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In the Matter of the Compensation of  
**PENELOPE A. CAMARATA, Claimant**  
WCB Case No. 05-05927  
ORDER ON REVIEW  
Unrepresented Claimant  
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

Claimant requests review of Administrative Law Judge (ALJ) Riechers' order that declined to award additional temporary partial disability (TPD) from June 28, 2005 through December 1, 2005. Claimant has also submitted several documents that were not admitted at hearing. We treat the submissions as a motion for remand. *Judy A. Britton*, 37 Van Natta 1262 (1985). In her brief, claimant also requests remand for a new hearing. On review, the issues are remand and TPD.

We deny claimant's request for remand, and adopt and affirm the ALJ's order with the following supplementation.<sup>1</sup>

Motion for Remand/New Hearing

With her appellant's brief, claimant has submitted the following documents: a copy of a Request for Director's Review; a copy of the ALJ's order; single pages from several prior orders issued by other ALJ's; a "conclusion" argument from defense counsel; an April 22, 2006 letter from claimant to Sedgwick; "post-hearing" work status reports dated April 4, 2006 and April 21, 2006; a "post-hearing" April 21, 2006 letter from Dr. French; a "post-hearing" paystub from March 1, 2006 through March 24, 2006; and a December 1, 2001 Employment Appeals Board decision.

Our review is limited to the record developed by the ALJ. We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed[.]" ORS 656.295(5). There must be a compelling reason

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<sup>1</sup> 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

for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000). A compelling reason exists when the new evidence: (1) concerns disability; (2) was not obtainable at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *SAIF v. Avery*, 167 Or App at 333; *Mary K. Greenwood*, 57 Van Natta 1632, 1632 (2005).

Here, the issue before the ALJ was TPD beginning June 28, 2005 (the date of an earlier ALJ's order setting aside Sedgwick's partial denial of a bilateral shoulder instability condition) through the date of hearing, December 1, 2005. (Tr. 10). Because none of the documents claimant has submitted pertain to entitlement to TPD between June and December 2005, the documents are not reasonably likely to affect the outcome of the case. Thus, we find no compelling reason to remand to the ALJ for the taking of additional evidence.

Claimant also asserts that remand is appropriate based on the alleged bias of the ALJ. However, if claimant believed that the ALJ was biased against her, it was incumbent upon her to have objected at the hearing level and requested a change of ALJ. *See* OAR 438-006-0095(4). Claimant's current request for remand and a new hearing is essentially a motion for a change of ALJ. Such a request at this stage of litigation is neither timely nor in accordance with the applicable administrative rule. *E.g.*, *Robert Delauney*, 55 Van Natta 1170 (2003); *Timothy D. Gaines*, 53 Van Natta 100 (2001).

In any event, even assuming claimant's objection to the ALJ was timely filed, we are statutorily authorized to make our own appraisal of the documentary and testimonial evidence (irrespective of the ALJ's order). *E.g.*, *Sueyen A. Yang*, 48 Van Natta 1626 (1998). In other words, we are authorized to review this record without consideration of the ALJ's findings and conclusions.<sup>2</sup> On *de novo* review, we find no compelling reason to return this case to the Hearings Division for a new hearing before a new ALJ. Accordingly, we deny claimant's motion.<sup>3</sup>

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<sup>2</sup> Although we generally defer to an ALJ's determination of credibility when it is based on the ALJ's opportunity to observe the witnesses, *see Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991), the ALJ in this case did not make any demeanor-based credibility findings. Thus, we are equally capable of determining the credibility of witnesses based on the written record. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Angelo L. Radich*, 45 Van Natta 45 (1993). These circumstances provide a further reason to deny claimant's motion for remand.

<sup>3</sup> Claimant requests that Sedgwick's counsel and the ALJ be referred to the bar. Such a request is not a matter for this forum. *See Kathleen M. Depping*, 57 Van Natta 1049 (2005); *Teresa J. Kolibaba*, 52 Van Natta 960 (2000); *Neal S. Anderson*, 49 Van Natta 1 (1997).

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TPD

In declining to award additional TPD, the ALJ reasoned that, even if claimant had an attending physician authorization, she would nonetheless not be entitled to additional TPD because her “post-injury” wages exceeded her “pre-injury” wages. We agree.

Temporary disability is due and payable only for those periods of time authorized by the attending physician. ORS 656.262(4)(a),(h). An attending physician or nurse practitioner authorized to provide compensable medical services may authorize the payment of temporary disability compensation. ORS 656.262(4)(a). Such authorization need not be made in explicit terms; when an objectively reasonable carrier would understand contemporaneous medical reports to excuse an injured worker from work, the carrier is obligated to pay such benefits. *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *modified on recons*, 195 Or App 94 (2004); *Brian Courchesne*, 57 Van Natta 1593, 1596 (2005).

Here, as noted by the ALJ, claimant’s “post-injury” wage was higher than her “pre-injury” wage. Thus, assuming TPD was authorized, claimant’s TPD benefits would equal zero because her “post-injury” wage earnings were equal to, or higher than, the wage used to compute the rate of compensation at the time of injury. ORS 656.212; OAR 436-060-0030(1); *Kelly D. Skeel*, 55 Van Natta 3365 (2003). Accordingly, we affirm.<sup>4</sup>

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<sup>4</sup> Claimant further requests that the Director of DCBS appoint a new “claim administrator.” We are not the proper forum for addressing such a matter. ORS 656.054(7) states in pertinent part:

“Notwithstanding any other provision of law, the director’s selection of assigned claims agents shall be made at the sole discretion of the director. Such selections shall not be subject to review by any court or other administrative body.”

Here, the Director has selected Sedgwick to process claimant’s claim with the noncomplying employer. In turn, Sedgwick has retained its attorney to represent its interest in the matter. Such actions are entirely consistent with the Director’s authority under the statutory scheme. Moreover, these procedures have no relevance to the TPD issue litigated at hearing.

Claimant also requests that “all monies paid” from the Workers’ Benefit Fund to Sedgwick or its representative be reviewed and returned. Because claimant raises this argument for the first time on review, we are not inclined to address it. *See Vogel v. Liberty Northwest Ins. Corp.*, 132 Or App 7, 13 (1994) (Board has discretion not to address issues raised for the first time on reconsideration); *Stevenson v. Blue Cross*, 108 Or App 247, 252 (1991); *see also Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of

ORDER

The ALJ's order dated May 8, 2006 is affirmed.

Entered at Salem, Oregon on September 18, 2006

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considering only those issues raised by the parties at hearing). In any event, any questions regarding transactions and expenditures concerning the Workers' Benefit Fund should be directed to the Workers' Compensation Division, on behalf of the Director. *See* ORS 656.605(3); OAR 436-150-0040.