
In the Matter of the Compensation of
NANCY J. FERGUSON, Claimant
Own Motion No. 10-0190M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Swanson Thomas & Coon, Claimant Attorneys
Law Office of Thomas A Andersen, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of the insurer's July 30, 2010 and March 31, 2011 Own Motion Notices of Closure that awarded 17 percent (54.4 degrees) additional unscheduled permanent partial disability (PPD) for "post-aggravation rights" new/omitted medical conditions ("failed back syndrome, chronic low back pain, right leg radiculopathy, right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above").^{1 2} Claimant requests an additional award of permanent disability up to and including permanent total disability (PTD). We grant PTD.

FINDINGS OF FACT

In 1985, claimant underwent an L4-5 discectomy and laminectomy. (Exs. 6-4, 34-2). She has had several episodes of suicidal ideation and suicide attempts and was hospitalized for depression in 1985, 1987, 1988, 1989, and 1991. (Exs. 38-4, 43-1, 43-5; 78). In 1991, Dr. Parvaresh, examining psychiatrist, reported an ongoing depressive condition, as well as a borderline personality

¹ A July 30, 2010 Own Motion Notice of Closure awarded 17 percent (54.4 degrees) additional unscheduled PPD for "post-aggravation rights" new/omitted medical conditions ("failed back syndrome, chronic low back pain, and right leg radiculopathy"). (Ex. 82). A March 31, 2011 Own Motion Notice of Closure closed the "post-aggravation rights" new/omitted medical condition claim ("right sciatic parasthesias or right leg radiculopathy from nerve root irritation") without any additional PPD award. (Ex. 113A). We review both closures in tandem.

² Claimant's January 6, 1993 claim was accepted as a disabling claim and was first closed on June 27, 1996. Thus, claimant's aggravation rights expired on June 27, 2001. Therefore, when claimant sought claim reopening in April 2002, the claim was within our Own Motion jurisdiction. ORS 656.278(1). Consistent with our statutory authority, on May 3, 2004, we issued an Own Motion Order authorizing the reopening of the "post-aggravation rights" new/omitted medical condition claim ("failed back syndrome, chronic low back pain, and right leg radiculopathy"). (WCB Case No. 03-0496M). On February 7, 2011, we issued an Own Motion Order authorizing the reopening of the "post-aggravation rights" new/omitted medical condition claim ("right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above"). (WCB Case No. 10-0214M). Both orders noted that when claimant was medically stationary, the insurer should close the claim pursuant to OAR 438-012-0055. On July 30, 2010, and March 31, 2011, respectively, the insurer issued its Notices of Closure.

disorder. (Exs. 38-6, 43-6). Claimant's psychiatric conditions have required ongoing treatment, including antidepressant and antipsychotic medications, psychotherapy, and occasional hospitalization.

On January 6, 1993, claimant compensably injured her low back while working as a department store sales clerk. The insurer initially accepted "recurrent lumbar disk protrusion, right L4-5" and "resultant epidural fibrosis at surgical site." (Exs. 5, 15).

Claimant underwent L4-5 discectomies and laminectomies in March 1993 and May 1993. (Ex. 6-2, -4). In July 1994, she underwent a "right facetectomy, right partial hemilaminectomy, discectomy and foraminotomy, L4-5." (Ex. 9). In March 1995, she underwent an L4-5 fusion and a "bilateral discectomy, wide foraminotomy, L4-5." (Exs. 12, 13).

As of May 30, 1996, Dr. Knopf, claimant's then-attending physician, considered her capable of working full-time light duty work. (Exs. 17, 24-3).

On June 27, 1996, claimant's injury claim was closed with an award of 34 percent unscheduled PPD for the low back and 5 percent scheduled PPD for loss of use or function of the right foot. (Ex. 19). Following litigation, the unscheduled PPD award was reduced to 29 percent, with a residual functional capacity (RFC) of sedentary/light.³ (Exs. 23, 24).

On July 18, 1996, Dr. Knopf reported that claimant was continuing to work at her regular job, which involved standing for more than seven hours per day. Because of claimant's ongoing back pain, Dr. Knopf recommended more sedentary work. (Ex. 21).

On October 14, 1996, Dr. Martens, medical arbiter, determined that claimant's RFC was "light," with restrictions on stooping, twisting, reaching, climbing, and crouching. (Ex. 22-4). Reporting that she had begun working as a receptionist, Dr. Martens found that she was not restricted from working the same number of hours that she worked before her injury. (Ex. 22-3, -5).

In April 1998, claimant underwent surgery to remove the L4-5 fusion hardware. (Ex. 27).

³ Claimant's aggravation rights expired on June 27, 2001.

On May 4, 1998, the insurer accepted a new medical condition (“disc protrusion L4-5 left”). (Ex. 28). On June 18, 1998, the insurer closed the claim with an additional award of 4 percent unscheduled PPD for the low back, with a RFC of sedentary/light. (Ex. 29). Claimant’s total award to date was 33 percent unscheduled PPD for the low back and 5 percent scheduled PPD for loss of use or function of the right foot. (*Id.*)

By April 1999, claimant had returned to full-time work, although with ongoing pain complaints. (Ex. 51-3). Her low back condition returned to its baseline and she was doing well at work. (*Id.*)

In March 2000, claimant attempted an overdose of medications and was hospitalized for depression. (Exs. 31, 38-4, 38A-2, 43-3). She was diagnosed with borderline personality disorder and recurrent major depressive disorder. (Ex. 43-4).

Claimant worked in temporary jobs in the spring of 2000. In June 2000, Dr. Knopf reported a two month history of progressive and worsening low back pain, with some sciatica and right foot paresthesias, with no new trauma. He felt this was evidence of radiculopathy secondary to nerve root irritation. (Ex. 51-3).

In June 2001, Dr. Knopf reported that claimant had incapacitating, chronic low back pain and nerve root irritation, as well as chronic depression and borderline personality disorder. Noting that she had applied for Social Security Disability Insurance (SSDI) benefits, he opined that she was not employable due to her chronic low back problems and psychiatric condition, and should receive such disability benefits. (Ex. 32A).

In February 2002, Dr. Knopf referred claimant to Dr. McCluskey, a pain specialist. (Ex. 33). From 2002 into 2009, Dr. McCluskey treated claimant’s low back pain and radiculopathy, variously providing pain medication, trigger point injections, nerve blocks, and lumbar epidural lysis of adhesions. (Exs. 44, 46, 48, 56, 57, 58, 59, 60, 63, 66, 77, 78). In August 2003, he implanted a spinal narcotic infusion pump, which he surgically replaced in August 2006. (Exs. 50, 70).

On April 2, 2002, Dr. Johnson, neurosurgeon, examined claimant on behalf of the insurer. He reported that she had not worked since June 2000. (Ex. 34-4). He diagnosed “[f]ailed back syndrome with chronic low back pain and right sciatic paresthesias secondary to above.” (Ex. 34-5). He opined that the major contributing cause of these conditions were the multiple back surgeries, which in turn were related to the original injury. (Exs. 34-7, 40-2).

In April 2002, claimant requested that the insurer accept the following “post-aggravation rights” new/omitted medical conditions: depression, right leg radiculopathy from nerve root irritation, failed back syndrome, and chronic low back pain. (Exs. 35, 36). The insurer denied the depression claim and contended that the remaining conditions were encompassed in the previously accepted conditions. (Exs. 39, 41). Claimant litigated these claims.

In July 2002, Dr. Davies, examining psychologist, interviewed claimant, performed testing, and reviewed the record, including prior psychiatric consultations. He opined that claimant had a history of chronic mental illness that primarily involved diagnoses of a mood disorder and a personality disorder. (Ex. 38-6). He believed that her “psychiatric problems have been chronic and ongoing since at least adolescence.” (Ex. 38-7). He also opined that her mental illness was not worsened by the work injury. (*Id.*)

On July 8, 2002, claimant was awarded SSDI benefits based on “medically determinable severe impairments” of “failed back syndrome and depression.” (Ex. 38A-2). Considering claimant’s age, education, work experience, and residual functional capacity, she was found incapable of making a successful adjustment to work. (Ex. 38A-4).

In December 2002, Dr. Turco, psychiatrist, performed a record review on behalf of the insurer. He opined that claimant had experienced a “major depressive disorder alternating with dysthymia (reactive depression) throughout her life.” (Ex. 43-8). He also noted that she had a borderline personality disorder. He opined that her depression and psychological problems long preexisted the 1993 back injury and had not worsened since that time. (*Id.*)

On May 3, 2004, following litigation, the insurer’s “depression” denial was upheld.⁴ (Exs. 51, 55). However, the following “post-aggravation rights” new/omitted medical conditions were found compensable, and claimant’s Own Motion claim was reopened for those conditions (“failed back syndrome, chronic low back pain, right leg radiculopathy from nerve root irritation”). (Ex. 55-4). *Nancy J. Ferguson*, 56 Van Natta 1499 (2004).

⁴ The basis of that compensability decision was that the medical record established that claimant’s depression was a preexisting condition that was not worsened by the 1993 work injury. (Exs. 51, 55).

On May 7, 2004, Mr. Weiford, vocational consultant, opined that job search efforts for claimant from August 2001 through March 2003 would have been futile. (Ex. 55A). Based on a medical record review, Mr. Weiford considered claimant to be unable to seek or accept employment due to her work-related impairments, including her failed back syndrome and radiculopathy. (Ex. 55A-3).

In August 2004, claimant was hospitalized for depression. (Exs. 77-22, 78-25).

On August 4, 2005, the insurer issued a Modified Notice of Acceptance to include the following “post-aggravation rights” new/omitted medical condition: “right sciatic parasthesias or right leg radiculopathy from nerve root irritation, secondary to the above.” (Ex. 64).

In June 2006, claimant was hospitalized for depression. (Ex. 78-28).

On May 12, 2009, Dr. Carr, examining orthopedist, found claimant’s conditions medically stationary. (Ex. 77-32). He reported reduced lumbar ranges of motion (ROM) findings and found her significantly limited in the repetitive use of her lumbar spine. (Ex. 77-29, -33). He also stated that she was unable to perform regular work, noting that she could occasionally lift up to 20 pounds and was precluded from frequently stooping, twisting, reaching, climbing, or crouching. (Ex. 77-33-34).

On July 10, 2010, Dr. McGehee, claimant’s then-attending physician, concurred with Dr. Carr’s opinion. (Ex.79).

On July 30, 2010, the insurer issued an Own Motion Notice of Closure, which awarded an additional 17 percent unscheduled PPD for the low back, for a total award to date of 50 percent unscheduled PPD for the low back and 5 percent scheduled PPD for loss of use or function of the right foot.⁵ (Ex. 82). Claimant requested review and appointment of a medical arbiter. (Ex. 84).

⁵ Because the August 2005 accepted “post-aggravation rights” new/omitted medical condition claim (“right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above”) had not been reopened, the July 30, 2010 closure only related to the reopened “post-aggravation rights” new/omitted medical conditions (“failed back syndrome, chronic low back pain, right leg radiculopathy”). (Ex. 85A). *Nancy J. Ferguson*, 63 Van Natta 81 (2011).

As addressed below, on February 7, 2011, we reopened claimant’s Own Motion claim for the additional “post-aggravation rights” new/omitted medical condition claim (“right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above”). *Nancy J. Ferguson*, 63 Van

On October 10, 2010, Dr. Fiks, claimant's attending physician, agreed with Dr. Carr's findings, with clarification regarding her work restrictions. Dr. Fiks reported that claimant was completely restricted from stooping, twisting, reaching, climbing, crouching, crawling, and kneeling. (Ex. 85). Although claimant was not restricted from sitting or standing, Dr. Fiks recommended that she frequently change positions and be allowed to lie down. (Ex. 85-2). He anticipated that she would likely miss work unpredictably due to the waxing and waning of her chronic pain condition. (*Id.*)

In October 2010, Ms. Martin, a vocational rehabilitation consultant, concluded that claimant was not physically able to perform any of the occupations for which she had knowledge and transferable skills. (Ex. 86-21).

On December 6, 2010, Dr. Fiks implanted a spinal cord stimulator. (Ex. 91).

On February 7, 2011, we reopened claimant's Own Motion claim for "post-aggravation rights" new/omitted medical conditions ("right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above"). *Nancy J. Ferguson*, 63 Van Natta 263 (2011).

On March 11, 2011, the insurer closed the "post-aggravation rights" new/omitted medical conditions ("right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above") without any additional award of permanent disability. (Ex. 113A). Claimant requested review and the appointment of a medical arbiter.

On May 23, 2011, Dr. Fiks stated that claimant's right sciatic parasthesias or right leg radiculopathy from nerve root irritation condition was medically stationary as of March 10, 2011. (Ex. 118-1). He agreed that the work restrictions for this condition were the same as those he provided on October 13, 2010, with an additional restriction to a "sedentary" lifting category. (Ex. 118-2).

On July 7, 2011, Ms. Martin reevaluated claimant's employability based on Dr. Fiks's additional limitation to "sedentary" work and concluded that she was unable to regularly perform suitable and gainful work. (Ex. 120-17).

Natta 263 (2011). On March 11, 2011, the insurer closed this "post-aggravation rights" new/omitted medical condition claim ("right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above") without any additional award of permanent disability. (Ex. 113A). Claimant requested review and appointment of a medical arbiter. Both the July 2010 and March 2011 closures are being reviewed in tandem.

On August 26, 2011, Dr. Rischitelli, medical arbiter, found no strength or sensory loss and measured loss of lumbar ROM.⁶ He reported that she was significantly limited in the repetitive use of her lumbar spine due to the newly accepted conditions. (Ex. 121-10).

Regarding only the newly accepted conditions,⁷ Dr. Rischitelli made the following findings. Claimant could lift up to 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. She could sit, stand, and walk up to two consecutive hours in an eight-hour day. She was precluded from frequently stooping, climbing, crouching, bouncing, crawling, kneeling, twisting, and pushing or pulling. She was not precluded from frequently performing overhead or forward reaching. She was not restricted from working the same number of hours that were worked prior to the injury. (Ex. 121-11).

Claimant is 55 years old and has a high school degree, with some college credit hours, but no degree.

CONCLUSIONS OF LAW AND OPINION

Claimant's 1993 injury claim was reopened for the processing of "post-aggravation rights" new/omitted medical conditions ("failed back syndrome, right leg radiculopathy, chronic back pain, and right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above"). Such a claim may qualify for payment of permanent disability, including PTD. ORS 656.278(l)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *James S. Daly*, 58 Van Natta 2355 (2006); *Sherlee M. Samel*, 56 Van Natta 931, 938 (2004).

Here, the claim is in Own Motion status; therefore, the Notices of Closure issued under ORS 656.278(6), not ORS 656.206 or ORS 656.268. Nevertheless, where consistent with the provisions of ORS 656.278, the 2005 amendments to ORS 656.206 apply to Own Motion Notices of Closure that issue on or after January 1, 2006. *David C. Drader*, 58 Van Natta 3093, 3098 (2006). Thus, because these Own Motion Notices of Closure issued after January 1, 2006, the 2005 amendments to ORS 656.206 apply.

⁶ Dr. Rischitelli attributed 25 percent of the loss of ROM to the newly accepted conditions, 50 percent to the previous surgeries and previous accepted conditions, and 25 percent to her obese body habitus and other comorbid diagnoses. (Ex. 121-11).

⁷ Dr. Rischitelli limited his evaluation to the newly accepted "post-aggravation rights" conditions ("failed back syndrome, chronic low back pain, right leg radiculopathy, right sciatic parasthesias or right leg radiculopathy from nerve root irritation secondary to above"). (Ex. 121-2).

ORS 656.206(1)(d) (2005) provides that PTD “means, notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.” “‘Regularly performing work’ means the ability of the worker to discharge the essential functions of the job” and “‘[s]uitable occupation’ means one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation.” ORS 656.206(1)(e), (f) (2005). Claimant must also establish that she is “willing to seek regular gainful employment” and that she has “made reasonable efforts to obtain such employment.” ORS 656.206(3) (2005). Finally, claimant has the burden of proving PTD status. *Id.*

In *James S. Daly*, 58 Van Natta 2355, we awarded claimant PTD for a “post-aggravation rights” new or omitted medical condition. Our analysis of ORS 656.206, in conjunction with 656.278, resulted in the following conclusions.

First, disability for a previously accepted condition is considered as it existed at the last claim closure that preceded the expiration of the claimant’s 5-year aggravation rights.⁸ *Daly*, 58 Van Natta at 2361. Second, any disability that predates the initial compensable injury is also considered. 58 Van Natta 2364-65. Third, when such disabilities exist, they are considered with any disability from the “post-aggravation rights” new or omitted medical condition to determine whether claimant has established entitlement to PTD.

Claimant must establish entitlement to PTD by proving that: (1) she is completely physically disabled and therefore precluded from gainful employment; or (2) her physical impairment, combined with a number of social and vocational factors, effectively prohibits gainful employment under the “odd lot” doctrine. 58 Van Natta at 2368.

The record does not establish that claimant is completely *physically* disabled. Therefore, we turn to the “odd lot” doctrine. Under that doctrine, a disabled person, capable of performing work of some kind, may still be

⁸ We reasoned that, under this method, the PTD evaluation would include consideration of permanent disability from the accepted conditions occurring before the expiration of aggravation rights, but would not include consideration of permanent disability from any “worsened condition” after the expiration of aggravation rights, which would be contrary to the statutory scheme and the rationale expressed in *Goddard*, *Samel*, and *Jimmy O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2002), *aff’d Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005). *Daly*, 58 Van Natta at 2362.

permanently disabled due to a combination of her physical condition and certain non-medical factors, such as her age, education, adaptability to nonphysical labor, mental capacity and emotional conditions. *See Clark v. Boise Cascade*, 72 Or App 397, 399 (1985); *Welch v. Banister Pipeline*, 70 Or App 699, 701 (1984); *Stephen H. Johnson*, 55 Van Natta 3074, 3078 (2003).

Here, we first determine whether claimant had any preexisting disability that may be considered in determining her entitlement to PTD. Resolution of that issue turns on whether the record establishes that claimant's psychiatric conditions caused "disabling effects" *before* her 1993 compensable injury. *Fimbres v. SAIF*, 197 Or App 613 (2005); *Daly*, 58 Van Natta at 2365. In *Fimbres*, the court explained that the ordinary meaning of "disability" includes a "physical or mental illness, injury, or condition that incapacitates in any way." 197 Or App at 617 n 1 (quoting *Lecangdam v. SAIF*, 185 Or App 276, 282 n 4 (2002); internal quotations omitted).

The record indicates that claimant has psychiatric conditions (depression and borderline personality disorder) that she has experienced at least since adolescence. For the following reasons, we find that these conditions are a mental disability that caused disabling effects before the 1993 injury.

In 1991, Dr. Parvaresh, examining psychiatrist, explained that claimant had chronic exacerbations and remissions of a longstanding depressive disorder, as well as borderline personality disorder, which required ongoing treatment. (Ex. 43-6).

Dr. Turco, examining psychiatrist, opined that claimant had a major depressive disorder alternating with dysthymia (reactive depression) throughout her life, along with borderline personality disorder. (Ex. 43-8). He explained that claimant's psychiatric problems dated back to her early development, long preexisted the 1993 injury, and had not worsened since that time. (Ex. 43-1, -8). He also noted that these psychiatric conditions had required ongoing treatment, including multiple hospitalizations before the 1993 injury. (Ex. 43-4-5).

Dr. Davies, examining psychologist, explained that claimant had a history of chronic mental illness that predated the 1993 injury. (Ex. 38-6). This consisted of major depression, chronic and recurrent, and borderline personality disorder. He noted that claimant had made several suicide attempts, and was first hospitalized for depression in 1985, with subsequent hospitalizations in 1989 and 1991. (Ex. 38-4).

Based on the unrebutted opinions of Drs. Parvaresh, Turco, and Davies, we conclude that the record establishes that claimant's psychiatric conditions caused "disabling effects" before the 1993 injury. See *Lecangdam*, 185 Or App at 282 n 4 (the ordinary meaning of "disability" includes a "physical or mental illness, injury, or condition that incapacitates in any way"); *Daly*, 58 Van Natta at 2366.

After the 1993 injury, claimant's psychiatric conditions continued to present problems, resulting in continuing exacerbations and remissions that required treatment, including hospitalizations in 2000, 2004, and 2006. Moreover, there is no persuasive evidence that these conditions worsened after the 1993 injury. To the contrary, Dr. Turco's unrebutted opinion is that claimant's psychiatric conditions did not worsen after 1993. (Ex. 43-8).

In summary, we conclude that claimant's psychiatric conditions caused "disabling effects" before the 1993 injury, and we are not persuaded that those conditions worsened since that injury. Under these circumstances, we may consider the "disabling effects" of claimant's psychiatric conditions in determining whether she is PTD.⁹ *Elder v. Rosboro Lumber Co.*, 106 Or App 16, 19 (1991); *Daly*, 58 Van Natta at 2369.

The June 1998 closure was the last claim closure that preceded the expiration of claimant's 5-year aggravation rights. (Ex. 29). At that time, the previously accepted conditions ("recurrent lumbar disk protrusion, right L4-5, resultant epidural fibrosis at surgical site, and disc protrusion L4-5 left") resulted in multiple surgeries, loss of ROM, and an RFC of "sedentary/light." Claimant's total award to date was 33 percent unscheduled PPD for the low back and 5 percent scheduled PPD for loss of use or function of the right foot. (*Id.*)

The insurer argues that claimant's restrictions and inability to work are due to a "worsening" of her previously accepted conditions ("recurrent lumbar disk protrusion, right L4-5, resultant epidural fibrosis at surgical site, and disc protrusion L4-5 left"). (Exs. 5, 15, 28). Basically, the insurer contends that, because claimant was unable to work before her 2002 claim for "post-aggravation

⁹ In reaching this conclusion, we acknowledge that the insurer's denial of "depression" has been upheld. Nevertheless, the basis for upholding that denial was that the medical record established that claimant's depression was a preexisting condition that was not worsened by the 1993 work injury. (Exs. 51, 55). Thus, the denial of a worsened depression claim was upheld. Such a determination does not preclude a finding that the "pre-injury" "disabling effects" of claimant's depression may be considered in evaluating her entitlement to PTD.

rights” new/omitted medical conditions, her current inability to work is not due to those conditions but, instead, is due to a “worsening” of the previously accepted conditions. We disagree.

In support of this argument, the insurer relies on Dr. Knopf’s June 2001 opinion that “because of [claimant’s] chronic low back problems [as] well as [her] psychiatric condition that she is not employable and should receive a disability benefit.” (Ex. 32A). However, Dr. Knopf did not attribute claimant’s condition to a worsening of her accepted low back conditions. Instead, regarding those “low back problems,” Dr. Knopf diagnosed “[c]hronic low back pain which is incapacitating” and “nerve root irritation,” which are conditions that were ultimately determined compensable as “post-aggravation rights” new/omitted medical conditions. (Exs. 32A, 51, 55).

The insurer also relies on Mr. Weiford’s May 2004 vocational report, which concluded that claimant was unable to work from August 2001 through March 2003 “due to her work-related impairments including her failed back syndrome as well as her radicular symptoms.” (Ex. 55A-3). However, this statement does not indicate a worsening of the accepted conditions resulting in an inability to work. Instead, the identified impairments were conditions that were ultimately determined compensable as “post-aggravation rights” new/omitted medical conditions. (Exs. 51, 55).

Thus, the evidence cited by the insurer does not persuasively support its assertion that claimant’s disability and inability to work were due to a worsening of her previously accepted conditions. Moreover, our review of the record does not lead us to reach the conclusion advanced by the insurer.

In May 2004, we reopened claimant’s Own Motion claim for “post-aggravation rights” new/omitted medical conditions (“failed back syndrome, chronic low back pain, right leg radiculopathy from nerve root irritation”). (Ex. 55-4). In addition, in August 2005, the insurer accepted an additional “post-aggravation rights” new/omitted medical condition (“right sciatic parasthesias or right leg radiculopathy from nerve root irritation, secondary to the above”).¹⁰ (Ex. 64).

¹⁰ As addressed above, in February 2011, we reopened claimant’s Own Motion claim for these additional “post-aggravation rights” new/omitted medical condition (“right sciatic parasthesias or right leg radiculopathy from nerve root irritation, secondary to the above”). *Ferguson*, 63 Van Natta at 263.

In May 2009, Dr. Carr, examining orthopedist, reported that claimant was unable to perform regular work, noting that she could occasionally lift up to 20 pounds and was precluded from frequently stooping, twisting, reaching, climbing or crouching. (Ex. 77-33-34). In August 2010, Dr. Fiks, claimant's current attending physician, agreed with Dr. Carr's findings, although restricting claimant from any stooping, twisting, reaching, climbing or crouching. (Ex. 85). Dr. Fiks recommended allowing claimant to frequently change positions and lie down. (Ex. 85-2). Dr. Fiks anticipated that claimant would likely miss work unpredictably due to the waxing and waning of her chronic pain condition. (*Id.*)

In October 2010, Ms. Martin, a vocational rehabilitation consultant, evaluated claimant's employability based, in part, on Dr. Fiks's work restrictions of sedentary to light work, with restrictions. (Ex. 86). After considering the jobs within claimant's transferrable skills, Ms. Martin concluded that she was not physically able to return to work that she had the knowledge and skills to perform. (Ex. 86-14-21).

After finding claimant's "post-aggravation rights" new/omitted medical condition ("right sciatic parasthesias or right leg radiculopathy from nerve root irritation") medically stationary, Dr. Fiks agreed that the work restrictions for this condition were the same as those he provided on October 13, 2010, with an additional restriction to a "sedentary" lifting category. (Ex. 118-2).

In July 2011, Ms. Martin reevaluated claimant's employability based on Dr. Fiks's additional limitation to "sedentary" work, with restrictions, and reached the same conclusions as in her October 2010 report. (Ex. 120).

The medical arbiter, Dr. Rischitelli, found claimant's RFC was sedentary/light, with restrictions, due to the newly accepted conditions. (Ex. 121-11). Nevertheless, as discussed above, Ms. Martin analyzed the sedentary/light job market that was within claimant's transferrable skills and concluded that she was not physically able to return to work that she has the knowledge and skills to perform. (Ex. 86-14-21).

Drs. Fiks and Rischitelli support a finding that claimant was physically capable of sedentary or sedentary/light work duties, with restrictions. However, Ms. Martin's un rebutted opinions establish that claimant does not have transferable vocational skills to perform such work duties. Therefore, we find that the record establishes that claimant's physical impairment, combined with her vocational factors, effectively prohibits gainful employment under the "odd lot" doctrine. *Daly*, 58 Van Natta at 2368.

Finally, we turn to claimant's work force status. In a November 2010 affidavit, claimant explained that she had tried to continue working for the employer after her 1993 injury, but was unable to keep up with the physical demands of the job due to back pain. (Ex. 88-2). After leaving that job, she performed temporary work through an agency. In the fall of 1997 through spring 1998, she was employed as a cashier in a cafeteria. She then worked at various temporary jobs. She had to leave her last job due to her back and leg pain.¹¹ After losing that job, she applied for SSDI benefits.¹² (Ex. 88-3). She would prefer to be working and is willing to work. (*Id.*)

Based on claimant's persuasive, un rebutted affidavit, we find that she has established that she is "willing to seek regular gainful employment" and that she has "made reasonable efforts to obtain such employment."¹³ ORS 656.206(3) (2005). Claimant is therefore entitled to PTD benefits.¹⁴

Accordingly, in lieu of the additional unscheduled permanent disability granted by the July 30, 2010 and March 31, 2011 Own Motion Notices of Closure, claimant is awarded PTD, effective as of May 12, 2009, her medically stationary date as found by the Notices of Closure. Any permanent disability benefits paid beyond May 12, 2009 may be offset against this PTD award.

¹¹ The record indicates that claimant last worked in June 2000. (Ex. 34-4).

¹² Claimant applied for SSDI benefits in January 2001. (Ex. 38A-1).

¹³ The insurer argues that, because claimant did not respond to its request for work force information when it submitted its February 26, 2004 Own Motion Recommendation, she agreed with the insurer that she had removed herself from the work force. (Exs. 53, 54). In effect, the insurer argues this failure to respond to its request for information results in a prior determination that claimant was not in the work force. We disagree.

As we explained in our order reopening the "post-aggravation rights" new/omitted medical condition claim ("failed back syndrome, chronic low back pain, right leg radiculopathy from nerve root irritation"), claimant's work force status "is not a condition precedent to claim reopening" for such a claim. *Ferguson*, 56 Van Natta at 1501 n 1. Therefore, no determination was made regarding claimant's work force status.

¹⁴ In light of our conclusion, we do not address claimant's argument that she is entitled to additional PPD benefits.

Because our decision results in increased compensation, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$12,500, to be paid out of the permanent total disability award, payable directly to claimant's counsel.¹⁵ ORS 656.386(2); OAR 438-015-0040(2); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on December 6, 2012

¹⁵ "Out-of-compensation" attorney fees are not subject to offset. OAR 438-015-0085(2); *Weyerhaeuser Co. v. Sheldon*, 86 Or App 46 (1987).