
In the Matter of the Compensation of
PATRICIA G. HALEY, Claimant
WCB Case No. 08-05156
ORDER ON REVIEW
Malagon Moore et al,
Julene M Quinn, SAIF Legal

Reviewing Panel: Members Weddell, Langer, and Herman. Member Langer dissents.

Claimant requests review of Administrative Law Judge (ALJ) Mundorff's order that reduced her whole person impairment award for a left elbow condition from 15 percent, as granted by an Order on Reconsideration, to zero. On review, the issue is extent of permanent disability (whole person impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following change and summary. In the first full paragraph on page 2, we delete the last sentence.

In June 2005, claimant injured her left elbow in a non-work-related injury, which resulted in a comminuted intra-articular fracture of the distal humerus. (Ex. 2). On June 28, 2005, Dr. Fitzpatrick performed an open reduction and internal fixation of the fracture, transposed the ulnar nerve and repaired the collateral ligament. (Ex. 5).

On January 22, 2007, claimant was compensably injured after she fell down a step at work. The SAIF Corporation accepted a left elbow contusion. (Exs. 11, 17).

Claimant treated with Dr. Fitzpatrick for her elbow condition. On February 23, 2007, Dr. Fitzpatrick reported that claimant's left elbow CT scan showed that the elbow hardware from her 2005 surgery had "now migrated out of the joint." (Ex. 15). He performed surgery to remove the left elbow hardware on March 20, 2007. (Ex. 16).

On February 5, 2008, Dr. Fitzpatrick performed a third left elbow surgery, which involved ulnar neurolysis, hardware removal, and interposition arthroplasty of the left elbow. (Ex. 31).

Two days later, Dr. Fitzpatrick responded to an inquiry from SAIF, explaining that claimant's left elbow contusion was medically stationary as of January 17, 2008 and that she had no permanent impairment due to the work injury. (Ex. 33).

SAIF closed the claim on April 8, 2008, without an award of permanent disability. (Ex. 37). Claimant requested reconsideration. Dr. Brewster performed a medical arbiter examination on July 10, 2008. (Ex. 45). An August 14, 2008 Order on Reconsideration relied on Dr. Brewster's opinion and awarded 15 percent whole person impairment for the elbow condition for reduced supination, reduced strength, and a chronic elbow condition. (Ex. 48). SAIF requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that Dr. Brewster, the medical arbiter, did not explain why claimant's impairment was due to the accepted elbow contusion and was not related to her prior significant injury and degeneration. The ALJ determined that different findings by Dr. Fitzpatrick were more accurate and should be used to determine her impairment. Based on Dr. Fitzpatrick's opinion, the ALJ reduced claimant's permanent disability award to zero.

On review, claimant contends that Dr. Brewster adequately considered her preexisting elbow condition. She argues that SAIF did not sustain its burden of showing error in the reconsideration process.

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).

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 2, 2008). Absent persuasive evidence to the contrary, we are not free to disregard a 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, *recons*, 196 Or App 146 (2004).

We begin by determining claimant's "attending physician." The Appellate Review Unit (ARU) found that Dr. Beckwith was the attending physician at the time of claim closure. (Ex. 48-1). The ALJ explained that Dr. Beckwith had concurred with Dr. Fitzpatrick's opinion that claimant's left elbow contusion was medically stationary and that there was no permanent impairment from that condition. (Ex. 35, *see* Ex. 33). However, the ALJ found that Dr. Fitzpatrick provided the most persuasive opinion regarding impairment.

Whether a physician qualifies as an "attending physician" is a question of fact. *E.g., Troy O. West*, 58 Van Natta 2699 (2006). ORS 656.005(12)(b) defines an "attending physician" as a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury.

After the January 2007 work injury, claimant sought treatment from Dr. Fitzpatrick. On February 2, 2007, he explained that he was treating claimant's elbow condition, but she had also injured her back, neck and knees. Dr. Fitzpatrick explained that with regard to her work injury, "given the fact that she has multiple injuries, I am going to remain in a consulting position treating her elbow only." (Ex. 10). Dr. Fitzpatrick said that claimant was seeing Dr. Beckwith for the remainder of her work injuries. (Ex. 15). The record includes two chart notes from Dr. Beckwith, which indicated that he treated soft tissue sprains other than claimant's elbow injury. (Exs. 13, 14).

The only accepted condition at issue is claimant's left elbow contusion. Because Dr. Fitzpatrick was primarily responsible for the treatment of claimant's left elbow injury, we find that he was her attending physician.

After conducting our review, we conclude that a preponderance of the medical evidence does not demonstrate that findings by Dr. Fitzpatrick are more accurate than those of the medical arbiter. Rather, we consider Dr. Brewster's arbiter report to be unambiguous and the most persuasive opinion regarding claimant's left elbow impairment. We reason as follows.

Dr. Brewster examined claimant on July 10, 2008 and was aware that SAIF had accepted a left elbow contusion resulting from the January 2007 work injury and had denied several other conditions. He reviewed medical records provided by the ARU prior to the examination. (Ex. 45-1). He discussed several medical records, including Dr. Fitzpatrick's June 28, 2005 surgical report, as well as the March 20, 2007 "hardware removal" surgery. (Ex. 45-2, -3, -4, -5). Dr. Brewster was aware that claimant had "salvage surgery" in the left elbow on February 5, 2008. (Ex. 45-6).

Dr. Brewster provided detailed measurements of claimant's elbow, including ranges of motion, muscle strength, and sensation. (Ex. 45-9 to -12). He concluded that claimant had a chronic and permanent condition that significantly limited her left elbow "due to accepted condition." Dr. Brewster explained that this involved "new findings of decreased grip, and elbow flexion extension motor strength 100% attributed to accepted condition * * *." (Ex. 45-11). He also determined that 100 percent of claimant's decreased left elbow supination, as well as the strength findings, were due to the accepted condition. None of claimant's findings were considered invalid. (*Id.*)

On July 22, 2008, ARU wrote to Dr. Brewster and asked whether the letters from Dr. Fitzpatrick dated November 1, 2007 and March 20, 2008 were considered when preparing his report. (Ex. 46-2). The record includes a response checking the "yes" box, with a typed "signature" of Dr. Brewster dated August 13, 2008. (Ex. 46-1).

SAIF argues that Dr. Brewster failed to consider claimant's preexisting elbow arthritis and her February 2008 surgery in determining her impairment. We disagree. Dr. Brewster specifically referred to claimant's February 5, 2008 left elbow "salvage surgery." (Ex. 45-6). In his July 14, 2008 report, he stated that he had reviewed medical records provided by the ARU prior to the examination. (Ex. 45-1). The August 13, 2008 response from Dr. Brewster expressly acknowledged that he had considered Dr. Fitzpatrick's November 1, 2007 and March 20, 2008 letters in preparing his report. (Ex. 46). In addition, Dr. Brewster reviewed Dr. Bald's report, which discussed claimant's preexisting arthritis from her 2005 injury. (Ex. 45-5; *see* Ex. 20). Thus, the record does not support SAIF's assertion that Dr. Brewster failed to consider the development of claimant's arthritis and her February 2008 surgery.

According to SAIF, Dr. Brewster did not have "sound medical principles" because he simply compared claimant's findings before and after her work injury without considering the arthritis or non-work-related surgery. SAIF argues that Dr. Brewster did not assign what was "due to" the work injury because he assigned disability on the basis of what existed before the injury and what existed after the injury, without considering the intervening arthritis and unrelated surgery.

As discussed above, we disagree with SAIF's underlying premise that Dr. Brewster did not consider claimant's arthritis or her non-work-related surgery. Moreover, Dr. Brewster explained which impairment findings were related to the accepted condition and which findings were unrelated to that condition. He

specifically stated that claimant's decreased left elbow supination, strength findings, and chronic condition were "100 percent" attributed to the accepted condition. (Ex. 45-11). Dr. Brewster did not attribute the aforementioned impairment findings to a preexisting condition. We find no ambiguity in Dr. Brewster's responses. Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's unambiguous impairment findings. *Hicks*, 194 Or App at 659-60.

SAIF relies instead on Dr. Fitzpatrick's February 7, 2008 letter indicating that there was no permanent impairment relative to claimant's left elbow contusion. (Ex. 33). SAIF contends that Dr. Fitzpatrick's opinion is more persuasive because he treated claimant before and after the January 2007 work injury and was in a better position to separate out disability due to the work injury from that due to the prior, non-work-related injury.

Although Dr. Fitzpatrick examined claimant on multiple occasions and performed her elbow surgeries, we are not persuaded that a "preponderance of the evidence" demonstrates that different findings by Dr. Fitzpatrick are more accurate and should be used. *See* OAR 436-035-0007(5); OAR 436-035-0005(13) ("preponderance of medical evidence" means the more probative and more reliable medical opinion based upon factors including, but not limited to, the most accurate history, the most objective findings, sound medical principles, or clear and concise reasoning). We reason as follows.

After claimant's non-work-related left elbow injury in 2005, Dr. Fitzpatrick performed elbow surgery on June 28, 2005. (Ex. 5). On February 23, 2007, he reported that claimant "was doing extremely well until her fall at work, at which time she starting having increasing pain in the elbow." He explained that claimant "was fully functional prior to her fall." (Ex. 15). In a later report, he also said that claimant did "very well after this [non-work-related] fracture[.]" (Ex. 39).

After claimant's January 22, 2007 work injury, Dr. Fitzpatrick reported that her left elbow CT scan showed that the elbow hardware from the 2005 surgery "has now migrated out of the joint." (*Id.*) On February 23, 2007, Dr. Fitzpatrick explained that, because claimant "was having absolutely no problem with the elbow prior to her injury and began having significant problems immediately after the injury[.]" he believed that her need for surgery at that time was greater than 50% caused by the work injury. (*Id.*) He performed surgery on March 20, 2007 to remove the left elbow hardware. (Ex. 16).

Claimant continued to have elbow pain. In August 2007, Dr. Fitzpatrick explained that claimant's elbow condition was "100 percent related to her original injury." He recommended an open debridement and hardware removal, which he said was "100% related to her previous elbow fracture." (Exs. 23, 26). He performed another left elbow surgery on February 5, 2008. (Ex. 31).

In a March 20, 2008 letter to SAIF, Dr. Fitzpatrick explained that claimant had post-traumatic arthritis, "post-op internal fixation for the supracondylar humerus fracture," and avascular necrosis of her supracondylar humerus fracture, which preexisted the January 22, 2007 work injury. He concluded that the preexisting non-work-related 2005 injury was the "major contributor" to her need for treatment. (Ex. 34).

After SAIF closed the claim, Dr. Fitzpatrick responded to claimant's questions as to whether the need for her most recent elbow surgery (in 2008) was caused by her work injury. He explained that after claimant's January 2007 injury, her x-rays showed significant elbow arthritis with evidence of avascular necrosis of her elbow, which were related to the original 2005 injury. Dr. Fitzpatrick explained that there "may have been a small contribution from her work related injury. I would put this percentage as less than 50%." (Ex. 39).

In February 2008, Dr. Fitzpatrick "checked a box" indicating that claimant did not have any permanent impairment from the work injury (Ex. 33), but he did not perform a closing examination with detailed measurements, as did Dr. Brewster. Moreover, Dr. Fitzpatrick did not adequately explain his opinion. We are unable to reconcile his varying opinions regarding the contribution of claimant's January 2007 work injury to her need for treatment. He has opined that the contribution of claimant's work-related injury to her elbow need for treatment have ranged from "major contributing cause" to zero percent to less than 50 percent. Dr. Fitzpatrick's conclusory opinion that claimant had no impairment from the work injury is not persuasive in light of his varying and apparently inconsistent opinions regarding the contribution from the work injury. Under these circumstances, we are not persuaded that Dr. Fitzpatrick provided the more probative or reliable medical opinion. *See* OAR 436-035-0005(13); OAR 436-035-0007(5).

In conclusion, we find that Dr. Brewster'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 elbow condition. We are not persuaded that a preponderance of medical

opinion establishes a different level of impairment. Consequently, SAIF has not sustained its burden of establishing error in the reconsideration process. *See Callow*, 171 Or App at 183-184. We therefore reverse the ALJ's order and reinstate the Order on Reconsideration's permanent disability 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); *Crystal L. De Leon*, 61 Van Natta 1777 (2009). 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 \$3,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, claimant's written arguments and claimant's counsel's fee request) 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 15 percent permanent impairment "increase" between the ALJ's zero percent award and our 15 percent award), not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(3); 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), *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 January 30, 2009 is reversed. The Order on Reconsideration's award of 15 percent permanent impairment is reinstated and affirmed. For services at the hearing level, claimant's counsel is awarded an assessed attorney fee of \$3,500, 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 15 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 July 31, 2009

Member Langer dissenting.

I agree with the majority that Dr. Fitzpatrick was claimant's attending physician.¹ I disagree, however, with reversing the ALJ's decision that Dr. Fitzpatrick's findings regarding claimant's impairment should be used rather than those of the medical arbiter.

On review, SAIF argues that Dr. Brewster did not assign impairment based on what was "due to" the work related injury. *See* ORS 656.214(1)(a) ("impairment" means the "loss of use or function of a body part or system due to the compensable industrial injury"). I agree.

I am mindful that we are required to apply the arbiter's impairment findings, 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); *see SAIF v. Hicks*, 194 Or App 655, 659, *recons*, 196 Or App 146 (2004). Nevertheless, I find Dr. Brewster's report ambiguous. Moreover, I am not persuaded that Dr. Brewster's medical arbiter report is sufficient to establish that claimant's impairment findings were "due to the compensable industrial injury[.]" *See* ORS 656.214(1)(a); *Khrul v. Foremans Cleaners*, 194 Or App 125, 131 (2004) ("although in the absence of other medical opinion, the board is required to use a medical arbiter's rating of impairment, it must nonetheless be satisfied that the report rates impairment caused by the compensable condition"). I reason as follows.

The only accepted condition arising out of claimant's January 22, 2007 work injury is "left elbow contusion." (Ex. 36). Based on medical evidence concluding that claimant's work injury combined with her preexisting left elbow conditions, but that the work injury never was the major contributing cause of the need for treatment and disability of the combined condition, SAIF issued a denial of compensability of the combined left elbow condition. (Ex. 38). The preexisting left elbow conditions include supracondylar humerus fracture, ulnar neuropathy, lateral collateral ligament avulsion, post-traumatic arthritis and avascular necrosis. (Exs. 5, 20-9, 25, 34).

Dr. Brewster found that claimant's reduced supination, strength, and her "chronic" elbow condition were "100 percent" attributed to the accepted contusion. (Ex. 45-11). His report includes a "treatment summary" that begins with a

¹ The parties do not raise any issue related to Dr. Fitzpatrick's status as the attending physician.

June 2005 report and ends with Dr. Bald's June 10, 2007 IME report. (Ex. 45-2-5). Claimant, however, received significant medical treatment after June 2007 for her left elbow condition. On February 5, 2008, Dr. Fitzpatrick performed ulnar neurolysis, hardware removal "metal deep," interposition arthroplasty with use of the Achilles tendon allograft and application of fixator pins.² (Ex. 31). This treatment was unrelated to and was not considered in rating claimant's accepted contusion condition. (Ex. 48-2). Furthermore, during a post-surgery follow-up, Dr. Fitzpatrick noted that claimant experienced pain and crepitus with range of motion and continued to use a brace. (Ex. 42).

Dr. Brewster's July 14, 2008 report did not even acknowledge, much less discuss, the conditions that preexisted claimant's January 2007 work injury. Although the report refers to the February 2008 surgery as an "intervening medical incident" and describes claimant's report of "salvage surgery" resulting in hand weakness (Ex. 45-6), it does not recount any details of that treatment and its consequences.

A later report with Dr. Brewster's typed signature acknowledged that he had "considered" Dr. Fitzpatrick's November 1, 2007 and March 20, 2008 reports in preparing his report. (Ex. 46). In the November 1, 2007 letter, Dr. Fitzpatrick reported that claimant's need for additional surgery on her left elbow was "100 % related to her previous elbow fracture." (Ex. 26). The "additional surgery" apparently refers to the procedure that eventually took place on February 5, 2008. In the March 20, 2008 report, Dr. Fitzpatrick agreed with Dr. Bald's opinion that claimant had post-traumatic left elbow arthritis that preexisted her work injury and added that she also had avascular necrosis of her fracture, which also preexisted the work injury. Dr. Fitzpatrick further agreed that the preexisting conditions combined with the work injury and that the injury was not the major contributor to her need for treatment. (Ex. 34).

Dr. Brewster's "consideration" of Exhibits 26 and 34 does not clear up any ambiguity as to what, if anything, he knew about claimant's 2008 treatment and its residuals. Claimant's lay description of "salvage surgery" is insufficient to establish that Dr. Brewster knew and considered the relevant facts. Under these circumstances, I find his report incomplete and ambiguous. *See Joy Seiling*, 61 Van Natta 805, 809 (2009) (medical arbiter's findings and report ambiguous

² "Interposition arthroplasty" is "surgical correction of ankylosis by separation of the immobile part of a joint from the mobilized part and interposition of a substance (e.g., fascia, cartilage, metal, or plastic) between them." *Stedman's Electronic Medical Dictionary*, Version 7.0 (2007).

because he did not address or acknowledge unrelated condition); *Lindsey K. Clark*, 58 Van Natta 2853, 2855 (2006) (in light of countervailing medical evidence showing that accepted conditions resolved, medical arbiter's conclusory comment that impairment findings were due to accepted condition not well-reasoned or persuasive).

The majority finds Dr. Fitzpatrick's opinions unexplained, "varying and apparently inconsistent." I disagree. His multiple reports certainly provide more explanation than Dr. Brewster's single conclusory opinion. Moreover, because Dr. Fitzpatrick treated claimant for an extended period of time before and after her work injury, his assessment amounts to highly probative and reliable evidence establishing that claimant has no impairment due to the accepted contusion.

Shortly after the work injury, Dr. Fitzpatrick reported that claimant sustained a new injury to her elbow that temporarily worsened her previous ulnar neuropathy. (Ex. 10). He continued to assess claimant's condition and determined that revision of previously implanted hardware in claimant's elbow was needed. At that time, based on claimant's subjective reports that she was doing extremely well and was fully functional until the work incident, Dr. Fitzpatrick believed that claimant's need for surgery was caused in greater part by the work injury rather than the preexisting conditions. He remained uncertain, however, whether the hardware problem was caused by the new injury or had been a "progressive migration over time." (Ex. 15). On March 20, 2007, he removed part of the hardware, but was unable to locate and remove all of it. (Ex. 16). Shortly thereafter, he diagnosed avascular necrosis and arthritis in the elbow. (Ex. 18).

Claimant returned to Dr. Fitzpatrick in August 2007, at which time he diagnosed multiple loose bodies in the elbow and recommended an open debridement and remaining hardware removal. (Ex. 23). In October 2007, he diagnosed significant degenerative changes on both sides of the elbow and discussed with claimant that, because he would need to do a fairly significant release to get the screws out, interposition arthroplasty may be required rather than just a simple debridement. (Ex. 25; *see also* Ex. 27). Subsequently, he reported that the planned surgery was entirely due to the noncompensable elbow fracture. (Ex. 26). As noted above, Dr. Fitzpatrick performed the arthroplasty, together with a number of other procedures, in February 2008. (Ex. 31). Subsequently, he agreed that the work injury combined with the preexisting conditions, but the injury was not the major contributing cause of claimant's need for treatment. (Ex. 34-1).

Dr. Fitzpatrick's reports are internally consistent. They are also consistent with the law of the case that establishes that claimant sustained a compensable elbow contusion, which SAIF accepted as a non-combined condition, and a noncompensable combined condition subject to SAIF's April 2008 denial. Dr. Fitzpatrick never opined that claimant sustained any impairment due to the accepted contusion. To the contrary, he reported that the contusion caused no permanent impairment. (Ex. 33-2). In addressing the combined condition, Dr. Fitzpatrick initially believed that the work injury contributed in a greater degree to the need of claimant's treatment of the combined condition; subsequently, however, after repeated surgical explorations, he concluded that, while the work injury contributed somewhat, the need for treatment of the combined condition (as opposed to the accepted elbow contusion) was due in major part to the preexisting conditions, with the February 2008 surgery due exclusively to those preexisting conditions.

No other medical evidence rebuts persuasively Dr. Fitzpatrick's opinion. Dr. Brewster not only did not even acknowledge most of Dr. Fitzpatrick treatment notes, he also failed to distinguish claimant's disability due to the noncompensable combined condition from the consequences, if any, due to the compensable contusion. On this record, I agree with the ALJ that, because Dr. Fitzpatrick's findings are more accurate than those of the medical arbiter and should be used to rate claimant's accepted condition. Accordingly, I would conclude that claimant is not entitled to a permanent disability award for her accepted left elbow contusion. Because the majority concludes otherwise, I must respectfully dissent.