

In the Matter of the Compensation of
BRIAN VELAZQUEZ, Claimant

WCB Case No. 09-00085

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

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

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Lipton's order that set aside its denial of claimant's occupational disease claim for bilateral upper extremity conditions. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.¹

Dr. Graham, orthopedic surgeon, examined claimant in November 2008. He reported that claimant exhibited "no objective evidence of abnormality at this time." (Ex. 41-8). In the same report, Dr. Graham noted claimant's then current forearm tenderness and his history of over five years of upper extremity symptoms associated with his computer work. Dr. Graham diagnosed claimant's upper extremity condition as "Chronic muscular tension pain, bilateral forearms and trapezii, secondary to work exposure." (*Id.*) He related this condition to "the prolonged exposure to long hours of repetitive keyboarding and computer mouse work," stating:

"[I]t is my opinion that [claimant's] current condition is due in whole to the worker's job duties [for the employer]. They have been chronic in duration and recurrent with each return to work after a period of being off work * * * There is nothing in his personal life or other activities that I can see that will account for his symptoms." (*Id.* at 9-10).

Dr. Graham also specifically ruled out claimant's athletic activities as contributing factors. (*Id.* at 11).

¹ However, we do not reject Dr. Puziss's opinion.

We rely on Dr. Graham's opinion, because we find it well-reasoned and based on an accurate and complete history. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

In reaching this conclusion, we acknowledge that Dr. Graham at one point agreed "that he found no objective findings of a diagnosable condition" and that "musculoneuralgia" and "overexertion" were "descriptive terms and not diagnoses." (Ex. 48). However, the determination of whether "objective findings" are present is a legal issue, so a physician's opinion that no objective findings are present is not controlling if findings satisfying the statutory definition are nevertheless present.² *See Carmen Z. Garcia*, 283, 286 (2009); *Jason L. Moon*, 56 Van Natta 2119, 2121 (2004).

Here, the record is replete with objective findings, including upper extremity numbness, tingling, and pain.³ (*See Exs. 5-2, 7-2, 14-2, 18-2, 19-2, 31-2, 50-5*). These findings have persisted for years and Dr. Graham relied on them to diagnose chronic bilateral forearm and trapezii muscular tension pain. (Ex. 41).

Accordingly, on this record, we are satisfied that the medical reports documenting claimant's upper extremity findings constitute "objective findings" supporting the existence of the conditions that Dr. Graham diagnosed. *See SAIF v. Lewis*, 335 Or 92, 102-02 (2002) (the statutory definition of "observable" objective findings "does not require that the indication of disease be present during a physical

² We also acknowledge that Dr. Thiessen, claimant's treating physician, agreed (in February 2009) that claimant "does not have nor has he ever had any objective findings, nor does he have any identifiable or diagnosable shoulder, arm and/or hand condition." (Ex. 49; *see Exs. 46, 47A; cf. Exs. 22-2-3, 26-1, 29-2, 30, 31-2*). However, because we find that claimant did have objective findings, Dr. Thiessen's opinion in this regard is not controlling. Moreover, because Dr. Thiessen relied on a purported absence of such findings, we find his ultimate conclusions unpersuasive. *See e.g., Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (Board properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case); *Timothy L. O'Dore*, 59 Van Natta 1404, 1406 (2007) (opinion of physician who did not believe that the disputed condition existed was unpersuasive when the medical evidence established the existence of that condition).

³ The employer does not argue that claimant's findings are *legally* insufficient under ORS 656.005(19) (defining "objective findings") and *SAIF v. Lewis*, 335 Or 92 (2002) (interpreting the statutory definition of "objective findings"). In any event, we find the record sufficient to establish "objective findings" as required by ORS 656.005(19), which states:

"Objective findings' in support of medical evidence are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. 'Objective findings' does not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable."

examination of the claimant * * *"); *Daniel J. Wilson*, 62 Van Natta 381, 386 (2010) (discussing “observable” objective findings that support the existence of a diagnosable condition, even if those findings were not “observed” by a physician). Consequently, we find Dr. Graham’s persuasive opinion sufficient to carry claimant’s burden of proving that his work activities were the major contributing cause of his upper extremity conditions. *See* ORS 656.802(2)(a).

The dissent relies on Dr. Button’s opinion relating claimant’s upper extremity symptoms to his athletic activities. According to Dr. Button, “[C]laimant’s physical requirements seriously training to maintain conditioning as a triathlete are far more physically taxing than tapping on a keyboard.” (Ex. 47-7).

However, the remainder of the record persuades us that claimant’s athletic activities are properly rejected as contributing factors. For example, Dr. Puziss opined, “I agree that the patient’s triathlons are probably not a causative factor in the overuse, since his exercises did not cause pain. He actually believed, and I agree, that his exercises probably have helped him in the long term [to] avoid substantial overuse difficulties.” (Ex. 50-5-6).

Claimant’s testimony and the remainder of the record support this conclusion. For example, Dr. Graham noted that claimant could bike “ride many miles with no aggravation of his symptoms at all.” (Ex. 41-6). Consistent with Dr. Graham’s history, when asked whether leaning over his bike on his elbows caused any symptoms, claimant answered “No.” (Tr. 14). Claimant also testified that exercise was the main reason that he was able to forego seeking medical treatment between 2005 and 2008. (Tr. 10). Thus, our review of the record persuades us that claimant’s symptoms increased with his workload, *not* with his athletic activities.⁴ In sum, considering the record as a whole, including claimant’s testimony, we are not persuaded that athletic activities contributed to claimant’s upper extremity condition.

Accordingly, based on Dr. Graham’s persuasive opinion, we conclude that claimant has established a compensable upper extremity condition.⁵ Accordingly, we affirm the ALJ’s order that set aside the employer’s denial of claimant’s occupational disease claim.

⁴ We note that Dr. Thiessen reported that claimant “moves his mouse between arms, which is why both arms hurt.” (Ex. 22-2).

⁵ We note that Dr. Graham’s reasoning and conclusions are supported by the opinions of Drs. Puziss and Wyles. (Exs. 40-1, 50).

Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3). Claimant's counsel is entitled to an employer-paid attorney fee award 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 \$3,000, 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, his counsel's request, and the employer's objection), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated July 28, 2009 is affirmed. For services on review, claimant's counsel is awarded a \$3,000 attorney fee, payable by the self-insured employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on June 7, 2010

Member Langer, dissenting.

Claimant works for the employer as a computer network engineer. Claimant's off-work activities include running, swimming, biking, skiing, wake boarding, yoga, weight lifting, and competing in triathlon races.

After several years of upper extremity complaints, claimant filed an occupational disease claim for bilateral shoulder, forearm and hand conditions, which the employer denied. Claimant requested a hearing.

The ALJ set aside the employer's denial of claimant's occupational disease claim for bilateral upper extremity conditions, based on Dr. Graham's opinion relating claimant's condition to his work activities. The majority affirms the ALJ's decision. I disagree, reasoning as follows.

Claimant bears the burden of proving by a preponderance of the persuasive evidence that his condition is compensable. ORS 656.266(1); *Hutcheson v. Weyerhaeuser*, 288 Or 51, 55-56 (1979). To establish a compensable occupational disease, employment conditions must be the major contributing cause of the disease. ORS 656.802(2)(a).

Because of the possible alternative causes for claimant's condition, resolution of this matter is a complex medical question that must be resolved by persuasive expert medical opinion. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). We generally rely on a treating physician's causation opinion, absent persuasive reasons to do otherwise, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (the Board properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case); *Weiland v. SAIF*, 63 Or App 810, 814 (1983).

Here, Dr. Thiessen treated claimant for years for his upper extremity complaints. Thus, Dr. Thiessen was in a uniquely advantageous position to evaluate and understand claimant's presentation.

Ultimately, Dr. Thiessen concluded that claimant had no identifiable or diagnosable upper extremity condition and he never had any objective findings. (Ex. 49). Thus, even assuming that claimant had examination findings that *might* qualify as "objective findings" (for purposes of his claim), Dr. Thiessen's opinion supports a conclusion that claimant had such "symptoms," but no upper extremity "condition."

The majority rejects Dr. Thiessen's entire opinion, finding that a *doctor* is not the one who properly decides whether findings are "objective" under ORS Chapter 656. This reasoning begs the pivotal question about what constitutes persuasive medical evidence. Moreover, because Dr. Thiessen was the only physician who examined claimant on numerous occasions, his opinion about the significance of claimant's findings should be accorded substantial weight.

Like Dr. Thiessen, Dr. Button rejected the idea that claimant has (or had) objective findings supporting the existence of an upper extremity condition. In reaching this conclusion, Dr. Button specifically noted that all of claimant's diagnostic tests were within normal limits. (Ex. 47-5; *see* Ex. 47A). Considering Dr. Thiessen's status as claimant's longtime treating physician (and Dr. Button's supporting reasoning), I would say that the majority rejects Dr. Thiessen's opinion without adequate explanation. *See Somers*, 77 Or App at 263; *Weiland*, 63 Or App at 814.

Finally, even if claimant has a *condition* (rather than just unexplained symptoms), I would find Dr. Graham's causation opinion insufficient to carry claimant's burden of proof under ORS 656.802(2). Dr. Graham summarily dismissed claimant's athletic activities as contributing to his upper extremity problems. However, as Dr. Button explained, claimant participates in extensive athletic activities and those activities not only involve his upper extremities, but they are also very physically taxing. In addition, Dr. Button explained that claimant's computer work was "in a very low physical capacity range" and insufficiently stressful to cause an upper extremity condition. (Ex. 47-5, -7). Dr. Thiessen concurred with Dr. Button's opinion. (Ex. 47A).

Yet, neither Dr. Graham nor the majority explain why they believe that claimant's "low physical capacity" computer work activities cause his upper extremity problems, which he described as "musculoneuralgia" or "overexertion." (Exs. 41-9, 47-7). Accordingly, in light of the contrary evidence, I would find Dr. Graham's opinion inadequately explained and insufficient to establish "major causation." *See, e.g., Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995) (to persuasively establish the major contributing cause of a condition, an opinion must consider the relative contribution of each cause and determine which cause, or combination of causes, contributed more than all other causes combined).

In sum, absent well-reasoned medical evidence supporting the claim, I would uphold the employer's denial. Because the majority reaches the opposite conclusion, I respectfully dissent.