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

Reviewing Panel: Members Johnson and Weddell.

In our September 25, 2014 Own Motion Order, we declined claimant's requests for: (1) temporary disability benefits for his reopened "post-aggravation rights" new/omitted medical condition claim ("adjustment reaction with depressed mood and major depression"); and (2) penalties and attorney fees for the insurer's allegedly unreasonable claim processing. In reaching our conclusion, we determined that the record was insufficient to establish that claimant was in the workforce before August 13, 2013, his "date of disability." Claimant requests reconsideration, contending that he was in the workforce at the determinative time.

As we held in our prior order, workforce status is determined at the time of disability. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989);¹ *Weyerhaeuser Co. v. Kepford*, 100 Or App 410, 414, rev den 310 Or 71 (1990). The relevant time period for which claimant must be in the workforce is the time before the "date of disability." See generally *SAIF v. Blakely*, 160 Or App 242 (1999); *Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *Donald W. Wagner*, 63 Van Natta 441, 444 (2011).

Here, claimant last worked on April 24, 2012, and was not released from work until August 13, 2013 (his "date of disability"), over a year after he stopped working. Furthermore, the record does not establish that he made reasonable efforts to find employment during the period between April 24, 2012 and August 13, 2013. Thus, as we found in our prior order, claimant did not satisfy the first or second *Dawkins* criteria.

Asserting that the determinative period for analyzing his workforce status is "at the time of" his disability (rather than "before") claimant contends that we should focus solely on Dr. Fulper's statement that, since he began treating claimant

¹ Under the *Dawkins* criteria, claimant is in the workforce at the time of disability if he is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and is making reasonable efforts to obtain employment; or (3) 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. *Dawkins*, 308 at 258.

in August 2013, claimant was unable to maintain employment and any reasonable effort to obtain employment would have been futile due to a combination of shoulder pain and depression. Relying on that statement and his un rebutted representations regarding his willingness to work, claimant asserts that he was in the workforce at the time of disability under the third *Dawkins* criteria. Based on the following reasoning, we adhere to our previous determination.

Consistent with the *Dawkins* rationale, in analyzing the “workforce” issue, we are reviewing the circumstances existing “at the time of” claimant’s “disability date.” However, in conducting such an evaluation, we must necessarily take into consideration the period preceding the “date of disability” in determining whether a claimant has established workforce status as of the time of disability. *See, e.g., Morris*, 103 Or App at 274 (in light of the Board’s two previous determinations that were directly contrary to the claimant’s current assertion that he had never withdrawn from the workforce, the court reversed as inadequately explained the Board’s finding that the claimant was now willing to work and was in the workforce when his condition worsened); *Arthur R. Morris*, 41 Van Natta 2820 (1990) (on remand, after reviewing past determinations and considering the lack of corroborative evidence demonstrating a change in attitude toward returning to work, the Board found that the claimant had withdrawn from the workforce at the time his condition worsened); *Steven L. Traister*, 65 Van Natta 1295 (2013) (work history and medical opinions before “date of disability” established it was futile for the claimant to work or seek work on or before the date of disability).

In other words, if the claimant was engaged in regular gainful employment, or willing to work and making reasonable efforts to obtain employment in the period preceding the “date of disability,” he or she would be considered to be in the workforce at the time of disability. *See, e.g., Gary W. McDaniel*, 62 Van Natta 1561 (2010) (the claimant’s participation in a job search program before the “date of disability” demonstrated his willingness to work and work search efforts at the time of disability); *Connie J. Morrow*, 58 Van Natta 2588 (2006) (the claimant was found to be in the work force at the time of disability based on references incorporated in the medical record regarding her employment with a locksmith and safe company for the 15 years preceding the “date of disability”). As such, an evaluation of the “futility” component would be unnecessary.

In addition, we have considered gaps in employment before the “date of disability” in determining whether the claimant was in the workforce at the time of disability. Depending on the length of those gaps in employment, we have determined whether the claimant had withdrawn from the workforce. *See, e.g.,*

Mike J. Perkins, 62 Van Natta 2005 (2010) (approximately four week period between last employment and “date of disability” insufficient to establish that the claimant had withdrawn from the workforce); *Jennifer L. Williams*, 61 Van Natta 2161 (2009) (same – approximately three week period); *compare Cherry L. Donaldson*, 65 Van Natta 1558 (2013) (the claimant was not in the workforce after six week gap following her most recent job search efforts and her “date of disability”); *Joanne M. Abshire*, 63 Van Natta 549 (2011) (the claimant was not in the workforce where there was an eight week gap between her departure from work and her “date of disability”).

Moreover, in considering what occurred during the period preceding the “date of disability” where a claimant has withdrawn from the workforce in the past, we do not end our inquiry with that retirement. In this regard, *Morris* held that a finding that a claimant withdrew from the workforce at one time did not irrevocably commit the claimant to retirement for purposes of workers’ compensation benefits. *See Morris*, 103 Or App at 273; *Dean L. Watkins*, 48 Van Natta 60 (1996). Consequently, if a person withdraws from the workforce and subsequently reenters the workforce by the “date of disability,” he or she would establish workforce status at the relevant time. *See Michael D. Pickett*, 60 Van Natta 54 (2008) (after retiring, the claimant returned to the workforce and was working before the “date of disability”; therefore, he was in the workforce at the time of disability); *Wendel P. Harrison*, 58 Van Natta 2474 (2006) (same); *compare Loyd E. Franks*, 66 Van Natta 892 (2014) (the claimant retired before the “date of disability” and did not return to the workforce; therefore, he was not in the workforce at the time of disability).

Thus, the above points and authorities establish that we necessarily include the period preceding the “date of disability” in determining whether the claimant was in the workforce at the time of disability under the *Dawkins* criteria, including the third *Dawkins* criterion; *i.e.*, where the claimant is 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. *Dawkins*, 308 at 258. *See, e.g., Traister*, 65 Van Natta at 1301-02 (work history and medical opinions before “date of disability” established it was futile for the claimant to work or seek work on or before the date of disability); *Timothy A. Hall*, 62 Van Natta 709 (2010) (the claimant was found to be in the workforce under third *Dawkins* criterion where the attending physician released him from work about four months before his “date of disability” due to back pain, which required surgery); *Morris*, 41 Van Natta at 2822 (after reviewing past determinations and considering the lack of

corroborative evidence demonstrating a change in attitude toward returning to work, the claimant was found to have had withdrawn from the workforce at the time his condition worsened).

In conclusion, for the reasons expressed in our previous order, the record does not establish that it was futile for claimant to have sought work during the period preceding his August 13, 2013 “date of disability.” Consequently, this record does not persuade us that he was in the workforce at the time of his disability.² Therefore, claimant is not entitled to the requested temporary disability benefits.

Accordingly, we withdraw our September 25, 2014 order. On reconsideration, as supplemented herein, we republish our September 25, 2014 order. The parties’ 30-day rights of reconsideration and appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on October 22, 2014

² As noted in our prior order, if a party wishes to submit additional evidence that addresses the “work force” and “inability to work” components of the statutory standard for the period preceding August 13, 2013, that party may request reconsideration of our decision. However, because our authority to reconsider this decision expires within 30 days after the mailing date of this Own Motion Order, the reconsideration request must be filed within that 30-day period. OAR 438-012-0065(2).