

In the Matter of the Compensation of
CRYSTAL L. DELEON, Claimant

WCB Case No. 08-03173

ORDER ON REVIEW

Dunn & Roy PC, Claimant Attorneys
Bruce A Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that reduced her whole person impairment award for upper back, neck, and right shoulder conditions from 11 percent, as granted by an Order on Reconsideration, to zero. On review, the issue is extent of permanent disability (impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

Claimant has an accepted injury claim for thoracic, cervical, and right shoulder strain conditions. (Exs. 12, 32). Dr. Truong, claimant's attending physician, stated that most of claimant's shoulder pain was consistent with a muscular problem and a tendonitis. He diagnosed thoracic strain, shoulder strain, and myofascial pain (with involvement of the right levator scapula, trapezius musculature, rhomboid musculature and deltoid muscle). (Exs. 14, 16).

On January 15, 2008, Dr. Neumann examined claimant at the SAIF Corporation's request. In addition to cervical and thoracic strains, Dr. Neumann diagnosed right shoulder acromioclavicular (AC) arthritis, right rotator cuff tendonitis and degenerative changes in the labrum with biceps tendonitis. (Ex. 27-10). Dr. Neumann identified claimant's preexisting conditions as degenerative disc disease in the cervical spine, degenerative changes in the AC joint, and some degenerative changes in the rotator cuff. (Ex. 27-11). He opined that the preexisting AC joint changes and tendinopathy in the rotator cuff were the major contributing cause of claimant's current disability and need for treatment for the right shoulder. (Ex. 27-12). According to Dr. Neumann, the accepted cervical and thoracic strains were medically stationary and had resolved without impairment. (Ex. 27-13). He also opined that the loss of range of motion (ROM) found in the right shoulder was secondary to the underlying degenerative changes, and not related to the accepted strain injuries. (Ex. 27-13, -14). His impression was that claimant's right shoulder was "stationary and stable." (Ex. 27-13).

On January 31, 2008, Dr. Truong concurred with Dr. Neumann's diagnoses, causation opinions, and impairment findings, except that he believed claimant had a work-related right shoulder strain, which was "now medically stationary without impairment." (Exs. 29, 30). Dr. Truong agreed that claimant had ongoing right rotator cuff tendonitis and shoulder arthritis, which were preexisting and not work related. He opined that such conditions may impair lifting activities and cause ongoing pain. (Ex. 30-2). He placed claimant on a 40-pound lifting restriction with no repetitive lifting over the shoulder. (*Id.*)

On February 14, 2008, SAIF closed the claim without an award of permanent disability benefits. (Ex. 34). Claimant requested reconsideration and the appointment of a medical arbiter. (Ex. 35).

Dr. Borman performed a medical arbiter examination on April 9, 2008. Claimant complained of diffuse right shoulder pain in the deltoid and scapular regions, and primarily right-sided pain in the posterior neck and upper thoracic spinal region. (Ex. 38-1-2). On examination, Dr. Borman found reduced right shoulder ROM with no spinal or shoulder tenderness. (Ex. 38-3). He opined that claimant was significantly limited in the repetitive use of the right shoulder, but not of the cervical or thoracic spine. (Ex. 38-4). He attributed the loss of cervical and thoracic ROM to degenerative disc disease, and concluded that the cervical and thoracic strains had resolved. (*Id.*) He stated that the shoulder findings were "completely due to the work related event of August 7, 2007." (*Id.*)

Based on Dr. Borman's report, an April 21, 2008 Order on Reconsideration awarded 11 percent permanent disability for ROM loss and chronic condition impairment of the right shoulder. (Ex. 39). SAIF requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Finding Dr. Borman's opinion conclusory and ambiguous regarding the cause of claimant's impairment, the ALJ concluded that the findings of Dr. Neumann, as ratified by Dr. Truong, were more accurate and should be used to rate claimant's impairment. Thus, because a preponderance of the evidence (as represented by the findings of Dr. Neumann, with which Dr. Truong concurred) established that claimant's impairment was not due to her compensable conditions, the ALJ reduced the reconsideration order's permanent disability award to zero.

After conducting our review, we disagree with the ALJ that the findings of Dr. Neumann, as concurred with by Dr. Truong, are more accurate than those of the medical arbiter. Rather, for the following reasons, we conclude that the Appellate Review Unit (ARU) properly used Dr. Borman's findings in awarding claimant 11 percent permanent disability.

Claimant has the burden of proving the nature and extent of her disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, SAIF must show that the Order on Reconsideration's permanent disability award was in error. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000); *Albert T. Jones*, 60 Van Natta 1158, 1159 (2008) (although the claimant had the burden of proving the nature and extent of his disability under ORS 656.266(1), the carrier had the burden of establishing error in the reconsideration process because it requested a hearing regarding the reconsideration order).

Furthermore, evaluation of a worker's disability is as of the date of the reconsideration order. ORS 656.283(7). On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5) (WCD Admin. Order 07-060; eff. January 1, 2008). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's impairment findings when the arbiter unambiguously attributes the claimant's permanent impairment to the compensable condition. *Hicks v. SAIF*, 194 Or App 655, 659, *modified on recons*, 196 Or App 146 (2004); *Margarito N. Carbajal*, 60 Van Natta 2681 (2008).

After conducting our review, we conclude that a preponderance of the medical evidence does not demonstrate that findings by the attending physician, or impairment findings with which the attending physician concurred, are more accurate than those of the medical arbiter. Rather, we consider Dr. Borman's arbiter report to be unambiguous and the most persuasive opinion regarding claimant's right shoulder impairment due to the accepted right shoulder strain. Given the specific purpose for his examination (*i.e.*, to determine claimant's permanent impairment related to the compensable conditions), we find Dr. Borman's report to be thorough and based on complete and accurate information.

Dr. Borman examined claimant on April 9, 2008 for the specific purpose of determining impairment findings. (Ex. 38-1). He reviewed claimant's records, including her imaging reports and the opinions of Drs. Truong and Neumann,

and had a complete and accurate history of her condition. (Ex. 38-1-2). His examination of claimant's right shoulder revealed reduced ROM. (Ex. 38-3). He specifically opined that claimant was significantly limited in the repetitive use of the right shoulder, but not in the cervical or thoracic spines. (Ex. 38-4). Dr. Borman concluded that his findings were valid. (Ex. 38-4).

Dr. Borman was given detailed instructions by ARU on how to evaluate the extent of impairment due to the formally accepted conditions. (Ex. 37). In response to the ARU's inquiry regarding whether the impairment findings "are due to the accepted condition(s) AND due to other unrelated/denied conditions," (Ex. 37-3), Dr. Borman responded that the "[f]indings about the shoulder are completely due to the work related event of August 7, 2007." (Ex. 38-4). This answer was made in specific reference to the ARU's instructions, asking Dr. Borman to describe whether the findings were "due to the accepted conditions." Furthermore, in respect to the right shoulder, Dr. Borman had earlier accurately described claimant's accepted condition as a "right shoulder strain." Finally, Dr. Borman did not report any "unrelated conditions." Under such circumstances, it is reasonable to infer that Dr. Borman attributed his impairment findings in the right shoulder to the accepted right shoulder strain and not to any other condition. *See, e.g., Brian D. Benavente*, 59 Van Natta 673, 675 (2007); *Derrel W. Nelson, Jr.*, 58 Van Natta 264 (2006).

Moreover, Dr. Borman was aware of claimant's preexisting conditions, as indicated by his response to the ARU's questions and given his review of claimant's prior medical records discussing her degenerative shoulder conditions. Based on his consideration of the preexisting conditions, Dr. Borman ultimately attributed no impairment to the thoracic and cervical strains, but concluded otherwise with respect to the right shoulder strain. Thus, even considering the preexisting shoulder degeneration, he still did not attribute claimant's shoulder impairment findings to a noncompensable cause, and he rejected the analysis of Drs. Truong and Neumann relating claimant's shoulder impairment to those preexisting conditions.

Under these circumstances, we find Dr. Borman's report sufficient to show that claimant's right shoulder impairment was related to her compensable right shoulder injury. Moreover, the issue of whether claimant has sustained any permanent impairment as a result of her compensable right shoulder injury is a complex medical question.

Here, Dr. Borman's report does not suggest that claimant's impairment was not permanent and/or would improve, nor, after reviewing claimant's medical records, did he attribute his right shoulder impairment findings to any other condition than that accepted. Dr. Borman did not relate claimant's right shoulder impairment findings to degenerative changes or a preexisting condition, as he did with impairment findings in the cervical and thoracic spines. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence). We find no ambiguity in Dr. Borman's responses.

In conclusion, we find that Dr. Borman's arbiter report is unambiguous regarding the cause of claimant's impairment, and that he provided the most persuasive opinion regarding claimant's permanent impairment due to the accepted shoulder condition. We are not persuaded that a preponderance of medical opinion establishes a different level of impairment. Accordingly, we find no error in the ARU's reliance on Dr. Borman's report in rating claimant's permanent disability nor in the ARU's evaluation of claimant's permanent disability. Consequently, SAIF has not sustained its burden of establishing error in the reconsideration process. *See Callow*, 171 Or App at 183-184; *Jones*, 60 Van Natta at 1159. We therefore reverse the ALJ's order and reinstate the Order on Reconsideration's award.

Because SAIF requested a hearing regarding the Order on Reconsideration and we have reinstated and affirmed that order, claimant's attorney is entitled to an assessed fee for services at the hearing level, inasmuch as claimant's compensation was not ultimately reduced or disallowed as a result of SAIF's hearing request. 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 at the hearing level is \$2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record and claimant's written arguments) the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

In addition, because our order results in increased compensation, claimant's counsel is entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the 11 percent permanent impairment "increase" between the ALJ's zero percent award and our 11 percent award), not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(2); OAR 438-015-0055(2). In the event that a portion of the

substantively increased permanent disability award has already been paid to claimant, claimant's attorney may seek recovery of the fee in the manner prescribed in *Jane A. Volk*, 46 Van Natta 681 (1994), *on recons*, 46 Van Natta 1017 (1994), *aff'd on other grounds Volk v. America West Airlines*, 135 Or App 565 (1995), *rev den*, 322 Or 645 (1996).

ORDER

The ALJ's order dated September 16, 2008 is reversed. The Order on Reconsideration's award of 11 percent permanent impairment is reinstated and affirmed. For services at the hearing level, claimant's counsel is awarded an assessed attorney fee of \$2,500, payable by SAIF. In addition, claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the "increased" compensation created by this order (the 11 percent permanent disability "increase" between the ALJ's award and this award), not to exceed \$6,000, payable directly to claimant's counsel.

Entered at Salem, Oregon on April 7, 2009