
In the Matter of the Compensation of
BENJAMIN A. VANDEMAN, Claimant
Own Motion No. 14-00025M
THIRD OWN MOTION ORDER ON RECONSIDERATION
Ransom Gilbertson Martin et al, Claimant Attorneys
Liberty Mutual Ins, Carrier

Reviewing Panel: Members Johnson and Weddell.

On December 4, 2014, in lieu of our October 22, 2014 and September 25, 2014 Own Motion Orders, we directed the insurer to pay temporary disability benefits for claimant's reopened "post-aggravation rights" new/omitted medical condition claim ("adjustment reaction with depressed mood and major depression").¹ Based on Dr. Fulper's newly submitted and un rebutted medical report, we were persuaded that claimant was in the "workforce" in the period preceding his August 13, 2013 "disability date" because it was futile for him to have sought work during that period.

In issuing our decision, we noted that a response to our November 19 abatement order had not been timely filed. We have since received the insurer's "response" to our abatement order. We treat this as a request for reconsideration.²

The insurer contends that Dr. Fulper's November 2014 report was not in existence at the "date of disability" (August 13, 2013). Noting that Dr. Fulper also stated on August 13, 2013 that it was unclear why claimant had left the job he had obtained following vocational retraining, the insurer argues that Dr. Fulper's November 2014 opinion represents an unexplained change of opinion. The insurer also asserts that Dr. Fulper's November 2014 report is essentially an impermissible retroactive time loss authorization. Finally, the insurer contends that Dr. Fulper's opinion is inconsistent, contradictory, and not supported by the record.

¹ In our prior orders we had determined that claimant had not established workforce status because the record did not persuasively establish that it was futile for claimant to have sought work during the period preceding his August 13, 2013 "date of disability." *Benjamin A. Vandeman*, 66 Van Natta 1613, *recons*, 66 Van Natta 1762 (2014).

² The insurer was allowed 14 days from our November 19, 2013 Own Motion Order of Abatement, or until December 3, 2014, to respond. *Benjamin A. Vandeman*, 66 Van Natta 1880 (2014). Although the insurer's response was dated December 3, 2014, it was postmarked December 4, 2014, and we received it on December 5, 2014. Under such circumstances, the response was untimely filed. In any event, we have interpreted the insurer's response as a motion for reconsideration of our December 4 order.

After considering the insurer's contentions, we disagree with its position. We reason as follows.

Dr. Fulper's November 2014 report was not in existence at the "date of disability." Nevertheless, the substance of his report (*i.e.*, his opinion) is persuasive under the facts of this case. On August 13, 2013, Dr. Fulper, claimant's attending physician, contemporaneously released him from work until his next appointment. (Ex. CL). Thereafter, he continued treating claimant for depression and right shoulder pain. After each appointment, he released claimant from work until his next appointment. (Exs. CL, A4). Therefore, claimant was contemporaneously released from work by his attending physician from August 13, 2013, and thereafter.

On June 16, 2014, Dr. Fulper reported that, since August 2013, claimant was unable to maintain employment and any unreasonable effort to obtain employment would have been futile due to a combination of shoulder pain and depression. (Ex. C6-1).

As explained in our prior orders, the issue before us was whether claimant was in the workforce under the third criteria in *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989); *i.e.*, not employed, but willing to work and is not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. We found that claimant proved that he was willing to work; therefore, the remaining element to be established was whether it was futile for him to seek work *before* August 13, 2013 (his "disability date"). Because Dr. Fulper's June 2014 report did not clearly address the "futility" question regarding the period preceding August 13, 2013, we initially found the record insufficient to conclude that claimant was in the workforce at the time of his disability.

However, Dr. Fulper's November 2014 report persuasively addressed this "futility" element. In other words, Dr. Fulper concluded that it was futile for claimant to seek work during the calendar year 2013. Such an opinion would necessarily include the period preceding August 13, 2013.

Contrary to the insurer's argument, Dr. Fulper's opinion is not a "retroactive" time loss authorization. As addressed above, in his August 2013 chart note (and thereafter) Dr. Fulper had contemporaneously authorized time loss.

Finally, Dr. Fulper's comment that it was unclear why claimant left a job in April 2012 is not inconsistent with his opinion that it was futile for claimant to look for work in the year 2013. In other words, regardless of claimant's reason for

leaving a job in April 2012, it is apparent that Dr. Fulper believes that claimant's condition had deteriorated to such a degree that it was futile for him to look for work throughout 2013. Therefore, Dr. Fulper's opinion is not inconsistent, contradictory, and unsupported by the record.

Accordingly, we withdraw our prior orders. On reconsideration, as supplemented herein, we adhere to and republish our prior orders. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on December 11, 2014