
In the Matter of the Compensation of
Own Motion No. 14-00079OM
OSCAR CANO-SANCHEZ, Claimant
SECOND OWN MOTION ORDER ON RECONSIDERATION
Gary Borden, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Johnson, Weddell, and Somers. Member Johnson dissents.

On January 4, 2016, we withdrew our December 3, 2015 Own Motion Order on Reconsideration that authorized the reopening of claimant’s “worsened condition” claim under ORS 656.278(1)(a). We took this action to consider the self-insured employer’s motion for reconsideration, as well as to provide claimant an opportunity to respond. Having received claimant’s response, we proceed with our reconsideration.

In our prior reconsideration order, the issue was whether claimant’s “worsened condition” required “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” *See* ORS 656.278(1)(a). That type of qualifying treatment requires the establishment of three elements: (1) curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery); (2) prescribed (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) is necessary (required or essential) to enable (render able or make possible) the injured worker to return to work. *Larry D. Little*, 54 Van Natta 2536, 2546 (2002).

Applying those requirements, we held that the supplemented record established that claimant sustained a worsening of his compensable injury that required “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” *See* ORS 656.278(1)(a).

In its request for reconsideration, the employer does not dispute that claimant’s compensable injury worsened and that the treatment he received was necessary to enable him to return to work. Instead, the employer contends that our holding is inconsistent with *Little*, 54 Van Natta at 2546, asserting that: (1) the medical treatment (injections and physical therapy) was palliative and not curative; and (2) the treatment was not prescribed in lieu of hospitalization. Claimant

disagrees with this contention. Based on the following reasoning, we continue to find that the supplemented record satisfies the medical treatment requirement for reopening this “worsened condition” claim.

Although Dr. Johnson, claimant’s attending physician, had previously indicated that the recommended epidural steroid injections were “palliative,” based on subsequent medical records, we found that, following the February and April 2015 epidural steroid injections, claimant’s leg pain ultimately resolved, enabling him to return to work. (Exs. 37, 45, 48). We found that such circumstances satisfied the definition of “curative treatment” in that it represents treatment that relates to “bringing about recovery.” In reaching that conclusion, we relied, in part, on *SAIF v. Camarena*, 264 Or App 400, 407 (2014) (where conditions and treatments were not beyond the range of an ordinary person’s understanding and experience, specific medical testimony that the purpose of treatment was to heal the claimant was not required to permit a finding that the treatment was curative in nature, in light of all the other evidence showing that the point of the claimant’s treatment was to help him recover).

The employer asserts that we incorrectly applied *Camarena*, contending that the court did not hold that a patient’s report of reduced symptoms should outweigh the treating physician’s opinion regarding whether treatment is curative or palliative. The employer further contends that such a holding would conflict with longstanding precedent concerning deference to attending physicians’ opinions.

We disagree with the employer’s assertions. We did not hold that claimant’s opinion outweighed Dr. Johnson’s opinion. Instead, we found that medical records subsequent to Dr. Johnson’s February 2015 “palliative” statement established that the epidural steroid injections were “curative” treatment; *i.e.*, the injections related to “bringing about recovery.” *Little*, 54 Van Natta at 2546. In addition, claimant’s report to his physicians regarding the resolution of his leg pain following those epidural steroid injections is the type of observation relied on by physicians in rendering medical treatment. In applying *Camarena* to this particular record, we determined that the medical evidence established that claimant’s treatment was designed to help him recover. As such, we concluded that the facts of this specific case satisfied the existence of curative treatment. In doing so, our analysis does not conflict with case precedent regarding reliance on the opinions of attending physicians.

The employer also argues that the epidural steroid injections were “not prescribed in lieu of hospitalization or surgery.”¹ However, Dr. Johnson responded on January 21, 2015 that the epidural steroid injections, prolotherapy, and physical therapy were “prescribed in lieu of hospitalization.” (Ex. 36-1). Although Dr. Johnson’s characterization of the treatments subsequently changed from “curative” to “palliative,” he did not alter his statement that the treatments were “prescribed in lieu of hospitalization.”² Accordingly, on reconsideration, we rely on Dr. Johnson’s aforementioned response to find that the record supports a conclusion that these treatments were “prescribed in lieu of hospitalization.” (*Id.*)

Our decision does not conflict with our *Little* rationale. In *Little*, the claimant underwent epidural steroid injections and sought reopening of his Own Motion claim for a “worsened condition.” The record in *Little* established that those injections did not qualify as hospitalization, surgery, or “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” Based on such a record, we held that we were not authorized to reopen the “worsened condition” claim and denied the request for Own Motion relief. 54 Van Natta at 2548.

Little did not establish that, as a matter of law, epidural steroid injections do not qualify as hospitalization, surgery, or “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” Instead, resolution of the issue of the medical treatment requirement under ORS 656.278(1)(a) is made on a “case-by-case” basis considering the particular record before us. See *Daren L. Johnson*, 59 Van Natta 1351 (2007); *Peter B. Wallen*, 55 Van Natta 1905 (2003) (attending physician’s un rebutted opinion established that the claimant’s epidural injections were curative treatment prescribed in lieu of hospitalization for lumbar surgery that was necessary to enable him to return to work).

¹ As addressed above, the issue here is whether claimant sustained a worsening of his compensable injury that required “other curative treatment prescribed in lieu of *hospitalization* that is necessary to enable the injured worker to return to work.” See ORS 656.278(1)(a) (emphasis added). There is no requirement that such treatment be prescribed in lieu of *surgery*.

² Although claimant contends that “whether treatments are prescribed in lieu of hospitalization does not depend on whether those treatments are curative or palliative,” we note that all qualifying medical treatment (including hospitalization) must be curative. See ORS 656.278(1)(a); *George M. Moore*, 60 Van Natta 2777 (2008). Nevertheless, for the reasons addressed above, we find that this record establishes that claimant’s “worsened condition” required “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” ORS 656.278(1)(a).

Here, for the reasons previously expressed, this specific record persuasively establishes that claimant's epidural steroid injections were curative treatment prescribed in lieu of hospitalization that were necessary to enable him to return to work. Therefore, we continue to find that the record supports the reopening of claimant's Own Motion claim for a "worsened condition" under ORS 656.278(1)(a).

Finally, claimant is entitled to a carrier-paid attorney fee for his counsel's services on reconsideration. ORS 656.382(2); *Christopher J. Camarena*, 64 Van Natta 1556, 1558, *recons*, 64 Van Natta 1697 (2012); *Antonio L. Martinez*, 61 Van Natta 1892, 1903-04 (2009). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on reconsideration is \$2,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case on reconsideration (as represented by claimant's response), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Accordingly, on reconsideration, we adhere to and republish our December 3, 2015 order, as supplemented herein.³ The parties' rights of appeal and reconsideration shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 2, 2016

Member Johnson dissenting.

After further consideration of this "claim reopening" issue for a "worsened condition," I am not persuaded that the "medical treatment" requirement under ORS 656.278(1)(a) has been satisfied. Because the majority finds otherwise, I respectfully dissent.

The determinative issue is whether claimant's "worsened condition" required "other curative treatment prescribed in lieu of hospitalization that is

³ We note that claimant has been represented by different attorneys at separate stages of this proceeding. Nonetheless, attorney fee awards granted by a Board order are payable to the attorney of record. See *Orlando M. Gongora*, 63 Van Natta 1127 (2011); *Franklin E. Chase*, 61 Van Natta 2154, *recons*, 61 Van Natta 2686, 2687 (2009); *Gabriel Zapata*, 46 Van Natta 403 (1994). Further, the precise apportionment of any attorney fee award between multiple attorneys is a matter between them. *Id.*

necessary to enable the injured worker to return to work.” See ORS 656.278(1)(a). That type of qualifying treatment requires the establishment of three elements: (1) curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery); (2) prescribed (directed or ordered by a doctor) in lieu of (in the place of or instead of) hospitalization; and (3) is necessary (required or essential) to enable (render able or make possible) the injured worker to return to work. *Larry D. Little*, 54 Van Natta 2536, 2546 (2002).

It is undisputed that claimant’s compensable injury worsened and that the treatment he received was necessary to enable him to return to work. However, even assuming that the medical treatment was prescribed in lieu of hospitalization, this record does not support a conclusion that the medical treatment was curative. Thus, the “medical treatment” requirement for claim reopening under ORS 656.278(1)(a) is not satisfied. I reason as follows.

On January 21, 2015, the employer asked Dr. Johnson, attending physician, whether claimant required “other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work.” In response, Dr. Johnson referred to “epidural steroid injections, prolotherapy, PT” and also listed “PT, injections weekly for next several months” as “palliative treatment.” (Ex. 36-1). Thereafter, the employer requested clarification, noting that Dr. Johnson had apparently characterized “the injections as both palliative and curative.” (Ex. 37). Dr. Johnson then responded that the “injections are palliative.” (*Id.* emphasis in original).

Thus, when explicitly asked whether the recommended “epidural injections” were palliative or curative, Dr. Johnson unequivocally described them as palliative.

Subsequently, claimant submitted reports from Drs. Johnson and Brown, which described his pain and his return to modified work following those epidural steroid injections. Yet, none of those reports address Dr. Johnson’s opinion that the epidural steroid injections were “palliative” treatment. (Exs. 35-1, 35A, 35B, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51). Furthermore, Dr. Johnson provided no subsequent clarification that could be interpreted as establishing that his ultimate opinion was that the epidural steroid injections were curative treatment. To the contrary, his ultimate opinion was that those injections were palliative treatment. (Ex. 37).

In our earlier decision, we found that the aforementioned reports established that claimant’s epidural steroid injections were “curative” treatment. In doing so,

we cited *SAIF v. Camarena*, 264 Or App 400, 407 (2014). Upon further reflection, I consider *Camarena* to be distinguishable.

In *Camarena*, the court found substantial evidence to support a Board’s “curative treatment” finding and rejected the carrier’s argument that “whether treatment is ‘curative treatment’ is a medical question that can be established only through expert medical opinion.” Specifically, the court held:

“The purpose of a particular medical treatment – that is, whether it is curative, palliative, or diagnostic – is something that an ordinary person does not necessarily require the assistance of medical expertise to understand. *Cf. Uris v. Compensation Department*, 247 Or 420 (1967) (holding that, in “uncomplicated” cases, medical testimony is not required to establish that precipitating workplace event was the cause of the claimant’s injury). Although we can envision instances in which the board will not be able to determine whether a particular course of treatment is curative without specific medical evidence on that point – certainly some conditions and treatments will be beyond the range of an ordinary person’s understanding and experience – this is not such a case. Here, claimant suffered a back strain that was diagnosed as nonstationary and was treated through means familiar to ordinary people. Specific medical testimony that the purpose of that treatment was to heal claimant was not required to permit the finding that the treatment was curative in nature, in the light of all the other evidence showing that the point of claimant’s treatment was to help him recover.” *Camarena*, 264 Or App at 406-07.

As quoted above, *Camarena* cited *Uris* in support of its holding. *Uris* includes the absence of expert testimony in its list of distinguishing features of compensation cases holding medical testimony unnecessary.⁴ Furthermore, in

⁴ Specifically, *Uris* provides:

“In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior

Camarena, there was no contrary medical opinion finding that the treatment in question was “palliative.” In contrast to *Camarena*, here, Dr. Johnson explicitly responded that the epidural steroid injections were “palliative.” In light of these circumstances, I consider *Camarena* to be distinguishable from the present case.

In conclusion, given Dr. Johnson’s unrebutted opinion that the epidural steroid injections were “palliative,” this is not an uncomplicated case that is in the realm of “ordinary people” to decide. Furthermore, we are not free to substitute our opinion for that of a medical expert. *See SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (“the board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”); *Terry L. Smith*, 55 Van Natta 2763 (2003); *see also Randy A. Eggleston*, 59 Van Natta 2661, 2662-63 (2007) (reopening of Own Motion “worsening” claim denied based on unrebutted opinion of treating pain specialist that implantation of spinal cord stimulator was “palliative treatment to assist [the claimant] with pain control rather than a curative treatment”).

Therefore, based on the aforementioned reasoning, this record does not persuasively establish the requisite medical treatment for reopening claimant’s “worsened condition” claim under ORS 656.278(1)(a). Accordingly, I respectfully dissent.

and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury: *DiFiori v. United States Rubber Co., supra.*” *Uris*, 247 Or at 426.