In the Matter of the Compensation of
DANIEL R. WHITMORE, Claimant
Own Motion No. 15-00063OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Guinn & Dalton, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of an August 3, 2015 Own Motion Notice of Closure that awarded an additional 12 percent (18 degrees) scheduled permanent partial disability (PPD) for his "post-aggravation rights" new/omitted medical condition (left knee lateral compartment arthritis).[1] Based on the following reasoning, we modify the closure notice.

FINDINGS OF FACT

On December 1, 2003, claimant sustained a compensable left knee injury, for which the SAIF Corporation accepted a left lateral meniscus tear. (Exs. 10, 15).

On December 9, 2003, Dr. Ballard performed a left knee complete lateral meniscectomy. (Ex. 13).

A February 13, 2004 Notice of Closure awarded 10 percent (15 degrees) scheduled PPD for the loss of use or function of the left leg (knee). (Ex. 16).

In October 2014, Dr. Ballard diagnosed left knee arthritis and recommended a total knee arthroplasty (TKA). (Ex. 37).

On November 14, 2014, claimant requested acceptance of left knee arthritis. (Ex. 39). On November 21, 2014, SAIF accepted and voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition (left knee lateral compartment arthritis). (Exs. 41, 42).

[1] Claimant's December 1, 2003 claim was accepted as a disabling claim and was first closed on February 13, 2004. Thus, claimant's aggravation rights expired on February 13, 2009. Therefore, when claimant sought claim reopening in November 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On November 21, 2014, the SAIF Corporation voluntarily reopened claimant's Own Motion claim for a "post-aggravation rights" new/omitted medical condition (left knee lateral compartment arthritis). ORS 656.278(1)(b), (5). On August 3, 2015, SAIF issued its Notice of Closure.

On February 5, 2015, Dr. Ballard performed the left TKA. (Ex. 43).

On July 17, 2015, Dr. Ballard declared claimant's accepted conditions to be medically stationary. (Exs. 85-1, 86-1). He found the following left/right knee ranges of motion (ROM): 125/130 degrees flexion; and 0/0 degrees extension. (Exs. 85-2, 86-1). Dr. Ballard noted that claimant had no history of injury or disease to the contralateral right knee joint. (Ex. 85-2). He opined that claimant had no loss of strength, instability, or significant limitation in the repetitive use of his left leg/knee. (Ex. 85-3). Dr. Ballard attributed the impairment findings to claimant's accepted conditions. (*Id.*)

An August 3, 2015 Own Motion Notice of Closure awarded an additional 12 percent (18 degrees), for a total award of 22 percent (33 degrees) scheduled PPD for the loss of use or function of the left leg (knee). (Ex. 88). Claimant requested review, seeking an additional permanent disability award and the appointment of a medical arbiter.

On November 25, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Daniel R. Whitmore*, 67 Van Natta 2087 (2015).

On February 10, 2016, Dr. Borman, the medical arbiter, found the following left/right knee ROM: 110/135 degrees flexion; and 20/10 degrees extension.[2] He opined that claimant had no loss of strength, instability, or significant limitation in the repetitive use of the left leg/knee. Dr. Borman attributed claimant's left knee ROM and TKA surgery to the newly accepted left knee lateral compartment arthritis.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of a "post-aggravation rights" new/omitted medical condition (left knee lateral compartment arthritis). 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. The PPD limitation set forth in ORS 656.278(2)(d) applies where there is

[2] Although Dr. Borman reported -20/-10 degrees extension in claimant's left/right knees, he explained that the knees were "both short of full extension." Thus, we interpret his findings to mean that claimant had 20/10 degrees "retained motion." OAR 436-035-0011(2).

(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.

Here, as discussed below, all three factors 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); *Nielsen*, 55 Van Natta at 3207.

Claimant's claim was closed by an August 3, 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, SAIF argues that the impairment findings from Dr. Ballard, claimant's attending physician, are more accurate and should be used to rate claimant's permanent disability. Specifically, it asserts that Dr. Ballard's opinion of impairment are more accurate because of his 12-year "treating" familiarity with claimant's left knee conditions and treatment, and because his impairment findings, with the exception of the ROM findings, were similar to those reported by Dr. Borman, who examined claimant on one occasion. SAIF also contends that Dr. Ballard's ROM findings were consistent with claimant's physical therapy goals.

At the outset, we do not expressly reject Dr. Ballard's opinion of impairment. However, we disagree that a preponderance of the evidence demonstrates that Dr. Ballard's impairment findings are more accurate and should be used. We reason as follows.

First, Dr. Borman determined that claimant's impairment findings, which included the ROM measurements, were due to the newly accepted condition. The fact that Dr. Ballard's ROM findings differ from those of Dr. Borman's does not make Dr. Ballard's findings more accurate. *See Daniel J. Bergmann*, 67 Van Natta 338, 343 (2015).

Second, even if Dr. Ballard's full left knee extension impairment finding is consistent with claimant's successful physical therapy goals, Dr. Ballard did not concur with any physical therapy ROM findings. (*See* Ex. 84). Instead, he provided his own ROM findings. (Exs. 85-2, 86-1).

Finally, in attributing claimant's impairment findings to the accepted conditions, Dr. Borman explained that his "current left knee disability manifest[s] as loss of left knee [ROM], and his total left knee replacement arthroplasty condition." Furthermore, in reaching his conclusion that the impairment findings were due to the newly accepted condition, Dr. Borman specifically considered claimant's current left knee impairment as compared to the left knee impairment "assigned at the time of claim closure following healing from his left knee arthroscopic surgery[.]" Moreover, Dr. Borman performed a thorough and complete examination, and limited his examination to the newly accepted left knee lateral compartment arthritis condition. We find no ambiguity in Dr. Borman's medical arbiter findings. *Hicks*, 196 Or App at 152; *Khrul*, 194 Or App at 130.

Under these circumstances, a preponderance of the medical evidence does not demonstrate that the attending physician's findings are more accurate than the medical arbiter's findings. Accordingly, we rely on Dr. Borman's medical arbiter

findings to rate claimant's permanent impairment. OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45; *Hicks*, 196 Or App at 152; *Bergmann*, 67 Van Natta at 344.

Dr. Borman found the following left/right knee ROM: 110/135 degrees flexion; and 20/10 degrees extension. Because claimant has no history of injury or disease in the contralateral joint, a comparison with the right knee is appropriate. OAR 436-035-0011(3). Claimant receives the following left knee ROM findings: 10.2 percent for flexion; and 1.6 percent for extension.[3] OAR 436-035-0220(1), (2). These values are added for a total left knee ROM impairment value of 11.8 percent, which is rounded to 12 percent. OAR 436-035-0011(2), (4).

Claimant receives a surgical impairment value of 20 percent for the February 2015 left TKA. OAR 436-035-0230(5)(d). He does not receive a separate value for the previous December 2003 lateral meniscectomy in addition to the 20 percent impairment value for the left TKA. *See* OAR 436-035-0230(5)(e); *Daniel J. Campbell*, 65 Van Natta 427, 430 (2013) (no separate value awarded for previous partial meniscectomy in addition to the 20 percent for a subsequent total knee arthroplasty).

There are no other ratable permanent impairment findings. Therefore, we combine claimant's left leg (knee) impairment values as follows: 20 percent (surgery) combined with 12 (ROM) results in a total of 30 percent (45 degrees) scheduled PPD for the loss of use or function of the left leg (knee). OAR 436-035-0011(6).

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional scheduled PPD only to the extent that the PPD rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van

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[3] We compare claimant's left/right flexion findings as follows: 110/135 = X/150; X = 122.22 degrees, which rounds to 122 degrees; 122 degrees equals 10.2 percent impairment. OAR 436-035-0011(3), (4); OAR 436-035-0220(1).

The value for claimant's left knee extension finding is calculated by first finding the complement of the extension values, then using the same left/right comparison method as for flexion, and finally reverting the compared "complement" finding back to extension. *See* OAR 436-035-0011(3). The complement for 20 degrees left knee extension is 130 degrees (150 – 20), and the complement for 10 degrees right knee extension is 140 degrees (150 – 10). We compare the complement measurements as follows: 130/140 = X/150; X = 139.28 degrees. This is reverted back to 10.72 degrees extension (150 – 139.28), which is rounded to 11 degrees. 11 degrees extension equals 1.6 percent impairment. OAR 436-035-0011(3), (4); OAR 436-035-0220(2).

Natta at 3208. In this instance, claimant's prior 10 percent (15 degrees) scheduled PPD award is less than his current 30 percent (45 degrees) scheduled PPD, which leaves a remainder of 20 percent (30 degrees). The August 2015 Own Motion Notice of Closure awarded an additional 12 percent (18 degrees) scheduled PPD. Accordingly, we modify the Notice of Closure to award an additional 8 percent (12 degrees) scheduled PPD for loss of use or function of the left leg (knee).[4]

Because our decision results in increased scheduled PPD, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased scheduled PPD compensation created by this order (the 8 percent (12 degrees) scheduled PPD award granted by this order), not to exceed $4,600, payable directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on May 16, 2016

[4] Claimant's total award to date is 30 percent (45 degrees) scheduled PPD for the loss of use or function of the left leg (knee).