
In the Matter of the Compensation of
KEVIN T. KINNAMORE, Claimant
Own Motion No. 15-00028OM
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
Philip H Garrow, Claimant Attorneys
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Reviewing Panel: Members Curey, Lanning, and Somers.

Claimant requests review of the April 2, 2015 Notice of Closure, as corrected on April 14, 2015, that awarded an additional 7 percent whole person impairment for his “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis).¹ ORS 656.278(1)(a). We modify the closure notice.

FINDINGS OF FACT²

On September 6, 2008, claimant sustained a compensable left ankle injury while working as a cook. (Ex. 1). The SAIF Corporation accepted a left ankle sprain. (Ex. 4).

A December 8, 2009 Notice of Closure awarded 2 percent whole person impairment for the left ankle and no work disability based on claimant’s release/return to regular work. (Ex. 20).

On December 9, 2012, claimant sustained another compensable left ankle injury while working as a cook for the same employer. (Exs. 23, 25). SAIF accepted a “lateral ankle sprain, left ankle.” (Ex. 27).

¹ Claimant’s September 6, 2008 claim was accepted as a nondisabling claim. Thus, his aggravation rights expired on September 6, 2013. Therefore, when claimant sought claim reopening in March 2014, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On June 19, 2014, the SAIF Corporation voluntarily reopened the claim for a “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis). On April 2, 2015, as corrected on April 14, 2015, SAIF issued its Notice of Closure.

² Because SAIF’s exhibits were numbered in chronological order, we rely on those exhibit numbers. Claimant submitted two additional exhibits, which he numbered as follows: (1) “Exhibit 67A” (a March 5, 2015 “daily note” from Ms. Foster, physical therapist); and (2) “Exhibit 67B” (claimant’s attorney’s conversation summary with which Dr. Hinz concurred on March 5, 2014). Claimant’s “Exhibit 67B” is renumbered in chronological order as “Exhibit 50A.”

In January 2013, claimant began treating with Dr. Hinz, his current attending physician. (Exs. 31, 50A-1, -2).

Regarding the 2012 left ankle injury claim, a December 24, 2013 Order on Reconsideration affirmed a September 27, 2013 Notice of Closure that awarded 2 percent whole person impairment for the left ankle and no work disability based on claimant's release/return to regular work.

On January 13, 2014, Dr. Hoppert examined claimant on behalf of SAIF and opined that claimant had preexisting arthritis in both ankles. (Ex. 49-7-8). Dr. Hoppert stated that claimant's current condition was secondary to his age, body habitus, and a degenerative process within his ankle. He concluded that the work injuries irritated claimant's underlying condition, which remained the primary cause of his symptomatology. (Ex. 49-9-10).

On March 5, 2014, Dr. Hinz diagnosed "left ankle post traumatic arthritis." (Ex. 50A-3). He opined that claimant had mild preexisting arthritis in both ankles and significant loss of function in his left ankle due to the work injuries, which were the primary cause of his disability and need for treatment. (*Id.*) Dr. Hinz believed that the work injuries were the major contributing cause of claimant's need for treatment for the left ankle osteoarthritis. (Ex. 50A-4).

On April 3, 2014, Dr. Hinz performed a left ankle arthroscopy and debridement with ankle synovectomy and chondroplasty of the medial talar dome. (Ex. 52).

On June 6, 2014, Dr. Fellars examined claimant on behalf of SAIF and opined that claimant had preexisting arthritis in both ankles and post-traumatic arthritis in his left ankle, as evidenced by a January 2009 MRI. (Ex. 55-15). Dr. Fellars concluded that the work injury contributed to the development of post-traumatic arthritis. (Ex. 55-19).

In June 2014, SAIF accepted and voluntarily reopened claimant's Own Motion 2008 injury claim for a "post-aggravation rights" new/omitted medical condition (left ankle post-traumatic arthritis). (Exs. 56, 57).

On July 24, 2014, Dr. Hinz examined claimant, noting his left ankle history from the 2008 work injury and referring to subsequent chronic long-standing changes. (Ex. 59). Finding that claimant was not medically stationary, Dr. Hinz recommended a left ankle arthrodesis and syndesmosis fusion, with proximal bone grafting. (*Id.*)

That same date, Dr. Hinz responded to SAIF's inquiry regarding claimant's medically stationary status concerning his 2008 injury claim. (Ex. 58). Dr. Hinz indicated that claimant's 2008 injury-related conditions were not medically stationary and that surgical fusion of the left ankle was recommended. (Ex. 58-1).

On August 26, 2014, Dr. Hinz performed a left ankle arthrodesis, left syndesmosis arthrodesis, and major proximal tibial bone grafting, left foot and ankle. (Ex. 60). Dr. Hinz related this surgery to claimant's 2008 work injury and subsequent degenerative changes in his left ankle, diagnosed as "left posttraumatic tibiotalar arthritis." (Ex. 60-1, -2).

On January 12, 2015, Dr. Hinz released claimant to his regular job as a cook. (Ex. 66). As of February 12, 2015, claimant had returned to his job as a cook with his at-injury employer. (Ex. 67).

On March 5, 2015, Ms. Foster, physical therapist, documented the following left ankle muscle testing results: ankle dorsiflexion (4/5); ankle plantar flexion (+4/5); ankle eversion (+4/5); and ankle inversion (4/5). (Ex. 67A).

On March 12, 2015, Dr. Hinz declared claimant's left ankle post-traumatic arthritis condition medically stationary, again noting that he was performing his regular job as a cook. (Ex. 68). After performing a complete physical examination of the lower extremities "for lymphatics, range of motion, motor, sensory, vascular and skin," Dr. Hinz measured the following left/right ankle ranges of motion (ROM): 15/35 degrees subtalar inversion; 0/12 degrees subtalar eversion; 3/12 degrees ankle dorsiflexion; and 10/45 degrees ankle plantar flexion. (*Id.*) He also noted a grossly intact motor sensory exam and "no focal motor weakness." (*Id.*) Finally, he found that the measurements were appropriate for impairment rating. (*Id.*)

An April 2, 2015 Notice of Closure awarded an additional 7 percent whole person impairment for claimant's left ankle and no work disability. (Ex. 69). Claimant requested Board review, seeking an increased permanent disability award. He did not request the appointment of a medical arbiter. In response, SAIF requested the appointment of a medical arbiter.

On May 27, 2015, Dr. Hinz concurred with the March 5, 2015 muscle testing performed by Ms. Foster. (Ex. 72-1). Regarding residual functional capacity (RFC), Dr. Hinz opined that claimant could not frequently perform the following activities due to the accepted conditions related to the 2008 injury:

kneeling; crawling; and climbing. (*Id.*) In addition, he found claimant significantly limited in the repetitive use of his left ankle due to the accepted conditions related to the 2008 injury. (Ex. 72-2).

On August 18, 2015, we referred the claim to the Director for the appointment of a medical arbiter. *Kevin T. Kinnamore*, 67 Van Natta 1505 (2015).

On October 24, 2015, the medical arbiter, Dr. Kowalik, examined claimant and reviewed the medical record. He measured left/right ankle ROM as follows: 10/30 degrees subtalar inversion; 15/25 degrees subtalar eversion; 0/15 degrees ankle dorsiflexion; and 10/50 degrees ankle plantar flexion. He noted that claimant did not have a previous history of injury or disease to the contralateral right foot joint. He found 5/5 muscle strength in the muscles of the lower extremities, with the exception of the left tibialis anterior and left triceps surae, which he noted had “active muscle firing but limited evaluation secondary to fusion.” He found the left ankle ROM and strength testing of the left tibialis anterior and left triceps surae “not valid” for the purpose of rating impairment due to the left ankle fusion surgery, which eliminated “any movement in this joint.” Finally, he noted that any impairment that claimant may have was 50 percent due to the accepted condition and 50 percent due to preexisting arthritis.

CONCLUSIONS OF LAW AND OPINION

The claim was reopened for the processing of a “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis). 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).

We first determine whether ORS 656.278(2)(d) applies to limit any award of permanent partial disability (PPD) for the “post-aggravation rights” new/omitted medical conditions. 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 “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. Dr. Hinz found decreased ROM and a “chronic condition” limitation in claimant’s left ankle. These impairment findings qualify for an impairment rating. Moreover, claimant’s “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis) involved the same “injured body part” (left foot (ankle)) that was the basis of his previous permanent disability award.

Thus, the limitation in ORS 656.278(2)(d) applies to claimant’s permanent disability. However, before application of the statutory limitation, we redetermine claimant’s permanent disability pursuant to the Director’s standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

Claimant’s claim was closed by an April 2, 2015 Own Motion Notice of Closure. Therefore, the applicable standards are found in WCD Admin. Order 15-053 (eff. March 1, 2015). *See* OAR 436-035-0003(1).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter’s findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5), (6); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Findings of impairment that are permanent and caused by the accepted condition 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). In addition, 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(14); OAR 436-035-0005(5); OAR 436-035-0006(1), (2); OAR 436-035-0013(1), (2). If the loss of use or function of a body part or system is not caused in any part by the compensable injury, the loss is not due to the compensable injury and the worker is not eligible for an award for impairment. OAR 436-035-0007(1)(b)(C).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter’s opinion that unambiguously attributes the claimant’s permanent impairment to the compensable condition, “the medical arbiter’s report provides the default determination of a claimant’s impairment.” *Hicks v. SAIF*, 194 Or App 655, *adh’d to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has

provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, claimant argues that the impairment findings from Dr. Hinz, his attending physician, and those findings that Dr. Hinz ratified should be used to rate his permanent impairment. In response, SAIF contends that Dr. Kowalik's medical arbiter findings should be used. For the following reasons, we find that the preponderance of the medical evidence establishes that Dr. Hinz's impairment findings are more accurate.

Dr. Kowalik, the medical arbiter, measured loss of ROM on examination, noting that "this is expected given his fusion surgery." In describing claimant's left ankle strength in the tibialis anterior and triceps surae muscles, Dr. Kowalik reported "active muscle firing but limited evaluation secondary to fusion." He explained that the exam findings were diffuse tenderness mainly over the dorsum of the foot. He noted that it was:

"difficult to assign [claimant's] current symptoms to the accepted condition because the ankle fusion essentially treated the left ankle post traumatic arthritis. The nature of a joint fusion operation is to eliminate the joint and thus he cannot have any current arthritis in the ankle joint."

Finally, Dr. Kowalik concluded that the left ankle ROM and strength testing of the tibialis anterior and triceps surae were "not valid" for the purpose of rating impairment because the fusion surgery eliminated any movement in that joint and those muscles mainly control movement of that joint.³

³ Dr. Kowalik also noted that Dr. Hoppert, a physician who examined claimant in January 2014, mentioned a history of preexisting left ankle arthritis. Dr. Kowalik stated that it was "likely" that this preexisting arthritis, in addition to the newly accepted post-traumatic arthritis condition, contributed to the need for the ankle fusion surgery. Dr. Kowalik opined that claimant's current symptoms (presumably the diffuse tenderness over the dorsum of the foot) were 50 percent from the accepted condition and 50 percent from preexisting arthritis. He stated that "[a]ny impairment that [claimant] may have is also 50 [percent] from the accepted condition and 50 [percent] from pre-existing arthritis."

However, as noted above, 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). “Direct medical sequela” means a condition that is clearly established medically and originates or stems from an accepted condition. OAR 436-035-0005(5).

Dr. Kowalik’s observations raise the question of whether the fusion surgery was a direct medical sequela of the accepted “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis). Yet, Dr. Kowalik neither analyzed nor resolved this question. Instead, without explanation, he stated that it was “likely” that “preexisting arthritis” and the newly accepted post-traumatic arthritis condition contributed to the need for the ankle fusion surgery. Under such circumstances, we consider the medical arbiter’s opinion to be based on a mere medical possibility, and, therefore, ambiguous and unpersuasive. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *Donald E. Adams*, 58 Van Natta 2815, 2820 (2006) (medical arbiter’s opinion ambiguous and unpersuasive because the arbiter did not apply accurate rating standards and the opinion was based on possibility, rather than medical probability).

Moreover, although Dr. Kowalik measured left ankle loss of ROM, he considered that loss “not valid” for rating impairment, contending that the fusion surgery eliminated the joint (thus, eliminating any current arthritis in that joint) and removed movement in that joint. However, given his unpersuasive analysis regarding the need for and effects of claimant’s fusion surgery, Dr. Kowalik did not consider ratable impairment resulting from that fusion surgery as direct medical sequelae of the accepted condition (*e.g.*, claimant’s measured decreased left ankle ROM). OAR 436-035-0006(2)(b); OAR 436-035-0013(2)(b)(C)(ii). Thus, Dr. Kowalik’s opinion is also ambiguous in this regard.

In contrast, Dr. Hinz explained that claimant had chronic long-standing changes in his left ankle following the 2008 work injury and recommended fusion surgery to treat the left ankle. (Exs. 58, 59). He also related the fusion surgery to the 2008 injury and subsequent degenerative changes in claimant’s left ankle, which he diagnosed as “left posttraumatic tibiotalar arthritis.” (Ex. 60-1, -2). Thus, Dr. Hinz’s analysis supports a conclusion that claimant’s left ankle fusion surgery stemmed from the accepted “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis). (Exs. 56, 58, 59, 60).

In addition, Dr. Hinz measured decreased left ankle ROM, which he stated was “appropriate for impairment rating.” (Ex. 68). He also found chronic condition impairment. (Ex. 72-2). Finally, as addressed above, he considered the effects of claimant’s left ankle fusion surgery in rating the impairment in that joint. (Exs. 56, 58, 59, 60). Thus, unlike Dr. Kowalik’s conclusory opinion, Dr. Hinz’s opinion was based on a thorough evaluation of claimant’s accepted condition and all contributing components to his permanent impairment.

Under these particular circumstances, we conclude that a preponderance of the medical evidence establishes that the findings from claimant’s attending physician are more accurate than the ambiguous findings of the medical arbiter and should be used to rate claimant’s impairment. Therefore, we find persuasive reasons to disregard the medical arbiter’s findings. See OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45; *Jerald M. Souther*, 67 Van Natta 412, 416 (2015).

Accordingly, we rate claimant’s permanent impairment based on Dr. Hinz’s findings, which establish that claimant’s left ankle fusion surgery and the effects of that surgery were direct medical sequelae of the accepted “post-aggravation rights” new/omitted medical condition (left ankle post-traumatic arthritis). Therefore, impairment resulting from that fusion surgery is ratable. See *Dennis L. Gering*, 62 Van Natta 2572, 2575 (2010) (conditions that stemmed from surgery for accepted condition rated as “direct medical sequela” of accepted condition); *Steven D. Clark* 62 Van Natta 430, 438 (2010) (surgery that stemmed from accepted “failed back” condition rated as “direct medical sequela” of accepted condition).

Based on Dr. Hinz’s ROM findings, the parties do not dispute, and we find, that claimant is entitled to a left foot/ankle ROM impairment value of 22 percent. OAR 436-035-0011(3); OAR 436-035-0190. (Ex. 69-2).

In addition, Dr. Hinz found that claimant is significantly limited in the repetitive use of his left ankle due to the accepted condition. (Ex. 72-1). Therefore, claimant is entitled to a 5 percent impairment value for a “chronic condition” limitation in his left lower leg (ankle). OAR 436-035-0019(1)(a).

Claimant also seeks an impairment value for loss of strength based on Dr. Hinz’s concurrence with Ms. Foster’s strength loss findings. Based on the following reasoning, we conclude that such an award is not warranted.

On March 12, 2015, Dr. Hinz declared claimant's left ankle condition medically stationary, measured bilateral ankle ROM, and found "no focal motor weakness." (Ex. 68). He also noted that claimant had measurable impairment based on loss of ROM of both his left ankle and subtalar joint and found those measurements appropriate for impairment rating. (*Id.*) On May 27, 2015, without explanation, Dr. Hinz checked a box indicating that he concurred with Ms. Foster's March 5, 2015 muscle testing.⁴ (Ex. 72-1).

Because Dr. Hinz did not offer an explanation for this apparent change of opinion regarding claimant's muscle strength findings, we do not consider it sufficient to persuasively establish strength loss impairment. *Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (unexplained change of opinion renders physician's opinion unpersuasive); *compare Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (medical opinion found persuasive where record revealed reasonable explanation for change of opinion).

There are no other ratable impairment findings.⁵ Therefore, we combine claimant's impairment values as follows: 22 percent (ROM) combined with 5 percent (chronic condition) equals 26 percent. Pursuant to OAR 436-035-0235(3), a 26 percent loss of the foot (ankle) is converted to 11 percent whole person impairment.

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional permanent disability only to the extent that the permanent disability rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant's prior 2 percent whole person impairment award is less than his current 11 percent whole person impairment, which leaves a remainder of 9 percent. The Notice of Closure awarded an additional 7 percent whole person impairment. Accordingly, we modify the Notice of Closure to award an additional 2 percent whole person impairment for the left foot (ankle).^{6 7}

⁴ Ms. Foster had measured the following muscle testing: ankle dorsiflexion (4/5); ankle plantar flexion (+4/5); ankle eversion (+4/5); and ankle inversion (4/5). (Ex. 67A).

⁵ Although claimant underwent left foot (ankle) surgery, he does not receive an impairment value for that surgery because it is not included among those surgeries that receive a rating. *See* OAR 436-035-0007(13)(a); OAR 436-035-0230(5)(c); *Wesley W. Bittner*, 67 Van Natta 1081, 1088 n 9 (2015).

⁶ Because claimant was released to or returned to his regular work, he is not entitled to a work disability award. OAR 436-035-0009(4).

⁷ Claimant's total award to date is 11 percent whole person permanent impairment for his left foot (ankle).

Because our decision results in increased whole person impairment, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased whole person impairment compensation created by this order (the 2 percent whole person impairment award granted by this order), not to exceed \$4,600, payable directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0040(1); OAR 438-015-0080(3).

IT IS SO ORDERED.

Entered at Salem, Oregon on March 18, 2016