
In the Matter of the Compensation of
RICHARD L. ELSEA, Claimant
Own Motion No. 13-0119M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE ON
RECONSIDERATION
Hooton Wold & Okrent LLP, Claimant Attorneys
Liberty Mutual Ins, Carrier

Reviewing Panel: Members Lowell and Lanning.

On March 18, 2014, we issued an Own Motion Order that: (1) declined to award permanent total disability (PTD) benefits; and (2) awarded an additional 10 percent (15 degrees) scheduled permanent partial disability (PPD) benefits for claimant's "post-aggravation rights" new/omitted medical condition ("right knee osteoarthritis/degenerative joint disease"). Claimant seeks reconsideration of our order, reiterating his previous contention that he is entitled to PTD benefits.¹ In addition, he submits several additional documents for inclusion in the record and our consideration.

We treat claimant's submissions as a request to present further evidence. Based on the following reasoning, we decline that request.

On December 12, 2013, claimant requested review of the October 15, 2013 Notice of Closure that awarded an additional 26 percent (39 degrees) scheduled PPD for the aforementioned "post-aggravation rights" new/omitted medical condition. With his request for review, claimant submitted his December 11, 2013 affidavit and a December 10, 2013 report from his attending physician, Dr. Kounine. (Exs. 41, 42). On December 19, 2013, he submitted a December 16, 2013 report from Mr. Stipe, a vocational consultant. (Ex. 43). Furthermore, with his opening brief, claimant submitted 29 exhibits in addition to the exhibits filed by the insurer.

Thus, claimant had ample opportunity to supplement the record prior to our decision, and fully availed himself of that opportunity. Moreover, prior to our decision, claimant did not contend that the record was insufficiently developed. To the contrary, he argued from the existing record that he was entitled to an award of PTD benefits or, in the alternative, increased PPD benefits.

¹ Claimant's reconsideration request was filed on April 16, which was within 30 days of our March 18 order. Consequently, we are authorized to reconsider our previous decision. See OAR 438-012-0065(2); *Gladys Biggs*, 54 Van Natta 1094 (2002).

Finally, the record was sufficiently developed to determine entitlement to PTD benefits.² In this regard, the record included evidence from which to determine whether the work force element, as well as the factors in *James S. Daly*, 58 Van Natta 2355 (2006), were satisfied.³

Based on that record, we determined that claimant had not established entitlement to PTD benefits, finding, in part, that he had withdrawn from the work force and his December 2013 affidavit did not establish that he had reentered the work force or was otherwise willing to work. *Richard L. Elsea*, 66 Van Natta 493, 501 (2014). Thus, because the “work force” element was not established, we did not conclusively address the remaining elements for entitlement to PTD benefits, although we noted concerns about whether Mr. Stipe’s opinion focused solely on the right knee condition factors that could be considered in reaching his “employability” decision. *Elsea*, 66 Van Natta at 500 n 6, 501 n 8.

On reconsideration, claimant submits additional evidence for the “work force” element regarding his entitlement to PTD benefits. This evidence includes his April 16, 2014 “supplemental affidavit,” as well as letters from his last employer and the business manager of the local sheet metal union,⁴ along with June and September 2009 chart notes from his former attending physician,

² The record was also sufficiently developed to determine claimant’s entitlement to PPD benefits. Because no medical arbiter examination was performed, permanent impairment was rated based on the reports from Dr. Kounine, claimant’s attending physician, and any impairment findings with which she concurred. (Exs. 33, 37).

³ As explained in our prior order, in *Daly*, we awarded the claimant PTD for a “post-aggravation rights” new/omitted medical condition. 58 Van Natta at 2374. Our analysis of ORS 656.206, in conjunction with ORS 656.278, resulted in the following conclusions. First, disability for a previously accepted condition (here, the “right knee lateral cartilage tear superimposed over pre-existing mild femoral tibial osteoarthritis (unrelated)”) is considered as it existed at the last claim closure that preceded the expiration of claimant’s 5-year aggravation rights. *Daly*, 58 Van Natta at 2361. Second, any disability that predates the initial compensable injury is also considered. *Id.* at 2364-65. Third, when such disabilities exist, they are considered with any disability from the “post-aggravation rights” new/omitted medical condition to determine whether the claimant has established entitlement to PTD. *Id.* at 2371.

Considering those factors, claimant may establish entitlement to PTD by proving that: (1) he is completely physically disabled and therefore precluded from gainful employment; or (2) his physical impairment, combined with a number of social and vocational factors, effectively prevents gainful employment under the “odd lot” doctrine. *Id.* at 2368; see also *Clark v. Boise Cascade*, 72 Or App 397, 399 (1985); *Nancy J. Ferguson*, 64 Van Natta 2315 (2012).

⁴ These letters were generated after the issuance of our March 18 order.

Dr. Austin. Claimant also submits Mr. Stipe's "post-order" April 2014 addendum to his December 2013 vocational assessment report and Dr. Kounine's "post-order" April 2014 "check-the-box" concurrence with Mr. Stipe's December 2013 report.

Claimant does not indicate why, with due diligence, he could not have produced this "additional evidence" at the time of our prior order. In this regard, we find *Donald P. Bond*, 40 Van Natta 361, *recons* 40 Van Natta 480 (1988), instructive. In *Bond*, a third party recovery distribution case, we declined to consider the claimant's affidavit first submitted on reconsideration, finding that it was obtainable with due diligence prior to the issuance of our distribution order. In addition, we concluded that "[t]o hold otherwise, would potentially expose the Board to an endless string of reconsideration requests and submissions of additional evidence, all designed to respond to conclusions reached by a previous third party order." 40 Van Natta at 481. The same reasoning applies to the present Own Motion case. See *Daren L. Johnson*, 65 Van Natta 2298 (2014) (on reconsideration, Board declined carrier's request to submit "post-order" evidence where, during initial review, carrier had relied on record and did not contend record insufficiently developed); *Rex A. Olson*, 55 Van Natta 3379 (2003) (on reconsideration, Board declined the claimant's attorney's request to submit further evidence where the claimant had sufficient opportunity to develop the record and record was adequately developed); *Corinne L. Birrer*, 52 Van Natta 1423 (2000) (on reconsideration, Board declined to refer medically stationary issue for fact-finding hearing where the claimant had sufficient opportunity to develop the record and record was adequately developed); *Bobbie J. Blakely*, 51 Van Natta 1762 (1999) (on remand from the court, Board found that the claimant had ample opportunity to establish her willingness to work and declined to grant another opportunity to "cure" the record regarding the "work force" issue).

For all of these reasons, we decline the request to submit additional evidence at this late date, particularly considering that claimant is represented and, prior to our decision, his attorney presented multiple submissions of additional evidence, did not challenge the sufficiency of the record as developed before the issuance of our decision, and relied on that record in contending that claimant was entitled to PTD benefits. *Olson*, 55 Van Natta at 3383.

After reconsidering the record as previously developed, we continue to find that claimant withdrew from the work force in January 2010, when he took medical disability retirement. (Exs. 41-2, 42-2). Moreover, this record (as previously developed) does not persuasively establish that he reentered the

work force following his January 2010 retirement. *See SAIF v. Stephen*, 308 Or 41, 47 (1989); *Wausau Ins. Co. v. Morris*, 130 Or App 270, 273 (1990) (a claimant's withdrawal from the work force does not irrevocably commit him to retirement/withdrawal for workers' compensation purposes); *George Sweet*, 64 Van Natta 1022, 1027 (2012).

In particular, for the reasons addressed in our initial order, we continue to find that claimant's December 2013 affidavit does not establish that he reentered the work force or was otherwise willing to work following his January 2010 retirement.⁵ Thus, the record does not persuasively establish that the requirements under ORS 656.206(3) (2005) have been satisfied.

In conclusion, based on the foregoing reasoning, we continue to conclude that claimant is not entitled to PTD benefits. Accordingly, we withdraw our March 18, 2014 order. On reconsideration, as supplemented herein, we republish our March 18, 2014 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 30, 2014

⁵ Thus, assuming for the sake of argument that claimant's initial "date of disability" was February or September 2009 (while he was still working), the record persuasively establishes that he retired from the work force shortly thereafter (in January 2010) and did not reenter the work force before the October 2013 Notice of Closure (when his entitlement to PTD benefits is evaluated).