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In the Matter of the Compensation of  
**SEAN A. CHVAL, Claimant**  
WCB Case No. 16-00659  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that affirmed an Order on Reconsideration that had rescinded a Notice of Closure as premature. On review, the issue is premature closure.<sup>1</sup>

We adopt and affirm the ALJ's order with the following supplementation.

On November 12, 2013, claimant fell at work, suffering multiple injuries. The SAIF Corporation accepted several rib fractures, a left pneumothorax, a partial thickness tear of the left rotator cuff, and a full thickness tear of the right rotator cuff. (Exs. 7, 11).

On April 24, 2014, Dr. Schenck performed a right shoulder subacromial decompression and rotator cuff repair surgery. (Ex. 10). On March 13, 2015, he noted that claimant had finished a work rehabilitation program three weeks earlier. (Ex. 15). He opined that claimant's examination was "essentially unchanged" and recommended a functional capacity evaluation and an "independent closing examination." (*Id.*)

On April 8, 2015, an occupational therapist performed a work capacities evaluation and reported that claimant had limitations with overhead lifting and repetitive reaching to the overhead level. (Ex. 17-5). On the same day, Dr. Lorber, a physiatrist, performed a medical closing evaluation, documented shoulder and thoracic spine range of motion deficits, and opined that claimant was probably limited in the repetitive use of his shoulders, but not his chest. (Exs. 18-4, -5, -6, 20).

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<sup>1</sup> The Workers' Compensation Division (WCD), on behalf of the Director, has participated in this proceeding. See ORS 656.726(4)(h).

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Dr. Schenck concurred with the occupational therapist's assessment and Dr. Lorber's impairment findings. (Exs. 19, 21).

A June 17, 2015 Notice of Closure awarded 22 percent whole person impairment (based on right partial acromioplasty and bilateral shoulder range of motion deficits and chronic condition limitations) and 28 percent work disability. (Ex. 23-3). Claimant requested reconsideration.

On August 26, 2015, the claim was reopened to process left scapulothoracic crepitus, left scapulothoracic bursitis, right biceps tendon tear, right shoulder subluxation, and right shoulder impingement syndrome as new/omitted medical conditions. (Exs. 29, 33).

An August 31, 2015 Notice of Closure did not award additional permanent impairment or work disability. (Ex. 31-3).

On September 10, 2015, an Order on Reconsideration rescinded the June 17, 2015 closure notice. Finding that the record did not clearly establish that the accepted conditions, as well as any conditions directly resulting from the injury, were medically stationary on June 17, 2015, the Appellate Review Unit (ARU) concluded that the claim had not qualified for closure under ORS 656.268(1) and OAR 436-030-0020(1).

On September 25, 2015, Dr. Schenck opined that claimant was "unable to \* \* \* repetitively mov[e] his arms and shoulders forward and backwards (like in a sawing motion)," as a result of the compensable rib fractures. (Ex. 35-2). Dr. Schenck also observed that the rotator cuff tears caused the scapula to rotate with forward flexion, rotation, and abduction of the arm, further contributing to the loss of repetitive use of the shoulders, arms, and chest. (Ex. 35-3).

An October 9, 2015 Notice of Closure awarded 22 percent whole person impairment (based on the right partial acromioplasty and bilateral shoulder range of motion deficits and chronic condition limitations) and 28 percent work disability. (Ex. 36-3).

Claimant requested reconsideration. (Ex. 38). Relying on Dr. Schenck's opinion, he claimed chronic condition awards for his entire left arm, forearm, and arm, entire right arm, forearm, and arm, and chest. (Ex. 37-1). He also sought an impairment rating for his thoracic spine range of motion deficits. (*Id.*)

On November 23, 2015, the ARU asked Dr. Schenck for clarification of claimant's chronic condition impairment regarding his arms and chest.<sup>2</sup> (Ex. 42). Dr. Schenck did not reply. On December 15, 2015, ARU re-sent its request to Dr. Schenck. (Ex. 44). Again, Dr. Schenck did not reply.

The January 11, 2016 Order on Reconsideration rescinded the closure notices. In doing so, the ARU determined that, at the time of the October 9, 2015 closure, Dr. Schenck had provided information regarding additional permanent impairment (related to the repetitive use of claimant's arms and chest) that was unclear. (Ex. 45-3). Accordingly, because its attempts to clarify this information were unsuccessful, the ARU concluded that there was insufficient information to determine the extent of permanent disability. (*Id.*)

Claimant requested a hearing. At the hearing level, he asserted that the ARU did not have statutory authority to seek additional information directly from Dr. Schenck. Further contending that the ARU was obligated to evaluate the evidence that had been submitted by the parties, he asserted that the ARU erred in concluding that there was insufficient information to determine permanent disability.

The ALJ determined that ORS 656.268 authorized the Director to request additional information deemed necessary for the reconsideration proceeding. Reasoning that claimant had the burden to establish error in the proceeding, the ALJ found no error in the ARU's determination that there was insufficient information to determine the extent of permanent disability. Accordingly, the ALJ affirmed the January 11, 2016 Order on Reconsideration.

On review, claimant renews his arguments that the ARU did not have the authority to seek additional information directly from Dr. Schenck. Based on Dr. Schenck's opinion (as expressed in his September 25, 2015 letter and his concurrence with Dr. Lorber's thoracic findings), claimant seeks chronic condition awards for his arms and chest and an impairment rating for his reduced thoracic range of motion. For the following reasons, we affirm the ALJ's decision.

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<sup>2</sup> The ARU's letter to Dr. Schenck stated, in part, "You have stated that the worker is significantly limited in his ability to move his arms forward and backwards (like a sawing motion). In addition, you stated that the scapula rotates when you forward flex and when you rotate or abduct the arm. **These motions are motions of the shoulders and not the arms.**" (Emphasis in original). The ARU asked Dr. Schenck if, because of a permanent and chronic condition caused by the compensable injury, claimant was unable to repetitively use his right arm, his left arm, or his chest for more than two-thirds of a period of time. (Ex. 42-2).

ORS 656.726(4)(d) grants the Director broad authority to obtain information in any proceeding conducted by the Director or the Director's representatives.<sup>3</sup> Moreover, ORS 656.268(6)(b) authorizes the Director to require additional medical or other information deemed necessary and postpone the reconsideration proceeding. The related administrative rule further provides: "Upon review of the record, the director may request, under ORS 656.268(6), any additional information deemed necessary for the reconsideration and set appropriate time frames for response." OAR 436-030-0145(3)(b) (WCD Admin. Order No. 15-059, eff. May 21, 2015).

Claimant argues that the Director must address any request for additional information to the parties. We disagree. Neither ORS 656.268(6)(b) nor OAR 436-030-0145(3)(b) limit the Director's authority in this manner. Moreover, OAR 436-030-0115(3) (which provides the parties the opportunity to submit documents into the reconsideration record regarding the worker's status at the time of claim closure) and OAR 436-030-0115(5) (which provides for postponement of the reconsideration proceeding under ORS 656.268(6) when the director requires additional information to complete the record) do not compel the Director to obtain necessary additional information from the parties.

Based on the aforementioned statutory and administrative authorities, we conclude that the ARU was not prohibited from asking Dr. Schenck for additional information regarding any limitations on claimant's ability to repetitively use his arms and chest.

When Dr. Schenck did not reply to its inquiry, the ARU held that there was insufficient information to determine the extent of permanent disability. (Ex. 45-3). Claimant contends that the ARU was obligated to evaluate permanent impairment based on the evidence that had been submitted by the parties and, therefore, it erred in rescinding the closures. We disagree for the following reasons.

As the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Based on the following reasoning, we conclude that claimant has not made such a showing.

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<sup>3</sup> ORS 656.726(4)(d) provides the Director the authority to "[i]ssue and serve \* \* \* subpoenas for the attendance of witnesses and the production of \* \* \* documents and testimony in any inquiry, investigation, proceeding or rulemaking hearing conducted by the director or the director's representatives."

ORS 656.268(1)(a) provides for claim closure when “the worker has become medically stationary and there is sufficient information to determine permanent disability.” ORS 656.268(1)(a). Where there is a reasonable expectation of permanent disability, “sufficient information” to close a claim requires a closing examination report, provided or concurred with, by an attending physician, which includes detailed documentation of all measurements, findings, and limitations regarding permanent impairment caused by an accepted condition, direct medical sequela of an accepted condition, or a condition directly resulting from the work injury. OAR 436-030-0020(2)(b)(C)(i).

Here, at the time of the June 17, 2015 and August 31, 2015 claim closures, Dr. Schenck had concurred with Dr. Lorber’s findings that claimant had repetitive use limitations involving the shoulders, but not the chest. (Exs. 18-6, 19, 20-1, 21). In September 2015, Dr. Schenck opined that claimant’s ability to repetitively use his arms and chest was impacted by his compensable rib fractures and rotator cuff tears. (Ex. 35-2, -3). The October 9, 2015 closure awarded chronic condition impairment of the shoulders, but not the arms or chest. (Ex. 36-3).

During the reconsideration proceeding, the ARU requested additional information from Dr. Schenck regarding claimant’s inability to repetitively use his arms and chest. (Ex. 42). In doing so, the ARU provided Dr. Schenck with the Director’s interpretation of what constitutes “chronic condition impairment” under OAR 436-035-0019. (Ex. 42-1). The ARU also provided Dr. Schenck the definition of “arm” under OAR 436-035-0020 (advising him that he had previously described shoulder, rather than arm, motions). (*Id.*) Lastly, the ARU asked Dr. Schenck whether claimant was unable to repetitively use his arms and chest for more than two-thirds of a period of time. (Ex. 42-2). In the absence of Dr. Schenck’s response to its inquiry, the ARU concluded that there was insufficient information to determine the extent of claimant’s permanent partial disability. Based on that determination, the ARU rescinded the closure notices.

Under these particular circumstances, where the ARU sought clarification of Dr. Schenck’s impairment findings (suggesting that it questioned the sufficiency of those findings), the record does not establish that the ARU erred in rescinding the closure notices after Dr. Schenck did not respond to its inquiries. Consequently, claimant has not established error in the reconsideration process. *See Callow*, 171 Or App at 183. Accordingly, we affirm the ALJ’s order.

ORDER

The ALJ's order dated July 25, 2016 is affirmed.

Entered at Salem, Oregon on March 16, 2017