constitute “gainful employment” under ORS 656.206(11)(b).

On review, Sedgwick argues that claimant’s dizziness/vertigo is not compensable and, therefore, cannot be considered in determining claimant’s entitlement to PTD benefits. In doing so, Sedgwick relies on the opinions of Drs. Jones, Denekas, Leadbetter,¹ and the medical arbiter panel.

ORS 656.206(1)(d) provides that PTD “means, notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.”

Claimant has the burden of proving PTD status and must be willing to seek regular gainful employment and make reasonable efforts to obtain such employment unless medical or vocational findings make such efforts futile. ORS 656.206(3); OAR 436-030-0055(3)(c), 4(c). Thus, claimant must be either: (1) completely physically disabled and therefore precluded from gainful employment; or (2) because of his physical impairment, combined with social and

¹ Drs. Denekas and Leadbetter performed an examination at Sedgwick’s request in January 2011. Their diagnoses included: “Reported vertigo, possibly secondary to the event of December 4, 2009; again workup is needed to establish diagnosis and causation.” (Ex. 93-11).

vocational factors, effectively precluded from gainful employment under the “odd-lot” doctrine. ORS 656.206(1)(d); OAR 436-030-0055; *Welch v. Bannister Pipeline*, 70 Or App 699, 701 (1984); *Ken Anderson*, 61 Van Natta 1328, 1333 (2009).

Here, the record does not establish that claimant is completely physically disabled. Therefore, we turn to the “odd-lot” doctrine. Under that doctrine, a person capable of performing work of some kind may still be permanently totally disabled due to a combination of his physical condition and certain nonmedical factors, such as his age, education, adaptability to nonphysical labor, mental capacity, and emotional conditions. *See Clark v. Boise Cascade*, 72 Or App 397, 399 (1985); *Welch*, 70 Or App at 701; *Patrick S. Holman*, 65 Van Natta 1044, 1049 (2013).

In evaluating PTD, we consider “preexisting disability,” the accepted conditions, and conditions that are direct medical sequelae to the accepted conditions, unless they have been specifically denied. ORS 656.206(1)(d); ORS 656.268(15). “Preexisting disability” means the “disabling effects” caused by a preexisting condition before the work injury, but not any disability that developed as a result of the preexisting condition after the injury unless the disability is a result of employment. *Fimbres v. SAIF*, 197 Or App 613, 617-18 (2005). “Direct medical sequela’ means a condition that is clearly established medically and originates or stems from an accepted condition.” OAR 436-035-0005(5).

Here, Dr. Wagner ultimately opined that claimant’s vertigo and dizziness are direct medical sequelae to the accepted neck strain and cervical radiculitis. (Ex. 156-2). In November 2010, Dr. Wagner opined that claimant’s vertigo was “directly related to [the] industrial injury with head, neck, and shoulder trauma MVA.” (Ex. 80-1). In January 2012, Dr. Wagner observed that claimant’s dizziness disappeared when cervical facet injections relieved his cervical symptoms. (Ex. 115-1). He opined that claimant’s dizziness was “directly related” to the work injury. (Ex. 115-2). He also noted that claimant’s headaches were associated with loss of equilibrium. (Ex. 123-1). Additionally, claimant developed some balance issues following the C3-4 facet radiofrequency ablation procedure, which Dr. Wagner described as “not uncommon” with that procedure. (Ex. 133-1). In May 2013, Dr. Wagner reiterated his opinion that claimant’s dizziness was directly related to the work injury. (Ex. 138-2).

In contrast, the medical arbiter panel opined that claimant “is unable to stoop because of balance problems, but not because of the work injury.” (Ex. 163-9). Yet, the panel also noted that claimant’s disequilibrium/dizziness “is not an accepted condition.” (Ex. 163-10). The panel did not address whether claimant’s balance problems are direct medical sequelae to his accepted conditions.

Under these circumstances, we find the panel’s opinion ambiguous with regard to whether claimant’s impairment findings were due to the compensable conditions. Instead, we find that Dr. Wagner’s well-reasoned opinion established that claimant’s dizziness/vertigo are direct medical sequelae that should be considered in evaluating PTD. *See Khurl v. Foremans Cleaners*, 194 Or App 125, 130 (1994) (declining to rely on medical arbiter’s report that contained ambiguities as to whether impairment findings were due to the compensable conditions); *Joan Beaver*, 65 Van Natta 1804, 1808-09 (2013) (attending physician’s findings used to rate permanent impairment where those findings were found to be more accurate than a medical arbiter’s ambiguous findings).

Sedgwick cites *Ken Anderson*, 61 Van Natta 1329 (2009), in arguing that it is premature to consider claimant’s dizziness/vertigo in determining his entitlement to PTD benefits. *Anderson* is distinguishable on its facts. In *Anderson*, the carrier denied the claimant’s combined condition before claim closure. Before the reconsideration order issued, the denial was set aside and the carrier was ordered to process the claim. On review of the reconsideration order, we declined to rate claimant’s “post-closure” condition, explaining that the appropriate time to address permanent disability from a “post-closure” compensable condition is after the employer has reopened and reclosed the claim. *See* ORS 656.262(7)(c); *Jonathan M. Humphrey*, (when a carrier issued a “ceases” denial before claim closure, the claim was not prematurely closed); *Jonathan E. Ayers*, 56 Van Natta 1103, 1104 (2004), *recons*, 56 Van Natta 1470 (2004) (when a combined condition was accepted and denied before claim closure, only impairment findings related to the claimant’s accepted right shoulder strain and its direct medical sequela were considered; under ORS 656.262(7)(c), the appropriate time to address permanent disability from the “post-closure” compensable condition is after the carrier has reopened and reclosed the claim).

Here, claimant’s dizziness/vertigo was neither claimed nor denied. We acknowledge that, in the absence of claimant’s new/omitted condition claim for such condition, a denial would have been premature. *See Christopher L. Rowles*, 66 Van Natta 1445, 1447 (2014) (the carrier’s denial was premature and invalid because the claimant had not made a new/omitted medical condition claim).

Yet, in rating conditions that are direct medical sequelae to the accepted condition, ORS 656.268(15) does not require such conditions to be claimed or accepted. Therefore, consideration of claimant's dizziness/vertigo condition as direct medical sequelae to the accepted condition is appropriate under ORS 656.268(15).²

We turn to whether claimant has established that he is currently unable to regularly perform work in a gainful and suitable occupation. ORS 656.206(1)(d), (e), (f), 11(b)(B); OAR 436-030-0055(1)(a), (b), (c). For the following reasons, we find that, on this record, he is currently unable to regularly perform work at a "suitable" occupation.³

A "suitable occupation" is "one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation." ORS 656.206(1)(f). That determination is made based on claimant's condition at the time of reconsideration. See ORS 656.283(6); *Kenneth R. Reed*, 49 Van Natta 2129, 2132 (1997).

Here, the record establishes that claimant's condition at the time of reconsideration (including his dizziness/vertigo) precluded him for regularly performing work in a suitable occupation. Specifically, Dr. Wagner opined that it was "unrealistic" for claimant to return to work given his multiple limitations from the work injury and that job seeking would be futile. (Ex. 161-2). Additionally, Ms. Broten's thorough occupational research did not identify any suitable occupations. In doing so, Ms. Broten considered claimant's ability to perform entry level jobs "compromised" and found him eligible for vocational training. (Ex. 162-11). See *Gerardo L. Herrera*, 64 Van Natta 2057, 2063 (2012) (where the claimant required vocational training, his entitlement to PTD benefits was based on his condition at the time of reconsideration, rather than on his employment potential after retraining).

Sedgwick contends that the opinions offered by Ms. Broten and Drs. Jacobson and Wagner establish that claimant is currently capable of performing work at a suitable occupation. Yet, those opinions expressly

² Based on this conclusion, we do not adopt the ALJ's reasoning regarding *Brown v. SAIF*, 262 Or App 640, 651 (2014).

³ Sedgwick argues that there is insufficient evidence to establish claimant's average weekly wage under ORS 656.206(11)(b)(B). Claimant responds that this "issue" was not raised at the hearing level and, as such, cannot be considered on review. Sedgwick replies that this "average weekly wage" question is an integral component of claimant's entitlement to PTD benefits and, consequently, must

be satisfied. Based on our conclusion that claimant is unable to regularly perform work in a "suitable" occupation, we need not address whether he is unable to regularly perform work at a "gainful" occupation. See ORS 656.206(1)(d); *Gerardo L. Herrera*, 64 Van Natta 2057, 2062 n 6 (2012).

excluded consideration of claimant's dizziness/vertigo. As reasoned above, his dizziness/vertigo are direct medical sequelae to the accepted conditions under ORS 656.268(15). Therefore, we do not find such opinions persuasive.

Finally, the record establishes that claimant participated in vocational rehabilitation efforts and was willing to continue working with Ms. Broten to determine retraining opportunities. (Ex. 162-11, -12). Under these circumstances, we find that claimant was willing to seek regular employment and that he made reasonable efforts to obtain such employment. *See* ORS 656.206(3); *Herrera*, 64 Van Natta at 2064. (The claimant's participation in vocational rehabilitation efforts established that he was willing to seek regular gainful employment and had made reasonable efforts to obtain such employment).

Based on this record, we conclude that due to a combination of claimant's physical impairment and social and vocational factors,⁴ he is currently unable to sell his services on a regular basis in a hypothetically normal labor market.⁵ Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. 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 is \$6,000, payable by Sedgwick (on behalf of the noncomplying employer). In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, his counsel's fee submission, and Sedgwick's objection), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated August 22, 2014 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$6,000 payable by Sedgwick.

Entered at Salem, Oregon on February 27, 2015

⁴ At the time of reconsideration, claimant was 72 years old. (Ex. 169-4). He did not have a high school diploma or general equivalency diploma (GED). (Ex. 162-4). His highest educational level was the eighth grade. (*Id.*) Since 1980, he had worked as a truck driver and livestock attendant. (Ex. 162-5, -6).

⁵ If through training claimant becomes employable in the future, his status can be reassessed under ORS 656.206(5).