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In the Matter of the Compensation of  
**LEONARD L. SEEGER, Claimant**  
Own Motion No. 14-00052OM  
OWN MOTION ORDER ON RECONSIDERATION  
Harder Wells Baron & Manning PC, Claimant Attorneys  
John M Pitcher, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

On March 13, 2015, we withdrew our February 13, 2015 Own Motion Order that: (1) declined claimant's request for permanent total disability (PTD) benefits for his "post-aggravation rights" new medical condition ("C4-5 spinal stenosis and spondylosis"); and (2) increased his additional unscheduled permanent partial disability (PPD) for that new medical condition from 15 percent (48 degrees), as granted by an Own Motion Notice of Closure, to 22 percent (70.4 degrees), for a total award to date of 64 percent (204.8 degrees) unscheduled PPD for the head, cervical spine, and left shoulder. We took this action to consider claimant's motion for reconsideration and to allow the self-insured employer an opportunity to respond. The time for such response has expired; therefore, we proceed with our reconsideration.

Claimant requests reconsideration of that portion of our order that declined to grant PTD benefits. In reaching our conclusion, we found that he had retired before the issuance of the May 19, 2014 Notice of Closure and, as such, was not a "worker" under ORS 656.005(30) during the period for which PTD benefits were sought.

On reconsideration, claimant contends that we incorrectly applied the current version of ORS 656.005(30), the last sentence of which provides: "For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, 'worker' does not include a person who has withdrawn from the workforce during the period for which such benefits are sought." This provision was added to ORS 656.005(30) in 2001 and applies to claims with a date of injury on or after January 1, 2002. *See* Or Laws 2001, ch 865, §§ 1, 22. Because claimant's date of injury is April 4, 1985, this provision does not apply to his claim.

Nevertheless, in our initial order, we also relied on *Richard L. Elsea*, 66 Van Natta 493, *recons*, 66 Van Natta 727 (2014). In *Elsea*, we applied ORS 656.206(3) (2005)<sup>1</sup> and held that the claimant was not entitled to PTD benefits because he had

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<sup>1</sup> As we explained in our initial order, because this claim is in Own Motion status, the May 10, 2014 Notice of Closure issued under ORS 656.278(6), not ORS 656.206 or ORS 656.268. Nevertheless,

retired from the workforce and did not reenter the workforce before issuance of the Own Motion Notice of Closure, when his entitlement to PTD benefits was evaluated.

Here, as we found in our initial order, before the June 24, 2010 “date of disability,” claimant was regularly and gainfully employed as a mechanic in a bowling alley. Therefore, he was in the workforce at the time of disability. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989); *Benjamin A. Vandeman*, 66 Van Natta 1613, *recons*, 66 Van Natta 1762, 1764 (2014).

After recovering from the June 2010 cervical surgery, claimant returned to work as a mechanic at the bowling alley. In March 2011, at the age of 73, he continued to work full-time as a bowling alley mechanic, stating that he needed to work at least another year. (Exs. 380, 382-1).

On December 8, 2011, claimant underwent another cervical surgery and was released from work. (Exs. 396, 402, 404, 405). In April or May of 2012, he attempted to return to work, but was unable to continue because of neck pain. (Ex. 409). In March 2014, he was 76 years of age. At that time, Dr. Farris, examining physician, reported that claimant was not working and had not worked since 2012. (Ex. 422-9). On May 12, 2014, Dr. Bert, attending physician, reported that claimant was “now retired.” (Ex. 427-1).

Claimant argues that we should not rely on this single reference from Dr. Bert that he was “now retired.” However, the record establishes that claimant had been contemplating retirement. Moreover, Dr. Bert’s un rebutted statement

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where consistent with the provisions of ORS 656.278, we have applied the 2005 amendments to ORS 656.206 to Own Motion Notices of Closure that issue on or after January 1, 2006. *See David C. Drader*, 58 Van Natta 3093, 3098 (2006). Thus, because this Own Motion Notice of Closure issued after January 1, 2006, the 2005 amendments to ORS 656.206 apply. In *Elsea*, the Own Motion Notice of Closure also issued after January 1, 2006; therefore, the 2005 amendments to ORS 656.206 applied.

ORS 656.206(3) (2005) provides:

“The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment.”

Under the statute, claimant must prove that, “but for the compensable injury, [he] (1) is or would be willing to seek gainful employment and (2) has or would have made reasonable efforts to obtain such employment” unless seeking such work would have been futile. *SAIF v. Stephen*, 308 Or 41, 47-48 (1989). The statutory language in ORS 656.206(3) that was interpreted by *Stephen* remains unchanged, as quoted above.

establishes that claimant actually retired before the May 19, 2014 Notice of Closure. In addition, there is no evidence that he returned to the workforce before the May 2014 closure notice, when his entitlement to PTD benefits is evaluated. Under these facts, the record establishes that claimant retired from the workforce and is not entitled to PTD benefits. *Elsea*, 66 Van Natta at 500-01, *recons*, 66 Van Natta at 729-30 n 5.

In any event, even if we agreed with claimant that he did not withdraw from the workforce, the record does not satisfy the remaining elements regarding entitlement to PTD benefits. We reason as follows.

ORS 656.206(1)(d) (2005) provides that PTD “means, notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.” “Regularly performing work” means “the ability of the worker to discharge the essential functions of the job,” and “[s]uitable occupation” means “one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation.” ORS 656.206(1)(e), (f) (2005). Claimant has the burden of proving PTD status and must establish that he is willing to seek regular gainful employment and has made reasonable efforts to obtain such employment. ORS 656.206(3); ORS 656.266(1).

In *James S. Daly*, 58 Van Natta 2355 (2006), we awarded a claimant PTD for a “post-aggravation rights” new/omitted medical condition. Our analysis of ORS 656.206, in conjunction with ORS 656.278, resulted in the following conclusions. First, disability for a previously accepted condition is considered as it existed at the last claim closure that preceded the expiration of claimant’s 5-year aggravation rights.<sup>2</sup> *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 claimant has established entitlement to PTD.

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<sup>2</sup> We reasoned that, under this method, the PTD evaluation would include consideration of permanent disability from the accepted conditions occurring before the expiration of aggravation rights, but would not include consideration of permanent disability from any “worsened condition” after the expiration of aggravation rights, which would be contrary to the statutory scheme and the rationale expressed in *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004), *Sherlee M. Samel*, 56 Van Natta 931, 938 (2004), and *Jimmy O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2002), *aff’d Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005). See *Daly*, 58 Van Natta at 2362.

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 prohibits gainful employment under the “odd lot” doctrine. *Id.* at 2368; *see also Nancy J. Ferguson*, 64 Van Natta 2315 (2012); *David C. Drader*, 58 Van Natta 3093 (2006).

Here, claimant had preexisting disc disease at C5-6 and C6-7, although there is no evidence that it was disabling before the 1985 work injury. (Exs. 21-2, 422-13). He also had preexisting borderline diabetes that was not disabling before the 1985 work injury. (Exs. 4, 172-2, 185-2, 231-1). In 1983, claimant sustained a compensable left knee injury that required multiple surgeries following his 1985 compensable injury. (Exs. 71, 74, 211, 213, 268, 271, 272, 282-1, 293, 294, 347). In 1988, while working for his subsequent employer at the bowling alley, claimant sustained a compensable right shoulder injury that required surgery (repair large rotator cuff tear, partial acromioplasty and resection of coracoacromial ligament). (Exs. 130, 137, 145, 152, 206-3). In 1993, claimant had open-heart bypass surgery. (Exs. 293-1, 318-1).

In January 2013, claimant sought treatment from Dr. Bert for worsening numbness and tingling in the ring and small fingers of both hands. (Ex. 419). Dr. Bert did “not feel that [claimant was] capable of work activity at his present level of loss of motion of his neck and numbness and tingling in his hands.” (Ex. 419-2). Electrical studies were consistent with carpal tunnel syndrome. (Exs. 421, 422-14).

On March 27, 2014, Dr. Farris examined claimant, conducted a record review, and evaluated imaging studies. (Exs. 422, 423). He noted that claimant suffered from insulin-dependent diabetes mellitus, coronary artery disease, and generalized atherosclerosis. (Ex. 422-9). He opined that, although electrical studies were consistent with bilateral carpal tunnel syndrome, because claimant reported no real benefit from a carpal tunnel release, his bilateral upper extremity complaints were likely due to diabetic polyneuropathy and not to a compressive neuropathy. He stated that any carpal tunnel syndrome that claimant might have would be due to his diabetes mellitus, rather than the 1985 work incident. (Ex. 422-14).

Regarding claimant’s ability to work, Dr. Farris concluded:

“On the basis of medical probability, [claimant] would not be able to return to his job as a mechanic with the bowling alley because of difficulty positioning his neck

as he works on equipment. He should, however, be capable of performing any work activity that does not require extreme postures of the cervical spine, repetitive or sustained overhead use of the upper extremities, or lifting of more than 25 pounds. In practical terms, however, [claimant] is now 76 years of age and would likely have difficulty finding suitable employment because of his age.” (Ex. 422-15).

Dr. Bert concurred with Dr. Farris’s report. (Ex. 424). In an August 20, 2014 conversation summary, Dr. Bert agreed with Dr. Farris’s assessment that claimant could perform work activity that does not require extreme postures of the cervical spine and lifting greater than 25 pounds. (Ex. 430-2). However, he indicated that claimant has additional limitations in that he experiences chronic pain secondary to his fusion that “requires unscheduled breaks from work that is performed within the above-described limitations and based upon his frequent need for unscheduled breaks, he would not be able to sustain regular work.” (*Id.*).

The medical record does not distinguish between disability which may be considered in evaluating a claimant’s PTD status under *Daly* (*i.e.*, disability for the previously accepted condition as it existed as of the last claim closure before the expiration of claimant’s aggravation rights, disability that preceded the initial compensable injury, and disability from the “post-aggravation rights” new/omitted medical condition) and disability from other causes, such as his right shoulder injury that occurred after the 1985 work injury or his unaccepted bilateral hand condition (whether that condition was caused by diabetic polyneuropathy or carpal tunnel syndrome), which did not have disabling effects before the initial compensable injury. *See Shakur Shabazz*, 65 Van Natta 1551, 1557 (2013) (medical opinion did not establish PTD because it did not distinguish between disability that may be considered in evaluating a claimant’s PTD status under *Daly* and disability from other causes); *Patrick S. Holman*, 65 Van Natta 1044, 1051-52 (2013) (medical opinion did not establish PTD status because it considered unaccepted conditions that did not cause disabling effects before the initial compensable injury); *Joseph P. Hapka*, 61 Van Natta 1148, 1159 (2009) (same).

Under these circumstances, we find the record insufficient to establish that claimant is permanently incapacitated from regularly performing work at a gainful and suitable occupation. Consequently, for the reasons expressed in our February 13, 2015 Own Motion Order, as supplemented herein, we adhere to our conclusion that claimant is not entitled to PTD benefits.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our February 13, 2015 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 17, 2015