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In the Matter of the Compensation of  
**GARY R. JONES, Claimant**  
WCB Case No. 01-01905  
ORDER ON REVIEW  
David C Force, Claimant Attorneys  
Garrett Hemann Et Al, Defense Attorneys

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

The self-insured employer requests review of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) declined to admit "post-reconsideration" order evidence; (2) declined to remand the case to the Appellate Review Unit (ARU) for consideration of the "post-reconsideration" evidence; (3) reopened the hearing record for admission of medical arbiter reports that were not submitted as evidence at the hearing; and (4) affirmed a 100 percent (320 degrees) unscheduled permanent disability award for a mental disorder as awarded by an Order on Reconsideration. With its reply brief, the employer attached a document not admitted at hearing. We treat the submission as a motion to remand to the ALJ. *See Harold G. Olds*, 52 Van Natta 2036 (2000); *Judy A. Britton*, 37 Van Natta 1262 (1985). Claimant objects to the employer's motion. On review, the issues are the propriety of the ALJ's evidentiary rulings, remand, and extent of unscheduled permanent disability.<sup>1</sup> We reverse in part, and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant, a former sewer worker, filed an occupational disease claim for a mental disorder as the result of exposure to toxic chemicals at work. (Ex. 8). The employer denied the claim and claimant requested a hearing.

A prior ALJ's order found claimant's "major depressive reaction" condition compensable and set aside the employer's denial. (Ex. 20). The employer requested Board review. We affirmed the prior ALJ's order. *Gary R. Jones*,

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<sup>1</sup> We do not address either the employer's motion to remand or the employer's challenge to the ALJ's evidentiary rulings because resolution of those issues would not change the outcome of this case.

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52 Van Natta 2216 (2000). The court, without opinion, affirmed our order. *Jones v. City of Salem*, 180 Or App 612 (2002).

On September 2, 2000, Dr. Elder (attending physician) opined that claimant's condition was medically stationary. (Ex. 23). Dr. Elder described claimant's impairment as "Class 1, generally doing moderately well."<sup>2</sup> (*Id.*) Dr. Elder further opined that claimant continued to have depressive and anxious times, and would likely require lifetime psychiatric treatment. (*Id.*)

On September 19, 2000, the employer closed the claim without an award of unscheduled permanent disability. (Ex. 25). Claimant requested reconsideration on November 15, 2000. (Ex. 27).

On January 10, 2001, Drs. Knight-Richardson, Meyerhoff, and Flynn performed a medical arbiters' evaluation. (Ex. A30A). The arbiter panel diagnosed "post-traumatic stress disorder, with depression and anxiety" and opined that claimant "qualified for Class III disability (mild to moderate)." (Ex. A30A-3).

Relying on the medical arbiter's report, as clarified on January 30, 2001, and applying vocational factors because claimant could not return to the job at injury, a February 9, 2001 Order on Reconsideration awarded 100 percent unscheduled permanent disability (320 degrees). (Ex. 31). On February 23, 2000, Dr. Knight-Richardson further clarified the medical arbiter evaluation. (Ex. A31A). The employer requested a hearing.

The ALJ determined that the accepted condition was "major depressive reaction." Finding that the medical arbiter's evaluation should be used to rate claimant's impairment, and further finding that claimant was unable to return to the same type of regular work as the job at injury, the ALJ concluded that claimant was entitled to an unscheduled permanent disability award of 100 percent. Consequently, the ALJ affirmed the Order on Reconsideration.

On Board review, the employer does not dispute that the accepted condition is "major depressive reaction." Rather, the employer asserts that the medical arbiters attributed their impairment findings to a different condition; *i.e.*, post-traumatic stress disorder. Consequently, the employer argues that the medical arbiters' impairment findings cannot be used to rate claimant's impairment.

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<sup>2</sup> "Class 1" equates to zero impairment pursuant to OAR 436-035-0400(5)(a).

Claimant responds that the employer failed to make such an argument at hearing. Citing *Stevenson v. Blue Cross*, 108 Or App 247, 252 (1991), claimant requests that we not consider the employer's argument on Board review, and summarily affirm the ALJ's order. We note, however, that on page 7 of the Opinion and Order, the ALJ wrote: "Employer argues that the appellate reviewer rated an unaccepted condition -- post traumatic stress disorder." Consequently, we reject claimant's assertion that the employer's argument is raised for the first time on Board review.

Pursuant to OAR 436-035-0007(1) (WCD Admin. Order 99-056), a worker is entitled to a value under the standards only for those findings of impairment that are permanent and caused by the accepted compensable condition. Unrelated or noncompensable impairment findings shall be excluded and shall not be valued under the rules. *Id.* Additionally, unless specifically denied, conditions that are direct medical sequelae to the original accepted condition are included in rating permanent disability. ORS 656.268(14).

Here, there is no medical evidence from which we might infer that "post-traumatic stress disorder" is the same condition as or consistent with "major depressive reaction" (the accepted condition). Nor is there any medical evidence from which we might infer that "post-traumatic stress disorder" is a direct medical sequelae of "major depressive reaction." Consequently, we conclude that the medical arbiters' evaluation, which attributes claimant's impairment to "post-traumatic stress disorder," cannot be used to rate claimant's impairment. *See Quinna J. Nolan*, 53 Van Natta 226, 230 n.5 (2001) (Because we are not an agency with specialized medical expertise qualified to take official notice of technical facts outside our specialized knowledge, we must have medical evidence that the impairment is consistent with, or a direct sequelae of, the accepted condition); *Robert A. Moon*, 51 Van Natta 242, 244 n. 3 (1999) (medical evidence is necessary to establish that impairment is consistent with, or a direct medical sequelae of, the accepted condition).

Other than the medical arbiters' evaluation, the only medical evidence in this record that may be used to rate claimant's impairment is the closing report (Exhibit 23) of Dr. Elder. *See Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666, 670 (1994) (medical evidence used to rate impairment must come from findings of the attending physician or other physicians with whom the attending physician concurs). Because Dr. Elder considered that claimant's condition was within Class I, we find that claimant has no measurable impairment (zero percent). OAR 436-035-0400(5). Because claimant has no measurable impairment, he is not

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entitled to an award of unscheduled permanent disability. OAR 436-035-0270(1). Accordingly, we conclude that the employer's Notice of Closure must be reinstated and affirmed.

### ORDER

The ALJ's order dated October 2001 is reversed in part and affirmed in part. That portion of the ALJ's order that affirmed the February 9, 2001 Order on Reconsideration is reversed. The ALJ's attorney fee award is reversed. The employer's September 19, 2000 Notice of Closure is reinstated and affirmed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 21, 2002

Board Member Phillips Polich concurring.

I write separately to further discuss claimant's assertion that the accepted "major depressive reaction" is the same condition as "post-traumatic stress disorder, with depression and anxiety."

I acknowledge that regardless of the name given to claimant's condition, the medical evidence establishes that the condition is manifested by symptoms of depression and anxiety. Thus, claimant's assertion that the terms "major depressive reaction" and "post-traumatic stress disorder, with depression and anxiety" represent the same condition is, at first blush, logically compelling. However, as the majority points out, the Board is not an agency with specialized medical expertise that is qualified to make that conclusion in the absence of medical opinion(s) addressing that issue. Consequently, I agree with the majority's decision.

Additionally, I note that OAR 436-035-0400(2) requires that the diagnoses of mental disorders follow the guidelines of the Diagnostic and Statistical Manual of Mental Disorders DSM-IV (1994). According to DSM-IV, "major depressive disorder" has different diagnostic criteria than "posttraumatic stress disorder." Diagnostic and Statistical Manual of Mental Disorders 345, 428-29 (4<sup>th</sup> ed. 1994). Consequently, even though claimant's argument has a certain logical appeal, it does not appear that "major depressive reaction" and "post-traumatic stress disorder, with depression and anxiety" are the same conditions.