In the Matter of the Compensation
RONALD G. KRAFT, Claimant
WCB Case No. 01-09126
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
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Reviewing Panel: Members Lowell and Biehl.

The insurer requests review of that portion of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) changed claimant's medically stationary date to July 16, 2001; and (2) awarded additional temporary disability benefits. Claimant cross-requests review of those portions of the ALJ's order that: (1) awarded temporary disability benefits through July 16, 2001; and (2) declined to assess a penalty for the insurer's allegedly unreasonable delay in the payment of temporary and permanent disability benefits. On review, the issues are medically stationary date, temporary disability and penalties. We modify in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Medically Stationary Date

Claimant compensably injured his low back in August 1995 and the insurer accepted an L4-5 herniated nucleus pulposus. (Ex. 5). In September 1995, a right L4-5 laminotomy and microdiscectomy was performed. (Ex. 7). A May 8, 1996 Determination Order awarded 16 percent unscheduled permanent disability. (Ex. 10).

Claimant's low back pain continued and he developed pain radiating down the right thigh into the heel. (Ex. 11). In May 1999, Dr. Randolph referred claimant to Dr. Gifford, who apparently referred him to Dr. O'Neill. (Exs. 13, 14, 15). Dr. O'Neill recommended a "redo" microdiscectomy and fusion, and in August 1999, he signed an aggravation claim form. (Exs. 15, 16). On August 13,

1999, he performed a right "L5-6"[1] "redo" microdiscectomy with fusion. (Ex. 17). The insurer accepted an L4-5 and L5-S1 herniated nucleus pulposus. (Ex. 21).

In September 2000, claimant was found eligible for vocational assistance. (Ex. 30). A March 19, 2001 Notice of Closure awarded 28 percent unscheduled permanent disability for claimant's low back condition and 7 percent scheduled permanent disability for loss of use or function of the right leg. (Ex. 35). Claimant was found to be medically stationary on March 7, 2000. (*Id.*)

Claimant requested reconsideration and a June 1, 2001 Order on Reconsideration found that, because the medically stationary status was unclear at the time of closure, the claim was prematurely closed. (Ex. 38).

In July 2001, the insurer issued another updated notice of acceptance at closure, referring to the same L4-5 and L5-S1 accepted conditions. (Ex. 41). An August 2, 2001 Notice of Closure found that claimant was medically stationary on March 7, 2000, and it awarded the same permanent disability awards as in March 2001. (Ex. 42). Claimant requested reconsideration and Dr. Steele performed a medical arbiter examination. (Ex. 46). A November 14, 2001 Order on Reconsideration found that claimant's attending physician at closure was Dr. O'Neill, and it concluded that claimant was medically stationary on March 7, 2000. (Ex. 47-1, -2).

Claimant requested a hearing. The ALJ found that Dr. Gifford was claimant's attending physician at the time of claim closure and that claimant had proved he was not medically stationary on March 7, 2000. The ALJ reviewed the medical records and concluded that claimant was medically stationary by July 16, 2001.

On review, the insurer argues that the ALJ erred in finding that Dr. Gifford was claimant's attending physician at the time of claim closure and by changing the medically stationary date to July 16, 2001. The insurer contends that, even if Dr. Gifford was the attending physician, his opinion establishes that claimant was medically stationary on March 7, 2000. In contrast, claimant argues that he was medically stationary on August 14, 2001, based on Dr. Gifford's reports.

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[1] As the ALJ noted, there is confusion about what disc level required surgery in August 1999. In October 2001, Dr. Steele, a medical arbiter, reported that both of claimant's surgeries were at the same L4-5 level. (Ex. 46-2, -3).

"Medically stationary" means that no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17). We agree with the ALJ that claimant has the burden of proving that he was not medically stationary on March 7, 2000. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000) (although the worker has the burden of proof with respect to facts that go to the nature and extent of his or her injury, the party challenging the Appellate Review Unit's conclusion has the burden of establishing error in the prior resolution).

The issue of claimant's medically stationary status is a medical question to be decided based on competent medical evidence. *Harmon v. SAIF*, 54 Or App 121, 125 (1981); *Austin v. SAIF*, 48 Or App 7, 12 (1980). Although the parties dispute whether Dr. O'Neill or Dr. Gifford was claimant's attending physician at closure, we need not address that question for the following reasons.

As discussed earlier, Dr. O'Neill performed additional back surgery in August 1999. (Ex. 17). Although the insurer initially closed the claim in March 2001 (Ex. 35), that closure was rescinded because the medically stationary status was unclear at the time of closure. (Ex. 38). The insurer obtained additional medical reports and issued an August 7, 2001 Notice of Closure that again found claimant medically stationary on March 7, 2000. (Ex. 42). An August 2, 2001 Order on Reconsideration affirmed the medically stationary date and awarded permanent disability. (Ex. 47).

On March 7, 2000, Dr. O'Neill examined claimant and reported that he was unable to bend, squat or do repetitive twisting motions, and was unable to lift more than 10 pounds. (Ex. 26). He felt that claimant should work in a "light, sedentary" capacity. (*Id.*)

On January 30 and 31, 2001, Mr. Andes, physical therapist, performed a work capacity evaluation. (Ex. 31). He found that claimant could occasionally bend (stoop), kneel, squat (crouch), crawl, climb and twist, and could occasionally lift and carry up to 25 pounds. (Ex. 31-3). He concluded that claimant was capable of "light" work. (Ex. 31-1). Dr. O'Neill concurred with the work capacity evaluation. (Ex. 33). Although Dr. Gifford initially did not agree with that evaluation (Ex. 32A), he subsequently received a letter from the insurer explaining the terminology and Dr. Gifford then concurred with the January 2001 evaluation. (Ex. 36).

After the March 2001 closure was rescinded, the insurer wrote to Drs. O'Neill and Gifford. Both physicians agreed with the following:

> "[T]he accepted L4-5 & L5-S1 herniated nucleus polposis [sic] remain medically stationary and there has been no change since 3-7-00 and the impairment findings in the PCE may be used for rating at closure." (Exs. 39, 40).

Thus, both Drs. Gifford and O'Neill agreed that the impairment findings in the January 2001 evaluation by Mr. Andes could be used for rating at closure. (*Id.*) Furthermore, Dr. Steele, who performed a medical arbiter examination in October 2001, agreed that the January 2001 work capacity evaluation reflected claimant's true residual functional capacity. (Ex. 46-7).

Despite the fact that Drs. Gifford and O'Neill agreed that there had been no change since March 7, 2000, that statement is fundamentally at odds with their conclusion that the findings in the January 2001 work capacity evaluation should be used to rate impairment. As noted above, Dr. O'Neill reported on March 7, 2000 that claimant was unable to bend, squat or do repetitive twisting motions, was unable to lift more than 10 pounds, and he felt claimant was in a "light, sedentary" capacity. (Ex. 26).

On the other hand, the January 2001 work capacity evaluation found that claimant could occasionally bend (stoop), kneel, squat (crouch), crawl, climb and twist, could occasionally lift and carry up to 25 pounds, and he was capable of "light" work. (Ex. 31). A comparison of those two reports suggests that claimant's low back condition materially improved between March 7, 2000 and late January 2001. Thus, the findings in the January 2001 work capacity evaluation are inconsistent with Drs. O'Neill and Gifford's agreement that "there has been no change since 3-7-00[.]" (Exs. 39, 40).

We acknowledge the contradictory nature of the medical opinions in this case. Nevertheless, we find that claimant has sustained his burden of proving that he was not medically stationary on March 7, 2000. When read as a whole, the opinions of Drs. O'Neill and Gifford, as well as the opinion of the medical arbiter, Dr. Steele, support the conclusion that claimant was medically stationary on January 31, 2001, at the time of the work capacity evaluation. (Exs. 31, 33, 36, 39, 40, 46). We therefore conclude that claimant was medically stationary as of January 31, 2001.

Temporary Disability

The November 14, 2001 Order on Reconsideration affirmed the temporary disability award in the August 2, 2001 Notice of Closure, which had awarded temporary total disability from August 13, 1999 through January 20, 2000, and temporary partial disability from January 21, 2000 through March 7, 2000. (Exs. 42, 47). The ALJ awarded additional temporary disability benefits through July 16, 2001.

Here, we have determined that claimant was medically stationary as of January 31, 2001. Under these circumstances, we conclude that claimant is entitled to additional temporary total disability benefits from March 7, 2000 through January 31, 2001.

Penalties

At hearing, claimant sought penalties for the insurer's allegedly unreasonable delay in the payment of temporary and permanent disability benefits. On review, claimant argues that the insurer's unreasonable claims processing has delayed his receipt of unscheduled permanent disability benefits.

In light of the medical reports indicating that claimant was medically stationary as of March 7, 2000, the insurer had a reasonable basis for its claim processing actions. We affirm that portion of the ALJ's order that declined to assess a penalty.

ORDER

The ALJ's order dated May 15, 2002 is modified in part and affirmed in part. The ALJ's order is modified to find that claimant was medically stationary on January 31, 2001, and to award additional temporary total disability from March 7, 2000 through January 31, 2001. The ALJ's "out-of-compensation" attorney fee award is modified accordingly. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on January 16, 2003