
In the Matter of the Compensation of
GLENN E. SEVERNS, DCD., Claimant
WCB Case No. 08-06410
ORDER ON REVIEW
Hansen Malagon Lawyers, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant,¹ a surviving beneficiary of the deceased worker, requests review of those portions of Administrative Law Judge (ALJ) Mills’s order that: (1) admitted evidence over her objection, and (2) upheld the self-insured employer’s denial of her occupational disease claim for bladder cancer.² The employer cross-requests review of that portion of the ALJ’s order that determined that claimant’s occupational disease claim was timely filed under ORS 656.807(1). On review, the issues are timeliness of claim filing, evidence, and compensability.

We adopt and affirm the ALJ’s order, with the following supplementation.³

We need not address claimant’s evidentiary argument because, as explained below, we do not find that the medical evidence persuasively supports claimant’s burden of proof, regardless of whether or not the disputed evidence is considered. *See, e.g., Anthony Castro*, 59 Van Natta 2008, 2010 (2007); *Jasper Osborn*, 51 Van Natta 811 (1999).

The ALJ upheld the employer’s denial, finding that the medical opinions from the decedent’s treating physicians, Drs. Desai and Rockove, were not sufficient to satisfy claimant’s burden of proof. On review, claimant contends that those physicians have persuasively supported compensability. We adopt the ALJ’s reasoning regarding the compensability issue, as supplemented below.

¹ Claimant is Jean A. Severns, the deceased worker’s widow.

² Although the ALJ described the employer as “Alcoa Reynolds Metals Co.,” claimant asserts that the decedent’s employer was “Reynolds Metals.” The employer does not dispute claimant’s assertion.

³ The ALJ’s order used the phrases “expressly *and* in substance,” as well as “simply and directly” in determining when claimant was informed by a physician that he was suffering from an occupational disease for purposes of determining one of the “triggering dates” for evaluating the timeliness of his occupational disease claim. *See* ORS 656.807(1)(b). Yet, as noted by the employer, the “triggering date” for that particular statutory predicate is actually when a physician tells the worker “expressly *or* in substance” that he is suffering from an occupational disease. *Id.*, *Wayne-Dalton Corp. v. Mulford*, 190 Or App 370, 375 (2003); *Charles R. Beem*, 63 Van Natta 166, 167 (2011). Nonetheless, we need not address this timeliness issue because, even if the claim was timely filed, for the reasons expressed above, we conclude that the claim is not compensable.

To establish a compensable occupational disease, employment conditions must have been the major contributing cause of the disease. ORS 656.802(2)(a). The major contributing cause means a cause that contributes more than all other causes combined. See *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133-34 (2001); *McGarrah v. SAIF*, 296 Or 145, 166 (1983). 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. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995). Determination of the major contributing cause is a complex medical question that must be resolved on the basis of expert medical opinion. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003), citing *Uris v. Comp. Dep't*, 247 Or 420, 426 (1967).

Claimant argues that the employer used an incorrect test, *i.e.*, the “standing alone” test,⁴ when questioning both Drs. Desai and Rockove on whether work activities were the major contributing cause of the decedent’s bladder cancer. Observing that the correct analysis requires a weighing of the relative contribution of all the causative factors, claimant asserts that the ALJ erred in “accepting” the “standing alone” test.

We do not interpret the ALJ’s reasoning as accepting the employer’s particular wording regarding the test for an occupational disease. Moreover, consistent with ORS 656.802(a), the ALJ recited that claimant must establish that work exposure was the major contributing cause of the decedent’s occupational disease. In any event, our *de novo* review authority includes determining which legal standard or law applies to the facts of a particular case. See *DiBrito v. SAIF*, 319 Or 244, 248 (1994) (when reviewing the record of a workers’ compensation claim, the Board’s first task is to determine which provisions of the law apply); *Edison L. Netherton*, 50 Van Natta 771, 772 (1998) (*de novo* review includes determining which law applies to the facts of a particular case, including identifying any applicable administrative rules).

In upholding the employer’s denial, the ALJ found that none of the medical opinions was sufficient to support the decedent’s burden of proof.⁵ Our review of the evidence leads us to the same conclusion. Although we agree with claimant

⁴ The employer asked Dr. Rockove: “* * * [W]hich is the greater risk; cigarette smoking standing alone or working in an aluminum plant standing alone?” (Ex. 43-20). Dr. Desai was asked a similar question. (Ex. 42-26).

⁵ Dr. Pierce attributed the major cause of claimant’s bladder cancer to his 40-year history of smoking.

that the relative contribution of all contributing causes should be weighed in determining which cause can be deemed the major cause, none of the physicians ultimately stated, to a degree of medical probability, that the decedent's work exposure to toxins was more than 51 percent of the cause of his bladder cancer.

Dr. Rockove and Dr. Desai believed that the toxic exposure was *a* major cause of the disease, yet, they also considered the decedent's 40-year smoking history to be a major contributor.⁶ Each physician made statements that, arguably, were supportive of claimant's position, yet, upon further questioning, neither Dr. Desai nor Dr. Rockove was ultimately able to designate any cause as being *the* major cause, nor were they able to separate the decedent's personal risk factor (smoking) from his occupational risk factor. (*See* Exs. 42-23, 43-47-8).

Claimant cites medical literature which stated, in part, that "because the effects of occupational exposure and smoking apparently combine multiplicatively, this probability [that a bladder cancer was caused by occupational exposure in an aluminum plant] is independent of whether a case patient smoked." (Ex. 40-17). Relying on this and other medical literature discussing epidemiology as it relates to causation, claimant maintains that aluminum plant exposure undeniably causes bladder cancer.

However, as the ALJ stated, the medical literature was not admissible for substantive evidence; it was admitted because Drs. Desai and Rockove indicated that they had considered it in reaching their medical conclusions. Moreover, even after reviewing the literature, neither physician ultimately opined that the decedent's work exposure was the major contributing cause of his condition. (Exs. 42-26, 43-30-31).

Accordingly, having reviewed the record, we concur with the ALJ's reasoning that the medical evidence does not persuasively support the compensability of claimant's occupational disease claim. Thus, we affirm.

ORDER

The ALJ's order dated May 21, 2010 is affirmed.

Entered at Salem, Oregon on April 13, 2011

⁶ Dr. Rockove has opined that work exposure was the major cause of the development of the disease, but has also expressed an opinion consistent with Dr. Desai. (Exs. 37, 38, 43).