
In the Matter of the Compensation of
LINDA M. AYERS, Claimant
WCB Case No. 01-07161
ORDER ON REVIEW
Cary et al, Claimant Attorneys
Mark P Bronstein, Defense Attorneys

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

Claimant requests review of that portion of Administrative Law Judge (ALJ) Martha Brown's order that reduced her unscheduled permanent disability award for cervical and thoracic conditions from 20 percent (64 degrees), as awarded by an Order on Reconsideration, to zero. On review, the issue is extent of unscheduled permanent disability.

We adopt and affirm the ALJ's order with the following change and supplementation. In the first full paragraph on page 4, we replace the first sentence with the following:

“Drs. Blum, Russo and Goodwin noted during their treatment of claimant that they anticipated no permanent impairment. (Exs. 3, 5, 9, 12).”

We write to address claimant's argument that the ALJ erred by failing to discuss the opinion of Dr. Weller. The ALJ explained that claimant had treated with Dr. Weller in May 2001 for complaints of neck, upper back and left arm pain. Nevertheless, because Dr. Weller was not the attending physician at the time of claim closure, the ALJ's conclusion focused on the reports from Dr. Goodwin, claimant's attending physician at claim closure, and the medical arbiter's opinion.

For the purpose of rating permanent disability, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and the medical arbiter's findings, if any, may be considered. See ORS 656.245(2)(b)(B), ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). On reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter, except where a preponderance of medical opinion establishes a different level of impairment. OAR 436-035-0007(14). However, the Board is not compelled to rely on medical opinions it finds

unpersuasive, whether those opinions are authored by the attending physician or a medical arbiter. *See James v. SAIF*, 176 Or App 337 (2001) (the Board is not bound by the medical arbiter's opinion and may reject medical opinions that it finds to be unpersuasive); *Atkins v. Allied Systems*, 175 Or App 487 (2001).

On *de novo* review, we agree with the ALJ that the opinion of Dr. Glassman, the medical arbiter, is not persuasive because it lacks adequate explanation. Dr. Glassman found that claimant's impairment was "most likely due to the work related incident as it affects both her cervical and thoracic spine." (Ex. 32-2). Dr. Glassman's report is inconsistent with that of Dr. Goodwin, claimant's attending physician, who felt that claimant's ongoing symptoms were probably related to degenerative changes in her cervical spine. (Exs. 18, 19). Dr. Goodwin agreed with the report from Drs. Rich and Marble, which found no evidence of permanent impairment related to the work injury, and noted that any impairment would be due to preexisting degenerative changes. (Exs. 15, 17). We agree with the ALJ that Dr. Glassman's opinion, which did not adequately discuss claimant's degenerative condition, is not persuasive.

Furthermore, we are not persuaded by claimant's argument that Dr. Weller's opinion supports the medical arbiter's opinion that her change in symptoms was a reflection of increased activity, and not any different or new condition. To the contrary, Dr. Weller's reports indicate that claimant's current symptoms are related to C7 radiculitis, which is not an accepted condition. Dr. Weller first examined claimant on May 18, 2001. Claimant complained of neck, upper back and left arm pain. (Ex. 27-1). Dr. Weller's impression was:

"History of (L) cervical and (L) scapular strains. Clinical findings include some persistent (L) weakness. A differential diagnosis includes rhomboid strain vs possible C7 radiculopathy. In addition, there is persistent cervical pain with myofascial trigger points, likely secondary to above." (Ex. 27-4).

Dr. Weller planned to review claimant's past medical records and MRI. (*Id.*) She recommended electrodiagnostic studies to assess for "cervical radiculopathy vs brachial plexopathy." (*Id.*) She believed claimant continued to be medically stationary. (*Id.*)

In a June 18, 2001 letter regarding claimant's physical therapy, Dr. Weller reported that claimant's exam suggested the possibility of a C7 radiculopathy and,

despite the fact that claimant's MRI showed no evidence of significant disc herniation, claimant's nerve conduction studies suggested C7 radiculitis. (Ex. 29). Thus, Dr. Weller's reports indicate that claimant's symptoms may be related to C7 radiculitis, which is not an accepted condition.¹ Dr. Weller's reports appear to be inconsistent with Dr. Glassman, who said that claimant's impairment was related to the work-related incident.

In summary, we agree with the ALJ that a preponderance of medical opinion establishes a different level of impairment than that of the medical arbiter.²

ORDER

The ALJ's order dated February 12, 2002 is affirmed.

Entered at Salem, Oregon on October 2, 2002

Board Member Phillips Polich dissenting.

The majority agrees with the ALJ that the opinion of Dr. Glassman, the medical arbiter, was not persuasive. Because I disagree with the majority's evaluation of the medical evidence, I respectfully dissent.

Dr. Glassman found that claimant's cervical and thoracic impairment was related to the work related incident. The ALJ reasoned that, "in light of the contrary remarks made by claimant's treating doctor, and without further explanation," Dr. Glassman's opinion was conclusory and not persuasive. The majority affirms the ALJ's decision, explaining that Dr. Glassman's report was inconsistent with that of Dr. Goodwin, claimant's attending physician, who felt that claimant's ongoing symptoms were probably related to degenerative changes in her cervical spine.

¹ Our holding, however, does not mean that a claim for the unaccepted conditions cannot be made and, if accepted or determined to be compensable, rated for permanent disability in the future. *See* ORS 656.262(6)(d), (7)(a), (7)(c).

² In light of our conclusion, we need not address the insurer's alternative arguments that the Department erred by failing to consider a videotape submitted by the insurer, and that claimant should not be given an award based on social/vocational factors.

Medical arbiters are not asked or paid to explain whether they agree with a claimant's attending physician. The ALJ and majority err by rejecting Dr. Glassman's opinion for his failure to respond to an issue that he did not know he was supposed to address. If this information is required, WCD needs to revise the questions it asks the medical arbiters.

ORS 656.283(7) provides that "[e]valuation of the worker's disability by the [ALJ] shall be as of the date of issuance of the reconsideration order[.]" Dr. Glassman's opinion is the most persuasive and the ALJ (and majority) err by resorting to earlier, speculative and incomplete medical records. The older medical records relied on by the ALJ and majority are of limited relevance because they merely reflect claimant's condition *before* she began normal activities. In previous cases, we have held that a medical arbiter's report may be more probative when there is a significant time gap between the closing examination and the medical arbiter's examination. *E.g., Androtti D. Harrison*, 53 Van Natta 1130 (2001). Here, the time gap is significant because claimant had not resumed normal activities at the time of closure.

Dr. Glassman reported that claimant complained of neck pain that radiated into the trapezius and was "accompanied by paresthesia in the medial humerus, forearm, and digits 4 and 5 *which occurs only when lifting heavier objects.*" (Ex. 32-1; emphasis supplied). Dr. Glassman explained that claimant had decreased strength, particularly grip strength involving her left upper extremity, and he noted that her pain was lessened by rest, but "never consistently goes away." (*Id.*) Dr. Glassman concluded that claimant had cervical and thoracic impairment, which was due to the work-related incident. (Ex. 32-2). Furthermore, as claimant notes, Dr. Glassman's opinion is consistent with the next-most recent medical report from Dr. Weller, who also correlated claimant's increasing symptoms to increased activity. (Ex. 27). Based on Dr. Glassman's report, the Order on Reconsideration correctly awarded claimant 20 percent unscheduled permanent disability award for her cervical and thoracic conditions. The majority errs in reducing claimant's permanent disability award to zero.