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In the Matter of the Compensation of  
**HILDA BANDERAS, Claimant**  
WCB Case No. 09-02807  
ORDER ON REVIEW  
Philip H Garrow, Claimant Attorneys  
David Runner, SAIF Legal, Defense Attorneys

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

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Kekauoha's order that increased claimant's unscheduled permanent partial disability (PPD) award for her cervical and right shoulder injuries from 5 percent (16 degrees), as granted by an Order on Reconsideration, to 38 percent (121.6 degrees). On review, the issue is extent of unscheduled PPD.

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

Claimant was compensably injured when pushing a heavy bin full of wood on August 20, 2004. SAIF initially accepted a right shoulder strain. On October 18, 2006, SAIF issued a Notice of Closure that awarded 3 percent unscheduled PPD for the right shoulder, reflecting decreased right shoulder range of motion (ROM).

In February 2008, claimant was laid off from her job for reasons unrelated to the injury.

On July 3, 2008, SAIF accepted cervical strain and right shoulder subacromial bursitis as new/omitted medical conditions and reopened the claim for processing of those conditions. On December 24, 2008, SAIF issued a Notice of Closure that awarded no additional PPD. Both SAIF and claimant requested reconsideration of the Notice of Closure. SAIF requested appointment of a medical arbiter panel.

The arbiter panel examined claimant on April 8, 2009 and found that claimant was significantly limited in the repetitive use of the right shoulder, but found no other impairment. On April 27, 2009, the Appellate Review Unit (ARU) issued an Order on Reconsideration that increased claimant's unscheduled PPD award to 5 percent for a "chronic condition" of the right shoulder, based on the medical arbiter panel's report. Claimant requested a hearing.

The ALJ reasoned that a preponderance of the medical evidence showed that the impairment findings of Dr. Hill, claimant's attending physician, were more accurate than those of the medical arbiter panel. Based on Dr. Hill's opinion, the ALJ found that claimant was entitled to impairment for loss of right shoulder ROM and chronic conditions of the cervical spine and right shoulder. The ALJ also found that because claimant had not returned to regular work or been released to return to regular work by Dr. Hill, she was entitled to the rating of social-vocational factors. In evaluating claimant's social-vocational factors, the ALJ found that claimant was entitled to an adaptability value of 5 based on a base functional capacity (BFC) of "medium" and a residual functional capacity (RFC) of "sedentary," and that she was entitled to a value of 1 for formal education because she had not obtained a high school diploma or GED. Based on her impairment and social-vocational factors, the ALJ increased claimant's unscheduled PPD award to 38 percent.

On review, SAIF contends that claimant's impairment is limited to that found by the medical arbiter panel and that, because Dr. Hill released claimant to regular work, she was not entitled to PPD based on social/vocational factors. Alternatively, SAIF argues that claimant's BFC was "light," and that claimant has not shown that she is entitled to a value of 1 for formal education. As explained below, we disagree with SAIF's contentions.

### Unscheduled Permanent Impairment

For the purpose of rating PPD, only the impairment findings of claimant's attending physician at the time of claim closure, other medical findings with which the attending physician concurred, and the findings of a medical arbiter may be considered. ORS 656.245(2)(b)(B); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest, Ins. Corp.*, 125 Or App 666 (1994). On reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter, except where a preponderance of the medial evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5).<sup>1</sup> We are not free to disregard a medical arbiter's opinion regarding causation of impairment solely because we find it unpersuasive. *Hicks v. SAIF*, 194 Or App 655, 660 (2004), *recons*, 196 Or App 146 (2004).

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<sup>1</sup> Because claimant's claim was closed on December 24, 2008, the applicable standards are found in WCD Admin. Order No. 07-060 (eff. January 1, 2008).

Claimant bears the burden to prove the nature and extent of her disability. ORS 656.266(1). In addition, as the party challenging the reconsideration order, she bears the burden to persuade us that the reconsideration order's PPD award was erroneous. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

Both Dr. Hill and the medical arbiter panel opined that claimant is significantly limited in the repetitive use of her right shoulder. (Exs. 49-3, 56-3). Therefore, regardless of whether we rely on the impairment findings of the medical arbiter panel or those of Dr. Hill, claimant is entitled to 5 percent impairment for a "chronic condition" of the right shoulder. OAR 436-035-0019(1)(g).

The medical arbiter panel opined that claimant is not significantly limited in the repetitive use of the cervical spine. (Ex. 56-4). Dr. Hill, by contrast, opined that claimant is significantly limited in the repetitive use of the cervical spine. (Ex. 49-3). As noted above, we use the arbiter panel's impairment findings unless the preponderance of the medical evidence shows that Dr. Hill's findings are more accurate and should be used. We find such a preponderance of medical evidence.

On April 26, 2006, Dr. Hill opined that claimant's cervical injury was musculoligamentous in nature and included a myofascial pain syndrome. (Ex. 14-2-3. From May 26, 2006 through August 18, 2006, he consistently diagnosed claimant's cervical strain as "chronic." (Exs. 15-1, 16-1, 17-1). From October 2, 2006, through December 5, 2008, he consistently noted neck symptoms and described residual myofascial pain syndrome, with waxing and waning symptoms, in his assessment of claimant's cervical strain.<sup>2</sup> (Exs. 19-1, 23-1, 24-1, 26-1, 27-1, 28-1, 29-1, 31-1, 32-1, 34-1, 35-1, 36-1, 37-1, 39-1, 40-1, 41-1).

On December 11, 2008, Dr. Hill agreed that there was "no permanent impairment directly related to the 'cervical strain.'" (Ex. 43-1). He qualified his agreement with a comment that his chart notes of August 18, 2006 and October 2, 2006 summarized claimant's impairment. (*Id.*) As noted above, the August 18, 2006 chart note diagnosed "chronic" cervical strain, and the October 2, 2006 chart note described "residual myofascial pain syndrome" in its assessment of claimant's cervical strain. (Exs. 17-1, 19-1).

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<sup>2</sup> The dissent notes that Dr. Hill performed a closing examination for the right shoulder strain on October 2, 2006. (Ex. 20). However, Dr. Hill continued to treat claimant for cervical symptoms for over two years after that examination. (Ex. 41-1). Therefore, the time between the closing examination and the issuance of the reconsideration order is not relevant to the persuasiveness of Dr. Hill's cervical impairment findings.

On February 9, 2009, Dr. Hill was provided a definition of “significant” from *Webster’s Third New Int’l Dictionary* (unabridged ed. 1993) and asked whether claimant was significantly limited in the repetitive use of the cervical neck due to the compensable work injury. (Ex. 49-3). Dr. Hill answered, “Yes.”<sup>3</sup> (*Id.*)

The medical arbiter panel measured decreased cervical ROM, but concluded, based on observed ROM during the interview and claimant’s demonstration of her work activities, that the measured ROM findings were invalid and claimant had near normal cervical ROM. (Ex. 56-2, -4). They concluded that there was “no basis \* \* \* for limitation of repetitive use of the cervical spine due to any condition arising out of the accepted condition of cervical strain.” (Ex. 56-4).

It is unclear why the medical arbiter panel opined that claimant was not significantly limited in the repetitive use of her cervical spine. Although they opined that claimant’s cervical ROM findings were invalid, they reached a similar conclusion regarding claimant’s shoulder ROM and strength findings, but nevertheless opined that claimant was significantly limited in the repetitive use of her right shoulder. (Ex. 56-3). They offered no other reasoning regarding the repetitive use of claimant’s cervical spine.

Further, although the medical arbiter panel addressed claimant’s cervical ROM, they did not discuss the myofascial pain syndrome that Dr. Hill consistently described as part of the cervical strain over more than two years.<sup>4</sup> Dr. Hill’s

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<sup>3</sup> SAIF argues that Dr. Hill changed his December 11, 2008 opinion, that claimant’s cervical strain did not result in permanent impairment, without explanation. *See Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (unexplained change of opinion renders physician’s opinion unpersuasive). However, Dr. Hill’s December 11, 2008 opinion was qualified by his statement that impairment was described by his August 18, 2006 and October 2, 2006 chart notes. (Ex. 43-1). Further, his February 9, 2009 opinion responded to a more specific question regarding whether claimant was significantly limited in the repetitive use of her cervical spine, which included a definition of “significant” for him to consider. (Ex. 49-3). Under such circumstances, we find that even if Dr. Hill’s February 2009 response was a change of opinion, there was a reasonable explanation for the change. *Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (finding a reasonable explanation for a change in medical opinion).

<sup>4</sup> SAIF contends that the myofascial pain syndrome should not be considered part of the accepted cervical strain or a direct medical sequela. *See OAR 436-035-0007(1)* (except as provided by OAR 436-035-0014, a worker is entitled only to values for permanent impairment caused by the accepted compensable condition and their direct medical sequela). SAIF contends that myofascial pain syndrome is instead more properly characterized as a separate condition. *See OAR 436-035-0007(1)* (claimant is entitled to values only for impairment caused by the accepted compensable conditions and direct medical sequela).

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initial opinion that the cervical strain did not result in permanent impairment was qualified by reference to chart notes describing the cervical strain as “chronic” and involving myofascial pain syndrome. Those chart notes are consistent with Dr. Hill’s observations over more than two years of regular treatment.

Under such circumstances, given the medical arbiter panel’s failure to address this aspect of claimant’s cervical strain, the preponderance of evidence establishes that Dr. Hill’s impairment findings are more accurate. Accordingly, we find that claimant is entitled to 5 percent impairment for chronic condition of the cervical spine. OAR 436-035-0019(1)(e).

Finally, claimant has previously been awarded 3 percent impairment for loss of right shoulder ROM resulting from the initially accepted right shoulder strain. (Ex. 22-2). Because SAIF accepted new/omitted medical conditions after the last arrangement of compensation, OAR 436-035-0007(3) provides that “[i]mpairment values for conditions which are not actually worsened, unchanged, or improved are not redetermined and retain the same impairment values established at the last arrangement of compensation.” Thus, claimant retains the 3 percent impairment award for lost right shoulder ROM resulting from the right shoulder strain unless that condition was “actually worsened, unchanged, or improved.”

Here, the medical record does not establish whether claimant’s right shoulder strain was actually worsened, unchanged, or improved. Therefore, the right shoulder strain retains the same impairment value established by the October 18, 2006 Notice of Closure. Accordingly, claimant is entitled to 3 percent impairment for lost right shoulder ROM.

Claimant’s right shoulder impairment for chronic condition and loss of ROM are combined, not added, and the result is combined, not added, with her cervical impairment. OAR 436-035-0011(6)(b). 5 percent right shoulder chronic condition impairment combined with 3 percent loss of right shoulder ROM equals

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Here, however, there is no evidence indicating that claimant’s myofascial pain syndrome is a separate condition rather than merely a part of the accepted cervical strain. Based on Dr. Hall’s consistent characterization of claimant’s myofascial pain syndrome as part of the cervical strain, we conclude that impairment associated with claimant’s “myofascial pain syndrome” is impairment caused by the accepted cervical strain or a direct medical sequela. *See* OAR 436-035-0005(6) (defining “direct medical sequela” as a condition that “originates or stems from the compensable injury or disease that is clearly established medically”).

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8 percent impairment for the right shoulder. OAR 436-035-0011(6)(a). 8 percent impairment for the right shoulder combined with 5 percent chronic condition impairment for the cervical spine equals 13 percent. *Id.* Therefore, claimant is entitled to 13 percent unscheduled permanent impairment.

### Social-Vocational Factors

Because claimant's date of injury is August 20, 2004, the ALJ correctly applied the 2003 version of ORS 656.726(4)(f). *See Jeannine M. Dietz*, 60 Van Natta 2854, 2856 n 3 (2008) (because date of injury was before January 1, 2005, ORS 656.726(4)(f) (2003), Oregon Laws 2003, chapter 811, section 17, applied).

ORS 656.726(4)(f)(D) (2003) provides:

“Notwithstanding any other provision of this section, impairment is the only factor to be considered in evaluation of the worker's disability under ORS 656.214(5) if:

“(i) The worker returns to regular work at the job held at the time of injury;

“(ii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work at the job held at the time of injury and the job is available but the worker fails or refuses to return to that job; or

“(iii) The attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 releases the worker to regular work at the job held at the time of injury but the worker's employment is terminated for cause unrelated to the injury.”<sup>5</sup>

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<sup>5</sup> Similarly, OAR 436-035-000(9)(3) provides:

“Only permanent impairment is rated for those workers with a date of injury prior to January 1, 2006 and who:

Disability is evaluated as of the date of the issuance of the reconsideration order. ORS 656.283(7). Claimant's employment was terminated for cause unrelated to the injury before the issuance of the reconsideration order. (Ex. 51A). Therefore, neither condition (i) nor condition (ii) of ORS 656.726(4)(f)(D) (2003) applies.<sup>6</sup> Thus, the relevant question is whether, as of April 27, 2009, Dr. Hill had released claimant to regular work at the job held at the time of injury. *David S. Lund*, 61 Van Natta 979, 987 (2009).

Claimant completed an affidavit stating that at the time of injury, she was working as a "Grader/Stacker (DOT 669.687-30/569.685-066)." (Ex. 51-2). She stated that her job at injury was "very physical," that she "regularly lifted and stacked bundles of wood stock weighing up to fifty-six pounds," and that her job involved pushing carts "weighing 250 to 300 pounds empty and up to 800 pounds full" and "working at and above shoulder level." (*Id.*)

In his December 12, 2008 opinion, Dr. Hill agreed that claimant "continues to be released to regular work," but stated that claimant was restricted from overhead reaching with her right arm or lifting more than 20 pounds. (Ex. 43-2). In his February 9, 2009 opinion, Dr. Hill opined that claimant could not perform frequent reaching or pushing/pulling and could not lift and carry more than 15 pounds on an occasional basis. (Ex. 49-2).

Although Dr. Hill stated that claimant "continues to be released to regular work," his restrictions on lifting, reaching, and pushing/pulling restrict claimant from performing the work described in her affidavit. Therefore, we do not find that claimant was released to regular work. *Daniel N. Kelly*, 62 Van Natta 1226, 1228 (2010).

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"(a) Return to and are working at their regular work on the date of issuance; or

"(b) The attending physician or authorized nurse practitioner releases to regular work and the work is available, but the worker fails or refuses to return to that job; or

"(c) The attending physician or authorized nurse practitioner releases to regular work, but the worker's employment is terminated for cause unrelated to the injury."

<sup>6</sup> SAIF contends that the prior closure preclusively establishes that claimant is not entitled to social/vocational factors because she actually returned to work. However, because the April 2009 Order on Reconsideration addressed new/omitted conditions that had been added to the accepted conditions since the last arrangement of compensation, the extent of her permanent disability, including her social/vocational factors, must be redetermined. OAR 436-035-0007(3); *Jeannine M. Dietz*, 60 Van Natta 2854, 2855 (2008).

SAIF contests the accuracy of claimant's description of her job at injury. SAIF cites an e-mail from Mr. Robinson, an employer representative, stating that at the time of her injury, claimant was working as a "Finger Joint Feeder," a "Regular Job Description" of the "Finger Joint Block Feeder/Grader" position, and a "Job Analysis" of the "Regrade Feeder/Grader" position.<sup>7</sup> (Exs. 51A, 52-4, 54-2). The description of the Finger Joint Feeder position indicates that it did not involve reaching above the shoulder or require lifting, carrying, or pushing more than 10 pounds. (Ex. 52-4). The description of the Regrade Feeder position notes comparably modest lifting, carrying, and pushing requirements, but indicates occasional reaching upward to stack blocks. (Ex. 54-2-3). SAIF also notes that claimant's initial 801 and 827S forms identified her job as Finger Joint Feeder at several times after she was injured. (Exs. 3, 5).

After reviewing the record, we conclude that claimant was working in the Grader/Stacker position when she was injured. Although her initial 801 and 827S forms identified her job as Finger Joint Feeder, her descriptions of her job to her medical providers indicate that her job involved "lift[ing] multiple boards" and that her injury occurred while pushing a bin full of wood. (Exs. 1, 6-1). Thus, the contemporaneous medical records contradict SAIF's assertions that her work involved minimal lifting or pushing. Further, the e-mail from Mr. Robinson is unsworn and does not indicate the basis for Mr. Robinson's assertions. Under such circumstances, we find claimant's affidavit the most probative evidence regarding her job at injury.

Based on claimant's affidavit and Dr. Hill's work restrictions, we conclude that claimant was not released to regular work. Accordingly, she is entitled to values for social-vocational factors. OAR 436-035-0008(2)(b)(B).

The parties agree that claimant is entitled to a value of 1 for her age. OAR 436-035-0012(2)(a).

Claimant receives an education value based on her formal education and Specific Vocational Preparation (SVP). OAR 436-035-0012(3).

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<sup>7</sup> Claimant was transferred to the "Regrade Feeder/Grader" position in July 2007, following an unrelated injury. SAIF contends that the "Regrade Feeder/Grader" position was, nevertheless, physically equivalent to claimant's job at injury.

Claimant is entitled to a value of 1 for her formal education if she has not “earned or acquired a high school diploma or general equivalency diploma (GED).” OAR 436-035-0012(4)(b). A GED is “a certificate issued by any certifying authority or its equivalent.” OAR 436-035-0012(4)(a). Claimant’s affidavit stated that she “do[es] not have a US high school diploma or GED.” (Ex. 51-2).

SAIF contends that claimant has not proven that she had not earned or acquired a high school diploma or a GED because her statement that she does not have a “US high school diploma or GED” leaves open the possibility that she has an equivalent level of education from another country. SAIF cites *Wilberth A. Alejos*, 48 Van Natta 1661 (1996), which held that a claimant who had represented that he had received a high school diploma in another country was not entitled to a value of 1 for formal education.

Although education in another country can meet the criteria of a “high school diploma or GED,” there is no evidence that claimant attained such education in another country. Thus, this case is distinguishable from *Alejos*, in which the claimant had indicated that he had actually received a high school diploma in another country. 48 Van Natta at 1662. Although claimant’s affidavit did not explicitly address education that she completed in another country, the only evidence addressing her education indicates that she did not receive a “high school diploma or GED,” and there is no evidence that her affidavit is incomplete. Accordingly, we conclude that claimant is entitled to a value of 1 for formal education.

The parties agree that the SVP for claimant’s work before the injury is 4. Therefore, she is entitled to a value of 3 for SVP. OAR 436-035-0012(5).

Adding claimant’s formal education value of 1 to her SVP value of 3 results in a total education value of 4. OAR 436-035-0012(6).

We calculate claimant’s adaptability value by deriving a value from a comparison of her BFC to her maximum Residual Functional Capacity (RFC) and deriving a value from her unscheduled permanent disability, and using whichever value is higher. OAR 436-035-0012(7), (14).

BFC is based on the highest strength category of the jobs successfully performed by the worker in the five years prior to the date of injury. OAR 436-035-0012(9)(a). As discussed above, we rely on claimant’s affidavit’s description

of her work for the employer before her injury. Her affidavit indicates that her pre-injury jobs for the employer included Grader (DOT 669.687-030) (light), Stacker (DOT 569.685-066) (medium), and Cut-Off-Saw Operator I (DOT 667.682-022) (medium). (Ex. 51-2). Based on claimant's affidavit, we conclude that her BFC is "medium."

RFC is based on Dr. Hill's release unless a preponderance of medical opinion describes a different RFC. OAR 436-035-0012(10)(a). Dr. Hill's final release indicates that she can occasionally lift up to 15 pounds. (Ex. 49-2). This lifting restriction supports a "sedentary/light" RFC. OAR 436-035-0012(8)(e). However, he also opined that claimant is restricted from frequently reaching or pushing/pulling. (Ex. 49-2). Therefore, his opinion supports a "sedentary" RFC. OAR 436-035-0012(8)(1), (12). The medical arbiter panel, however, concluded that claimant could lift up to 20 pounds frequently with no other restrictions. (Ex. 56-4). Their opinion, therefore, supports a "medium/light" RFC. OAR 436-035-0012(8)(g). SAIF contends that a preponderance of medical opinion supports the medical arbiter panel's conclusion regarding claimant's RFC.

As discussed above, the medical arbiter panel failed to address all aspects of claimant's compensable conditions. Therefore, we conclude that a preponderance of the medical opinion does not support an RFC different from that described by Dr. Hill. Accordingly, we conclude that claimant's RFC is "sedentary."

Based on a BFC of "medium" and an RFC of "sedentary," claimant is entitled to an adaptability value of 5. OAR 436-035-0012(11). Based on an unscheduled permanent impairment value of 13 percent, claimant is entitled to an adaptability value of 2. OAR 436-035-0012(13). Therefore, claimant is entitled to an adaptability value of 5.

To calculate claimant's social-vocational factors, we add her age value of 1 to her education value of 4, and multiply the total of 5 by the adaptability value of 5, for a total social-vocational factor value of 25. OAR 436-035-0012(15). The result is added to her unscheduled impairment value of 13, for a total unscheduled PPD award of 38 percent. OAR 436-035-0008(2)(b)(A), (B).

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 \$4,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, her counsel's request, and SAIF's objection), the complexity of the issue, and the value of the interest involved.

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ORDER

The ALJ's order dated October 5, 2009 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, payable by SAIF.

Entered at Salem, Oregon on June 15, 2010

Member Langer dissenting.

The majority finds that claimant is entitled to 38 percent unscheduled PPD, in part, based on an award of 5 percent impairment for a chronic condition of the cervical spine, an education value of 1, and an RFC of "sedentary." I disagree with these components of the majority's analysis and, therefore, respectfully dissent.

We are not free to disregard the medical arbiter panel's unambiguous impairment findings. *Hicks v. SAIF*, 194 Or App 655, 660, *recons*, 196 Or App 146 (2004). Because a medical arbiter panel was used, impairment is based on that panel's findings unless a preponderance of the medical evidence demonstrates that Dr. Hill's findings are more accurate and should be used. OAR 436-035-0007(5). I would not find such a preponderance.

The medical arbiters considered claimant's history of symptoms and evaluated her ROM, sensation, and motor strength. (Ex. 56-1-2). They also observed her demonstrate her work activities. (Ex. 56-3). They noted that claimant's observed ROM exceeded measured ROM and that measured sensory loss in the right thumb and give-way observed in various muscle groups had no relationship to the accepted conditions. (Ex. 56-3). Their report was thorough, well reasoned, and persuasive.

Whereas the medical arbiter examination occurred on April 8, 2009, less than three weeks before the Order on Reconsideration issued, Dr. Hill's closing examination occurred on October 2, 2006, more than two years before the Order on Reconsideration issued. Because disability is rated as of the date of the reconsideration order, the medical arbiter examination, which was performed much closer in time to the Order on Reconsideration, is more probative. *See Nelida Caballero*, 59 Van Natta 1728, 1731 (2007) (medical arbiter's opinion more probative due in part to long gap between closing examination and medical arbiter's examination, which was closer in time to the date of reconsideration).

Further, Dr. Hill did not explain why he believed claimant was significantly limited in the repetitive use of her cervical spine, and did not explain why he changed his opinion that that claimant had no impairment attributable to her cervical strain. Although, as the majority notes, he qualified his December 12, 2008 opinion by referring to two chart notes, neither chart note actually describes cervical impairment or symptoms. (Exs. 17-1, 19-1). Because he did not explain why he changed his opinion regarding claimant's cervical impairment, I would not find his opinion persuasive. See *Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (unexplained change of opinion renders physician's opinion unpersuasive); cf. *Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (opinion found persuasive despite change from prior opinion because there was a reasonable explanation for the change in opinion).

The majority notes that Dr. Hill consistently diagnosed myofascial pain syndrome, which the medical arbiter panel did not discuss. However, myofascial pain syndrome is not an accepted condition. Further, the record does not show that myofascial pain syndrome is "a condition which originates or stems from an accepted condition that is clearly established medically." Therefore, I would not find that myofascial pain syndrome is a "direct medical sequela" of the accepted condition. OAR 436-035-0005(6). Because claimant is entitled to values only for findings of impairment caused by the accepted compensable conditions and direct medical sequela, I would not award a value for impairment due to myofascial pain syndrome. ORS 656.214(1)(a); OAR 436-035-0007(1).

Even if Dr. Hill's discussion of myofascial pain syndrome actually addressed the accepted cervical strain, it would not improve the persuasiveness of his opinion relative to that of the medical arbiter panel. The medical arbiter panel reviewed claimant's medical records and noted claimant's ongoing history of pain extending from the right side of the neck down to the right leg, which "is relatively constant and worsened by any type of household activity." (Ex. 56-1). The record does not indicate that the description of claimant's cervical condition as including "myofascial pain syndrome," as opposed to an accurate understanding of her symptoms over time, is significant to the evaluation of her cervical impairment.

After reviewing the record, I would not find that a preponderance of the medical evidence shows that Dr. Hill's findings are more accurate than those of the medical arbiter panel. Accordingly, I would find claimant entitled to a chronic condition award for her right shoulder, but not for her cervical spine. Therefore, claimant's unscheduled impairment would be 8 percent, the result of combining

the 5 percent award for chronic condition of the right shoulder with her previously awarded 3 percent award for reduced right shoulder ROM. OAR 436-035-0011(6)(a).

I also disagree with the value of 1 for claimant's formal education. Her affidavit stated:

"I further swear and affirm that I \* \* \* do not have a US high school diploma or GED." (Ex. 51-2).

Claimant is a Spanish speaker who has needed interpreter assistance to communicate in English. (*e.g.*, Exs. 8-1, 50). She explicitly limited her statement regarding her formal education to her lack of formal education in the United States, specifically excluding any information regarding whether she obtained an equivalent level of formal education outside the United States. Such education would also require a value of 0 to be assigned for claimant's formal education. *Wilberth A. Alejos*, 48 Van Natta 1661, 1662 (1996).

Claimant bears the burden to prove the nature and extent of her disability. ORS 656.266(1). Because claimant's statement regarding her formal education specifically fails to address a category of formal education that would result in a value of 0, she must be assigned a value of 0 for formal education. Therefore, based on her SVP value of 3, her total education value would be 3. OAR 436-035-00012(6).

Finally, I disagree with the majority's conclusion that claimant is entitled to an adaptability value of 5, based on an RFC of "sedentary." RFC is based on Dr. Hill's release unless a preponderance of medical opinion describes a different RFC. OAR 436-035-0012(10)(a).

As explained above, I would find the medical arbiter panel's opinion persuasive, and Dr. Hill's opinion unpersuasive. Therefore, I would find that a preponderance of medical opinion supports the RFC described by the medical arbiter panel.

The medical arbiter panel concluded that claimant could lift up to 20 pounds frequently with no other restrictions. (Ex. 56-4). Their opinion, therefore, supports a "medium/light" RFC. OAR 436-035-0012(8)(g). Accordingly, I would find claimant's RFC to be "medium/light."

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Comparing a BFC of “medium” and an RFC of “medium/light” results in an adaptability value of 2. OAR 436-035-0012(11). An unscheduled permanent impairment award of 8 percent results in an adaptability value of 1. OAR 436-035-0012(13). Therefore, claimant would be entitled to an adaptability value of 2. OAR 436-035-0012(14).

Adding the age value, 1, to the education value, 3, and multiplying the total, 4, by the adaptability value, 2, results in a total social-vocational factor value of 8. OAR 436-035-0012(15). Adding this result to the unscheduled impairment value, 8, results in a total unscheduled PPD award of 16 percent. OAR 436-035-0008(2)(b)(A), (B).

Because the majority concludes that claimant is entitled to 38 percent unscheduled PPD, and I conclude that claimant’s unscheduled PPD award should be reduced to 16 percent, I respectfully dissent.