

In the Matter of the Compensation of
RICK LOUCKS, Claimant

WCB Case No. 12-01234

ORDER ON REVIEW

Ronald A Fontana, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) determined that his claim was not prematurely closed; (2) did not award permanent total disability; and (3) reduced claimant's award of work disability from 53 percent, as awarded by an Order on Reconsideration, to 51 percent. In its respondent's brief, the self-insured employer contests that portion of the ALJ's order that determined that the WCD had jurisdiction to issue the Order on Reconsideration. On review, the issues are jurisdiction, premature closure, extent of permanent disability (work disability), and permanent total disability (PTD).

We adopt and affirm the ALJ's order with the following supplementation regarding the jurisdiction, premature closure and PTD issues.

Jurisdiction

The ALJ rejected the employer's contention that, under ORS 656.268(6)(a), claimant was barred from subsequently requesting reconsideration of a September 20, 2011 Notice of Closure after he withdrew his initial Request for Reconsideration.¹ In doing so, the ALJ concluded that the Appellate Review Unit (ARU) had conducted only one reconsideration proceeding on the Notice of Closure.

On review, citing various authorities, the employer contends that ARU completed the initial reconsideration proceedings with regard to the September 2011 closure notice on October 24, 2011, and conducted a second reconsideration proceeding in violation of ORS 656.268(6)(a) beginning on November 17, 2011, which resulted in the February 2012 reconsideration order. Therefore, the

¹ ORS 656.268(6)(a) provides that "[n]otwithstanding any other provision of law, only one reconsideration proceeding may be held on each notice of closure."

employer argues that the reconsideration order should be vacated as a product of a statutorily prohibited second reconsideration proceeding. The employer argues, alternatively, that the February 2012 reconsideration order should be vacated because ARU did not complete the reconsideration process within the 18 day period prescribed in ORS 656.268(6)(d).² For the following reasons, we reject the employer's contentions.

We begin by briefly recounting the procedural background of the claim. On September 20, 2011, the employer issued a "post-authorized training program" (post-ATP) Notice of Closure. On October 5, 2011, claimant requested reconsideration. On October 18, 2011, he withdrew his reconsideration request, stating that, because additional time was needed to obtain relevant records, the request for reconsideration should be withdrawn "without prejudice." (Ex. 37).

On October 24, 2011, ARU issued an Order of Dismissal. The order did not indicate whether the dismissal was with or without prejudice. (Ex. 39).

Claimant filed another request for reconsideration of the September 20, 2011 closure notice on November 17, 2011. ARU postponed its reconsideration proceeding for an additional 60 days on December 14, 2011. (Ex. 44). ARU issued its Order on Reconsideration of the September 2011 Notice of Closure on February 13, 2012 (a Monday). (Ex. 45). In doing so, ARU stated that the withdrawal of a reconsideration request does not generate a reconsideration review or order. (Ex. 45-2).

The employer argues that the reconsideration proceeding that started on October 5, 2011 had been completed on October 24, 2011, when ARU issued its dismissal order. It cites *Jordan v. Brazier Forest Products*, 152 Or App 15 (1998), in which the court stated that ARU's issuance of an Order Denying Reconsideration after the claimant untimely requested reconsideration terminated the reconsideration proceeding. The employer asserts that if an order denying a request for reconsideration terminated a reconsideration proceeding, an order dismissing a reconsideration request would also terminate the reconsideration proceeding. Thus, according to the employer, ARU began a prohibited second reconsideration proceeding regarding the September 2011 closure notice in November 2011, when it received claimant's second reconsideration request. We find *Jordan* distinguishable.

² That statute provides in part that "[e]xcept as provided in subsection (7) of this section, the reconsideration proceeding shall be completed within 18 working days from the date the reconsideration proceeding begins, and shall be performed by a special evaluation appellate unit within the department."

The *Jordan* court addressed whether the Board had jurisdiction to review an ARU order denying reconsideration of a Notice of Closure of the claimant's claim. The court held that the Board has jurisdiction over any order that resolves a request for reconsideration of a Notice of Closure, however the order may be denominated. *Id.* at 20.

In contrast to *Jordan* (which concerned the claimant's correct appeal route, *i.e.*, to the Board or to the WCD, after an order denying reconsideration of a Notice of Closure is issued), here, the issue is whether an ARU dismissal order issued in response to a withdrawal of a reconsideration request "without prejudice" constitutes a reconsideration proceeding. Accordingly, *Jordan* is inapposite.

Moreover, in contrast to the order in *Jordan*, the dismissal order in this case did not resolve issues pertaining to the September 2011 closure notice. Specifically, as previously noted, claimant expressly withdrew his reconsideration request "without prejudice." Granted the dismissal order did not explicitly state that the dismissal was "without prejudice." Nonetheless, we have interpreted an ALJ's order of dismissal as being "without prejudice" unless otherwise specified. *See Mickey L. Platz*, 46 Van Natta 1668 (1994) (an ALJ's (then referee's) order of dismissal is interpreted as a dismissal "without prejudice," unless the order otherwise specifies); *Robert L. Murphy*, 40 Van Natta 442, 442-43 (1988) (Board's policy is to interpret ALJ's (then referee's) order as "without prejudice," unless order states otherwise; nevertheless, statutory limitation period for timely requesting another hearing from a Determination Order would continue to run unabated, even with the issuance of a dismissal order without prejudice). We apply that rationale to ARU's issuance of a dismissal order.³ *See Laurie L. Boyce*, 63 Van Natta 2551, *aff'd without opinion*, 255 Or App 294 (2013) (consistent with existing case law regarding appealed ALJ orders, Board held that when abatement of ARU's Order on Reconsideration occurred the same day as the filing of a hearing request, jurisdiction remained with the ARU to issue another reconsideration order).

³ We further note that the record supports a conclusion that ARU issued its dismissal order without prejudice. First, in response to claimant's uncontested request for a dismissal order without prejudice, ARU issued a dismissal order that did not state "with prejudice." Moreover, when claimant again filed a request for reconsideration, ARU conducted a reconsideration proceeding and issued an Order on Reconsideration without questioning its statutory authority to do so.

The employer cites *Cedar Lodge Ltd. v. Elliot*, 115 Or App 688 (1992), in support of its argument that a dismissal order without prejudice does not join a prior and subsequent proceeding into a single continuous proceeding. There, the court held that a civil proceeding initiated after a dismissal without prejudice was a second, separate proceeding. However, in *Elliot*, the dismissal order in the first proceeding resulted in a court judgment that concluded the case. By contrast, this case does not involve a court judgment but rather an ARU dismissal order regarding a request for reconsideration, followed by a timely reconsideration request from a Notice of Closure. Moreover, there is no indication from this record that, before its dismissal order, ARU conducted its statutorily mandated reconsideration proceeding in response to claimant's initial reconsideration request. Rather, based on its dismissal order and ARU's actions in response to claimant's subsequent request for reconsideration, the record supports a proposition that ARU held only one reconsideration proceeding and, following that proceeding, issued its Order on Reconsideration.

Accordingly, we conclude that only one reconsideration proceeding was conducted with respect to the September 2011 closure notice.⁴ Therefore, we affirm the ALJ's determination that ARU had jurisdiction to issue the February 2012 Order on Reconsideration.

Premature Closure

In affirming the September 2011 Notice of Closure, the ALJ determined that claimant's accepted conditions (lumbar strain and L5-S1 disc herniation) were medically stationary based on the medical opinion of Dr. Gerry, claimant's attending physician. Claimant argues that the closure notice was prematurely

⁴ The employer alternatively argues that the February 2012 reconsideration order should be vacated because ARU did not complete the reconsideration process within 18 working days of the date the reconsideration proceedings began on October 5, 2011, as required by ORS 656.268(6)(d). However, claimant's November 17, 2011 request for reconsideration, which followed the October 24, 2011 dismissal without prejudice, entitled him to a new 18 "working day" period. In its acknowledgment of the November 2011 reconsideration request, the WCD indicated that it would issue either an Order on Reconsideration or a postponement notice by December 14, 2011. (Ex. 42). On December 14th, before expiration of the 18 "working day" period, ARU postponed the reconsideration proceedings an additional 60 days. In accordance with that postponement, the reconsideration order was then timely issued on Monday, February 13, 2012. See *Mary J. Freche*, 64 Van Natta 2044 (2012). Under such circumstances, we conclude that the reconsideration proceedings were timely conducted within the statutory time parameters.

issued because the medical evidence does not establish that alleged direct medical sequelae of his injury (depression, anxiety, erectile dysfunction and abdominal infection) were medically stationary before claim closure.⁵ We disagree.

If an accepted condition has a “direct medical sequela,” such sequela must also be medically stationary at claim closure. *See Manley v. SAIF*, 181 Or App 431, 437-39 (2002), *on remand*, *Leo R. Manley*, 54 Van Natta 2121 (2002). A condition that “originates or stems from the compensable injury or disease that is clearly established medically” is a direct medical sequela of the compensable condition. OAR 436-035-0005(6).

Here, there is evidence that the aforementioned conditions were medical sequelae of claimant’s compensable low back injury. (Exs. 1A-4, 1B, 1C, 1H-2, 1J, 1Q, 1S). However, these conditions were in existence when the claim was previously closed in December 2009 and when reconsideration orders issued in May and June 2010. Those orders became final. There is no indication that the alleged medical sequelae were no longer medically stationary since that claim closure. Moreover, Dr. Gerry indicated claimant’s accepted conditions were medically stationary before the September 2011 claim closure.

Under such circumstances, we conclude that claimant has not proven error in the reconsideration process with regard to his medically stationary status. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000) (the party challenging an Order on Reconsideration bears the burden of establishing error in the reconsideration process); *Collette E. Blanchard*, 61 Van Natta 663 (2009) (the claimant did not sustain her burden of establishing error in the reconsideration process with regard to premature closure).

Claimant also contends that the claim was prematurely closed because the employer did not obtain impairment findings regarding the alleged medical sequelae. We disagree.

In the prior May 2010 Order on Reconsideration, ARU determined that there was sufficient information to determine permanent disability when the claim was closed in December 2009. (Ex. 13-2). Thereafter, the claim was reopened because of claimant’s participation in an ATP, which resulted in the

⁵ We note that claimant’s attorney requested that the employer issue a Notice of Closure in September 2011. (Ex. 31). Claimant offers no explanation for this apparent contradiction.

September 2011 Notice of Closure currently at issue. As previously noted, the medical evidence does not establish that claimant's conditions were not medically stationary. Under such circumstances, we again conclude that claimant has not proven error in the reconsideration proceedings.

Claimant next contends that the employer did not provide an "accurate" description of the physical requirements of the job at injury. Therefore, he asserts that there was insufficient information to close the claim. Again, we disagree.

OAR 436-030-0020(2)(b)(A) requires that a claimant receive, before claim closure, "An accurate description of the physical requirements of the worker's job held at the time of injury, which has been provided by certified mail to the worker and the worker's legal representative, if any, either before closing the claim or at the time the claim is closed."

Here, the employer provided claimant, with a copy to his counsel, a description of the physical requirements of the job at injury. Claimant was asked to respond and to correct essential information. He provided corrections to the job description, as requested. (Ex. 2A). Under such circumstances, the record does not support claimant's contention regarding his job description.

Claimant also asserts that the September 2011 Notice of Closure was defective because a copy of the closure notice was not mailed simultaneously to his attorney and to him as required by OAR 436-030-0020(8). However, the record indicates that the closure notice was simultaneously mailed to claimant and his attorney on September 20, 2011. (Ex. 43). Although the closure notice was mailed to claimant's attorney's previous address, the record does not indicate that the notice was returned or otherwise undelivered.⁶ Under such circumstances, we are persuaded that the employer complied with the aforementioned administrative rule.

PTD

The ALJ rejected claimant's contention that he was permanently and totally disabled under the "odd-lot" doctrine, noting that he had not established reasonable work search efforts and that there was no vocational evidence that it was futile for

⁶ Moreover, a second copy was mailed to claimant's attorney at the correct address on September 22, 2011, and was received by claimant's counsel on September 23, 2011. (Ex. 33A).

him to seek work.⁷ See *Welch v. Banister Pipeline*, 70 Or App 699, 701 (1984), *rev den*, 298 Or 470 (1985). Claimant contests the ALJ's determination that he had not established PTD status. We affirm.

There is no *vocational* evidence that supports claimant's contention that it would be futile for him to seek work, even assuming that he has made reasonable efforts to find work. OAR 436-030-0050 (under the "odd-lot" doctrine, the worker must prove "the futility of seeking work if the worker has not made reasonable work search efforts by competent written vocational testimony"). Accordingly, we affirm.

ORDER

The ALJ's order dated September 24, 2012 is affirmed.

Entered at Salem, Oregon on March 21, 2013

⁷ Under the "odd-lot" doctrine, a claimant is permanently totally disabled if he establishes that, due to a combination of his physical condition and nonmedical factors, such as age, education, work experience, adaptability to nonphysical labor, mental capacity and emotional conditions, as well as the condition of the labor market, he is permanently incapacitated from performing gainful and suitable employment. *Clark v. Boise Cascade Co.*, 72 Or App 397 (1985).