
In the Matter of the Compensation of
CYRIL J. ALLEN, Claimant
Own Motion No. 15-00075OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
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Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of a September 29, 2015 Own Motion Notice of Closure (as corrected on October 5, 2015) that did not award additional permanent disability for his “post-aggravation rights” new/omitted medical conditions (closed head injury and post-traumatic headache).¹ On review, claimant seeks an additional permanent disability award (impairment and work disability). Based on the following reasoning, we affirm the closure notice.

FINDINGS OF FACT

On May 2, 2006, claimant, an electrician apprentice, was compensably injured when he slipped off on a ladder, struck his head on a window, and fell two stories to the ground, landing on his back and striking his head. (*See Exs. 1, 6, 7, 16, 21, 134, 139*). The SAIF Corporation accepted an abrasion over bridge of nose, left occipital scalp contusion, L2-3 compression fracture, laceration over left eyebrow, and cervical strain. (*See Ex. 13*).

On March 9, 2007, Dr. Sandquist, claimant’s then-attending physician, reported that claimant was ready to return to work, and released him to do so. (*Ex. 5*). Dr. Sandquist also referred claimant to Dr. Peterson, a neurologist and headache specialist, to evaluate his ongoing headache complaints. (*See Exs. 3, 5, 6*).

On March 27, 2007, Dr. Peterson opined that claimant sustained a cervical strain injury with post-whiplash headache when he struck his head on the window, as well as a closed head injury with post-traumatic headache when he struck his

¹ Claimant’s May 2, 2006 claim was accepted as a disabling claim and was first closed on December 19, 2007. Thus, claimant’s aggravation rights expired on December 19, 2012. Therefore, when claimant sought claim reopening in April 2015, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On September 15, 2015, the SAIF Corporation voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (closed head injury and post-traumatic headache). ORS 656.278(1)(b), (5). On September 29, 2015, as corrected on October 5, 2015, SAIF issued its Notice of Closure.

head as he fell to the ground on his back. (Ex. 6-5). She considered both mechanisms of injury to be significant, but stated that it was unknown which mechanism was more significant in causing his headache pain. (*Id.*) According to Dr. Peterson, claimant did not meet the diagnostic criteria for a “cervicogenic headache” as defined by the International Classification of Headache Disorders, which is a specific term used by headache specialists. (Ex. 6-5-6). Instead, she explained that claimant met the diagnostic criteria for a chronic post-traumatic headache attributed to the mild head injury, as well as a chronic headache attributed to the whiplash injury. (*Id.*) Dr. Peterson continued to treat claimant for his post-traumatic headache condition. (Exs. 9, 10, 14).

On April 11, 2007, Drs. DeBolt and Woodward examined claimant at SAIF’s request and diagnosed, *inter alia*, a cervical strain with cervico-genic headaches related to his May 2006 work injury. (Ex. 7-8). They opined that, except for the cervical strain and cervicogenic headaches, claimant’s accepted conditions were medically stationary. (Ex. 8). Dr. Sandquist concurred with Dr. Woodward’s and Dr. DeBolt’s opinions. (Ex. 11).

On June 20, 2007, SAIF accepted cervico-genic headaches due to the work injury of May 2, 2006. (Ex. 13).

On September 6, 2007, Dr. Peterson noted that claimant still had occasional transient headache pain, but that his claim was ready for closure. (Ex. 15).

On October 1, 2007, Dr. Golden examined claimant at SAIF’s request. (Ex. 16). Like Dr. Peterson, Dr. Golden made a distinction between cervicogenic headache and posttraumatic headache conditions, and concurred with her diagnosis of posttraumatic headache in preference to cervicogenic headache. (Ex. 16-7). However, he noted Dr. Peterson’s statement that claimant was experiencing some headache from the whiplash injury, which he considered to be a cervicogenic headache. (*Id.*) Dr. Golden opined that claimant’s headache had completely resolved at the time of his examination, and that the accepted conditions were medically stationary without significant impairment. (*Id.*) Dr. Golden found a 15 percent loss of height at the L2 vertebra from claimant’s L2-3 compression fracture. (Ex. 16-8). He considered the loss of ranges of motion (ROM) in claimant’s cervical and lumbar spines to be normal for him. (*Id.*)

Dr. Peterson concurred with Dr. Golden’s report, but noted that claimant “has been released to regular duty but please note that I do not have a job description with physical requirements.” (Ex. 17). Dr. Sandquist concurred with Dr. Golden’s and Dr. Peterson’s opinions. (Exs. 18, 19).

A December 19, 2007 Notice of Closure awarded 5 percent whole person impairment for claimant's lumbar spine based on the 15 percent compression at L2, and no "work disability" because he was released to regular work in March 2007. (Ex. 20-3, -6, -8). The Notice of Closure summary indicated that claimant was released to his "[j]ob at injury without restrictions," and had returned to a new job with a new employer. (Ex. 20-4). Claimant requested reconsideration of the closure notice.

In February 2008, Dr. Harris performed a medical arbiter evaluation. (Ex. 21). Claimant reported that, on occasion, his headaches could reach "8/10" in severity and last a few hours, which required him to stop working. (Ex. 21-2, -4). With the exception of an informal accommodation allowing claimant to occasionally work at a slower pace, Dr. Harris noted that claimant was working full duty and performing all aspects of his work as an electrician apprentice. (Ex. 21-2). Dr. Harris reported that claimant's headaches occurred roughly every five to seven days, with the varying frequency depending on the nature of his work. (Ex. 21-4). Dr. Harris opined that the headaches did not disrupt claimant's activities of daily living (ADL), but required some adjustments in his work activities (*i.e.*, slower production). (*Id.*) Claimant was not using any prescription medication or involved in therapy for his headaches. (*Id.*)

A March 27, 2008 Order on Reconsideration increased claimant's permanent disability award to 15 percent whole person impairment. (Ex. 22). The additional 10 percent impairment value was based on Dr. Harris's description of claimant's headaches, which satisfied the criteria for "Class 1" episodic neurologic disorder pursuant to OAR 436-035-0390(10)(e) (WCD Admin. Order 05-073, effective January 1, 2006). (Exs. 21-4, 22-2). Noting that he was released to regular work, the reconsideration order found that claimant was not entitled to a work disability award. (Ex. 22-3).

Thereafter, claimant began treating with Dr. Lewis (who became his attending physician) for complaints of low back, neck, and radiating leg pain. (Exs. 23, 24, 42, 86, 108, 131). Between 2010 and 2013, claimant received acupuncture treatment for his low back and neck pain, as well as his headache complaints. (Exs. 26 through 41, 44 through 56, 58 through 85, 87 through 107, 109 through 124, 126 through 130).

In March 2014, claimant underwent L4-5 lumbar spine surgery to treat his low back and radicular symptoms, and was taken off work by his treating surgeon. (*See* Exs. 134-4-5, 135-2-3). On May 12, 2014, SAIF denied claimant's new/omitted medical condition claim for lumbar radiculopathy. (*See* Exs. 135-1, 137-1). Claimant requested a hearing. (Ex. 139-1).

In April 2015, claimant requested that SAIF accept a closed head injury and post-traumatic headache as new/omitted medical conditions. (Ex. 136).

On May 5, 2015, Dr. Reimer, who examined claimant at SAIF's request, found no evidence that claimant sustained a closed head injury as a result of his May 2006 injury and, therefore, concluded that claimant did not meet the qualifications for what he considered a diagnosis of posttraumatic headaches. (Ex. 137-5-7). Dr. Reimer opined that a cervicogenic headache, which is assumed to be a response to pathology aggravating the upper cervical roots that supply the back of the cranial area, is not the same condition as posttraumatic headaches. (Ex. 137-6). However, Dr. Reimer commented that, if claimant's accepted cervicogenic headaches are considered to be a result of trauma (*i.e.*, the 2006 work injury), then that condition "would fit the vague description of posttraumatic headache, but not a description of posttraumatic headache related specifically to a closed head injury." (*Id.*) According to Dr. Reimer, because SAIF accepted claimant's cervicogenic headaches related to a cervical strain, SAIF had already accepted the posttraumatic headache condition as related to the work injury. (Ex. 137-7). Dr. Reimer considered claimant's head and neck conditions to be medically stationary, regardless of the cause of his headaches, and noted that claimant was released to full work with respect to his head and neck conditions. (Ex. 137-7-8).

On May 19, 2015, SAIF denied claimant's new/omitted medical condition claim for the closed head injury and post-traumatic headache. (Ex. 138). The denial letter noted that he did not have a closed head injury as a result of the 2006 injury, and that the post-traumatic headache was the same condition as the accepted cervicogenic headaches. (Ex. 138). Claimant requested a hearing challenging that denial.

On September 8, 2015, a prior ALJ set aside SAIF's denial pertaining to claimant's closed head injury and post-traumatic headache conditions.² (Ex. 139). In doing so, the ALJ found that the opinion of Dr. Peterson, as supported and corroborated by that of Dr. Golden, persuasively established the existence and compensability of the claimed closed head injury and posttraumatic headache conditions. (Ex. 139-9-11).

² The prior ALJ upheld SAIF's denial of lumbar radiculopathy, as well as that portion of its May 2015 denial for bilateral pars fractures at L4-5. The prior ALJ further noted that a March 2013 denial for grade II spondylolisthesis with foraminal narrowing and spondylosis was not appealed and became final by operation of law. (Ex. 139).

On September 15, 2015, SAIF accepted and voluntarily reopened claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical conditions (closed head injury and post-traumatic headache). (Exs. 140, 141).

A September 29, 2015 Own Motion Notice of Closure, as corrected on October 5, 2015, did not award any permanent disability for the "post-aggravation rights" new/omitted medical conditions (closed head injury and post-traumatic headache). (Ex. 142-3, -5). Claimant requested review of the closure notice, seeking an additional permanent disability award and the appointment of a medical arbiter. (Ex. 143).

On December 31, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Cyril J. Allen*, 67 Van Natta 2243 (2015).

On March 9, 2016, Dr. Gunn, the medical arbiter, examined claimant and reviewed the medical records, addressing the newly accepted closed head injury and posttraumatic headache conditions. She noted claimant's statements and opinion that there has been really no change in the frequency or severity of his headaches since his injury, and that his headache pain varied depending on his work commitments. Claimant reported that his headache often lasts for about one week, sometimes two, and that he has headaches about 50 percent of the time. He also stated that he is able to work with his headaches and does not adjust his work activities, as he did in the past. According to Dr. Gunn, there "is no disruption of his ADL's, and possibly some disruption of his IADL's." Claimant was not on medication or therapy for his headaches.

Comparing claimant's descriptions of his headaches with those at the time of Dr. Harris's 2008 report for cervico-genic headaches, Dr. Gunn noted that claimant currently described longer headaches at increased frequency, but about equal in severity. She also considered the disruption to ADLs and work adjustments to be likely about the same. Dr. Gunn observed that Dr. Harris considered claimant's headaches after his work injury as a whole, without apportioning the impairment to cervico-genic headaches. Reiterating claimant's statement that his headache had not really changed in frequency or severity, Dr. Gunn was unable to objectively find new impairment due to the newly accepted post-traumatic headache and closed head injury conditions beyond what was previously described by Dr. Harris.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of "post-aggravation rights" new/omitted medical conditions (closed head injury and post-traumatic headache). Such a claim may qualify for payment of permanent disability compensation.

ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004). However, as explained below, the record does not support an additional permanent disability award.

Claimant's claim was closed by a September 29, 2015 Own Motion Notice of Closure, as corrected on October 5, 2015. Thus, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). See OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Only findings of impairment that are permanent and caused by the accepted condition, direct medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994). Impairment attributable to the previously accepted conditions, which have been processed to closure, cannot be considered. *Robert A. Boehm, Jr.*, 68 Van Natta 310 (2016) (no permanent disability awarded for impairment due to previously accepted condition instead of "post-aggravation rights" new/omitted medical condition); *Randy D. Schollenberger*, 66 Van Natta 1792 (2014) (same).

Here, Dr. Gunn, the medical arbiter, performed a thorough and complete examination. Consequently, we rely on Dr. Gunn's medical arbiter report to rate claimant's permanent impairment.

Dr. Gunn was unable to find new impairment due to claimant's newly accepted closed head injury and post-traumatic headache conditions beyond what was previously described by Dr. Harris's examination. In doing so, she explained that Dr. Harris considered claimant's headaches as a whole without apportioning some impairment to the accepted cervico-genic headaches. Moreover, Dr. Gunn relied on claimant's statements that his headaches had not really changed in frequency and severity. Furthermore, Dr. Gunn noted that the previously accepted cervico-genic headaches had been the subject of claimant's prior permanent disability award. (Ex. 22-2).

Consequently, the record does not establish that claimant sustained permanent impairment attributable to his accepted new/omitted medical conditions (closed head injury and post-traumatic headaches). Therefore, he is not entitled to an additional permanent impairment award. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(2); *Boehm, Jr.*, 68 Van Natta at 313.

We turn to claimant's request for a work disability award. Citing OAR 436-035-0009(4), claimant argues that his "return to regular work does not preclude him from having work disability evaluated unless he has been released or returned to regular work by his attending physician or authorized nurse practitioner." However, OAR 436-035-0009(4) provides, "Only permanent impairment is rated for those workers with a date of injury on or after January 1, 2006, and who have been released or returned to regular work by the attending physician."³

Here, the previous March 2008 Order on Reconsideration found that claimant was released to regular work and, therefore, not entitled to a work disability award for his compensable injury. (Ex. 22-3). Furthermore, the record does not establish that he was subsequently taken off work, or had any work restrictions, due to the "post-aggravation rights" new/omitted medical conditions (closed head injury and post-traumatic headache) or any other accepted condition.⁴ Under such circumstances, claimant is not entitled to a "work disability" award concerning this claim closure. ORS 656.214(2) (Or Laws 2005, ch 653, §§ 3, 5); ORS 656.726(4)(f)(E) (Or Laws 2005, ch 653, §§ 1, 5); OAR 436-035-0009(4).

Moreover, "work disability" means *impairment* modified by age, education and adaptability to perform a given job. ORS 656.214(1)(e). For the purposes of determining permanent disability, "work disability" means *impairment* modified by age, education, and adaptability to perform the job at which the worker was injured. OAR 436-035-0005(19).

³ Because of claimant's May 2, 2006 date of injury, he is entitled to only impairment (not "work disability") if he "has been released to regular work by the attending physician * * *." ORS 656.214(2) (Or Laws 2005, ch 653, §§ 3, 5); ORS 656.726(4)(f)(E) (Or Laws 2005, ch 653, §§ 1, 5). "Regular work" means the job the worker held at injury. ORS 656.214(1)(d).

⁴ Although the record indicates that claimant was taken off work in March 2014 to undergo L4-5 surgery for treatment of his low back and radicular pain, SAIF has denied his claims for L4-5 grade II spondylolisthesis with foraminal narrowing and spondylosis, lumbar radiculopathy, and bilateral pars fractures at L4-5. (See Ex. 139). In accordance with OAR 436-035-0007(1)(b)(B)(ii)(I), an impairment award is not available for these denied conditions.

However, as previously explained, the record does not support claimant's entitlement to an additional permanent *impairment* award as a result of his newly accepted conditions. OAR 436-035-0006(1), (2); OAR 436-035-0007(1), (5); OAR 436-035-0013(2)(a), (b). Therefore, because claimant is not eligible for an award for impairment, he likewise is not eligible for an award for work disability. *See* ORS 656.726(4)(f)(C) ("The criterion for evaluation of work disability under ORS 656.214 is permanent impairment as modified by the factors of age, education and adaptability to perform a given job"); *see also* OAR 436-035-0007(2)(a) (a worker is eligible for an award for work disability if the worker is eligible for an award for impairment); OAR 436-035-0007(7) ("If there is no measurable impairment under these rules, no award of permanent partial disability is allowed").

In conclusion, in the absence of permanent impairment attributable to his new/omitted medical conditions (closed head injury and post-traumatic headache), claimant is not entitled to an additional permanent disability award. OAR 436-035-0006(1), (2); OAR 436-035-0007(1), (2), (3), (7); OAR 436-035-0013(2); *Boehm, Jr.*, 68 Van Natta at 313; *Paul N. Bennett*, 63 Van Natta 10 (2011) (no permanent disability awarded where there was no residual impairment due to the "post-aggravation rights" new/omitted medical condition). Accordingly, we affirm the September 29, 2015 Own Motion Notice of Closure, as corrected on October 5, 2015.⁵

IT IS SO ORDERED.

Entered at Salem, Oregon on August 31, 2016

⁵ Claimant's total award to date is 15 percent whole person impairment for his low back and head.