In the Matter of the Compensation of
PETTY ELLIOTT, Claimant
WCB Case No. 01-00558
ORDER ON REVIEW
Thomas J Dzieman, Claimant Attorneys
Hornecker Cowling Et Al, Defense Attorneys

Reviewing Panel: Members Langer, Bock, and Phillips Polich. Member Phillips Polich dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Stephen Brown's order that set aside its denial of current low back condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," but do not adopt the "Ultimate Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

On August 11, 2000, claimant, a registered nurse, sustained a compensable low back injury while transferring a patient. After a panel of examining physicians (Drs. Schilperoort and Williams) concluded that claimant had experienced a lumbar strain combined with preexisting lumbar spondylosis and fibromyalgia, the employer accepted a "combined condition" consisting of those conditions on November 2, 2000. (Exs. 12, 13).

On November 20, 2000, the employer denied the current low back condition on the ground that the preexisting fibromyalgia and lumbar spondylosis were the major contributing cause of claimant's current condition and need for treatment. (Ex. 15). Claimant requested a hearing from the denial.

At the hearing, claimant contended that the employer's denial was incorrect because the alleged preexisting fibromyalgia and lumbar spondylosis did not exist. The ALJ set aside the employer's denial, finding that the employer failed to prove that there were preexisting conditions that combined with the lumbar sprain claimant sustained on August 11, 2000.

On review, the employer contends that claimant was precluded from contesting the existence a "combined condition" because she never objected to the employer's acceptance notice pursuant to ORS 656.262(6)(d).[1] Moreover, the employer asserts that the medical

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[1] That statute provides:

> "An injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise

evidence establishes that the compensable injury combined with the alleged preexisting conditions and that those conditions are the major contributing cause of the need for treatment of the "combined condition."

We need not determine whether claimant properly challenged the existence of a "combined condition." That is, even if claimant was not required to first object to the employer's acceptance via ORS 656.262(6)(d), we would find that the medical evidence does establish the existence of a "combined condition." Moreover, we conclude that the same evidence proves that the compensable injury is no longer the major contributing cause of the need for treatment of the combined condition. Thus, we uphold the employer's denial. We reason as follows.

Under ORS 656.005(7)(a)(B), if an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable if the otherwise compensable injury is the major contributing cause of the disability or need for treatment of the combined condition. In this case, we perceive the primary dispute as being whether a preexisting condition "combined" with the compensable injury. Claimant does not contend that, if there is a combined condition, the compensable injury is the major contributing cause of the disability or need for treatment of the current combined condition.

Where the medical evidence is divided, we rely on those medical opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). Three physicians examined claimant on behalf of the employer: Drs. Schilperoort, Williams and Woodward. One physician, Dr. Parsons, reviewed medical records. The Schilperoort/Williams panel concluded that claimant's lumbar strain combined with preexisting lumbar spondylosis and fibromyalgia. (Ex. 12-6). Dr. Parsons opined that claimant sustained a lumbar strain as a result of her August 2000 injury, but that preexisting degenerative disease and fibromyalgia were the major factors in her "combined condition." (Ex. 20-3). While finding no basis for a diagnosis of spondylosis, Dr. Woodward nevertheless opined that claimant had a "combined condition" of lumbar strain and fibromyalgia. (Ex. 21-7, 8).

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deficient, first must communicate in writing to the insurer or self-insured employer the worker's objections to the notice pursuant to ORS 656.267. The insurer or self-insured employer has 60 days from receipt of the communication from the worker to revise the notice or to make other written clarification in response. A worker who fails to comply with the communication requirements of this paragraph or ORS 656.267 may not allege at any hearing or other proceeding on the claim a de facto denial of a condition based on information in the notice of acceptance from the insurer or self-insured employer. Notwithstanding any other provision of this chapter, the worker may initiate objection to the notice of acceptance at any time."

The only physician to dispute the existence of a combined condition was claimant's treating physician, Dr. Jones, who disagreed with Dr. Schilperoort's opinion that there was a combination of lumbar strain with spondylosis and fibromyalgia. Dr. Jones described Dr. Schilperoort's opinion as being based on "unfounded suppositions," stated that claimant had not had a problem with either spondylosis or fibromyalgia for a number of "years," and directly related claimant's condition to her compensable injury. (Ex. 14).

Although Dr. Jones stated that claimant had not had problems with fibromyalgia for "years," his own chart notes indicate that claimant had longstanding difficulties with fibromyalgia. Claimant had received treatment for this condition in her low back as recently June 1999, just over a year prior to her compensable August 2000 injury. (Ex. 8A-9). In light of the lengthy and recent history of fibromyalgia symptoms, we do not believe that Dr. Jones gave sufficient consideration to claimant's preexisting condition. Thus, we conclude, based on the medical evidence from the various examining and reviewing physicians, that a preexisting condition (fibromyalgia or lumbar spondylosis or both) did combine with the compensable injury to cause a need for medical treatment.

We acknowledge that, in their depositions, Drs. Parsons, Schilperoort and Woodward each expressed some reservations regarding the legitimacy of the diagnosis of fibromyalgia and whether diagnostic criteria for that condition had ever been satisfied in this case. (Exs. 26-6; 27-7, 8, 9; 28-5, 6, 7). Despite their reservations, none of the doctors rejected the diagnosis or retracted their opinions that claimant suffered from a "combined condition." Under these circumstances, we do not find that the physicians' testimony seriously detracts from their previous opinions that claimant has a "combined condition" in the lumbar spine.

Accordingly, we conclude that, as a factual matter, a "combined condition" exists and that the employer's denial does not fail for lack of such a condition. Moreover, based on the persuasive opinions of Drs. Schilperoort, Parsons, Woodward and Williams, we conclude that the compensable injury is not the major contributing cause of the disability or need for treatment of the current combined low back condition. Therefore, it follows that the employer's denial was substantively proper.

ORDER

The ALJ's order dated December 13, 2001 is reversed. The employer's denial is reinstated and upheld. The ALJ's attorney fee award is reversed.

Entered at Salem, Oregon on August 22, 2002

Member Phillips Polich dissenting.

The majority concludes that, as a factual matter, the record establishes a "combined condition" and that the compensable injury is not the major contributing cause of claimant's disability and need for treatment of the alleged combined low back condition. Because I

disagree with the majority's analysis of medical evidence with regard to the presence of a "combined condition," I respectfully dissent.

At the outset, I emphasize that I would defer to the opinion of attending physician, Dr. Jones, who disagreed with the opinion of the Dr. Schilperoort that there was a combination of a lumbar strain with spondylosis and fibromyalgia. This is in keeping with well-established Board policy of deference to the opinion of the attending physician. *See Weiland v. SAIF*, 63 Or App 810 (1983); *Darwin B. Lederer*, 53 Van Natta 974 n. 2 (2001). Moreover, the fact that claimant had not received treatment for her low back condition for over a year prior to the compensable August 2000 injury supports Dr. Jones' conclusion that any preexisting condition was not a significant factor in claimant's current condition.

Apart from failing to give appropriate deference to the attending physician, the majority further errs in relying on Drs. Parsons, Schilperoort, and Woodward. As the majority notes, all three doctors expressed reservations regarding the legitimacy of the fibromyalgia diagnosis and whether diagnostic criteria for that condition had been satisfied. (Exs. 26-6; 27-7, 8, 9; 28-5, 6, 7). The employer's own experts clearly establish that, if there is such a condition as "fibromyalgia," there is nothing in this record to show that an examination was ever performed which clinically establishes the diagnosis under American College of Rheumatology criteria.

Dr. Schilperoort testified that there was nothing in the record that allowed him to determine how the diagnosis was established. (Ex. 27-8). Dr. Parsons testified that fibromyalgia is an occasional syndrome involving tenderness over various muscles, but, to make the diagnosis, tenderness must be in at least 11 out of 18 spots. Dr. Parsons's testimony was clear that the medical records were insufficient to establish that diagnostic criteria of the American College of Rheumatology were satisfied. (Ex. 26-6). Finally, Dr. Woodward testified that he could not recall making a diagnosis of fibromyalgia in 25 years and that he observed nothing in the record to indicate that an adequate examination was ever performed for the diagnosis. (Ex. 28-6).

Finally, the medical evidence with respect to the existence of a preexisting "spondylosis" condition is also very weak. Dr. Woodward opined that there was no basis for diagnosing spondylosis in the medical records. (Ex. 21-8). Moreover, Dr. Parsons, Schilperoort and Williams all concluded that claimant had a preexisting degenerative condition without benefit of any diagnostic studies for review. After receiving studies, both Dr. Parsons and Dr. Schilperoort essentially deferred to Dr. Woodward's opinion.

In conclusion, I agree with the ALJ that, on this record, the employer failed to prove that there were preexisting conditions that "combined" with the lumbar sprain claimant sustained on August 11, 2000. Accordingly, I would find that the employer's denial was improper and would affirm the ALJ's well reasoned order. Thus, I dissent.