
In the Matter of the Compensation of
VICTOR L. JONES, Claimant
WCB Case No. 11-03900
ORDER ON REVIEW
Rex Q Smith, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Lanning and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Dougherty's order that affirmed an Order on Reconsideration that found that his injury claim was not prematurely closed.¹ On review, the issue is premature closure.

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

Claimant was compensably injured when he fell from a truck on December 14, 2009, resulting in the employer's acceptance of right shoulder strain, right elbow fracture, lumbar strain, and an acute partial thickness tear of the supraspinatus tendon of the right shoulder. On March 3, 2011, the employer issued a Notice of Closure, determining that the accepted conditions had become medically stationary on January 31, 2011. Claimant requested reconsideration, contending that his claim had been prematurely closed.

On June 21, 2011, the Appellate Review Unit (ARU) issued an Order on Reconsideration that found that the claim had not been prematurely closed. Claimant requested a hearing.

Reasoning that the medical evidence unanimously established that claimant's compensable conditions were medically stationary, the ALJ affirmed the Order on Reconsideration. On review, claimant contends that the medical evidence that he was medically stationary is unpersuasive and that the ALJ did not address several of his arguments. Based on the following reasoning, we affirm.

ORS 656.268(1)(a) authorizes a carrier to close a claim when: (1) the worker has become medically stationary; and (2) there is sufficient information

¹ Claimant also requested a hearing regarding a medical services denial. That matter was heard with this case. The ALJ upheld the denial, and claimant requested review. By a separate order issued today, we have affirmed the ALJ's order that upheld the medical services denial. (WCB Case No. 11-02678).

to determine permanent impairment. As the party challenging the Order on Reconsideration, claimant must establish error in the reconsideration process. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

On January 14, 2011, Dr. Woodward, an employer-arranged medical examiner, made findings that included right shoulder range of motion (ROM) impairment and opining that claimant's accepted conditions had resolved and were medically stationary. (Ex. 156-3, -15).

On January 28, 2011, Dr. DiPaola disagreed with Dr. Woodward's opinion insofar as it did not acknowledge the presence of the acute partial thickness tear of the supraspinatus tendon of the right shoulder, but otherwise agreed with Dr. Woodward's report. (Ex. 157, 163-1).

On January 31, 2011, Dr. DiPaola examined claimant and opined that "we have nothing further to offer [claimant] as it relates to curative medical treatment for his accepted conditions." (Ex. 158). Dr. DiPaola concluded that claimant was medically stationary and that Dr. Woodward's right shoulder findings were valid for the rating of impairment and claim closure. (Exs. 158, 159).

Claimant contends that the opinions of Drs. Woodward and DiPaola regarding his medically stationary status are unpersuasive.² We disagree.³

The issue of claimant's medically stationary status is primarily a medical question to be decided based on competent medical evidence. *Harmon v. SAIF*, 54 Or App 121, 125 (1982). Based on the following reasoning, we find Dr. DiPaola's opinion persuasive.

Dr. DiPaola had been claimant's attending physician since January 29, 2010. (Ex. 20). He noted that claimant's lumbar pain was occasionally accompanied by lower extremity pain, and referred claimant for physical therapy, chiropractic

² We adopt the ALJ's reasoning regarding claimant's request for administrative notice of statements made in a different case regarding Dr. Woodward's compensation.

³ Claimant also contends that the medical arbiter panel opined that his accepted conditions were not medically stationary because they noted that he continued to receive medical treatment. (Ex. 176-2). However, a worker's condition is "medically stationary" when no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17). Claimant's ongoing need for treatment, therefore, does not mean that his accepted conditions are not medically stationary. See *SAIF v. Ramos*, ___ Or App ___ (September 26, 2012); *Charmaine L. Edwards*, 64 Van Natta 1454, 1456 (2012).

therapy, and aquatic therapy. (Exs. 24-4, 51-1, 60, 90-1). Because of claimant's continuing pain, Dr. DiPaola referred claimant to Dr. Rosenbaum for a neurologic examination. (Ex. 94). Dr. Rosenbaum opined that claimant had degenerative changes, but no specific nerve root compression, and that claimant would not benefit from surgical intervention in the lumbar spine. (Ex. 94).

Based on the nature of claimant's symptoms, Dr. DiPaola recommended a consultation for spinal injections. (Ex. 99-2). Dr. Rask, a consulting physician, diagnosed displacement of lumbar intervertebral disc without myelopathy and recommended epidural steroid injections (ESIs). (Ex. 124-5). Dr. Rask performed an ESI. (Ex. 135-1). Dr. Rask reported that the ESI resulted in significant relief of symptoms, but Dr. DiPaola reported that it had little benefit. (Exs. 139-1, 142-1).

Dr. DiPaola referred claimant to Dr. Lorber for consultation regarding pain management. (Ex. 139-1). Dr. Lorber noted chronic low back pain with reported multilevel degenerative changes. (Ex. 150-6). He also reported that claimant was "nearing the need of treatment." (Id.)

On December 27, 2010, Dr. DiPaola opined that it was "becoming very clear that [claimant] is not going to be able to return to his job at injury due to work and non-work related issues." (Ex. 152). He explained that it was in claimant's best interest to "plan ahead for the future" and that he should consider other vocational options. (Id.) Dr. DiPaola anticipated that claimant would be medically stationary in three months. (Id.)

Thus, at the time that Dr. DiPaola rendered his January 31, 2011 opinion, he had been claimant's attending physician for approximately one year. During that time, he had referred claimant to three specialists for back pain. None of those specialists had opined that material improvement of the accepted conditions would reasonably be expected from medical treatment or the passage of time. Dr. DiPaola's December 27, 2010 opinion indicated that the limits of claimant's recovery had become apparent and that he would be medically stationary within a few months.

Against this context, Dr. DiPaola's ultimate opinion regarding claimant's medically stationary date is consistent with his earlier statements regarding the course of claimant's recovery, as well as with the record as a whole. His opinion was based on complete information. Further, there is no persuasive medical evidence to the contrary. Under such circumstances, we find Dr. DiPaola's opinion persuasive. Therefore, we conclude that claimant's condition was medically stationary on January 31, 2011.

Likewise, we conclude that there was sufficient information to determine permanent impairment. Therefore, we find that claimant's claim was not prematurely closed.⁴ Accordingly, we affirm.

ORDER

The ALJ's order dated March 12, 2012 is affirmed.

Entered at Salem, Oregon on October 1, 2012

⁴ In reaching this conclusion, we have also considered claimant's other arguments on review.