

In the Matter of the Compensation of
ERNESTO R. ARMENTA, Claimant

WCB Case No. 07-01194, 07-01193

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys

Judy L Johnson, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that: (1) upheld the self-insured employer's denial of his occupational disease claims for lumbar and cervical radiculopathies; and (2) declined claimant's motion to reopen the record to include the consideration of additional compensability issues. On review, the issues are the ALJ's evidentiary ruling and compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In December 2006, claimant filed a claim for cervical and lumbar radiculopathies. At the May 16, 2007 hearing, claimant requested a continuance so that he could submit a medical report from Dr. Gritzka, with whom claimant had a scheduled July 2007 appointment. The ALJ, finding that claimant's attorney had not exercised "due diligence" in obtaining Dr. Gritzka's report in a timely manner, denied the motion. (Tr. 3).

Alternatively, claimant's counsel sought to have Dr. Gritzka's "post-hearing" report admitted as a rebuttal to Dr. Rabie's report, which the employer had presented, and the ALJ had admitted, at the hearing. The ALJ ultimately granted the request, but limited the report to "actual rebuttal," stating specifically that the report was not to "raise new information based on the examination." (Tr. 5). The ALJ further stated that if Dr. Gritzka's "post-hearing" report raised new information that went beyond a rebuttal of Dr. Rabie's report, the employer could object. (*Id.*)

Thereafter, Dr. Gritzka's report was admitted into the record. The employer objected to use of the report to offer a new diagnosis for claimant's condition. Finding that Dr. Gritzka's report exceeded its parameters as a rebuttal report, the ALJ limited consideration of the report to the issues of cervical and lumbar radiculopathy. The ALJ also declined claimant's request to reopen the record to consider the new diagnosis.

On review, claimant contends that he should be allowed to present Dr. Gritzka's opinion, noting that his "cervical radiculopathy" claim espoused a theory of compensability similar to the analysis articulated by Dr. Rabie. (Exs. 62, 63). In essence, claimant is seeking relief from the ALJ's initial continuance denial which did not allow him to keep the record open for Dr. Gritzka's opinion concerning his medical conditions and their relationship to his work activities. As such, we review the ALJ's decision for an abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Richard W. Gallagher*, 56 Van Natta 3290, 3291 (2001).

Based on the ALJ's express language that the rebuttal report was limited to addressing claimant's cervical and lumbar radiculopathies, we conclude that it was within the ALJ's discretion to exclude evidence that did not fall within the limited purpose for which the record remained open. See *Lynne Trullinger*, 60 Van Natta 2407, 2408 (2008); *Clifford L. Conradi*, 46 Van Natta 854 (1994) (when the ALJ leaves the record open for a limited purpose, it is within the ALJ's discretion to exclude evidence that does not comport with that purpose). Likewise, it was within the ALJ's discretion to deny claimant's request to reopen the record to accept the evidence, and to consider the issues claimant was presenting. Thus, we find no abuse of discretion in the ALJ's evidentiary rulings.¹

Turning to the compensability issue, after our review of the record, we agree with the ALJ that there is no persuasive medical evidence supporting claimant's contention that his work activities were the major contributing cause of his cervical and lumbar radiculopathies.² Accordingly, we affirm.

ORDER

The ALJ's order dated July 16, 2008 is affirmed.

Entered at Salem, Oregon on March 6, 2009

¹ Although claimant contends that the issues disputed at hearing included the conditions identified in Dr. Gritzka's report, we disagree. The ALJ identified the issues as the employer's denials of claimant's cervical and lumbar radiculopathies; neither party disagreed with this identification of the compensability issue. (Tr. 6).

² In reaching this conclusion, we emphasize that our decision is limited to the issue of compensability concerning claimant's denied lumbar and cervical radiculopathy claims. As such, the compensability of any other condition was neither litigated at hearing nor before us on review.