

In the Matter of the Compensation of
KAREN S NUTTER, Claimant
WCB Case No. 01-02927, 01-00803
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Bock. Member Langer concurs in part and dissents in part.

The self-insured employer requests review of Administrative Law Judge (ALJ) Peterson's order that: (1) affirmed the Workers' Compensation Department's (WCD's) order that reclassified claimant's October 25, 1999 cervicothoracic strain injury claim from nondisabling to disabling; and (2) set aside its partial denial of claimant's right shoulder impingement syndrome. On review, the issues are classification and compensability. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact and ultimate findings of fact, with the exception of the last sentence of the ultimate findings of fact, and with the following supplementation. The employer accepted claimant's cervicothoracic strain claim as nondisabling on November 29, 1999. (Ex. 15). On December 20, 2000, claimant requested that the employer reclassify that claim to disabling. (Ex. 72). On January 8, 2001, the employer responded that the claim remained in nondisabling status. (Ex. 62). On January 29, 2001, claimant requested that WCD review the request for reclassification, pursuant to ORS 656.277(1). (Ex. 72).

CONCLUSIONS OF LAW AND OPINION

Reclassification

The employer accepted claimant's cervicothoracic strain claim as nondisabling on November 29, 1999. On December 20, 2000, claimant requested that the employer reclassify that claim to disabling.¹ On January 8, 2001, the employer responded that the claim remained in nondisabling status. Claimant requested review by WCD. On March 23, 2001, WCD issued a Director's

¹ Claimant's request itself is not in the record. Exhibit 72, WCD's reclassification order, specified the date of claimant's reclassification request as December 20, 2000.

Classification Review and Order reclassifying the cervicothoracic strain claim from nondisabling to disabling pursuant to OAR 436-030-0045(5)(b) on the basis that a claim is disabling if the worker is medically stationary within one year from the date of injury and will be entitled to an award of permanent partial disability under the Standards. The ALJ affirmed WCD's order.

On review, the employer contends that claimant's request for reclassification from "nondisabling" to "disabling" was untimely under ORS 656.277. We agree.

ORS 656.277 (1999)² provides:

"(1) A request for reclassification by the worker of an accepted nondisabling injury that the worker believes was or has become disabling must be submitted to the insurer or self-insured employer. The insurer or self-insured employer shall classify the claim as disabling or nondisabling within 14 days of the request *if the request is received within one year after the date of acceptance.*"

* * * * * The worker may ask the Director of [WCD] to review the classification by submitting a request for review within 60 days of the mailing of the classification notice by the insurer or self-insured employer.

"(2) A request by the worker that an accepted nondisabling injury was or has become disabling shall be made pursuant to ORS 656.273 as a claim for aggravation *if made more than one year after the date of acceptance.*" (Emphasis added).³

Here, claimant's request for reclassification was made on December 20, 2000, more than one year after the employer's November 29, 1999 acceptance of claimant's cervicothoracic strain claim as nondisabling. Thus, claimant's request

² ORS 656.277(1999) applies to all pending requests for reclassification submitted subsequent to October 23, 1999. *Norstadt v. Liberty Northwest Ins. Corp.*, 179 Or App 731 (2002).

³ The 2001 legislature amended ORS 656.277(1) to delete the phrase "if the request is received within one year after the date of acceptance." Or Laws 2001, ch 350, section 2. *Amended* ORS 656.277 became effective July 30, 2001, subsequent to claimant's December 20, 2000 request for classification at issue in this case. The language of ORS 656.277(2) remains the same.

for reclassification was untimely.⁴ Consequently, claimant's cervicothoracic strain claim remains in nondisabling status. *See Troy M. Matthews*, 55 Van Natta 2148 (2003) (where claimant did not timely request reclassification under ORS 656.277, initial nondisabling claim remained nondisabling).

Compensability-Right Shoulder Impingement Syndrome

We adopt and affirm the ALJ's opinion on this issue, with the following comment. The employer argues that the opinions of its physicians, Drs. Vessely and Schilperoort, who evaluated claimant's medical records only, are more persuasive than the opinion of Dr. Walther, who performed claimant's right shoulder surgery. Dr. Schilperoort, who believed that claimant's shoulder had been hurting for less than a month when she was seen by Dr. Walther, apparently did not have access to claimant's physical therapy notes that showed treatment beginning October 26, 1999 for right shoulder and right arm symptoms. (Exs. 8,

⁴ Claimant argues that WCD "apparently treated claimant's request for reclassification as a claim for aggravation pursuant to OAR 436-030-0045(3)." OAR 436-030-0045(3) (WCD Admin. Order 00-058, eff. January 1, 2001) provides:

"If a worker requests reclassification of a nondisabling claim more than one year after the date of claim acceptance or more than sixty (60) days after the first classification of the claim as nondisabling, whichever is later, *the worker must make the claim as a claim for aggravation.*" (Emphasis added).

There is no evidence, however, that claimant filed an aggravation claim for her cervicothoracic strain with the insurer, as required under ORS 656.277(2) and ORS 656.273(3). *See Stapleton v. Liberty Northwest Ins. Corp.*, 175 Or App 618, 623 (2001) (to perfect an aggravation claim, ORS 656.273(3) requires a claimant to contact the insurer in a timely manner, to provide the insurer with the proper aggravation claim form, and to include with the claim form a physician's report that establishes "by written medical evidence supported by objective findings that the claimant has suffered a worsened condition attributable to the compensable injury").

Claimant also surmises that WCD may have determined that the employer should have reclassified claimant's claim as disabling upon receipt of her treating physician's chart note indicating that claimant was medically stationary with permanent impairment, pursuant to OAR 436-035-0045(5)(b). However, at the time of the July 31, 2000 report from claimant's physician, OAR 436-035-0045(5) (WCD Admin. Order 97-065, eff. January 15, 1998) provided that no claim shall be reviewed for initial reclassification unless the request or notice to the carrier that a nondisabling injury is or originally was disabling was made within one year of the date of injury. Moreover, even if OAR 436-035-0045(5)(b) (WCD Admin. Order 00-058, eff. January 1, 2001), which defines a disabling claim, were to apply in this case, claimant ignores the fact that the employer's reclassification denial and the WCD order were in response to her untimely December 20, 2000 request for reclassification and subsequent request for review by WCD as set forth in ORS 656.277(1). (*See Ex. 72*).

10). Moreover, Dr. Maloney, who treated claimant shortly after the motor vehicle incident, obtained a right shoulder x-ray to ascertain the source of claimant's right shoulder pain on November 16, 1999. (Ex. 12).

Similarly, Dr. Vessely, who reviewed medical records just prior to the May 1, 2002 hearing, did not think that the records suggested a shoulder problem until March 2000. (Ex. 71). As discussed by the ALJ, the evidence shows (and claimant credibly testified) that she had no prior injuries or problems with her right shoulder prior to the motor vehicle accident, and had continuing pain in her right shoulder from that date forward.

Dr. Walther, orthopedic surgeon, claimant's attending physician for her shoulder condition, acknowledged that claimant had a preexisting Type II acromion; she also persuasively opined that the accident resulted in a rotator cuff strain, which over time became a chronic tendonitis with impingement, for which she performed subacromial decompression surgery. Like the ALJ, we find her opinion that the major contributing cause of the need for treatment for claimant's right shoulder impingement is more persuasive than those of Dr. Schilperoort and Dr. Vessely, particularly in light of their inaccurate histories of claimant's shoulder symptoms.

Claimant's attorney is entitled to an assessed fee for services on review regarding the compensability issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$1,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the compensability issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated January 22, 2003 is reversed in part and affirmed in part. That portion of the order that affirmed WCD's March 23, 2001 reclassification order is reversed. The claim remains in nondisabling status. The remainder of the order is affirmed. For services on review, claimant's attorney is awarded a fee of \$1,500, payable by the self-insured employer.

Entered at Salem, Oregon on August 26, 2003

Board Member Langer concurring in part and dissenting in part.

I agree with that portion of the majority's finding that claimant's request for reclassification was untimely. I disagree, however, from the majority's conclusion that claimant proved compensability of her right shoulder impingement syndrome. Because I disagree with the majority's analysis of the medical evidence, I respectfully dissent.

The majority adopts the ALJ's determination that the medical opinion of Dr. Walther was the most persuasive regarding the compensability of claimant's right shoulder condition. According to the majority, the ALJ correctly concluded that the opinions of Dr. Schilperoort and Dr. Vessely were unpersuasive in light of their inaccurate histories of claimant's shoulder symptoms. I, however, disagree with the ALJ's evaluation of the relevant medical opinions and would find that claimant did not meet her burden of establishing the compensability of her condition for the following reasons.

For claimant to establish the compensability of her "combined condition," she must show that her work injury was the major contributing cause of her disability and/or need for treatment for the combined condition. ORS 656.005(7)(a)(B); *SAIF v. Nehl*, 148 Or App 279, 283 (1993). Claimant must prove that her otherwise compensable injury contributed more to her ongoing need for treatment and/or disability than all other causes combined. *Schuler v. Beaverton School Dist. No. 48J*, 334 Or 290, 296 (2002). Because of claimant's preexisting condition and the possible alternative causes for her current condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *Uris v. Comp. Dept.*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993).

When there is a dispute between medical experts, more weight is given to those medical opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). We generally give greater weight to the treating physician absent persuasive reasons to the contrary. See *Weiland v. SAIF*, 64 Or App 810 (1983); *David B. Lederer*, 53 Van Natta 974 n.2 (2001). However, we properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

After reviewing claimant's medical records, Dr. Vessely noted that there was no indication of any primary shoulder problem in the subacromial or

glenohumeral area until March 2000, which was almost 5 months post injury. (Ex. 74-6). All the records prior to March 2000 referred to problems in the “posterior” aspect of the shoulder, which is more related to the cervical spine and scapular region, and did not note any subacromial or bicipital (*i.e.*, anterior and lateral) problems. *Id.*

Dr. Walther did not address the delay in claimant’s symptoms. As such, I find persuasive reasons not to rely on Dr. Walther’s opinion. *See Weiland*, 64 Or App at 814. Given the complexity of this medical matter, I find Dr. Walther’s opinion inadequate without further explanation. *See Somers*, 77 Or App at 263.

Accordingly, I would conclude that Dr. Walther submitted an unpersuasive medical opinion. Instead, I would rely on the medical opinions of the examining physicians, Drs. Schilperoort and Vessely, who addressed the delay of symptoms.

In conclusion, I would find that claimant did not sustain her burden of proving that her right shoulder condition is compensable. Because the majority concludes otherwise, I must dissent from this aspect of the majority opinion.