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

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of the May 10, 2014 Own Motion Notice of Closure that awarded an additional 15 percent (48 degrees) unscheduled permanent partial disability (PPD) for his “post-aggravation rights” new medical condition (“C4-5 spinal stenosis and spondylosis”).¹ Claimant seeks permanent total disability (PTD) benefits, or, in the alternative, increased unscheduled PPD benefits. We modify the closure notice.

FINDINGS OF FACT

Claimant’s date of birth is January 16, 1938. (Ex. 3). In 1954, he broke his right forearm, which was surgically repaired with a metal plate. (Ex. 2). He also had a heart attack at age 32 that did not cause any residual problems. (Exs. 82-2, 154-1). By about 1981, claimant was a “borderline diabetic,” which was controlled by diet. (Exs. 4, 172-2, 178-2, 185-2, 231-1).

On September 29, 1983, claimant sustained a compensable left knee injury while working as a log truck driver for the self-insured employer. (Ex. 3). Following left knee surgery (left medial meniscectomy), he returned to regular work with minimal impairment. (Exs. 10, 14, 15). In April 1984, he was awarded 5 percent (7.5 degrees) scheduled PPD for loss of use or function of his left leg (knee). (Ex. 17).

The current Own Motion claim concerns an April 4, 1985 work injury, wherein claimant compensably injured his head, neck, and left shoulder while driving a log truck for the same employer. (Exs. 16, 102, 206). The position of log truck driver (DOT# 904.683-010) requires “medium” strength.

¹ Claimant’s April 4, 1985 claim was accepted as a disabling claim and was first closed on June 24, 1986. Thus, claimant’s aggravation rights expired on June 24, 1991. Therefore, when claimant sought claim reopening in 2010, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On June 3, 2010, the self-insured employer voluntarily reopened claimant’s Own Motion claim for “post-aggravation rights” new medical conditions (“C4-5 spinal stenosis and spondylosis”). ORS 656.278(1)(b), (5). On May 19, 2014, the employer issued its Notice of Closure.

On April 24, 1985, Dr. Bert, attending physician, noted that cervical x-rays showed severe narrowing at C5-6 and lesser narrowing at C6-7, with spondylosis at those two levels. (Ex. 21-2). He diagnosed C5-6 cervical spondylosis. (*Id.*) On August 6, 1985, Dr. Bert performed an anterior cervical discectomy and fusion at C5-6. (Ex. 38).

In January 1986, Dr. Bert advised claimant not to return to work as a truck driver. (Exs. 50, 53). In April 1986, he began working as a maintenance mechanic (DOT# 683.281-014) in a bowling alley. (Exs. 53-2, 67-1). He continued to work in that position until 2012.

In May 1986, Dr. Bert performed left knee surgery (arthroscopy, debridement meniscal remnant) related to the 1983 work injury. (Exs. 71, 74). An August 1986 Determination Order, as affirmed in May 1987, awarded no additional scheduled PPD for the 1983 left knee injury claim. (Exs. 81, 102).

A June 24, 1986 Determination Order awarded 15 percent (48 degrees) unscheduled PPD for the head, cervical spine, and left shoulder, regarding the 1985 work injury. (Exs. 78, 102). A May 1987 Opinion and Order increased that award to 30 percent (96 degrees) unscheduled PPD for the head, cervical spine, and left shoulder. (Ex. 102-5).

In February 1988, an Opinion and Order upheld the employer's April 1987 denial of a right shoulder condition regarding the 1983 and 1985 injury claims. (Ex. 114).

In March 1988, Dr. Bert performed left knee surgery (arthroscopy, debridement of a chondritis of the medial femoral condyle and removal of synovial plica) related to the 1983 work injury. (Exs. 115, 119).

In April 1988, claimant sustained a compensable right shoulder injury while working at the bowling alley. (Exs. 130, 145, 152, 206-3). In June 1988, Dr. Bert performed right shoulder surgery (repair large rotator cuff tear, partial acromioplasty and resection of coracoacromial ligament). (Ex. 137). This 1988 injury claim was closed in April 1989, with an award of 5 percent (16 degrees) unscheduled PPD for the right shoulder. (Ex. 161).

An August 1988 Determination Order awarded an additional 5 percent (7.5 degrees) scheduled PPD for loss of use or function of the left leg (knee), related to the 1983 work injury. (Ex. 141). That award was affirmed. (Ex. 163).

In March 1989, Dr. Bert noted that claimant was having a “generalized arthritic flare up of his neck, back.” (Ex. 159). He also diagnosed left elbow medial epicondylitis and recommended surgery. (Exs. 158, 159). The employer denied this medial epicondylitis condition as unrelated to the 1985 work injury. (Ex. 162). Claimant did not appeal that denial, which became final. (Ex. 206-4). In May 1989, Dr. Bert performed left elbow surgery (left medial epicondylectomy). (Exs. 167, 168).

In April 1989, Dr. Wasner, consulting rheumatologist, examined claimant and opined that he did not have a systemic arthritis. (Ex. 165-2). However, he noted that claimant had extensive C6-7 osteoarthritis. (*Id.*)

In January 1990, Dr. Bert performed left shoulder surgery (decompression, repair rotator cuff tear, acromioplasty) related to the 1985 work injury. (Exs. 188, 192, 193, 206-7, -11-12).

In December 1990, claimant underwent left knee arthroscopic surgery related to the 1983 work injury. (Exs. 211, 213).

A February 12, 1991 Determination Order awarded an additional 12 percent (38.4 degrees) unscheduled PPD for the cervical spine and left shoulder related to the 1985 work injury, for a total award to date of 42 percent (134.4 degrees) unscheduled PPD for the head, cervical spine, and left shoulder. (Ex. 222). That award included 29 percent permanent impairment to the left shoulder. (Ex. 222-2).

In June 1991, claimant was diagnosed with diabetes and began treating with Dr. Levy for that condition, which was brought under control with oral medication. (Exs. 226, 231, 233, 234, 318-2).

In June 1992, Dr. Bert performed an anterior cervical discectomy and fusion at C6-7. (Ex. 252). The 1985 work injury claim was reopened in Own Motion status and subsequently closed by a November 25, 1992 Own Motion Notice of Closure that awarded temporary disability benefits. (Exs. 259, 266).

In August 1993, Dr. Bert performed left knee surgery (debridement medial meniscal remnant, lateral meniscus and chondromalacia). (Exs. 268, 271, 272, 282-1). The 1983 work injury claim was reopened in Own Motion status and subsequently closed by a January 18, 1994 Own Motion Notice of Closure that awarded temporary disability benefits. (Exs. 274, 277).

In 1993, claimant had open heart bypass surgery. (Exs. 293-1, 318-1). In August 1994, Dr. Bert performed a left knee injection and right elbow surgery (removal of olecranon bursa). (Exs. 282, 283).

In August 1995, Dr. Bert performed left knee surgery (debridement of cruciate stump and lateral femoral condyle). (Exs. 293, 294). The 1983 work injury claim was reopened in Own Motion status and subsequently closed by a December 4, 1995 Own Motion Notice of Closure that awarded temporary disability benefits. (Exs. 299).

In April 1997, the employer denied a “ruptured left biceps tendon and tendonitis” condition as unrelated to the 1985 work injury. (Ex. 305).

In May 1997, Dr. Whitney performed left shoulder surgery (rotator cuff repair). (Exs. 310-1, 318-1)

In July 1998, Dr. Bert performed surgery (anterior cervical fusion at C6-7) for a recurrent C6-7 disc with spondylosis. (Exs. 314, 318, 321). The 1985 work injury claim was reopened in Own Motion status and subsequently closed by an April 8, 1999 Own Motion Notice of Closure that awarded temporary disability benefits. (Exs. 315, 339).

In December 1999, Dr. Bert performed left knee surgery (debridement and subtotal synovectomy. (Ex. 347). The 1983 work injury claim was reopened in Own Motion status and subsequently closed by a May, 2003 Own Motion Notice of Closure that awarded temporary disability benefits. (Exs. 353).

In September 2003, Dr. Bert reported that claimant was working full time and planned on working another two years, until he was 67 years old. (Ex. 358). For several years, claimant did well with annual follow-ups with Dr. Bert. (Exs. 359, 360, 361, 362).

In April 2010, claimant sought treatment for increased neck pain. (Ex. 367). In May 2010, Dr. Bert recommended surgery (anterior cervical fusion at C4-5), but did not indicate any work release. (Exs. 371, 372).

On June 3, 2010, the employer accepted and voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new medical condition (“C4-5 spinal stenosis and spondylosis”) under the 1985 work injury claim. (Exs. 373, 374).

On June 10, 2010, Dr. Bert performed an anterior cervical fusion at C4-5. (Exs. 375, 382-5). Claimant was released from work on June 24, 2010. (Ex. 375). On August 25, 2010, Dr. Bert continued to release claimant from work, noting that he wanted claimant fully capable of work before he returned. (Exs. 376, 377). Claimant remained released from work until December 1, 2010, when he was released to regular work. (Exs. 378, 379).

On March 21, 2011, claimant sought treatment from Dr. Bert for carpal tunnel syndrome and increased neck symptoms. (Ex. 380). Dr. Bert recommended carpal tunnel release. At the age of 73, claimant continued to work full-time as a bowling alley mechanic, and indicated that he needed to work at least another year. (Exs. 380, 382-1).

On August 11, 2011, Dr. Bert performed left carpal tunnel release. (Ex. 389).

On October 17, 2011, Dr. Bert recommended surgery (decompression and fusion at C6-7 and C7-T1). (Ex. 393). On December 8, 2011, Dr. Bert performed an exploration at C6-7 and C7-T1, “with Zero-P fusion C7-T1 with spinal cord monitoring.” (Ex. 396). Claimant was released from work following that surgery. (Exs. 402, 404, 405).

On April 18, 2012, Dr. Bert noted that claimant’s neck condition was improving, but he could not yet do his usual and customary work. (Ex. 406-1, -2). On April 23, 2012, claimant reported to his physical therapist that his goals were “to decrease pain, increase functional mobility, and return back to work [at the bowling alley] without any limitations in his cervical spine.” (Ex. 407).

On May 30, 2012, Dr. Bert stated that he was not yet releasing claimant for work. (Ex. 409). He noted that claimant had “tried to go back to work and was unable to continue because of discomfort in his neck.” (*Id.*)

On August 30, 2012, Dr. Kitchel examined claimant on behalf of the employer and opined that claimant had reached “maximum medical improvement.” (Ex. 415-7). Dr. Bert concurred. (Ex. 416).

A November 9, 2012 Notice of Closure closed claimant’s Own Motion claim under the 1985 work injury claim. (Ex. 417). However, claimant contended that the closure was premature, and the parties agreed that the closure notice could be rescinded. (Ex. 420-1). A February 27, 2013 Own Motion Order set aside the November 2012 closure notice. (Ex. 420). *Leonard L. Seeger*, 65 Van Natta 426 (2013).

On January 28, 2013, claimant returned to Dr. Bert, complaining of 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) He felt “at this point, [claimant] is 100 percent disabled.” (*Id.*)

On March 27, 2014, Dr. Farris examined claimant on behalf of the employer. (Exs. 422, 423). He also conducted a record review and evaluated imaging studies. (*Id.*) He noted that claimant currently was not working and had not worked since 2012. (Ex. 422-9). 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. Farris found claimant medically stationary regarding all conditions related to the 1985 work injury. (Ex. 422-14). He measured claimant’s cervical ranges of motion (ROM) as follows: 20 degrees flexion; 15 degrees extension; 10 degrees right lateral flexion; 20 degrees left lateral flexion; 30 degrees right rotation; and 30 degrees left rotation. (Ex. 422-11). He found normal strength (5/5) and normal sensation throughout both upper extremities, noting that two-point discrimination was 6mm in all five digits of both hands. (*Id.*)

Dr. Farris apportioned 50 percent of claimant’s cervical spine impairment to the 1985 work injury and subsequent surgeries, and 50 percent to his preexisting degenerative disc disease, the natural degenerative process, and his 45-pack-year history of cigarette smoking. (Ex. 422-14).

Dr. Bert concurred with Dr. Farris’s report. (Ex. 424).

On May 12, 2014, claimant returned to Dr. Bert for treatment of neck pain. Dr. Bert noted that claimant's neck pain would be treated conservatively because any further neck surgery would constitute a "grave risk" to him. (Ex. 427-2). Dr. Bert also noted that claimant was "now retired." (Ex. 427-1).

A May 19, 2014 Own Motion Notice of Closure awarded an additional 15 percent (48 degrees) unscheduled PPD for the cervical spine and left shoulder. (Ex. 428). Claimant requested review.²

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.³ 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." (Ex. 430-2).

CONCLUSIONS OF LAW AND OPINION

PTD

Claimant's 1985 injury claim was reopened for the processing of a "post-aggravation rights" new medical condition ("C4-5 spinal stenosis and spondylosis"). Such claims may qualify for payment of permanent disability compensation, including PTD. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004); *James S. Daly*, 58 Van Natta 2355 (2006); *Sherlee M. Samel*, 56 Van Natta 931, 938 (2004).

The May 19, 2014 Notice of Closure issued under ORS 656.278(6),⁴ not ORS 656.206 or ORS 656.268. Nevertheless, consistent with the provisions of ORS 656.278, we have applied the 2005 amendments to ORS 656.206 regarding

² Claimant did not request the appointment of a medical arbiter.

³ Claimant's attorney submitted this August 20, 2014 conversation summary without numbering it as an Exhibit. We chronologically number that document as "Exhibit 430."

⁴ ORS 656.278(6) provides:

"Any claim reopened under this section shall be closed by the insurer or self-insured employer in a manner prescribed by the board, including, when appropriate, an award of permanent disability benefits as

Own Motion Notices of Closure that issue on or after January 1, 2006. *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.

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.”⁵ ORS 656.206(1)(e), (f) (2005).

In addition, 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.”

Finally, ORS 656.005(30) defines “worker” and provides, in relevant part:

determined under subsections (1)(b) and (2)(d) of this section. The board shall also prescribe a process to be followed if the worker objects to the claim closure.”

⁵ In *Daly*, 58 Van Natta at 2374, we awarded PTD for a “post-aggravation rights” new/omitted medical condition. Our analysis of ORS 656.206, in conjunction with 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 the claimant’s 5-year aggravation rights. *Id.* 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 or omitted medical condition to determine whether claimant has established entitlement to PTD.

Thus, to establish PTD, claimant must apply the above factors to prove 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. *Daly*, 58 Van Natta at 2368; *Drader*, 58 Van Natta at 2099.

“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.”

Based on the following reasoning, we find that claimant has not established the aforementioned “workforce” element for a PTD award.

Workforce status is determined at the time of disability. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989); *Weyerhaeuser Co. v. Kepford*, 100 Or App 410, 414, *rev den* 310 Or 71 (1990).⁶ The “date of disability” for the purposes of determining workforce status in an Own Motion claim for a “post-aggravation rights” new/omitted medical condition is the date the claimant’s condition: (1) resulted in a partial or total inability to work; and (2) required (including a physician’s recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment. ORS 656.278(1)(b); *Butcher v. SAIF*, 247 Or App 684, 689-90 (2012); *Henry D. Desamais*, 64 Van Natta 652, 653 (2012). The “date of disability” is the date on which both of these factors are satisfied. *Arthur D. Kiser*, 57 Van Natta 1128, 1130 (2005); *Robert J. Simpson*, 55 Van Natta 3801 (2003).

Here, on May 10, 2010, Dr. Bert recommended surgery, but did not indicate any work release. (Ex. 371). On June 10, 2010, Dr. Bert performed an anterior cervical fusion at C4-5. (Exs. 375, 382-5). Claimant was released from work on June 24, 2010. (Ex. 375). Therefore, the “date of injury” is June 24, 2010.

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); *see Benjamin A. Vandeman*, 66 Van Natta 1613, *recons* 66 Van Natta 1762 (2014).

Here, before the June 24, 2010 “date of disability,” claimant was regularly, gainfully employed as a mechanic at a bowling alley. Therefore, he was in the workforce at the time of disability. *Dawkins*, 308 Or at 258; *Vandeman*, 66 Van Natta at 1764. However, under the facts of this case, that does not end our inquiry.

⁶ 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.

After recovering from the June 2010 cervical surgery, claimant returned to work as a mechanic at a 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 reported that claimant was not working and had not worked since 2012. (Ex. 422-9). On May 12, 2014, Dr. Bert reported that claimant was “now retired.” (Ex. 427-1).

Thus, the record establishes that claimant had been contemplating retirement and actually retired before the May 19, 2014 Notice of Closure. Moreover, there is no evidence that he returned to the workforce before the May 2014 closure notice, when his entitlement to PTD benefits is evaluated. Therefore, because claimant withdrew from the workforce during the period for which PTD benefits are sought, he does not qualify as a “worker.” ORS 656.005(30). On that basis, he is not entitled to PTD benefits.⁷ *Id.*; ORS 656.206(3) (2005); *see Richard L. Elsea*, 66 Van Natta 493, *recons*, 66 Van Natta 727 (2014) (the claimant was not entitled to PTD benefits because he had retired from the workforce and did not reenter the workforce before issuance of the Notice of Closure (when his entitlement to PTD benefits was evaluated)).

Unscheduled PPD

Alternatively, claimant requests additional unscheduled PPD for the “post-aggravation rights” new medical condition (“C4-5 spinal stenosis and spondylosis”). Based on the following reasoning, we modify the May 2014 Notice of Closure.

The PPD limitation set forth in ORS 656.278(2)(d) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [PPD] award.” *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). If those conditions are satisfied, the Director’s standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate

⁷ We need not address the remaining elements regarding entitlement to PTD benefits.

“post-aggravation rights” new or omitted medical condition claims. Under such circumstances, we redetermine the claimant’s permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d).

Jeffrey L. Heintz, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at 3207-08.

Here, all three factors are satisfied regarding claimant’s cervical impairment. Dr. Bert ratified Dr. Farris’s decreased ROM findings. Claimant also underwent additional surgery. These impairment findings may qualify for an impairment rating. Moreover, claimant’s “post-aggravation rights” new medical condition (“C4-5 spinal stenosis and spondylosis”) involves the same “injured body part” (cervical spine) that was the basis, in part, of the prior 42 percent unscheduled PPD award. Therefore, the limitation in ORS 656.278(2)(d) applies to claimant’s unscheduled PPD. However, before application of the statutory limitation, we redetermine claimant’s unscheduled PPD pursuant to the Director’s standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

Claimant’s claim was closed by a May 19, 2014 Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1).

For the purpose of rating claimant’s permanent impairment, only the opinions of claimant’s attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter’s findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

Only findings of impairment that are permanent and caused by the accepted compensable condition may be used to rate impairment. OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994). However, conditions that are the direct medical sequelae of the accepted conditions are included in the rating of permanent disability, unless they have been specifically denied. *See* ORS 656.268(15); OAR 436-035-0005(6).

Here, no medical arbiter examination was performed. Consequently, we rely on the report from Dr. Farris, as ratified by Dr. Bert, claimant’s attending physician, to rate his permanent impairment. *See Jennifer L. Williams*, 63 Van Natta 638 (2011).

Dr. Farris found the following cervical ROM: 20 degrees flexion; 15 degrees extension; 10 degrees right lateral flexion; 20 degrees left lateral flexion; 30 degrees right rotation; and 30 degrees left rotation. (Exs. 422-11, 424). Claimant receives the following cervical ROM values: flexion, 4 percent; extension, 4.8 percent; right lateral flexion, 2.67 percent; left lateral flexion, 1.67 percent; right rotation, 3 percent; and left rotation, 3 percent. OAR 436-035-0360(2), (3), (4), (5). These are added for a value of 19.14, which is rounded to a total of 19 percent for decreased cervical ROM. OAR 436-035-0011(2)(a), (4); OAR 436-035-0360(11).

Dr. Farris attributed 50 percent of the impairment findings to the 1985 work injury and subsequent surgeries, and 50 percent to his preexisting degenerative disc disease, the natural degenerative process, and his 45-pack-year history of cigarette smoking. (Ex. 422-14). Dr. Bert concurred. (Ex. 424).

Claimant contends that Dr. Bert subsequently clarified that he apportioned 70 percent of the cervical spine impairment to the 1985 work injury. We disagree. In his August 2014 conversation summary, Dr. Bert apportioned claimant's "need for the original surgery" at 70 percent caused by the work injury and 30 percent caused by the preexisting cervical spondylosis.⁸ (Ex. 430-1). Dr. Bert did not address the apportionment of claimant's permanent impairment other than to concur with Dr. Farris's apportionment of 50 percent to the work injury and subsequent surgeries, and 50 percent to the previously mentioned contributors. (Exs. 422-14, 424). Nevertheless, based on the following reasoning, we do not consider apportionment appropriate under the facts of this case.

In *Schleiss v. SAIF*, 354 Or 637 (2013), the court analyzed the Director's "apportionment" rule (OAR 436-035-0013(1)) and determined that the rule was inconsistent with the statutory scheme in that it excluded non-legally cognizable conditions (*i.e.*, conditions that were not "preexisting conditions" under ORS 656.005(24)) from being rated for permanent disability purposes. In reaching its conclusion, the court reasoned that only the contributions of the component parts of a combined condition (*i.e.*, the otherwise compensable injury and the preexisting condition) should be compared in identifying the major cause of any disability (including impairment) of the combined condition. The court further determined

⁸ This was apparently in response to Dr. Farris's statement that he would consider "the preexisting degenerative disc disease at C5-6 and C6-7[,] the natural degenerative process[,] and [claimant's] 45-pack-year history of cigarette smoking to be at least as responsible for all of the neck surgeries as the incident of 4/4/85." (Ex. 422-13).

that other contributing causes that are neither encompassed within the compensable injury nor are legally cognizable preexisting conditions do not play any role in the impairment calculus of a combined condition claim.

Applying its analysis to the case at hand, the *Schleiss* court concluded that the two “non-compensable injury-related” conditions (advanced aging from smoking and mild low back degeneration) did not constitute “preexisting conditions” under ORS 656.005(24)(a) and, as such, were not legally cognizable contributing causes. Consequently, the court found that all of the claimant’s impairment was “due to” the compensable injury for purposes of granting a permanent disability award under ORS 656.214. Accordingly, the court held that we had erred in treating the claimant’s “aging and degenerative changes” as contributing causes for purposes of apportioning his permanent impairment. *Id.* at 655; see *Joseph Wagner*, 66 Van Natta 485 (2014) (applies *Schleiss*).

Here, as in *Schleiss*, two of claimant’s alleged preexisting conditions (the natural degenerative process and his 45-pack-year history of cigarette smoking) are not legally cognizable “preexisting conditions.” Specifically, the record does not contain medical records before the onset of the new medical condition⁹ indicating that claimant had previously been diagnosed with those conditions or received treatment for symptoms of such conditions. ORS 656.005(24)(a)(A).

However, medical records before the onset of the new medical condition indicate that claimant had previously been diagnosed with cervical spondylosis at C5-6 and osteoarthritis at C6-7. (Exs. 21-2, 165-2, 430-1). In addition, Dr. Bert agreed with Dr. Farris that claimant had cervical spondylosis that preexisted the 1985 work injury. (Ex. 430-1). Based on the aforementioned descriptions, we conclude that these conditions constitute legally cognizable “preexisting conditions.” ORS 656.005(24)(a)(A).

Nevertheless, Dr. Farris’s apportionment opinion, as ratified by Dr. Bert, included several factors that cannot be considered for “apportionment” purposes; *i.e.*, his 45-pack-year history of cigarette smoking and natural degenerative process. As explained above, those conditions are not legally cognizable “preexisting conditions.” Further, in the absence of a ratable impairment finding

⁹ Because this is a new medical condition claim (“C4-5 spinal stenosis and spondylosis”), the diagnosis or treatment for a “preexisting condition” must precede the onset of the new medical condition. ORS 656.005(24)(a)(A), (B)(ii). Here, the onset of the new medical condition began in April 2010, when claimant sought treatment for increased neck pain. (Ex. 367). In May 2010, Dr. Bert recommended surgery (anterior cervical fusion at C4-5). (Exs. 371, 372).

that apportioning only legally cognizable “preexisting conditions,” we are unable to make such a determination. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence); *see also SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record).

Therefore, in accordance with the *Schleiss* rationale, claimant’s permanent impairment is not subject to apportionment. Accordingly, claimant is entitled to a 19 percent impairment value for decreased cervical ROM.

The parties do not dispute and we find that claimant is entitled to 5 percent for “chronic condition” impairment.¹⁰ OAR 436-035-0019(1)(e). In addition, parties do not dispute and we find that claimant is entitled to 12 percent impairment for the cervical surgeries.¹¹ OAR 436-035-0350(2); OAR 436-035-0360(12).

There are no other ratable impairment findings for the cervical spine. Therefore, we combine the cervical impairment findings as follows: 19 percent (ROM) combined with 12 percent (surgery) equals 29 percent; 29 percent combined with 5 percent (chronic condition) results in a total cervical impairment of 33 percent. OAR 436-035-0011(6); OAR 436-035-0019(2); OAR 436-035-0360(12).

The parties do not dispute that claimant’s prior unscheduled PPD award was based, in part, on a 29 percent impairment value for a left shoulder condition. The record does not suggest that claimant’s previously rated left shoulder condition has changed since the last arrangement of compensation. Accordingly, the impairment value for claimant’s left shoulder condition continues to be the same impairment value that was established by the February 1991 Determination Order; *i.e.*, 29 percent impairment. (Ex. 222-2). OAR 436-035-0007(3)(b); *Doris G. Anderson*, 63 Van Natta 417, 422-23 (2011); *Laura A. Heisler*, 57 Van Natta 188, 194 (2005) (because “post-aggravation rights” new medical condition claim was reopened for cervical conditions and because the accepted thoracic condition had not actually worsened, the “thoracic” impairment value was not redetermined and remained unchanged from the last evaluation).

¹⁰ As addressed above, apportionment is not appropriate under the particular facts of this case.

¹¹ This irreversible surgical value is not subject to apportionment. OAR 436-035-0005(9); OAR 436-035-0013(5).

There are no other ratable impairment findings. Therefore, we combine the impairment values for claimant's cervical spine and left shoulder conditions as follows: 33 (cervical spine) combined with 29 percent (left shoulder) results in a total unscheduled impairment value of 52 percent. OAR 436-035-0011(6)(b); *Anderson*, 63 Van Natta at 422-23.

Claimant did not return to nor was he released to his regular work at the job held at the time of injury (log truck driver). *See* ORS 656.214(5) (Or Laws 1999, ch 876, § 2); ORS 656.726(4)(f)(D) (Or Laws 2003, ch 811, § 17); OAR 436-035-0008(2)(b); OAR 436-035-0012(1). Therefore, his social-vocational factors are considered in evaluating his unscheduled permanent disability. We now assemble those social-vocational values.

Claimant was over 40 years old at the time of the May 2014 Notice of Closure. (Ex. 3). Therefore, he receives a value of 1 for age. OAR 436-035-0012(2)(a).

Claimant has a general equivalency diploma (GED), which receives a neutral value of zero for formal education. (Ex. 53-3). OAR 436-035-0012(4)(a).

Claimant receives a Specific Vocational Preparation (SVP) value based on the job with the highest SVP that he successfully performed during the five years before the issuance of the May 2014 Notice of Closure. OAR 436-035-0012(5). During that five-year period, claimant worked as a maintenance mechanic for a bowling alley (DOT# 904.683-010), which has an SVP time of 7. Consequently, claimant's SVP value is 1. OAR 436-035-0012(5). The age and education values are added for a total of 2. OAR 436-035-0012(15)(c).

We now determine claimant's adaptability factor. Claimant contends that his Base Functional Capacity (BFC) is "heavy" based on the maintenance mechanic position (DOT# 904.683-010); *i.e.*, the job he held at the time of Own Motion claim reopening. We disagree.

BFC means an individual's demonstrated physical capacity before the injury or disease. OAR 436-035-0012(8)(a). Claimant's BFC is "medium" based on his work as a "Log Truck Driver" (DOT# 904.683-010) before the 1985 injury. (Ex. 222-2). Furthermore, claimant's BFC remains static and, as such, is not subject to redetermination. *See Doris M. Edwards*, 62 Van Natta 2928, 2932 (2010); *Sheila K. Merrill*, 61 Van Natta 2049, 2050-51 (2009). Therefore, claimant's BFC is "medium." *See* OAR 436-035-0012(9).

“Residual Functional Capacity” (RFC) is established by the attending physician’s release, unless a preponderance of evidence describes a different RFC. OAR 436-035-0012(10)(a). Here, Dr. Bert, claimant’s attending physician, concurred with Dr. Farris’s opinion that he was capable of lifting no more than 25 pounds. (Exs. 422-15, 424). This lifting limitation supports a “medium/light” RFC. OAR 436-035-0012(8)(g).

Under OAR 436-035-0012(12), if a worker has an RFC between two categories and also has restrictions, the next lower classification is used. Here, Dr. Bert concurred with Dr. Farris’s opinion that claimant could not perform work requiring extreme postures of the cervical spine or repetitive or sustained overhead use of the upper extremities. (Exs. 422-15, 424). Assuming without deciding that these limitations qualify as “restrictions” under OAR 436-035-0012(8)(l) that would authorize assignment of the next lower classification under OAR 436-035-0012(12), claimant’s RFC would be “light.”

Comparing claimant’s BFC of “medium” to his RFC of “light,” he would be entitled to an adaptability value of 3. OAR 436-035-0012(11). However, under the adaptability scale, with an unscheduled impairment value of 52 percent, claimant’s adaptability value would be 6. OAR 436-035-0012(13). Thus, the higher value of 6 will be used. OAR 436-035-0012(14).

Therefore, claimant’s age/educational value of 2 times the adaptability value of 6 equals 12, which is his social/vocational factor. OAR 436-035-0012(15)(e). Adding the impairment value of 52 percent to the social/vocational factor of 12 results in a total unscheduled PPD award of 64 percent (204.8 degrees). OAR 436-035-0008(2)(b)(A) and (B).

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional unscheduled PPD only to the extent that the PPD rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant’s prior unscheduled PPD awards totaling 42 percent (134.4 degrees) are less than his current 64 percent (204.8 degrees) unscheduled PPD, which leaves a remainder of 22 percent (70.4 degrees).

The May 19, 2014 Notice of Closure awarded an additional 15 percent (48 degrees) unscheduled PPD. Accordingly, we modify the May 2014 closure notice to award an additional 7 percent (22.4 degrees) unscheduled PPD for the cervical spine and left shoulder.^{12 13}

¹² Claimant’s total award to date is 64 percent (204.8 degrees) unscheduled PPD for the head, cervical spine, and left shoulder.

Because our decision results in increased unscheduled PPD, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased unscheduled PPD compensation created by this order (the 7 percent (22.4 degrees) unscheduled PPD award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(4); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on February 13, 2015

¹³ The employer requests Board authorization for reimbursement from the Reopened Claims Reserve pursuant to ORS 656.625(b). We lack authority to grant or deny reimbursement from the Reserve. *See SAIF v. Holmstrom*, 113 Or App 242 (1992). Such authority rests with the Workers' Compensation Division (on behalf of the Director).