
In the Matter of the Compensation of
TIMOTHY C. GUILD, Claimant
Own Motion No. 15-00066OM
OWN MOTION ORDER ON REMAND
Ransom Gilbertson Martin et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.¹

This matter is before the Board on remand from the Court of Appeals. *Guild v. SAIF*, 291 Or App 793 (2018). The court has reversed and remanded our prior order, *Timothy C. Guild*, 68 Van Natta 741 (2016), that declined to award permanent total disability (PTD) benefits related to claimant’s April 19, 2004 compensable right shoulder injury claim, which was closed by an August 21, 2015 Own Motion Notice of Closure for his “post-aggravation rights” new/omitted medical condition (post traumatic arthritis of the right shoulder). In reaching our conclusion, we had reasoned that claimant did not prove that: (1) he was completely physically disability and therefore precluded from gainful employment; or (2) his physical impairment, combined with a number of social and vocational factors, effectively prevented gainful employment under the “odd lot” doctrine. Reasoning that our finding that claimant was not completely physically disabled was neither supported by substantial evidence nor substantial reason, the court has remanded for reconsideration of that determination. Having received the parties’ supplemental briefs, we proceed with our review.²

FINDINGS OF FACT

We adopt the “Findings of Fact” set forth in our previous order.

CONCLUSIONS OF LAW AND OPINION

In our prior order, we reasoned that, because Dr. Fry (claimant’s attending physician) took into account claimant’s age and education in opining that he was totally permanently disabled, the record did not establish that claimant was

¹ Member Weddell was a member of the previous review panel. Because she is no longer with the Board, Member Ousey has participated in this review.

² The SAIF Corporation has submitted additional materials (marked as Exhibits 9A through 9D, 40A, 40B, and 52A), which predate the August 21, 2015, Own Motion Notice of Closure. Claimant objects to SAIF’s submissions as untimely. It is unnecessary to conclusively resolve this evidentiary issue because, even without considering the disputed submissions, the record does not establish claimant’s entitlement to PTD benefits, as explained below.

completely physically disabled. Turning to the “odd lot” doctrine, we determined that Dr. Fry’s ultimate opinion that claimant’s newly accepted right shoulder post traumatic arthritis condition (under his 2004 claim) rendered him totally permanently disabled was an unexplained change of opinion from his previous reports (which repeatedly considered claimant’s subsequent 2010 right shoulder injury in addressing claimant’s right shoulder disability). In addition, we found that Dr. Fry did not distinguish between disability which may be considered in evaluating a claimant’s PTD status and disability from other causes that may not be considered. Consequently, we concluded that claimant did not establish his entitlement to PTD under the “odd lot” doctrine.

On claimant’s appeal challenging our determination that he was not completely physically disabled,³ the court found that our order was not supported by substantial evidence because we focused on Dr. Fry’s isolated statement in a single exhibit (*i.e.*, his April 2015 concurrence letter referring to claimant’s age and educational background), rather than viewing the record as a whole. Further reasoning that we neither acknowledged other evidence, including Dr. Fry’s February 2015 chart note stating that claimant was completely physically disabled, nor provided any explanation for rejecting that February 2015 opinion, the court concluded that our order was also not supported by substantial reason. Finding that those opinions “cannot be viewed as tying claimant’s inability to work to matters other than his physical condition[,]” the court has remanded for our reconsideration.

After proceeding with our review in accordance with the court’s directive, we find that claimant has not established that he is completely physically disabled.⁴ Our reasoning is as follows.

ORS 656.206(1)(d) (2005) provides that PTD “means, notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.” “Regularly performing work” means “the ability of the worker to discharge the essential functions of the job” and

³ The court noted that, on judicial review, claimant argued that “the board’s first finding—that the record does not establish that he is completely physically disabled—is not supported by substantial evidence.” *Guild*, 291 Or App at 797.

⁴ We republish the reasoning expressed in our previous opinion, which concluded that claimant was not entitled to PTD benefits under the “odd lot” doctrine.

“[s]uitable occupation’ means one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation.” ORS 656.206(1)(e), (f) (2005).

In *James S. Daly*, 58 Van Natta 2355 (2006), we awarded PTD for a claimant’s “post-aggravation rights” new/omitted medical condition. 58 Van Natta at 2374. Our analysis of ORS 656.206, in conjunction with ORS 656.278, resulted in the following conclusions. First, disability for a previously accepted condition⁵ is considered as it existed at the last claim closure that preceded the expiration of the claimant’s 5-year aggravation rights.⁶ *Id.* at 2361. Second, any disability that predates the initial compensable injury is also considered. *Id.* at 2364-65. Third, when such disabilities exist, they are considered with any disability from the “post-aggravation rights” new/omitted medical condition to determine whether the claimant has established entitlement to PTD. *Id.* at 2371.

Considering those factors, claimant may establish entitlement to PTD by proving that: (1) he is completely physically disabled and therefore precluded from gainful employment; or (2) his physical impairment, combined with a number of social and vocational factors, effectively prevents gainful employment under the “odd lot” doctrine. *Id.* at 2368; *see also Elsea v. Liberty Mutual Ins.*, 277 Or App 475, 478-79 (2016); *Clark v. Boise Cascade*, 72 Or App 397, 399 (1985); *Nancy J. Ferguson*, 64 Van Natta 2315 (2012); *David C. Drader*, 58 Van Natta 3093, 3099 (2006).

Under the “odd lot” doctrine, a disabled person, capable of performing work of some kind, may still be permanently disabled due to a combination of his physical condition and certain non-medical factors, such as age, education, adaptability to nonphysical labor, mental capacity, and emotional conditions. *See Clark*, 72 Or App at 399; *Welch v. Banister Pipeline*, 70 Or App 699, 701 (1984); *Stephen H. Johnson*, 55 Van Natta 3074, 3078 (2003).

⁵ Here, claimant’s previously accepted condition under the 2004 injury claim was the “complex unstable tear of the anterior portion of the glenoid, right shoulder,” which was last closed in November 2004 (before the expiration of his 5-year aggravation rights on November 17, 2009). (Ex. 10).

⁶ In *Daly*, we reasoned that, under this method, the PTD evaluation would include consideration of permanent disability from the accepted conditions occurring before the expiration of aggravation rights, but would not include consideration of permanent disability from any “worsened condition” after the expiration of aggravation rights, which would be contrary to the statutory scheme and the rationale expressed in *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004), *Sherlee M. Samel*, 56 Van Natta 931 (2004), and *Jimmy O. Dougan*, 54 Van Natta 1213, *recons*, 54 Van Natta 1552 (2002), *aff’d Dougan v. SAIF*, 193 Or App 767 (2004), *vacated*, 339 Or 1 (2005). *Daly*, 58 Van Natta at 2362.

As explained in that portion of our prior order evaluating claimant's PTD entitlement under the "odd lot" doctrine, the record does not establish that claimant had a right shoulder condition (or any other condition) that caused "disabling effects" before the 2004 injury and, thus, he had no preexisting disability that may be considered in determining his entitlement to PTD. *Guild*, 68 Van Natta at 748. Moreover, his previously accepted condition (complex tear of the anterior portion of the glenoid, right shoulder) resulted in no permanent disability benefits and, therefore, there is no disability for the previously accepted condition to be considered as it existed at the last claim closure that preceded the expiration of claimant's 5-year aggravation rights. *Id.* Therefore, the remaining factor that may be considered in determining whether claimant has established entitlement to PTD is disability from the "post-aggravation rights" new/omitted medical condition (post traumatic arthritis of the right shoulder). *Id.* at 749.

In concluding that claimant had not established PTD status under the "odd lot" doctrine, we noted that Dr. Fry had repeatedly considered claimant's 2010 injury/surgery in addressing the cause of his right shoulder disability. (Exs. 23, 45, 46, 49, 51). *Guild*, 68 Van Natta at 749. To the extent that Dr. Fry changed his opinion when he agreed that claimant was totally permanently disabled due to the newly accepted arthritis condition, we considered the unexplained change of opinion to be unpersuasive. *Id.* Additionally, we reasoned that Dr. Fry did not distinguish between disability which may be considered in evaluating a claimant's PTD status under *Daly* (*i.e.*, disability related to the "post-aggravation rights" new/omitted medical condition under the 2004 right shoulder injury claim) and disability from other causes, such as his subsequent 2010 right shoulder injury. *Id.* at 749-50.

As noted in footnote 4, *supra*, we republish and adhere to the reasoning expressed in that portion of our previous opinion, which concluded that claimant was not entitled to PTD benefits under the "odd lot" doctrine. Regardless of whether claimant seeks to establish PTD under the "odd lot" doctrine or by proving that he is "completely physically disabled," only the *Daly* factors may be considered in the evaluation of his physical disability/impairment. *Daly*, 58 Van Natta at 2368. The determination of claimant's PTD status based on his physical disabilities must be based on medical evidence. *Joseph P. Hapka*, 61 Van Natta 1148, 1159-61 (2009).

Here, there is no dispute that claimant does not have any disability from his previously accepted conditions (under the 2004 claim) at the time last claim closure before his aggravation rights expired, or any disability that predated his

initial 2004 compensable injury, that may be considered in evaluating his PTD status. Therefore, the remaining *Daly* factor to be considered is disability from the “post-aggravation rights” new/omitted medical condition (post traumatic arthritis of the right shoulder).

The reasons expressed in our prior order finding Dr. Fry’s opinion insufficient to establish claimant’s PTD status under the “odd lot” doctrine, as summarized above, likewise apply to his opinion that claimant is “completely physically disabled.” In this regard, Dr. Fry repeatedly considered the effects/disability related to claimant’s 2010 injury/surgery (which may *not* be considered) in addressing the cause of his “complete disability” in the right shoulder. (Exs. 23, 45, 46, 49, 51). To the extent that Dr. Fry subsequently agreed that claimant was totally permanently disabled due to the “post-aggravation rights” new/omitted medical condition (post traumatic arthritis of the right shoulder), he did not explain that change of opinion. Lacking such an explanation, we do not consider Dr. Fry’s subsequent opinion to be persuasive. *See Moe v. Ceiling Systems*, 44 Or App 429 (1980) (unexplained change of opinion given little probative weight); *see also Seyed Jamali*, 59 Van Natta 2554 (2007) (physician’s inconsistent and unexplained change of opinion found unpersuasive to establish PTD status).

Additionally, Dr. Fry’s March 2014 chart note discussed claimant’s *injuries* and the recurrent *surgeries* increasing the progression of his right shoulder arthritis, in reference to “the severity of damage” in claimant’s right shoulder. (Ex. 45-3). Moreover, in his July 2014 chart note addressing claimant’s “complete disability” of the right shoulder, Dr. Fry referred to claimant’s 2004 injury and the significant glenohumeral joint traumatic arthritis described at that time (which had not substantially changed on the most recent MRI) and further noted that, “[s]ince that time, [claimant] has had several other diagnoses including a shoulder strain [and] a SLAP lesion[.]” (Ex. 49-1).⁷

We acknowledge the court’s statement that Dr. Fry’s February 2015 chart notes “cannot be viewed as tying claimant’s inability to work to matters other than his physical condition.” 291 Or App at 800. However, that chart note, like the others noted above, referred to *both* claimant’s 2004 *and* 2010 right shoulder injuries. (Ex. 51-1). Furthermore, it is unclear whether Dr. Fry’s statement

⁷ SAIF accepted claimant’s right shoulder strain and SLAP lesion under his 2010 injury claim. (Ex. 36).

that claimant is “completely disabled by the shoulder injury” is limited to the residuals/disability from his “post-aggravation rights” new/omitted medical condition related to the 2004 right shoulder injury (which may be considered in evaluating his entitlement to PTD benefits), or includes disability from the 2010 right shoulder injury (which cannot be considered in this PTD evaluation). (Ex. 51-3).

Under these particular circumstances, we continue to find that Dr. Fry’s opinion, viewed as a whole, does not persuasively establish claimant’s entitlement to PTD regarding his “post-aggravation rights” new/omitted medical condition (post traumatic arthritis of the right shoulder) under his 2004 right shoulder injury claim. *See Moe*, 44 Or App at 433; *see also Shakur Shabazz*, 65 Van Natta 1551, 1557 (2013) (physician’s opinion did not establish PTD because it did not distinguish between disability that may be considered in evaluating a claimant’s PTD status under *Daly* and disability from other causes). Consequently, this record does not establish that claimant is PTD.⁸

Accordingly, on remand, we adhere to and republish our May 16, 2016 order, as modified and supplemented herein.

IT IS SO ORDERED.

Entered at Salem, Oregon on November 2, 2018

⁸ As a result of our decision, we need not address the “workforce” element of claimant’s burden of proving PTD status. ORS 656.206(3) (2005).