
In the Matter of the Compensation of
CARMELO L. VILLA, Claimant
Own Motion No. 15-00077OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Douglas J Rock PC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of a November 20, 2015 Own Motion Notice of Closure that did not award additional scheduled permanent partial disability (PPD) for his “post-aggravation rights” new/omitted medical conditions (left knee osteoarthritis, left knee tears of the medial and lateral menisci, and left knee posterolateral loose body).¹ On review, claimant contends that his claim was prematurely closed, or, alternatively, that he is entitled to an additional PPD award. Based on the following reasoning, we affirm the closure notice.

FINDINGS OF FACT

On November 8, 1993, claimant sustained a compensable left knee injury. (Exs. 1, 5). The SAIF Corporation accepted a left medial collateral ligament tear, left anterior cruciate ligament tear, left proximal avulsion posterior cruciate ligament, and left medial meniscus tear. (Ex. 6).

On November 9, 1993, an exploration left knee joint repair was performed. (Ex. A). In February 1994, claimant underwent a left knee diagnostic arthroscopy. (Ex. 7).

On December 9, 1994, as corrected on January 13, 1995, SAIF closed claimant’s injury claim with a 27 percent (40.5 degrees) scheduled PPD award for the loss of use or function of the left leg (knee). (Exs. 8, 9). A May 15, 1995 Order on Reconsideration awarded an additional 5 percent scheduled PPD, for a total award of 32 percent (48 degrees) scheduled PPD for the loss of use or function of the left leg (knee). (Ex. 12).

¹ Claimant’s November 8, 1993 claim was accepted as a disabling claim and was first closed on December 9, 1994, and corrected on January 13, 1995. Thus, claimant’s aggravation rights have expired. Therefore, when he sought claim reopening in April 2015, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On May 14, 2015, the SAIF Corporation voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (left knee osteoarthritis, left knee tears of the medial and lateral menisci, and left knee posterolateral loose body). ORS 656.278(1)(b), (5). On November 20, 2015, SAIF issued its Own Motion Notice of Closure.

On April 23, 2015, Dr. Nicola, claimant's current attending physician, recommended left knee loose body removal surgery. (Exs. 14, 18). On May 14, 2015, SAIF accepted and voluntarily reopened claimant's Own Motion claim for "post-aggravation rights" new/omitted medical conditions (left knee osteoarthritis, left knee tears of the medial and lateral menisci, and left knee posterolateral loose body). (Exs. 16, 17).

On June 29, 2015, Dr. Nicola performed a left knee arthroscopy with a partial medial and lateral meniscectomy. (Ex. 19).

On September 14, 2015, Dr. Nicola found reduced strength in claimant's left knee with flexion. (Ex. 23-1). He believed that claimant's symptoms were mainly coming from arthritic changes. (Ex. 23-2). Dr. Nicola opined that claimant had "reached maximum medical improvement in regards to the meniscus tear industrial accident." (*Id.*) He attributed 50 percent of claimant's impairment "due to pre-existing from arthritic wear and tear" and 50 percent to "the acute industrial accident." (*Id.*)

In an October 2015 report, Dr. Nicola was informed of claimant's accepted conditions and agreed that all of the accepted conditions were medically stationary on September 14, 2015, with no anticipated need for additional medical services. (Ex. 24-1-2). Dr. Nicola stated that there was no loss of motion in the left knee due to the injury. (Ex. 24-2). Dr. Nicola reported 4/5 left knee/leg strength loss in the hamstring, innervated by the sciatic nerve, due to the accepted conditions and work injury. (Ex. 24-3; *see* Ex. 25-1). He indicated that claimant had "no limitation" in the repetitive use of the left knee/leg for the accepted conditions and work injury. (Ex. 24-3). Dr. Nicola also agreed that claimant had a diagnosis of "grade IV chondromalacia, extensive arthritis, or extensive degenerative joint disease" and "secondary strength loss, chronic effusion, varus or valgus deformity" as a result of the accepted conditions. (*Id.*) Dr. Nicola attributed 50 percent of claimant's impairment to the accepted conditions and work injury, and the remaining 50 percent "due to pre-existing conditions." (*Id.*) Finally, Dr. Nicola confirmed that there was no instability in the left knee as a result of the accepted conditions. (Ex. 25).

On November 20, 2015, an Own Motion Notice of Closure did not award any additional scheduled PPD for claimant's "post-aggravation rights" new/omitted medical conditions (left knee osteoarthritis, left knee tears of the medial and lateral menisci, and left knee posterolateral loose body) beyond the previously awarded 32 percent scheduled PPD award. (Ex. 27).

Claimant requested review of the November 20, 2015 Own Motion Notice of Closure, contending that his claim was prematurely closed or, alternatively, that he is entitled to an additional scheduled PPD award.²

CONCLUSIONS OF LAW AND OPINION

Premature Closure

Claimant asserts that his claim was prematurely closed. Under ORS 656.278(6) and OAR 438-012-0055, the propriety of the closure depends on whether claimant's accepted conditions were medically stationary at the time of the November 20, 2015 Own Motion Notice of Closure, considering the conditions at that time. *Sullivan v. Argonaut Ins. Co.*, 73 Or App 694 (1985); *Arvin D. Lal*, 55 Van Natta 816, 823 (2003) (an Own Motion claim closure pertains to those conditions for which the claim was reopened). "Medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17).

Claimant contends that his newly accepted left knee osteoarthritis condition was not medically stationary at the time of the November 2015 Own Motion Notice of Closure. In doing so, he asserts that Dr. Nicola's September 2015 report, in which he stated that claimant's symptoms were mainly coming from arthritic changes, indicates that Dr. Nicola did not appreciate that the osteoarthritis condition was accepted. (*See* Ex. 23-2). We disagree with claimant's arguments.

On September 14, 2015, Dr. Nicola opined that claimant had reached "maximum medical improvement" in regards to his "meniscus tear industrial accident." (Ex. 23-2). In an October 2015 "check the box" report, Dr. Nicola was informed of all of claimant's accepted conditions, including the left knee osteoarthritis, and opined that claimant's accepted conditions were medically stationary as of September 14, 2015. (Ex. 24-1). Dr. Nicola also stated that it was medically probable that claimant's accepted conditions resolved sufficiently such that there was no longer an anticipated need for additional medical treatment or services. (Ex. 24-2).

In light of the foregoing reports, the medical evidence establishes that all of claimant's accepted conditions for which the claim was previously reopened were medically stationary as of September 14, 2015, before the date of the November 20, 2015 Own Motion Notice of Closure. Accordingly, we conclude that the claim closure was not premature.

² No medical arbiter examination was requested.

PPD

The claim was reopened for the processing of “post-aggravation rights” new/omitted medical conditions (left knee osteoarthritis, left knee tears of the medial and lateral menisci, and left knee posterolateral loose body). 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 conditions. The 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.

Here, all three statutory conditions are satisfied. Therefore, the limitation in ORS 656.278(2)(d) applies to claimant’s scheduled PPD. However, before application of the statutory limitation, we redetermine claimant’s scheduled PPD pursuant to the Director’s standards. *See* OAR 436-035-0007(3); *Jeffrey L. Heintz*, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at 3207.

Claimant’s claim was closed by a November 20, 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 on the report of Dr. Nicola, claimant’s attending physician, to rate his permanent impairment. *See Jennifer L. Williams*, 63 Van Natta 638 (2011).

At the outset, we acknowledge that, on September 14, 2015, Dr. Nicola stated that claimant had “lower extremity impairment in regards to the partial medial and lateral meniscectomy, 50% due to pre-existing from arthritic wear and tear and 50% from the acute industrial accident.” (Ex. 23-2). In his October 2015 report, Dr. Nicola subsequently attributed 50 percent of claimant’s impairment “to pre-existing conditions.” (Ex. 24-3).

However, claimant’s claim has been accepted for the preexisting condition; *i.e.*, left knee osteoarthritis. (Ex. 16). Thus, Dr. Nicola did not identify a statutory “preexisting condition” that is not otherwise compensable. *See* OAR 436-035-0007(1)(b)(B)(ii); *see also* OAR 436-035-0013(2)(b)(C); OAR 436-035-0014(1). Additionally, SAIF does not argue that the impairment findings should be apportioned.³ Therefore, we rate claimant’s permanent impairment based on Dr. Nicola’s findings without “apportionment.”

Dr. Nicola found 4/5 strength in claimant’s left knee with flexion, and identified the hamstring muscle and sciatic nerve. (Exs. 24-3, 25-1). A 4/5 strength loss is valued at 20 percent. OAR 436-035-0011(7)(a). The sciatic nerve (hamstring loss only) is valued at 40 percent. OAR 436-035-0230(9). Therefore, claimant’s left leg/knee strength loss is determined by multiplying 20 percent (4/5 strength) by 40 percent (sciatic nerve (hamstring loss only)), which results in an 8 percent impairment value. OAR 436-035-0011(7).

Dr. Nicola found “extensive arthritis” with secondary strength loss in claimant’s left leg/knee. (Ex. 24-3). Therefore, claimant is entitled to a 5 percent impairment value for “extensive arthritis” in the left leg/knee. OAR 436-035-0230(11)(b).

The impairment value for claimant’s June 2015 left knee surgery is undisputed. (Ex. 19). Therefore, he is entitled to a 5 percent impairment value for the partial medial meniscectomy and a 5 percent impairment value for the partial lateral meniscectomy. OAR 436-035-0230(5)(d).⁴

³ The November 2015 Own Motion Notice of Closure, which did not award any additional scheduled PPD benefits, did not “apportion” claimant’s impairment findings. (Ex. 25A).

⁴ Claimant’s 1993 and 1994 left knee surgeries are not surgical procedures that receive values under the rules. OAR 436-035-0007(13)(a); OAR 436-035-0230(5)(d).

There are no other ratable impairment findings. Therefore, we combine claimant's impairment values as follows: 8 percent (strength loss) combined with 5 percent (arthritis) equals 13 percent; 13 percent combined with 5 percent (partial medial meniscectomy) equals 17 percent; 17 percent combined with 5 percent (partial lateral meniscectomy) results in 21 percent (31.5 degrees) scheduled PPD for the loss of use or function of the left leg (knee). OAR 436-035-0011(6).

As discussed above, claimant has received a prior award of 32 percent scheduled PPD for the left leg (knee). Because the limitation in ORS 656.278(2)(d) applies, claimant is entitled to additional PPD "only to the extent that the [PPD] rating exceeds the [PPD] rated by the prior award or awards." ORS 656.278(2)(d). In this instance, claimant's prior 32 percent (48 degrees) scheduled PPD award is greater than his current 21 percent (31.5 degrees) scheduled PPD. Consequently, the limitation in ORS 656.278(2)(d) precludes an additional scheduled PPD award. *Myrtle L. Alexander*, 57 Van Natta 2617, *recons*, 57 Van Natta 2970 (2005), *recons*, 58 Van Natta 82, 87-88 (2006).⁵

Accordingly, the November 20, 2015 Own Motion Notice of Closure is affirmed.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 28, 2016

⁵ Claimant's total award to date is 32 percent (48 degrees) scheduled PPD for the loss of use or function of the left leg (knee). See *Dina A. Ganieany*, 62 Van Natta 2616, *recons*, 62 Van Natta 3043, 3045 (2010) (no additional PPD awarded after the application of ORS 656.278(2)(d) because the prior PPD award exceeded the current PPD rating; however, because the claimant's prior PPD award was final, it was not reduced and remained the total award to date).