

In the Matter of the Compensation of
RAY L. STRAWS, Claimant

WCB Case No. 08-04873

ORDER ON REVIEW

Ransom Gilbertson et al, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that affirmed an Order on Reconsideration that awarded 21 percent whole person impairment for claimant's right knee condition. On review, the issue is extent of permanent disability (impairment).

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

On December 15, 2007, claimant suffered a compensable rupture of the infrapatellar ligament of his right knee. (Ex. 6). Dr. Carpenter, claimant's attending physician, surgically repaired the ligament. (Ex. 2).

On March 19, 2008, Dr. Carpenter performed a closing examination. He reported claimant's bilateral knee ranges of motion (ROM) and declared claimant's right knee condition medically stationary "with permanent impairment related to the potential for re-rupture of this patellar tendon." (Ex. 8).

An April 15, 2008 Notice of Closure awarded no permanent disability and listed claimant's "medically stationary" date as March 19, 2008. (Ex. 9). Claimant requested reconsideration, alleging premature closure and disagreeing with the "medically stationary" date and the impairment findings used to rate permanent disability. He also requested a medical arbiter examination. (Exs. 11, 12).

On June 17, 2008, Dr. Weeks performed a medical arbiter examination. His impairment findings included decreased right knee ROM and strength, as well as a "chronic condition" limitation. Dr. Weeks considered the findings to be valid and due solely to the accepted condition. Dr. Weeks also stated:

"In my opinion, [claimant's] condition is not stationary and his claim should remain open. In addition, based on [claimant's] injury, type of repair, and [claimant's] condition at the present time, I am anticipating that he will require reconstructive surgery

to improve the function of the right knee related to this injury. The reconstruction and attempt at salvage related to this injury will, in my experience, be difficult. Dr. Carpenter has related to [claimant] that he has nothing further that he can do for him and consequently, I would anticipate that [claimant] will seek care for surgical intervention to improve his current situation.” (Ex. 13-3).

On July 8, 2008, the Appellate Review Unit (ARU) issued an Order on Reconsideration affirming the “medically stationary” date and finding that claimant’s claim was not prematurely closed. (Ex. 14-2). The ARU noted that Dr. Weeks’s opinion that claimant’s condition was not “medically stationary” was “based on the assumption that further surgical intervention will provide further material improvement in [claimant’s] condition.” (Ex. 14-3). Consequently, the ARU relied on Dr. Carpenter’s opinion that claimant’s condition was “medically stationary.” (*Id.*) Based on Dr. Weeks’s medical arbiter report, the ARU awarded 21 percent whole person impairment, which was based on decreased ROM, strength loss, and a “chronic condition” limitation in his right knee. (Ex. 14-2-4).

SAIF requested a hearing, arguing that either the Notice of Closure should be set aside because claimant’s condition was not “medically stationary” at claim closure, or, alternatively, that the medical arbiter’s impairment findings should not be used to rate permanent disability because claimant’s condition worsened and was not “medically stationary” at the time of the examination.

In affirming the Order on Reconsideration, the ALJ found that claimant’s right knee condition was “medically stationary” at the time of claim closure. The ALJ reasoned that Dr. Weeks’s opinion that claimant’s condition was “not stationary” was contingent on whether further surgical intervention was recommended and/or elected, and that his opinion implied that such surgical intervention would not necessarily improve his condition. The ALJ further found no preponderance of medical evidence demonstrating that Dr. Carpenter’s different impairment findings were more accurate and should be used.

On review, SAIF acknowledges that claimant’s right knee condition was “medically stationary” at the time of claim closure and, therefore, the claim was not prematurely closed. However, SAIF argues that claimant’s compensable condition was no longer stationary at the time of Dr. Weeks’s medical arbiter examination and, therefore, his impairment findings were not permanent and cannot be considered. For the following reasons, we disagree.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, SAIF must show that the Order on Reconsideration's permanent disability award was in error. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000); *Albert T. Jones*, 60 Van Natta 1158, 1159 (2008) (although the claimant had the burden of proving the nature and extent of his disability under ORS 656.266(1), the carrier had the burden of establishing error in the reconsideration process because it requested a hearing regarding the reconsideration order).

Furthermore, evaluation of a worker's disability is as of the date of the reconsideration order. ORS 656.283(7). On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5).¹ Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's impairment findings when the arbiter unambiguously attributes the claimant's permanent impairment to the compensable condition. *Hicks v. SAIF*, 194 Or App 655, 659, *modified on recons*, 196 Or App 146 (2004); *Margarito N. Carbajal*, 60 Van Natta 2681 (2008).

At the June 17, 2008 medical arbiter examination, Dr. Weeks reviewed claimant's medical records and had a complete and accurate history of his right knee condition. (Ex. 13-1-2). The examination revealed decreased ROM and strength in claimant's right knee. (Ex. 13-3). Dr. Weeks also opined that claimant was significantly limited in his ability to repetitively use his right knee due to the accepted condition. (*Id.*) He reported that claimant had no instability, varus or valgus deformity, or loss of sensation. (*Id.*) Dr. Weeks concluded that the findings were valid and due solely to the accepted condition. (*Id.*)

SAIF argues that claimant's right knee condition was not "medically stationary" at the time of the medical arbiter examination because Dr. Weeks stated that the condition was "not stationary," and anticipated that claimant would require reconstructive surgery to improve the function of his right knee. Therefore, according to SAIF, Dr. Weeks's impairment findings were not permanent. We disagree.

¹ Because the Notice of Closure issued on April 15, 2008, the applicable standards are found in WCD Admin. Order 07-060 (eff. January 1, 2008). OAR 436-035-0003(1).

It is well established that the term “medically stationary” does not mean that there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527, 531 (1984); *Jesus M. Zarzosa*, 56 Van Natta 1683, 1684 (2004), *aff’d without opinion*, 201 Or App 216 (2005) (recommendation for pain treatment did not, by itself, support a reasonable expectation of material improvement in the claimant’s compensable condition). Rather, under the statutory definition of “medically stationary,” the issue is whether claimant’s condition, in the opinion of the medical experts, has reached a point where it will not materially improve with further treatment or the passage of time. ORS 656.005(17); *See Noel G. Brown*, 61 Van Natta 1698, 1701-02 (2009).

In *James C. Risener*, 50 Van Natta 181 (1998), the employer closed the claimant’s low back claim based on the attending physician’s “medically stationary” opinion. *Id.* at 182. Thereafter, a treating physician reported that the claimant’s low back condition was not “medically stationary,” requested authorization for surgery, and submitted an aggravation form. *Id.* at 183. Because the medical arbiter stated that the claimant’s condition was not stationary and that he needed surgery, we found that the arbiter’s impairment findings were not permanent. *Id.* at 184. Moreover, we found that the claimant’s condition “pathologically worsened.” *Id.* Consequently, we declined to rely on the medical arbiter’s impairment findings to rate permanent disability. *Id.* Instead, we relied on the attending physician’s findings, which were rendered when the claimant’s condition was “medically stationary.” *Id.*

In *Todd M. Resseguie*, 56 Van Natta 3489 (2004), a medical arbiter opined that the claimant’s condition was not “medically stationary” and recommended a surgery specialist examination, which would likely impact the claimant’s functional outcome and impairment deficit. *Id.* at 3489-90. In doing so, the arbiter noted that, “If no further intervention treatment is recommended and/or elected, this report can suffice as an impairment rating for disability determination.” *Id.* at 3490. We relied on the arbiter’s impairment findings, reasoning that the arbiter’s opinion was contingent on further treatment being recommended and/or elected and the record did not establish the occurrence of such treatment. *Id.* at 3492-93.

Here, unlike the “post-closure” medical opinions in *Risener*, the record does not indicate that claimant’s condition had pathologically worsened after claim closure. Moreover, unlike the treating physician in *Risener*, Dr. Carpenter did not recommend further surgical intervention or state that claimant’s condition was no longer “medically stationary.”

We acknowledge that, unlike the medical arbiter in *Resseguie*, Dr. Weeks did not expressly state that “but for” the anticipated further surgery, claimant’s permanent impairment could be rated per his findings. Nonetheless, based on Dr. Weeks’s references to “anticipating” that claimant would require and seek further surgery, the record supports a conclusion that the prospect of future surgical intervention to improve claimant’s right knee function was the premise of Dr. Weeks’s “not stationary” comment.

Under these circumstances, we interpret Dr. Weeks’s opinion to mean that improvement in claimant’s condition was contingent on the potential that surgery would be required and/or elected. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency). Therefore, Dr. Weeks’s “not stationary” opinion does not establish that claimant’s compensable right knee condition was not “medically stationary.” *See Brown*, 61 Van Natta at 1701 (“magic words” are not necessary to determine a worker’s medically stationary status); *see also John H. Dixon*, 56 Van Natta 1171, 1173 (2004).

Citing *Guadalupe B. Rosas*, 60 Van Natta 2297 (2008), *Jindriska Stavenikova*, 58 Van Natta 2444 (2006), and *Susan D. Moorehead*, 55 Van Natta 3545 (2003), SAIF further argues that Dr. Weeks’s impairment findings were not permanent. OAR 436-035-0007(1).² In *Rosas*, we held that the claimant was not entitled to a permanent disability award because his attending physician’s opinion that he had a “chronic condition” limitation in his low back was issued two months before the record established that his compensable condition was “medically stationary.” 60 Van Natta at 2300. In *Stavenikova*, we found that the medical arbiter’s impairment findings were not permanent because, in response to the ARU’s question related to whether the impairment findings were permanent, the medical arbiter checked the “no” box and added a comment stating “Undetermined.” 58 Van Natta at 2446-48. In *Moorehead*, we found that the claimant’s compensable condition was not “medically stationary” as a matter of law due to the insurer’s administrative claim closure and, therefore, concluded that the claimant’s impairment findings were not permanent on that basis. 55 Van Natta at 3547.

² OAR 436-035-0007(1) provides that a worker is entitled to a value under the rules “only for those findings of impairment that are permanent[.]”

Here, claimant disagreed with the impairment findings used to rate his permanent disability and Dr. Weeks was appointed to perform a medical arbiter examination. (Exs. 11, 12, 13-1). Therefore, Dr. Weeks examined claimant for the specific purpose of determining impairment findings used to rate permanent disability. ORS 656.268(7)(a).

As previously noted, there is no dispute that claimant's right knee condition was "medically stationary" at the time of claim closure. Likewise, as reasoned above, claimant's condition was "medically stationary" at the time of Dr. Weeks's medical arbiter examination. ORS 656.005(17). Consequently, *Rosas* and *Moorehead* are inapposite. Moreover, unlike the physician's opinion in *Stavenikova*, Dr. Weeks did not state that the impairment findings were *not* permanent. Instead, Dr. Weeks measured claimant's impairment and reported that "the findings are valid" and "due solely to the accepted condition and no other unrelated condition." (Ex. 13-3).

Under these circumstances, we find that Dr. Weeks's unequivocal impairment findings were permanent and should be used to rate permanent disability. OAR 436-035-0007(5); *see Hicks*, 196 Or App at 151 (when the medical arbiter's opinion is ambiguous regarding whether the impairment is permanent or caused by the compensable condition, we must interpret the opinion to determine whether it finds permanent impairment caused by the compensable condition); *see also Mark G. Hernandez*, 57 Van Natta 1253, 1254 (2005) (finding that a medical arbiter's impairment findings were permanent because he reported that the findings were valid and related to the accepted condition, and because he did not conclude that the claimant's *condition* would improve with further treatment). Accordingly, SAIF has not met its burden of establishing error in the reconsideration process. *Callow*, 171 Or App at 183-84. Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$3,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

ORDER

The ALJ's order dated March 20, 2009 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, payable by SAIF.

Entered at Salem, Oregon on September 29, 2009