
In the Matter of the Compensation of
MICHAEL L. SHULTS, Claimant
WCB Case No. 08-07243
ORDER ON REVIEW
James W Moller, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Brazeau's order that affirmed that portion of an Order on Reconsideration that awarded whole person impairment for claimant's myocardial infarction.¹ On review, the issue is extent of permanent disability (whole person impairment).

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

After litigation, the employer accepted a "disabling May 19, 2006 myocardial infarction (injury) and pneumonia (a consequential condition)" resulting from claimant's May 19, 2006 work incident. (Ex. 17). The acceptance was amended to include microsmia. (Exs. 19, 23).

A June 27, 2008 Notice of Closure did not award any permanent disability. (Ex. 24). After claimant requested reconsideration, he was examined by a medical arbiter panel, which included Drs. Murphy, Griffin, and Rischitelli. (Exs. 24A, 27). With regard to the cardiovascular system and "related to the accepted condition of myocardial infarction," the panel determined that claimant had coronary artery disease Class 2 impairment and cardiomyopathy Class 1 impairment. (Ex. 27-4).

Based on the medical arbiter panel's report, an October 24, 2008 Order on Reconsideration awarded 26 percent whole person impairment for claimant's myocardial infarction and microsmia conditions. Based on the arbiter panel's report that claimant had Class 2 coronary heart disease, the Appellate Review Unit (ARU) awarded a value of 20 percent whole person impairment under OAR 436-035-0380(3). In addition, the ARU relied on the panel's report that

¹ The Order on Reconsideration awarded 26 percent whole person impairment for claimant's myocardial infarction and microsmia conditions. (Ex. 28). At hearing, the employer conceded that claimant was entitled to 3 percent whole person impairment for the accepted microsmia condition.

claimant had Class 1 cardiomyopathy attributable to the accepted myocardial infarction or direct medical sequela and awarded a value of 5 percent whole person impairment. (Ex. 28-3).

The employer requested a hearing, challenging the whole person impairment awards for coronary heart disease and cardiomyopathy.

The ALJ reasoned that the arbiter panel's opinion that claimant's coronary heart disease and cardiomyopathy were the result of his accepted myocardial infarction was given in the context of specific instructions from the ARU to determine impairment based only on his accepted conditions and any direct medical sequela. The ALJ relied on the arbiter panel's opinion and affirmed claimant's whole person impairment awards for the myocardial infarction.

On review, the employer argues that the medical arbiter panel did not address any of the prior medical opinions or the "law of the case" from prior litigation orders, which established that claimant had coronary artery disease (CAD) before the May 2006 work incident. The employer relies on OAR 436-035-0005(6), which provides that "direct medical sequela" must be "clearly established medically" and contends that, because the arbiter panel did not clearly discuss whether the myocardial infarction caused the CAD or cardiomyopathy, the "direct medical sequela" requirement was not established.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, the employer has the burden of establishing error in the reconsideration proceeding. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).

Conditions that are the direct medical sequelae of the accepted conditions are included in the rating of permanent disability, unless they have been specifically denied. ORS 656.268(14); *see* OAR 436-035-0005(6).² OAR 436-035-0007(1) provides that "a worker is entitled to a value under these rules only for those findings of impairment that are permanent and were caused by the accepted compensable condition and direct medical sequela."

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

² Claimant's claim was closed by a Notice of Closure dated June 27, 2008. (Ex. 24). Thus, the applicable disability rating standards are found in WCD Admin. Order 07-060 (eff. January 2, 2008). OAR 436-035-0003(1).

attending physician are more accurate and should be used. OAR 436-035-0007(5). Here, however, claimant notes that, because the employer closed the claim administratively without obtaining a closing evaluation from his attending physician, only the findings of the medical arbiter panel may be considered for purposes of rating his permanent disability. 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).

OAR 436-035-0380(1) provides, in part, that “[i]mpairments of the cardiovascular system are determined based on objective findings that result in the following conditions[,]” including coronary heart disease and cardiomyopathies. Section (3) pertains to “coronary heart disease” and provides, in part, that “[i]mpairment resulting from work related coronary heart disease is rated according to the following classes * * *[,]” Similarly, section (5) rates “[i]mpairment resulting from work related cardiomyopathies” according to Classes 1 through 4.

The ARU provided the medical arbiter panel with detailed instructions for rating disability of each of claimant's accepted conditions. (Exs. 25, 26,). The ARU instructed the panel to address “**impairment findings attributable to the accepted myocardial infarction**” and explained that it was “particularly important that you **identify any pre-existing, denied or unrelated conditions** and, if appropriate, **distinguish between those findings due to the accepted conditions and any direct sequelae versus those that are not related.**” (Ex. 25-2; bold in original). The panel was asked to perform a complete examination of claimant and describe “any objective findings of permanent impairment resulting from the accepted condition(s) * * *.” (*Id.*) The ARU included the disability standards from OAR 436-035-0380 for rating impairment of the cardiovascular system, including the requirement that the impairment resulting from “work related coronary heart disease” and “work related cardiomyopathies” is rated according to Classes 1 through 4. (Ex. 25-2 to -8).

The medical arbiter panel accurately described claimant's accepted conditions and explained that it had reviewed the medical records provided by the ARU. (Ex. 27-1). The panel included a history of claimant's injury, described his current medical status, and performed a physical examination. The panel explained:

“With regard to the accepted conditions of this case (myocardial infarction, pneumonia, and microsmia), this panel of physicians have reached the following conclusions:

“With regard to the **CARDIOVASCULAR SYSTEM** and related to the accepted condition of myocardial infarction, the following opinions were made.

“a. Coronary artery disease: With regard to coronary artery disease, impairment is rated as Class II based on the fact the worker has a history of myocardial infarction which has been documented by appropriate studies and that at the time of this evaluation, the worker has no symptoms while performing ordinary daily activities or moderately heavy physical exertion, and the worker requires moderate dietary adjustment and medication to prevent angina or remain free of signs and symptoms of congestive heart failure, and the worker has been able to perform a treadmill and obtain 90 percent of his predicted heart rate without developing significant ST segment shift, ventricular tachycardia, or hypotension.

“* * * * *

“c. Cardiomyopathy: With regard to the diagnosis of cardiomyopathy, impairment rating of Class I, based on the fact that the worker is asymptomatic and has evidence of impaired left ventricular function from laboratory studies (cardiac catheter of May 19, 2006 and thallium stress test of June 19, 2006), and there is no evidence of congestive heart failure or cardiomegaly on physical examination.” (Ex. 27-4).

The panel explained that the examination findings were considered valid. (Ex. 27-5).

Thus, the medical arbiter panel concluded that with regard to the cardiovascular system “and related to the accepted condition of myocardial infarction,” and “[w]ith regard to coronary artery disease,”³ claimant’s impairment

³ The medical arbiter panel referred to “coronary artery disease,” whereas OAR 436-035-0380(3) refers to “coronary heart disease.” In light of the instructions from the ARU and the disability standards provided to the panel, which referred to “coronary heart disease” (Ex. 25-2, -3), we infer that the medical arbiter panel’s reference to “coronary artery disease” means “coronary heart disease.”

was rated as Class 2. (Ex. 27-4). The panel also concluded that “[w]ith regard to the diagnosis of cardiomyopathy,” claimant’s impairment was rated as Class 1. (*Id.*) We find no ambiguity in the medical arbiter panel’s findings, which related claimant’s impairment to the accepted conditions. There is no contrary medical evidence. The medical arbiter panel’s unambiguous comments relate claimant’s impairment findings to his accepted myocardial infarction and, as such, satisfy OAR 436-035-0007(5).

However, the employer argues that the medical arbiter panel did not address the prior medical opinions or the “law of the case” from prior litigation orders that established that claimant had CAD *before* the May 2006 work incident. But the panel specifically stated that they had reviewed the medical records provided by the ARU and described some of those records. (Ex. 27-1, -2). The panel included a history of claimant’s injury and reported that after the major cardiac event on May 19, 2006, he underwent cardiac catheterization that showed 70 percent occlusion of a transverse coronary artery and 90 percent occlusion of the left anterior descending artery. (Ex. 27-2). The evidence in the reconsideration record includes medical opinions explaining that claimant had CAD that preexisted the May 19, 2006 incident. (Exs. 9, 11, 12). In addition, the reconsideration record included an April 18, 2007 Opinion and Order and November 30, 2007 Order on Review explaining that claimant had CAD before May 19, 2006, but deciding that it was not a legally cognizable “preexisting condition.” (Exs. 14, 16).

After reviewing the records provided by the ARU and examining claimant, the medical arbiter panel concluded that he had class 2 impairment with regard to CAD and class 1 impairment with regard to cardiomyopathy, which were “related to the accepted condition of myocardial infarction[.]” (Ex. 27-4). To the extent that the employer is arguing that, because claimant already had CAD before the May 2006 myocardial infarction, he could not have developed CAD or cardiomyopathy from the myocardial infarction, we find no medical evidence to support that conclusion. In the absence of an expert medical opinion explaining that claimant could not have developed CAD or cardiomyopathy from the accepted myocardial infarction, we are not free to reach our own medical conclusion. *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); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge).

The employer contends that medical evidence does not establish that the accepted myocardial infarction “caused” the CAD and cardiomyopathy. As claimant points out, however, the issue here is not whether his CAD or cardiomyopathy conditions are independently compensable. Rather, the issue is the extent of his permanent disability due to the accepted myocardial infarction.

ORS 656.268(14) provides that conditions that are the “direct medical sequelae” to the accepted conditions are included in the rating of permanent disability, unless they have been specifically denied. Direct medical sequelae are an exception to the general rule that a condition must be accepted to be rated. *Manley v. SAIF*, 181 Or App 431, 437 (2002). The ARU instructed the medical arbiter panel to distinguish between findings “due to the accepted conditions and any direct sequelae” and those findings that were not related. (Ex. 25-2).

The medical arbiter panel concluded that claimant’s aforementioned impairment was “related to the accepted condition of myocardial infarction[.]” (Ex. 27-4). They did not explain that claimant’s impairment findings were related to preexisting, denied, or unrelated conditions. We find no ambiguity in the arbiter panel’s responses. Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter panel’s unambiguous impairment findings. *Hicks*, 194 Or App at 659-60; *Daniel J. Yarr*, 50 Van Natta 608, 612 (2008) (although the physician did not use the term “direct medical sequelae,” the physician’s opinion that the “slight inflammatory condition” was related “at least secondarily” to the accepted condition constituted a “direct medical sequela”).

Citing *Omer Lalley*, 44 Van Natta 2089 (1992), the employer contends that in order to receive a permanent disability award for coronary heart disease or cardiomyopathy, claimant must establish that they are work related conditions, either as conditions that have been specifically accepted by the employer or clearly established direct medical sequela of the accepted conditions. For the following reasons, we agree with claimant that the employer’s reliance on *Lalley* is misplaced.

In *Lalley*, the ALJ (then “Referee”) found that the claimant had a compensable myocardial infarction claim and preexisting coronary heart disease that was not caused or worsened by the myocardial infarction. The ALJ concluded that, because the standards required that impairment be due to work-related coronary heart disease and there was no evidence that the claimant had any impairment due to his compensable injury, he was not entitled to an award of unscheduled permanent partial disability (PPD).

The claimant conceded that his preexisting CAD was not work-related, but he argued that “coronary heart disease” was defined by the standards “as one suffering from either a myocardial infarction or angina pectoris.” The claimant argued that he was entitled to unscheduled PPD because he suffered a myocardial infarction and satisfied the elements in *former* OAR 436-35-380(2) (WCD Admin. Order 15-1990; eff. October 1, 1990).⁴

We rejected the claimant’s argument, explaining that he apparently based his reasoning on the requirement in Class 2 that the worker show a “history of a myocardial infarction or angina pectoris.” We explained that each classification pertained only to rating impairment and contained different requirements for various work-related cardiac diseases. We also explained that the medical evidence established that the myocardial infarction and coronary heart disease were not the same conditions, but required separate care and treatment. We therefore interpreted *former* OAR 436-35-380(2), Class 2, as requiring that a worker demonstrate impairment resulting from work-related coronary heart disease and a history of myocardial infarction or angina pectoris, as well as satisfy the remaining requirements in the rule. We concluded that, because the claimant’s preexisting coronary heart disease was not work-related, he was not entitled to unscheduled PPD.

⁴ In *Lalley*, we quoted *former* OAR 436-35-380(2) as follows:

“Impairments of the cardiovascular system shall be rated based on objective findings which establish that the job was the major contributor to: valvular heart disease, coronary heart disease, hypertensive cardiovascular disease, cardiomyopathies, pericardial disease, or cardiac arrhythmias. * * *

“* * * * *

“(2) Impairment resulting from work related coronary heart disease shall be rated according to the following classifications:

“* * * * *

“Class 2

“The worker has history of a myocardial infarction or angina pectoris that is documented by appropriate laboratory studies, but at the time of evaluation the worker has no symptoms while performing ordinary daily activities or even moderately heavy physical exertion[.]”

Lalley is distinguishable because, for the reasons explained above, the medical arbiter panel's report establishes that claimant's coronary heart disease and cardiomyopathy were direct medical sequelae of the accepted conditions. When *Lalley* was decided, former OAR 436-35-007(1) provided that a worker was entitled to a value under the rules only for "those findings of impairment that are proven to be due to the accepted injury and/or its accepted conditions." In contrast, OAR 436-035-0007(1), which applies here, provides that "a worker is entitled to a value under these rules only for those findings of impairment that are permanent and were caused by the accepted compensable condition *and direct medical sequela*." (Emphasis added). The language providing that conditions that are the "direct medical sequelae of the accepted conditions" are included in the rating of permanent disability was added to ORS 656.268 in 1995 as part of Senate Bill 369. Or Laws 1995, ch 332, § 30.

In conclusion, we agree with the ALJ that the medical arbiter panel's report is unambiguous regarding the cause of claimant's impairment, and that it was related to the accepted myocardial infarction. There is no medical opinion establishing a different level of impairment. See *Hicks*, 196 Or App at 152 ("in the absence of other persuasive medical evidence, the medical arbiter's [unambiguous] report provides the default determination of a claimant's impairment"). Consequently, we conclude that the employer has not sustained its burden of establishing error in the reconsideration process. See *Callow*, 171 Or App at 183-184.

Claimant's attorney is entitled to an assessed fee for services on review. 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 on review is \$1,800, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his attorney's specific request for an \$1,800 fee), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated January 29, 2009, as reconsidered February 27, 2009, is affirmed. For services on review, claimant's attorney is awarded \$1,800, payable by the employer.

Entered at Salem, Oregon on September 21, 2009