
In the Matter of the Compensation of
DALICE L. VUKASIN, Claimant
Own Motion No. 15-00032OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Unrepresented Claimant
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Claimant, *pro se*,¹ requests review of a June 9, 2015 Own Motion Notice of Closure that did not award additional scheduled permanent partial disability (PPD) for her “post-aggravation rights” new/omitted medical condition (right peroneal tendonitis).² For the following reasons, we affirm the closure notice.

FINDINGS OF FACT³

On March 3, 2000, claimant sustained a compensable injury, for which the insurer accepted a right distal tibiofibula sprain and synovitis. (Exs. 3, 6, 9). A March 19, 2002 Notice of Closure awarded 13 percent (17.55 degrees) scheduled PPD for the loss of use or function of the right foot (ankle). (Ex. 10).

In August 2005, the insurer accepted a right ankle neuroma. (Ex. 14). An August 30, 2005 Notice of Closure did not award any additional permanent disability. (Ex. 16). A December 20, 2005 Order on Reconsideration increased

¹ Although claimant was represented at the time she requested review of the insurer’s June 2015 Own Motion Notice of Closure, she is no longer represented. Because claimant is currently unrepresented, she may wish to consult the Ombudsman for Injured Workers, whose job it is to assist injured workers. She may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

DEPT OF CONSUMER & BUSINESS SERVICES
OMBUDSMAN FOR INJURED WORKERS
PO BOX 14480
SALEM OR 97309-0405

² Claimant’s March 3, 2000 claim was accepted as a disabling claim and was first closed on March 19, 2002. Thus, her aggravation rights expired on March 19, 2007. Therefore, when claimant sought claim reopening in January 2010, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On June 8, 2015, the insurer voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (right peroneal tendonitis). ORS 656.278(1)(b), (5). On June 9, 2015, the insurer issued its Own Motion Notice of Closure.

³ As noted in our interim order, we received records from both the insurer, its counsel, and claimant’s former attorney. For the purposes of review, we cite to the exhibits from the record submitted by the insurer’s counsel, unless otherwise noted.

claimant's scheduled PPD award to 17 percent (22.95 degrees) for the loss of use or function of the right foot (ankle). (*See* Ex. 24-3). On July 7, 2006, a prior Administrative Law Judge (ALJ) increased claimant's scheduled PPD award to 20 percent (27 degrees). (*See* Ex. 24-4).

In October 2008, the insurer issued a Modified Notice of Acceptance to include "fibular avulsion, right lateral malleolus; right flexor hallucis longus tenosynovitis; chronic tear, right anterior talofibular ligament." (Ex. 27). On December 16, 2008, we issued our Own Motion Order authorizing the reopening of claimant's claim for the processing of the aforementioned "post-aggravation rights" new/omitted medical conditions, and noted that when claimant was medically stationary, the insurer should close the claim pursuant to OAR 438-012-0055. (Ex. 29).

An August 28, 2009 Own Motion Notice of Closure awarded an additional 3 percent (4.05 degrees) scheduled PPD, for a total award of 23 percent (31.05 degrees) scheduled PPD for the loss of use or function of the right foot (ankle). (*See* Ex. 53-2).⁴ That closure was not appealed and became final by operation of law.

In April 2012, the insurer accepted right peroneal tendonitis. (Ex. 45).

On August 22, 2014, Dr. Jones, who examined claimant at the insurer's request, opined that claimant's accepted injury was medically stationary and provided impairment findings for the purposes of rating permanent disability due to her compensable injury. (*See* Ex. 48-10-14). On November 6, 2014, Dr. Sauvain, claimant's attending physician, concurred with Dr. Jones's report. (Ex. 51).

On June 8, 2015, the insurer voluntarily reopened claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical condition (right peroneal tendonitis). (Ex. 52).

A June 9, 2015 Own Motion Notice of Closure did not award any additional PPD for the "post-aggravation rights" new/omitted medical condition (right peroneal tendonitis) based on Dr. Jones's August 2014 findings, as ratified by Dr. Sauvain. (Ex. 53). Claimant requested review, seeking an additional permanent disability award and the appointment of a medical arbiter.

⁴ The August 28, 2009 Own Motion Notice of Closure and attached worksheet is marked as Exhibit 16 in the record submitted by the insurer.

On July 15, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Dalice L. Vukasin*, 67 Van Natta 1274 (2015).

On January 28, 2016, Dr. Takacs, the medical arbiter, documented the range of motion (ROM) findings in both of claimant's ankles and noted that she had no history of injury to the contralateral left ankle joint. She found no loss of strength, plantar sensation, or instability in the right foot/ankle. Dr. Takacs opined that claimant had no significant limitation in the ability to repetitively use the right foot/ankle, and no limitation in the ability to be on her feet for a total of more than two hours in an 8-hour period. Finally, Dr. Takacs stated, "At the time of this exam, there is no evidence of right peroneal tendonitis. That component has resolved without impairment or residual. There are no abnormal findings due to the newly accepted condition or direct medical sequelae of it."

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of "post-aggravation rights" new/omitted medical condition (right peroneal tendonitis). Such a claim may qualify for payment of permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004). However, as explained below, the record does not support an additional permanent disability award.

Claimant's claim was closed by a June 9, 2015 Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

For the purpose of rating claimant's permanent impairment, only the opinions of her 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 condition, direct medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

Here, Dr. Takacs, the medical arbiter, performed a thorough and complete examination. Because a preponderance of the medical evidence does not

demonstrate that the attending physician's findings are more accurate, we rely on Dr. Takacs's opinion to rate claimant's permanent impairment.

Dr. Takacs found no permanent impairment related to claimant's new/omitted medical condition of right peroneal tendonitis. In so finding, she explained that the right peroneal tendonitis had "resolved without impairment or residual." Dr. Takacs concluded that there were no abnormal findings due to the newly accepted condition or its direct medical sequelae.

In the absence of permanent impairment attributable to her new/omitted medical condition (right peroneal tendonitis), claimant is not entitled to an additional permanent disability award. OAR 436-035-0006(1), (2); OAR 436-035-0007(1), (3), (7); OAR 436-035-0013(2); *see Randy D. Schollenberger*, 66 Van Natta 1792 (2014) (no additional permanent disability awarded where impairment was not due to the "post-aggravation rights" new/omitted medical condition); *see also Paul N. Bennett*, 63 Van Natta 10 (2011) (no permanent disability awarded where there was no residual impairment due to the "post-aggravation rights" new/omitted medical condition).

Accordingly, we affirm the June 9, 2015 Own Motion Notice of Closure.⁵

IT IS SO ORDERED.

Entered at Salem, Oregon on April 4, 2016

⁵ Claimant's total award to date is 23 percent (31.05 degrees) scheduled PPD for the loss of use or function of the right foot (ankle).