

In the Matter of the Compensation of
DWAYNE L. MINNER, Claimant
Own Motion No. 16-00044OM
OWN MOTION ORDER
Jodie Phillips Polich, Claimant Attorneys
Bohy Conratt LLP, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The carrier has submitted its recommendation against the reopening of claimant's Own Motion claim for a "worsening" of his previously accepted right knee condition. ORS 656.278(1)(a). The carrier opposes reopening, contending, among other issues, that claimant's compensable condition does not require any medical treatment that qualifies for claim reopening. Based on the following reasoning, we deny claim reopening.

Pursuant to ORS 656.278(1)(a), among the requirements for the reopening of an Own Motion claim for a worsening of a compensable injury is a requirement that the worsening must require hospitalization, surgery (either inpatient or outpatient), or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the worker to return to work.¹ *Heath A. Wiltfong, 57 Van Natta 3108 (2005)*.

Whether a worsening of the compensable injury requires hospitalization, inpatient or outpatient surgery, or "other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work" presents a medical question that must be addressed by persuasive medical evidence. *Terry L. Smith, 55 Van Natta 2763 (2003)*.

Here, on February 29, 2016, Dr. Anderson, claimant's attending physician, performed a right knee injection. (Ex. 1-3). On June 6, 2016, Dr. Anderson reported that claimant "has a heavily damaged knee, and will definitely require

¹ The three qualifying medical treatments listed in ORS 656.278(1)(a) are defined as follows: (1) "Surgery" is an invasive procedure undertaken for a curative purpose that is likely to temporarily disable the worker; and (2) "hospitalization" is a nondiagnostic procedure that requires an overnight stay in a hospital or similar facility. *Larry D. Little, 54 Van Natta 2536, 2541-42 (2002)*. The third type of qualifying treatment requires 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. *Little, 54 Van Natta at 2546*. If any of these three qualifying medical treatments is satisfied, a "worsening condition" claim meets the "medical treatment" requirement for reopening in Own Motion. *Little, 54 Van Natta at 2540-41*.

surgical intervention in the future (arthroscopic debridement, possible ACL reconstruction, and eventually arthroplasty, without question). We are trying other options in the meantime, in lieu of surgery, including PT, injections, and bracing (still awaiting).” (Ex. 1-2).

Dr. Anderson does not currently recommend surgery or hospitalization. Instead, his report establishes that claimant may require knee surgery at some point in the future. Although a recommendation for the requisite medical treatment is sufficient to qualify for claim reopening under ORS 656.278(1)(a), the possibility of such treatment is not. *See James E. Crager*, 65 Van Natta 2343 (2013) (“possibility” of surgery insufficient to satisfy the medical treatment requirement for claim reopening under ORS 656.278(1)(a)); *Theron W. Stiehl*, 56 Van Natta 2267 (2004) (same).

In addition, Dr. Anderson’s current treatment (physical therapy, injections, and bracing) was prescribed in an effort to avoid surgery. There is no evidence that this was curative treatment prescribed in lieu of hospitalization that was necessary to enable claimant to return to work. ORS 656.278(1)(a); *Vicki M. Weaver*, 56 Van Natta 2862, 2864 (2004) (physical therapy and medication to avoid possible surgery did not qualify as curative treatment prescribed “in lieu of hospitalization” under ORS 656.278(1)(a)); *Stanley J. Birch*, 56 Van Natta 366 (2004) (bracing prescribed to avoid possible surgery did not qualify as curative treatment prescribed “in lieu of hospitalization” under ORS 656.278(1)(a)); *Stephen Jackson*, 55 Van Natta 2421, 2422 (2003) (although treatment (prescription medication) was arguably curative and necessary to enable the claimant to return to work, there was no evidence that the treatment was prescribed in lieu of hospitalization).

Based on this record, we do not find that claimant’s right knee condition worsened requiring necessary medical treatment under ORS 656.278(1)(a). Consequently, we are unable to authorize reopening of claimant’s Own Motion claim.

Accordingly, the request for claim reopening is denied. Claimant’s entitlement to medical services pursuant to ORS 656.245 is not affected by this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 28, 2016