

In the Matter of the Compensation of
CARMEN E. RUSSELL, Claimant
Own Motion No. 03-0326M
OWN MOTION ORDER
Claimant Unrepresented
SAIF Corporation, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Bock. Member Biehl chose not to sign the order.

The SAIF Corporation has submitted a “Carrier’s Own Motion Recommendation,” indicating that claimant seeks reopening of her 1995 low back claim for a “post-aggravation rights” new medical condition claim (“annular disc tear at the L5-S1 disc”). See ORS 656.278(1)(b) (2001). SAIF recommends against reopening, contending that: (1) claimant’s new medical condition is not causally related to the compensable condition; and (2) it is not responsible for claimant’s new medical condition.¹ For the following reasons, we deny claimant’s request for Own Motion relief.

FINDINGS OF FACT

In January 1995, claimant was compensably injured. SAIF accepted “acute sacroiliac sprain and acute lumbosacral strain.” The claim was first closed in September 1995. Claimant’s aggravation rights have expired.

Following closure of her claim, claimant continued to report chronic intermittent low back pain to her treating and examining physicians. On June 20, 2003, she requested that SAIF expand its acceptance to include “annular disc tear at the L5-S1 disc.” (Ex. 4).

SAIF submitted a “Carrier’s Own Motion Recommendation,” recommending against reopening the claim for a “post-aggravation rights” new or omitted medical condition. In its recommendation, SAIF asserted that claimant’s

¹ SAIF also asserts that claimant’s current condition does not require hospitalization, inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization, and that recommended medical treatment is not reasonable or necessary for the compensable condition. However, because these issues are not relevant to our decision regarding the reopening of the 1995 claim for a “post-aggravation rights” new or omitted medical condition under ORS 656.278(1)(b) (2001), we do not address them. ORS 656.278(1)(b) (2001); see *Charles Klutsenbecker*, 55 Van Natta 2244 (2003); *Kenneth P. Pray*, 54 Van Natta 2620 (2002).

current condition was not causally related to the accepted condition and that it was not responsible for the current condition. In addition, SAIF submitted the reports of Drs. Vessely, an insurer-arranged medical examiner, and Dr. Kuether.

Dr. Vessely, an orthopedic surgeon, reviewed records detailing claimant's medical history and x-rays taken in 1995, 2000, and 2002. He examined claimant in February 2003. At the conclusion of his February 18, 2003 report, Dr. Vessely diagnosed ongoing mechanical low back pain since 1995, pain localized to right sacroiliac joint, and greater trochanteric bursitis. He indicated that the possibility of internal derangement of a disc had not been ruled out and recommended an MRI of claimant's lumbar spine. (Ex. 1-8, 9).

A lumbar MRI was performed on April 1, 2003. Dr. Edelman, a radiologist, identified a small area of increased signal intensity in the posterior aspect of claimant's L5-S1 disc indicating a small annular tear. He found no significant disc bulge or protrusion and no nerve root displacement. (Ex. 2)

Dr. Vessely concurred with Dr. Edelman's interpretation of the imaging study. (Ex. 5-1). He further found that claimant had a narrowing of the disc space at L5-S1 to a very mild degree. Dr. Vessely could not rule out the possibility that claimant had a small annular disruption from the 1995 work injury "based purely on her history," but could not state with medical probability that the annular disruption occurred in 1995. He explained that it was impossible to determine with certainty whether the L5-S1 annular abnormality represented a degenerative process alone or one that was impacted by claimant's 1995 work event. (Ex. 5-2). When asked whether claimant's work injury was a "material contributor" to her current condition, Dr. Vessely described it as "a material contributor and not a major contributor." (Ex. 5-3).

Dr. Kuether, a consulting physician, examined claimant on May 29 and September 29, 2003. He determined that the MRI scan of claimant's lumbar spine demonstrated degenerative disc changes at the L5-S1 level resulting in disc space collapse and that the high intensity zone seen on the MRI was indicative of an annular tear in the L5-S1 region. In addition, he noted that claimant had undergone discography that showed concordant discogenic pain at L5-S1 as well as some abnormalities at L4-5. Dr. Kuether concluded that of claimant's symptoms the most likely to be "related" to her original injury was the L5-S1 disc injury. He "suspect[ed]" that the L5-S1 disc injury was "probably more likely relate[d] to [claimant's] original injury" than the L4-5 condition, which he concluded was "probably more related to generalized disc degeneration."

Claimant's treating physician, Dr. Dreibelbis, also concluded that there was evidence of an annular tear at the L5-S1 level. He opined that claimant had low back pain "associated with" her initial injury.

On August 8, 2003, claimant was examined by Dr. Okamoto, a chiropractic physician. Dr. Okamoto concluded that claimant had a pelvic obliquity, misalignment at T10 and L5 vertebrae, left posterior rotated sacrum, tight/short psoas muscles, and weak/inhibited gluteus medius muscle. He found that previous standing lumbar films related a high left hip, misalignment of the L5 vertebrae and some disc degeneration at the L5-S1 level, and noted that the April 2003 MRI revealed an annular tear at the L5-S1 level.

Dr. Okamoto stated that it was difficult to determine if claimant's annular tear had occurred as the result of the 1995 work injury that she described to him. However, based on claimant's history of recurring back pain since the work incident, he believed it more probable than not that the tear "did occur from the work injury."

CONCLUSIONS OF LAW AND OPINION

Claimant has requested that her 1995 injury claim be reopened for the acceptance of "annular disc tear at the L5-S1 disc" as a "post-aggravation rights" new medical condition.² SAIF has submitted a "Carrier's Own Motion Recommendation," recommending against the reopening, asserting that the condition claimed is not compensable.³

² Because claimant's L5-S1 annular disc condition was not diagnosed before SAIF accepted the "acute sacroiliac sprain and acute lumbosacral strain" in 1995, her claim is properly characterized as a "post-aggravation rights" new medical condition claim rather than a "post-aggravation rights" omitted medical condition claim. See *Johansen v. SAIF*, 158 Or App 672, 679-80 (1999) *adhered to on recon* 160 Or App 579, *rev den* 329 Or 527 (1999).

³ Claimant's "post-aggravation rights" new medical condition claim was initiated prior to September 1, 2003. Thus, rule amendments providing that requests for hearing regarding the denial of such claims be processed by the Hearings Division do not apply to the processing and review of this claim. See OAR 438-012-0018; WCB Admin. Order 2-2003, Order of Adoption, page 21; OAR 438-012-0090(1).

Here, although provided an opportunity to do so, neither party requested referral for a fact-finding hearing. We find that such an action is unnecessary because the record is sufficiently developed to permit our resolution of the dispute. *Georgie J. Turner*, 55 Van Natta 1033 (2003); *Michael R. Montgomery*, 55 Van Natta 765 (2003). Therefore, we have proceeded with our review based on the written materials submitted.

The statutory scheme set forth in ORS 656.278(1)(b) (2001) regarding the processing of new or omitted medical conditions related to an Own Motion claim requires satisfaction of the following requirements for reopening the claim: (1) the new or omitted medical condition claim must have been initiated after the expiration of the claimant's aggravation rights under ORS 656.273; and (2) the new or omitted medical condition must be accepted or compensable. *See William E. Hartzog*, 54 Van Natta 493 (2002); *James J. Kemp*, 54 Van Natta 491, 507-08 (2002).

In this instance, it is undisputed that the claim for a new medical condition was initiated after the September 2000 expiration of claimant's aggravation rights under ORS 656.273. SAIF asserts that Dr. Vessely's medical opinion is the most persuasive. Based on his reports, SAIF further contends that claimant has not established the compensability of the claimed "post-aggravation rights" new medical condition. We agree with both propositions.

Because of the length of time between claimant's 1995 injury and diagnosis of the L5-S1 annular tear, and the possible alternative causes for that condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *Uris v. Compensation Department*, 247 Or 420 (1967). In evaluating the medical evidence concerning causation, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Drs. Vessely, Kuether, Dreibelbis, and Okamoto offered opinions on causation.

Dr. Vessely, an orthopedic surgeon, reviewed claimant's medical records between 1995 and 2002 in detail. He personally reviewed claimant's 1995 and 2000 x-rays, as well as an April 2003 MRI. Based on this information, he attributed claimant's L5-S1 condition to degenerative process alone or in combination with the 1995 injury.⁴

Dr. Kuether agreed that the MRI of claimant's lumbar spine demonstrated degenerative changes at the L5-S1 level and that the high intensity zone seen on the MRI was indicative of an annular tear in the L5-S1 region. He indicated that claimant's L5-S1 condition was "related to" her 1995 injury and "suspect[ed] that

⁴ No physician attributed claimant's degenerative process to her 1995 injury.

the L5-S1 disc injury was “probably more likely relate[d] to [claimant’s] original injury” than was claimant’s L4-5 condition.

Dr. Dreibelbis stated that claimant’s low back *pain* was “likely from” and “associated with” her initial injury. He did not attribute claimant’s L5-S1 annular tear condition to the 1995 strain/sprain.

Dr. Okamoto, a chiropractic physician, examined claimant on a single occasion. He reviewed claimant’s “previous standing lumbar films.” However, his report does not indicate that he personally reviewed claimant’s previous medical records or MRI. Rather, Dr. Okamoto identified claimant as his source of medical history concerning the 1995 work injury.

Because Dr. Vessely’s opinion is based on the most complete and accurate information and presents the most comprehensive discussion of claimant’s condition, complaints, potential causative factors, and the difficulty in attributing cause, we find it the most thorough, well reasoned, and persuasive. *See Somers v. SAIF*, 77 Or App at 263. We note that Drs. Kuether, Dreibelbis and Okamoto did not address Dr. Vessely’s discussion of the contribution of a degenerative process. The failure to consider and respond to Dr. Vessely’s discussion on this point renders their opinions less persuasive. *See Daniel Morfin-Munoz*, 55 Van Natta 236 (2003); *Donna F. Brooks*, 50 Van Natta 265, 266 (1998) (physician’s failure to respond to opposing opinion that work should not provoke claimed condition rendered his opinion unpersuasive).

Based on this medical record, claimant was required to establish that her 1995 work injury was the major contributing cause of a “consequential” condition or the major contributing cause of her disability or need for medical treatment for a “combined” condition. ORS 656.005(7)(a)(A), (B); *Georgie J. Turner*, 55 Van Natta 1033, 1036 (2003). To satisfy the “major contributing cause” standard, the persuasive medical evidence must prove that the 1995 work injury contributed more to the “post-aggravation rights” new medical condition claimed than all other factors combined. *See e.g. McGarrah v. SAIF*, 296 Or 145, 146 (1983).

Here, Dr. Vessely’s medical opinion is insufficient to support compensability under either a “consequential” or “combined” condition theory. He expressly determined that claimant’s 1995 injury was a “material contributor and not a major contributor” to her current condition. (Ex. 503). Accordingly, we conclude that claimant’s L5-S1 annular disc tear is not compensable.

Under such circumstances, we are not persuaded that claimant meets the criteria necessary for reopening under ORS 656.278(1)(b) (2001) for an annular tear at the L5-S1 disc space. Accordingly, we are unable to authorize the reopening of her claim.⁵

IT IS SO ORDERED.

Entered at Salem, Oregon on February 5, 2004

⁵ Inasmuch as claimant is unrepresented, she may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. She may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPARTMENT OF CONSUMER & BUSINESS SERVICES]
PO BOX 14480
SALEM, OR 97309-0405