
In the Matter of the Compensation of
SHARON R. CARON, Claimant
WCB Case No. 00-09342
ORDER ON REVIEW
Floyd H Shebley, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Tenenbaum's order that upheld the insurer's denial of her omitted medical condition claim for additional low back conditions. On review, the issues are compensability and (potentially) issue preclusion. We affirm.

FINDINGS OF FACT

We adopt the ALJ's Findings of Fact, with the exception of the second paragraph on page 3 and the Findings of Ultimate Fact.

CONCLUSIONS OF LAW AND OPINION

Claimant compensably injured her low back on August 9, 1999 when she fell while using a vacuum cleaner. After initially denying her claim, on February 10, 2000, the insurer rescinded its denial and agreed to accept claimant's claim for "cervical strain, trapezius strain and low back strain with nerve root contusion at L5-S1." (Ex. 28B).

On March 5, 2001, claimant brought an omitted medical condition claim for additional conditions at L4-5, specifically L4-5 herniated nucleus pulposus, L4-5 disc disease, and L4-5 disc disruption. (Ex. 50A). Claimant requested a hearing from the insurer's *de facto* denial of the additional conditions.

The ALJ upheld the insurer's *de facto* denial based on the preclusive effect of the parties' February 10, 2000 stipulation, by which the insurer agreed to accept claimant's claim for certain specified conditions and which resolved all issues "raised or raisable" as of the date of the stipulation. (Ex. 28B).

On review, claimant contends that her claim for additional low back conditions is not barred by principles of issue preclusion and is compensably related to her August 9, 1999 injury. Because we find that claimant's additional

low back conditions are not compensable on the merits of the medical evidence, we need not resolve the issue of whether the claim is barred by issue preclusion.¹

The medical record indicates that claimant suffers from one or more preexisting low back conditions which have combined with the effects of her August 9, 1999 compensable injury to cause her current disability or need for treatment for the additional combined low back conditions. (*See, e.g.*, Exs. 44-7, 48-6). Claimant must therefore prove that her compensable injury is the major contributing cause of her disability or need for treatment for the combined conditions. ORS 656.005(7)(a)(B); *SAIF v. Nehl*, 148 Or App 101, *on recon*, 149 Or App 309 (1997), *rev den* 326 Or 329 (1998).

The compensability of claimant's additional conditions at L4-5 is a complex medical question that must be resolved on the basis of expert medical evidence. *Uris v. Compensation Dept.*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). 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). Absent persuasive reasons to the contrary, we give greater weight to the opinion of claimant's treating physician. *Weiland v. SAIF*, 64 Or App 810 (1983); *see Darwin B. Lederer*, 53 Van Natta 974 n2 (2001).

Here, Dr. Keenen has treated claimant several times with regard to her L4-5 disc conditions and has proposed a surgery at that level. Therefore, we consider Dr. Keenen to be claimant's treating physician. *See* ORS 656.005(12)(b). However, we find persuasive reasons not to rely on Dr. Keenen's opinion.

On July 14, 2000, Dr. Keenen diagnosed an L4-5 herniated nucleus pulposus and right L4-5 disc disease, along with "status post" L5-S1 diskectomy with "BAK" fusion. (Ex. 42-2). Dr. Keenen proposed an interbody fusion surgery. (Ex. 42-3). As to causation, Dr. Keenen concluded that claimant's August 9, 1999 injury and her previous L5-S1 fusion were the major contributing cause for claimant's continuing back and lower extremity pain. (Ex. 47-2). On March 30, 2001, Dr. Keenen confirmed that his January 8, 2001 opinion remained unchanged and stated that he believed claimant's lower extremity pain was due to nerve root irritation and was "consistent with MRI findings." (Ex. 51). Dr. Keenen did not

¹ Nevertheless, we question whether claimant's claim for the omitted medical conditions at L4-5, which was not "initiated" before the February 10, 2000 stipulation, would be barred by principles of issue preclusion. *See Evangelical Lutheran Good Samaritan Society v. Bonham*, 176 Or App 490, 498 (2001); *Wallace M. Prince*, 52 Van Natta 45, 47 (2000).

state that claimant's work injury was the major contributing cause of her disability or need for treatment on that date. Moreover, Dr. Keenen's opinion is not well-explained and is conclusory. As such, we find it unpersuasive. *See Dena L. McGage*, 53 Van Natta 1097 (2001); *Carol A. Bryant*, 53 Van Natta 795, 796 (2001).

Dr. Flemming, a consulting orthopedic surgeon, stated that claimant should have a decompression surgery directed at L4-5, as well as an interbody fusion. (Ex. 51A). Dr. Flemming concluded that claimant's L4-5 disc herniation, and current need for treatment for both the disc herniation and degenerative disc, were caused by her August 9, 1999 vacuuming injury. (Ex. 51A-3). However, Dr. Flemming's analysis focused on the temporal relationship between claimant's injury and her disc herniation. (*Id.*) We consider this "temporal" analysis to be unpersuasive. *See, e.g., Diana L. Fordyce*, 53 Van Natta 86 (2001).

Dr. Njegovan, a consulting physician, concurred with an opinion summary prepared by claimant's attorney. Dr. Njegovan agreed that claimant's conditions at L4-5, including a disc bulge, were caused in major part by her compensable injury. (Ex. 57). Yet, Dr. Njegovan's report, like that of Dr. Keenen, was conclusory in nature. As such, we find it likewise insufficient to sustain claimant's burden of proof. *See Carol A. Bryant*, 53 Van Natta at 796.

Of more importance, other physicians have rebutted Dr. Keenen, Dr. Flemming and Dr. Njegovan and concluded that claimant has no objective evidence of a condition at L4-5. Dr. Rosenbaum, a neurosurgeon who examined claimant at the request of the insurer, concluded that claimant had no objective "pathology" at the L4-5 space. (Ex. 48-5). Dr. Rosenbaum thought that the surgery proposed by Dr. Keenen would be directed at claimant's preexisting conditions. (Ex. 48-6). Dr. Rosenbaum reasoned that claimant's symptoms were more consistent with a musculoskeletal strain, in view of her imaging studies. (*Id.*) We find Dr. Rosenbaum's opinion well-reasoned and a persuasive rebuttal to Drs. Keenen, Flemming and Njegovan as to the objective evidence of a condition at L4-5.

Drs. Farris and McFarland, who also examined claimant at the request of the insurer, similarly did not diagnose a specific condition at L4-5. (Ex. 44-6). These physicians stated that claimant's present condition was not related in major part to her compensable work injury, but instead to preexisting degenerative changes. (Ex. 44-7). Drs. Farris and McFarland also noted that claimant tended to express stress and depression through physical complaints, and took that factor into

account in reaching their conclusion. (Ex. 44-7). Drs. Farris and McFarland thus considered all potentially causative factors, including claimant's psychological condition, in reaching their opinion. *See Dietz v. Ramuda*, 130 Or App 397 (1994), *rev den* 321 Or 416 (1995) (a determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's injury and deciding which is the primary cause). Accordingly, we find the report of Drs. Farris and McFarland to be well-reasoned and persuasive.

Finally, Dr. Long, another one of claimant's consulting physicians, diagnosed an "L4-5 disc disruption," but stated that he was unsure whether claimant's symptoms were caused by her condition at L4-5, as opposed to her cervical condition. (Ex. 53). Dr. Long therefore characterized the debate over the compensability of any condition at L4-5 as "premature." (*Id.*) Dr. Long's report thus casts further doubt on the opinions of Drs. Keenen and Flemming linking claimant's symptoms and need for surgery to the conditions at L4-5.

In sum, based on the above rationale, we are not persuaded that claimant has established the compensability of the additional low back conditions by a preponderance of the evidence. *See* ORS 656.266; 656.005(7)(a)(B). On that basis, we affirm the ALJ's order upholding the insurer's *de facto* denial.

ORDER

The ALJ's order dated September 24, 2001 is affirmed.

Entered at Salem, Oregon on June 18, 2002