
In the Matter of the Compensation of
ERVIN E. WOITT, Claimant
Own Motion No. 15-00042OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Ransom Gilbertson Martin et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of a May 28, 2015 Notice of Closure that did not award any permanent disability for his “post-aggravation rights” new/omitted medical condition (transverse fracture of the distal third of the fibular diaphysis).¹ Based on the following reasoning, we affirm the closure notice.

FINDINGS OF FACT

On May 5, 2009, claimant sustained a compensable injury to his left foot/ankle. (Exs. 23, 24, 25, 28). The diagnosis was medial malleolar ankle fracture, and transverse fracture of the distal third of the fibular diaphysis. (Exs. 25, 26, 27, 30).

On May 8, 2009, Dr. Robertson performed a left ankle open reduction internal fixation of the fracture. (Ex. 31). On May 20, 2009, the SAIF Corporation accepted a bimalleolar fracture of the left ankle. (Ex. 34).

On July 30, 2009, Dr. Robertson declared claimant’s condition to be medically stationary and released him to regular work without restrictions as of August 1, 2009. (Exs. 58, 59).

An August 12, 2009 Notice of Closure did not award permanent disability benefits. (Ex. 61). That closure notice was not appealed.

¹ Claimant’s May 5, 2009 claim was accepted as a disabling claim and was first closed on August 12, 2009. Thus, claimant’s aggravation rights expired on August 12, 2014. Therefore, when claimant sought claim reopening in November 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On January 12, 2015, the SAIF Corporation voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (transverse fracture of the distal third of the fibular diaphysis). ORS 656.278(1)(b), (5). On May 28, 2015, SAIF issued its Notice of Closure.

On November 20, 2014, claimant, through his attorney, requested that SAIF accept a transverse fracture of the distal third of the fibular diaphysis as a new/omitted medical condition.² (Ex. 65). On January 12, 2015, SAIF accepted and voluntarily reopened claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical condition (transverse fracture of the distal third of the fibular diaphysis). (Exs. 67, 68).

On May 15, 2015, Dr. Waring, claimant's current attending physician, performed a closing evaluation. (See Exs. 74, 75, 76). Dr. Waring documented decreased left/right ankle/foot range of motion (ROM) findings, but stated that claimant's left ankle ROM was normal, with no loss of motion due to the compensable injury. (Exs. 74-2-3, 76-5). She further noted that claimant had no history of injury or disease in the contralateral right ankle. (Exs. 74-3, 76-4). Dr. Waring found no strength loss, sensory loss, or instability in claimant's left foot/ankle. (Exs. 74-3, 76-4-5). She also opined that claimant had no limitation in the repetitive use of his left foot/ankle, and was able to stand or walk for more than two hours total in an eight-hour day. (Ex. 74-3). Dr. Waring concluded that claimant had no permanent impairment. (Ex. 74-4).

A May 28, 2015 Own Motion Notice of Closure awarded no permanent disability for claimant's "post-aggravation rights" new/omitted medical condition (transverse fracture of the distal third of the fibular diaphysis). (Ex. 77). Claimant requested review of the closure notice, seeking a permanent disability award and the appointment of a medical arbiter.

On September 3, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Ervin E. Woitt*, 67 Van Natta 1629 (2015).

On October 27, 2015, Dr. Karmy, the medical arbiter, documented decreased ROM findings in claimant's left and right foot/ankle. Dr. Karmy found no loss of strength, sensation, or instability in the left foot/ankle. He opined that claimant was not limited in the ability to stand and walk for more than two hours, and was not limited in the ability to repetitively use his left foot/ankle. Dr. Karmy concluded that claimant did not have any impairment from his newly accepted condition.

² Claimant's attorney also informed SAIF that claimant was in a memory care facility for his Alzheimer's and dementia. (Ex. 66).

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of “post-aggravation rights” new/omitted medical condition (transverse fracture of the distal third of the fibular diaphysis). 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).

We first determine whether ORS 656.278(2)(d) applies to limit any award of permanent for the “post-aggravation rights” new/omitted medical conditions. The permanent partial disability (PPD) limitation set forth in ORS 656.278(2)(d) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.” *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). If those conditions are satisfied, the Director’s standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate “post-aggravation rights” new or omitted medical condition claims. Under such circumstances, we redetermine the claimant’s permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d). *Jeffrey L. Heintz*, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at 3207-08. Conversely, where it is determined that the limitation in ORS 656.278(2)(d) does not apply, the permanent disability for the “post-aggravation rights” new/omitted medical condition is rated under the Director’s standards without “redetermination” of disability. *Randy D. Boydson*, 59 Van Natta 2360 (2007); *Terry J. Rasmussen*, 56 Van Natta 1136 (2004).

Here, all three factors are not satisfied regarding claimant’s left foot/ankle condition. Specifically, before the closure of this Own Motion claim, he has not received a prior PPD award for the left foot/ankle. Consequently, the ORS 656.278(2)(d) limitation does not apply, and the PPD for claimant’s newly accepted left foot/ankle condition is rated under the Director’s standards without a “redetermination” of disability.

Claimant’s claim was closed by a May 28, 2015 Own Motion Notice of Closure. 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).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's impairment." *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, Dr. Karmy, the medical arbiter, performed a thorough and complete examination. Because a preponderance of the medical evidence does not demonstrate that the attending physician's findings are more accurate, we rely on Dr. Karmy's opinion to rate claimant's permanent impairment.

Dr. Karmy documented the following left/right foot/ankle ROM findings: 40/35 degrees subtalar inversion; 20/20 degrees subtalar eversion; 10/10 degrees dorsiflexion (extension); and 50/50 degrees plantar flexion. Because claimant has no history of injury or disease to the contralateral joint, a comparison with the right foot/ankle is appropriate. OAR 436-035-0011(3). Therefore, claimant receives the following left ankle/foot ROM values: zero percent for subtalar inversion; zero percent for subtalar eversion; zero percent for dorsiflexion (extension); and zero percent for plantar flexion. OAR 436-035-0190(2), (4), (6), (8).³ Thus, claimant is not entitled to an impairment value for left ankle/foot ROM.

³ Because the contralateral right subtalar joint inversion finding (35 degrees) exceeds the value for the inversion ROM (30 degrees) established under the standards, the values established under the standards are maximums used to establish impairment. See OAR 436-035-0011(3); OAR 436-035-0190(2). Because the left subtalar inversion finding (40 degrees) does not meet the threshold (minimum) findings established in these rules, no value is granted. OAR 436-035-0007(13).

We compare claimant's left/right subtalar joint eversion findings as follows: $20/20 = X/20$; $X = 20$; 20 degrees receives an impairment value of zero. OAR 436-035-0011(3)(a); OAR 436-035-0190(4).

There are no other ratable permanent impairment findings. Accordingly, claimant is not entitled to an additional permanent disability award for his “post-aggravation rights” new/omitted medical condition.

As noted above, the ORS 656.278(2)(d) limitation does not apply. However, claimant is not entitled to a permanent disability award under this reopened Own Motion claim.

Consequently, the May 28, 2015 Own Motion Notice of Closure is affirmed.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 26, 2016

We compare claimant’s left/right ankle joint dorsiflexion findings as follows: 10/10 = X/20; X = 20; 20 degrees receives an impairment value of zero. *See* OAR 436-035-0011(3); OAR 436-035-0190(6).

Because the contralateral right ankle joint plantar flexion finding (50 degrees) exceeds the value for the plantar flexion ROM (40 degrees) established under the standards, the values established under the standards are maximums used to establish impairment. *See* OAR 436-035-0011(3); OAR 436-035-0190(8). Because the left ankle plantar flexion finding (50 degrees) does not meet the threshold (minimum) findings established in these rules, no value is granted. OAR 436-035-0007(13).