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In the Matter of the Compensation of  
**JIMMIE L. WILSON, Claimant**  
WCB Case No. 15-03117  
ORDER ON REVIEW  
Alvey Law Group, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that affirmed a Workers' Compensation Division's (WCD's) order that declined to reclassify claimant's nondisabling left shoulder tendinitis to disabling. On review, the issue is classification.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ found that WCD properly declined to reclassify the claim to disabling. In doing so, the ALJ concluded that there was no persuasive medical evidence establishing a reasonable expectation that claimant was entitled to a permanent disability award.

On review, claimant challenges the ALJ's classification decision, asserting that there was a reasonable expectation of permanent disability due to his March 18, 2015 subacromial decompression surgery. *See* OAR 436-035-0330(13). For the following reasons, we affirm.

ORS 656.277(1)(a) provides that a worker may request reclassification of an "accepted" nondisabling injury that the worker believes was or has become disabling. A "disabling compensable injury" entitles the worker to compensation for disability or death. ORS 656.005(7)(c). An injury is not disabling if no temporary disability benefits are due and payable, unless there is a reasonable expectation that permanent disability will result from the injury.<sup>1</sup> *Id.*

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<sup>1</sup> OAR 436-060-0018 provides, in relevant part:

"(2) The insurer must reclassify a nondisabling claim to disabling within 14 days of receiving information that any condition already accepted meets the disabling criteria in this rule. A claim is disabling if any of the following criteria apply:

- (a) Temporary disability is due and payable; or
- (b) The worker is medically stationary within one year of the date of injury and the worker will be entitled to an award of permanent disability; or

Here, claimant does not contend that temporary disability benefits are due and payable. Therefore, the claim classification issue depends on whether he has a reasonable expectation of permanent disability.

Claimant has the burden of proving that his claim has been misclassified. *SAIF v. Schiller*, 151 Or App 58, 63 (1997), *rev den*, 326 Or 389 (1998) (the claimant continued to have the burden on Board review to prove that the claim was disabling); *Heather J. Search*, 60 Van Natta 972, 973-74 (2008). In order to reclassify a claim from nondisabling to disabling, ORS 656.005(7)(c) requires proof of a current condition that could lead to a ratable impairment under the impairment standards, not proof of a condition presently ratable under the standards. *Schiller*, 151 Or App at 63. Accordingly, ORS 656.005(7)(c) does not require evidence of a specific and actual permanent impairment as defined by statute or rule. *Id.* at 62. Finally, our evaluation regarding the expectation of permanent disability must be based on medical evidence in the record, and those reasonable inferences that can be drawn from the evidence. *Lawrence V. Smith*, 54 Van Natta 1611 (2002).

Here, on January 9, 2015, claimant's attending physician, Dr. Seymour, concluded that claimant's accepted left shoulder tendonitis condition (which he diagnosed as related to the October 2013 work injury) had resolved by his January 28, 2014 examination. (Ex. 70-2). He explained that, given the lack of objective findings concerning his January 2014 examination, and the subsequent presence of objective findings supporting the diagnosis of left shoulder tendonitis in May 2014, claimant's "current left shoulder condition" was distinct/different from the left shoulder tendonitis condition he declared medically stationary in January 2014. (*Id.*) Ultimately, he concluded that claimant's current left shoulder condition developed between January 28, 2014 and May 5, 2014.<sup>2</sup>

In addition, Dr. Green, a neurologist, and Dr. Fuller, an orthopedic surgeon, performed an examination at the employer's request. (Ex. 60). They agreed with Dr. Seymour's opinion that the medical evidence supported a conclusion that

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- (c) The worker is not medically stationary, but there is a reasonable expectation that the worker will be entitled to an award of permanent disability when the worker does become medically stationary."

<sup>2</sup> We acknowledge Dr. Seymour's statement that the effects of cortisone injections can wear off over a period of two to three months in which time symptoms "can then recur if the underlying pathology remains which was not changed." Nonetheless, notwithstanding this comment, Dr. Seymour did not alter his express opinion that claimant's accepted left shoulder tendinitis condition was medically stationary in January 2014, and that claimant's current left shoulder condition was distinct/different from the accepted tendinitis condition. (Exs. 70-2, 74-1).

claimant's accepted left shoulder episode (diagnosed as tendinitis) had resolved in late January 2014. (Ex. 60-12). While they disagreed with Dr. Seymour that claimant was suffering from any occupationally-related condition, they opined that, even if claimant experienced recurrent tendinitis, it would represent a new episode of tendinitis distinct from his October 2013 work activities, which was considered medically stationary in January 2014. (Ex. 60-12, -17).

Finally, Dr. Nasson performed a left shoulder arthroscopic subacromial decompression in March 2015. (Ex. 83). Claimant's post-operative diagnosis was left shoulder subacromial impingement. (*Id.*) He did not offer an opinion regarding the cause of claimant's current left shoulder condition or the need for treatment. (Exs. 73, 76, 83).

Thus, the record does not support a determination that there is a reasonable expectation of permanent impairment related to the "accepted" October 2013 left shoulder tendinitis condition.<sup>3</sup> *See* ORS 656.277(1)(a). Even though Dr. Seymour subsequently diagnosed a recurrent left shoulder tendonitis, the record does not persuasively establish that the current condition is the same as the accepted October 2013 left shoulder injury. To the contrary, the record reflects a conclusion that the conditions are distinct/different. *See SAIF v. Calder*, 157 Or App 224, 228 (1998) (Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge; rather, the findings must be based on medical evidence).

In conclusion, for the reasons expressed above and those contained in the ALJ's order, we find the medical evidence insufficient to establish that there is a reasonable expectation that permanent disability will result from the accepted left shoulder tendonitis condition. Consequently, claimant has not proven that his claim should be reclassified as disabling. *See* ORS 656.005(7)(c); ORS 656.266(1). Accordingly, we affirm the ALJ's order.

### ORDER

The ALJ's order dated January 27, 2016 is affirmed.

Entered at Salem, Oregon on August 16, 2016

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<sup>3</sup> Claimant further contends that he has a reasonable expectation of permanent impairment because the MCO determined that his subacromial decompression was "medically necessary." (Ex. 70). However, that determination specifically indicated that it was not a determination of compensability. (*Id.*) Moreover, under ORS 656.262(10), "[m]erely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability[.]"