In the Matter of the Compensation of
ERIC K. MILLER, Claimant
Own Motion No. 15-00065OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Ransom Gilbertson Martin et al, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of a September 30, 2015 Own Motion Notice of Closure that awarded 10 percent (4.8 degrees) scheduled permanent partial disability (PPD) for his "post-aggravation rights" new/omitted medical condition (right thumb chronic radial collateral ligament instability, posttraumatic).[1] Based on the following reasons, we affirm the closure notice.

FINDINGS OF FACT

On September 15, 1998, claimant sustained a compensable right thumb injury. (*See* Exs. 1, 4). On October 25, 2000, the insurer accepted a nondisabling right thumb radial collateral ligament injury. (Ex. 12).[2]

On May 24, 2006, Dr. Tongue, claimant's attending physician, diagnosed posttraumatic right thumb chronic radial collateral ligament instability and performed a right thumb metacarpophalangeal (MP/MCP) joint reconstruction surgery with tendon graft. (Ex. 15).

On June 6, 2006, the insurer voluntarily reopened claimant's Own Motion claim for a "worsened condition" (right thumb radial collateral ligament tear). (Ex. 18).

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[1] Claimant's September 15, 1998 claim was accepted as a nondisabling claim. Thus, claimant's aggravation rights expired on September 15, 2003. Therefore, when he sought claim reopening in September 2015, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On September 29, 2015, the insurer voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition (right thumb chronic radial collateral ligament instability, posttraumatic). ORS 656.278(1)(b), (5). On September 30, 2015, the insurer issued its Notice of Closure.

[2] The at-injury employer was insured by an insurer that subsequently became insolvent. Thereafter, Oregon Insurance Guaranty Association (OIGA), through TriStar Risk Management, became responsible for the covered claims of that insolvent insurer. Under these circumstances, we identify the carrier as "the insurer."

On October 16, 2006, Dr. Tongue assessed a "[p]ost-operative successful reconstruction, radial collateral ligament, MP joint, right thumb of 05/24/06" and performed a closing examination. (Ex. 22-2). He noted that claimant's interphalangeal (IP) and carpometacarpal (CM) thumb joints were normal. (*Id.*) Dr. Tongue found the following right/left thumb MP joint ranges of motion (ROM): 43/53 degrees flexion; and -30/0 degrees extension. (*Id.*) He stated that claimant's condition was medically stationary, with impairment limited to the loss of motion. (*Id.*)

A November 15, 2006 Own Motion Notice of Closure awarded temporary disability benefits for claimant's "worsened condition" claim. (Ex. 23).

On September 1, 2015, claimant requested that the insurer accept "right thumb chronic radial collateral ligament instability, post-traumatic" as a new/omitted medical condition. (Ex. 24). On September 29, 2015, the insurer accepted and voluntarily reopened claimant's Own Motion claim for the aforementioned "post-aggravation rights" new/omitted medical condition. (Exs. 25, 26).

A September 30, 2015 Own Motion Notice of Closure awarded 10 percent (4.8 degrees) scheduled PPD for claimant's "post-aggravation rights" new/omitted medical condition (right thumb chronic radial collateral ligament instability, posttraumatic). (Ex. 27). Claimant requested review, "disagree[ing]" with the Own Motion Notice of Closure.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of "post-aggravation rights" new/omitted medical condition (right thumb chronic radial collateral ligament instability, posttraumatic). 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 scheduled PPD for the "post-aggravation rights" new/omitted medical condition.[3] The PPD limitation set forth in ORS 656.278(2)(d) applies where there is

[3] ORS 656.278(2)(d) provides that benefits under ORS 656.278(1):

> "May include permanent disability benefits for additional impairment to an injured body part that has previously been the basis of a [PPD] award, but only to the extent that the [PPD] rating exceeds the [PPD] rated by the prior award or awards."

(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). On the other hand, 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. *Terry L. Rasmussen*, 56 Van Natta 1136 (2004) (ORS 656.278(2)(d) "limitation" did not apply; new medical condition rated without "redetermining" disability).

Here, all three factors are not satisfied. Specifically, before the closure of this Own Motion claim, claimant has not received a prior scheduled PPD award for the right thumb. Consequently, the ORS 656.278(2)(d) limitation does not apply to claimant's right thumb, and PPD for claimant's newly accepted right thumb condition is rated under the Director's standards without a "redetermination" of disability.

Claimant's claim was closed by a September 30, 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).

For the purpose of rating claimant's permanent impairment, only the opinions of his attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp*., 125 Or App 666 (1994). 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).

Here, no medical arbiter examination was performed. Consequently, we rely the report of Dr. Tongue, claimant's attending physician, to rate claimant's permanent impairment. *See Jennifer L. Williams*, 63 Van Natta 638 (2011).

OAR 436-035-0011(2)(b) provides, in pertinent part: "Range of motion values for multiple joints in a single body part (*e.g.*, of a finger) are determined by finding the range of motion values for each joint (*e.g.*, MCP, PIP, DIP) and combining those values for an overall loss of range of motion value for that body part."

Here, Dr. Tongue stated that claimant's IP and CM thumb joints were normal. (Ex. 22-2). Therefore, claimant is not entitled to impairment values for his IP and CM joint ROM. OAR 436-035-0007(7), (13).

Dr. Tongue found the following right/left thumb MP joint ROM: 43/53 degrees flexion; and -30/0 degrees extension. (Ex. 22-2). Because claimant has no history of injury or disease to the contralateral joint, a comparison with the left thumb MP joint is appropriate. OAR 436-035-0011(3). Therefore, claimant receives the following values for the right thumb MP joint ROM: 9.9 percent for flexion; and zero percent for extension. OAR 436-035-0050(4), (5).[4] These impairment values are added, for a total of 9.9 percent, which is rounded to 10 percent for the right MP joint ROM. OAR 436-035-0011(2)(a), (4).

There are no other ratable permanent impairment findings.[5] Accordingly, claimant is entitled to a 10 percent (4.8 degrees) scheduled PPD award for his right thumb.

As noted above, the ORS 656.278(2)(d) limitation does not apply. Consequently, we affirm the September 30, 2015 Own Motion Notice of Closure that awarded 10 percent (4.8 degrees) scheduled PPD for the loss of use or function of the right thumb.[6]

IT IS SO ORDERED.

Entered at Salem, Oregon on February 16, 2016

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[4] We compare claimant's right/left thumb MP joint flexion findings as follows: 43/53 = X/60; X = 48.7, which is rounded to 49 degrees. OAR 436-035-0011(3), (4); OAR 436-035-0050(4). 49 degrees receives an impairment value of 9.9 percent. OAR 436-035-0050(4).

Given claimant's left thumb MP joint extension finding, the result is the same whether rating using a contralateral comparison or the standards. *See* OAR 436-035-0011(3); OAR 436-035-0050(5). Because his right thumb MP joint extension finding (-30 degrees) does not meet the threshold (minimum) findings established in these rules, no value is granted. OAR 436-035-0007(13).

[5] Claimant's May 2006 right thumb ligament surgery is not a surgical procedure that receives a value under the rules. OAR 436-035-0007(13)(a); OAR 436-035-0110(5)(a).

[6] Claimant's total award to date is 10 percent (4.8 degrees) scheduled PPD for the loss of use or function of the right thumb.