

In the Matter of the Compensation of
WILLIAM C. VOODRE, Claimant

WCB Case No. 09-07043

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for a C3-4 disc bulge. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized and supplemented below.

Claimant, a security guard, was compensably injured in March 2009, when he tripped and fell, experiencing pain in his head, back, and neck. (Ex. 19). In January 2010, he underwent a C3-4 discectomy and cervical fusion, which was performed by Dr. Hart. (Ex. 73). Dr. Hart diagnosed a C3-4 disc bulge, and asserted that the March 2009 work injury was the major contributing cause of claimant's disability/need for treatment for that condition. (Exs. 81-2, -3, 87A-25 through 28, -36 through 39).

Dr. Woodward examined claimant at the employer's request. (Ex. 61). He believed that claimant's C3-4 disc bulge was part of a preexisting degenerative pathology, and that the work injury was not a material contributing cause of any need for treatment for that condition. (Exs. 85-5, -6, 87B-4, -5, -6).

Dr. Williams performed a records review at the employer's request. (Ex. 84). He did "not document a C3-4 disc bulge," but rather severe preexisting degenerative changes at that level. (Ex. 84-4, -5). He opined that the work injury may have caused those degenerative changes to become symptomatic, but "did not anatomically pathologically produce acute changes * * *." (Ex. 89-3). He attributed Dr. Hart's surgery solely to preexisting degenerative changes of natural aging. (*Id.*)

Dr. Alaimo, an osteopath who treated claimant for his compensable injury, stated that it was medically probable that claimant had narrowing of the C3-4 disc space, but not “a herniation or bulge.” (Ex. 90).

The employer accepted a cervical strain, but denied claimant’s new/omitted medical condition claim for a C3-4 disc bulge. (See Ex. 66). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer’s denial, finding that a preponderance of the evidence did not establish the existence of the claimed C3-4 disc bulge. Alternatively, the ALJ assumed the existence of the disc bulge, but found that the work injury was not a material contributing cause of that condition.

On review, claimant contends that the persuasive medical evidence establishes that the work injury was a material contributing cause of the disability/need for treatment for a C3-4 disc bulge. We agree with that contention, reasoning as follows.

To prevail on his new/omitted medical condition claim, claimant must establish that the claimed C3-4 disc bulge condition exists and that the work injury is a material contributing cause of his disability/need for treatment for that condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition). Because of the divergent medical opinions regarding the claimed condition, expert medical opinion must be used to resolve the compensability issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

We first address the existence of the claimed C3-4 disc bulge, which the employer disputes. All of the medical experts agreed that claimant had some type of C3-4 disc pathology that involved the disc extending outward. (Exs. 81-2, 87A-25, -26, -38, -39, 85-5, 87B-4, -4, 89-2).

Dr. Hart noted that there was “a lot of terminology” concerning “disk injuries and descriptions of disc bulges.” (Ex. 87A-7). He defined a “disc bulge” as the disc “collapsing a bit” so that the “outer surface of the disk will bulge * * *

outside its normal confines.” (Ex. 87A-7, -8). He added that a bulge “typically” “goes beyond the margins of the vertebral bodies,” but that it “certainly expands the contours from [where] it otherwise is positioned.” (Ex. 87A-8). He considered claimant’s pathology to satisfy that definition and concluded that claimant’s cervical MRI verified a C3-4 bulging disc. (Exs. 81-2, 87A-25, -26, -38, -39).

The employer requests that we disregard Dr. Hart’s diagnosis because he did not use the phrase “disc bulge” in his chart notes/reports. Dr. Hart, however, explained that he used terms such as “compression,” “slight asymmetry in the disk” and “stenosis” to indicate the bulge. (Exs. 87A-25, -26, -38, -39). He further explained that, although a disc bulge is distinct from “stenosis” itself, here, the disc bulge was causing claimant’s compression and stenosis. (*Id.*) He elaborated that surgical procedures are not performed due to the mere presence of a “disc bulge,” a relatively common condition, but only when that disc bulge results in clinically significant stenosis or nerve root compression. We find that Dr. Hart adequately explained why he did not employ the phrase “disc bulge” in some of his chart notes/report.

Dr. Woodward also unequivocally stated that claimant’s C3-4 disc bulge was evident on the MRI. (Ex. 85-1, -5). Although he was subsequently asked to explain why he agreed with Dr. Williams that claimant did *not* have a C3-4 disc bulge, his response did not indicate an agreement with that position. (Ex. 87B-4). Specifically, he noted that claimant’s degenerative changes included “a slight disc bulge.” (*Id.*) He proceeded to define a “bulging disc” as “extension of the intervertebral disc beyond the margins of the vertebral bodies.” (*Id.*) With respect to claimant’s C3-4 disc, he concluded:

“bony osteophytes project beyond the margins of the major portion of the vertebral body. These osteophytes bring with them the periphery of the disc, thus the presence of osteophytes correlates with a disc bulging beyond the usual margins of the vertebral bodies.” (*Id.*)

Dr. Woodward added that it is “a matter of terminology whether the disc margins carried with the osteophytes are still within the margins of the vertebral body but there is no evidence of any disc bulge beyond the osteophytes.” (Ex. 87B-5). He did not believe that, in “ordinary usage,” the appearance of claimant’s C3-4 disc “would be described as a disc bulge beyond the osteophytes.” (*Id.*)

We interpret Dr. Woodward's opinion as supporting the existence of a disc bulge as he defined such a condition. First, he expressly found the existence of such a condition as confirmed by the cervical MRI. (Ex. 85-1, -5). He did not subsequently retract that opinion. He acknowledged, however, that it was a "matter of terminology" as to whether "disc margins carried with the osteophytes are still within the margins of the vertebral body." (Ex. 87B-5). He nevertheless reiterated that the presence of C3-4 osteophytes in claimant's case "correlate[d] with a disc bulging beyond the usual margins of the vertebral bodies." (Ex. 87B-4). Although he did not believe that the bulge extended "beyond the osteophytes," that issue is not before us. In other words, nothing in claimant's new/omitted medical condition request or the employer's denial necessarily concerns a disc bulge "beyond the osteophytes."

In contrast, Dr. Williams stated that the at-issue C3-4 disc condition did not satisfy his definition of a "disc bulge," which he opined required a disc "extend[ing] beyond its normal anatomic boundaries [of] the ventral and dorsal edges of the vertebral bodies." (Ex. 89-2). Although Dr. Williams found that claimant's cervical MRI showed "severe degenerative changes at C3-4," he asserted that the MRI did not establish that the C3-4 disc "protruded beyond the dorsal vertebral bodies of C3 or C4." (*Id.*)

We are not persuaded by Dr. Williams's opinion concerning the existence of a C3-4 "disc bulge." Initially, Dr. Williams indicated that claimant's C3-4 disc protruded, but just not beyond the boundaries that he believed necessary to constitute a "bulge." As set forth above, however, Drs. Hart and Woodward persuasively explained that claimant's C3-4 disc, in their opinions, extended beyond its normal confines, thereby qualifying as a "bulge." Moreover, we find Dr. Williams's more limited definition of a "bulge" contradicted by Drs. Hart's and Woodward's explanation that the label attached to such a condition involved some subjectivity and was a matter of "terminology." (*See* Exs. 87A-7, 87B-5). Consequently, we find that a preponderance of the evidence establishes the existence of a C3-4 disc bulge.¹

¹ Although Dr. Alaimo, an osteopath who treated claimant for the work injury, also opined that claimant's C3-4 disc pathology was "not the same as a herniation or a bulge," he offered no further explanation in support of that position. (*See* Ex. 90). Accordingly, and particularly in light of the detailed opinions of Drs. Hart and Woodward, we find Dr. Alaimo's opinion conclusory and unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Lanora J. Rea*, 60 Van Natta 1058, 1064 (2008) (same).

We next turn to whether the work injury was a material contributing cause of disability/need for treatment for the C3-4 disc bulge. Dr. Hart concluded that the work injury was the major contributing cause of any such need disability/need for treatment. (Exs. 81-3, 87A-29 through 35).

We disagree with the employer's assertion that Dr. Hart's opinion is unpersuasive because it was based exclusively on a temporal connection between the work injury and claimant's symptoms. Although opinions based solely on a temporal relationship are generally unpersuasive, such a relationship may be the most important factor in determining the cause of a claimant's disability/need for treatment of a condition. *Kirk Larkins*, 61 Van Natta 2904, 2908 (2009); *Jeffrey L. Vancleave*, 61 Van Natta 1595, 1597 (2009). See also *Allied Waste Industries, Inc. v. Crawford*, 203 Or App 512, 518 (2005), *rev den*, 341 Or 80 (2006); *David J. Glennon*, 60 Van Natta 2737, 2738 (2008). Indeed, a lack of explanation concerning the correlation between a claimant's work activities and the onset of symptoms may render a medical expert's opinion unpersuasive. *Caitlin Van Houtin*, 62 Van Natta 689, 693-94 (2010).

Here, Dr. Hart explained that the temporal relationship between the work injury and the onset of claimant's symptoms was significant. (Exs. 81-3, 87A-29 through 35). Specifically, he noted that claimant's preexisting degenerative disk disease was a commonplace condition that was frequently present without symptoms or any corresponding disability/need for treatment. (*Id.*) Therefore, he explained that claimant's "pre-injury" absence of cervical disc-related symptoms was an important factor in assessing the cause of claimant's disability/need for treatment. (Ex. 87A-30 through 34). Moreover, Dr. Hart explained that it was not credible that claimant would have experienced disability/need for treatment in the absence of the work injury. (Ex. 87A-34, -35).

In addition to the significant temporal connection between the work injury and the onset of claimant's symptoms and disability/need for treatment, Dr. Hart explained that his conclusion was supported by the mechanism of injury and claimant's response to treatment. (Exs. 81-3, 87A-29 through 35). Specifically, Dr. Hart explained that claimant had a preexisting degenerative cervical condition that included an asymptomatic disc bulge that was rendered symptomatic by the work injury, which necessitated claimant's need for treatment. (Ex. 87A-30, -31, -32). Dr. Hart elaborated as to how he made that attribution:

“[T]his patient is walking around with a disk that doesn't move much, doesn't get stretched much, and the nerve root kind of accommodates the disk bulge that's there.

And then all of a sudden, [there is] a forceful movement that stretches the ligaments * * * around the disk, maybe moves the disk into positions that it otherwise would not occupy, and exerts a bit of a hammer blow to the nerve root itself. And then that sets up a pattern where the nerve root is irritated and painful, and that persists until we go in and take the pressure off of the nerve root. * * * And I think the ultimate proof is in the pudding a little bit, that we go in on a guy like [claimant] and do this operation and lo and behold [his] pain gets better.” (Ex. 87A-31, -32).

We find Dr. Hart’s opinion to be based on more than a temporal relationship between the work injury and the onset of claimant’s symptoms. Moreover, we find Dr. Hart’s opinion concerning the cause of claimant’s disability/need for treatment for the C3-4 disc bulge to be well explained and persuasive.

We are less persuaded by the contrary opinions of Drs. Woodward and Williams.² Dr. Woodward opined that the work injury was not a material contributing cause of claimant’s need for surgery at C3-4. (Ex. 87B-6). Although he was asked to provide an explanation for that opinion, he did not provide one. Accordingly, we give little weight to that opinion. *See Moe*, 44 Or App at 433 (rejecting unexplained or conclusory opinion); *Rea*, 60 Van Natta at 1064 (same).

Dr. Williams also opined that the work injury was not a material contributing cause of claimant’s need for surgery at C3-4, but that the surgery was necessitated solely by preexisting degenerative changes at C3-4. (Exs. 84-5, 89-3). Dr. Williams’s explanation for his opinion, however, did not adequately distinguish between the cause of the C3-4 disc bulge itself, which Dr. Hart acknowledged preexisted the work injury, and the cause of the need for treatment for that disc bulge. Moreover, Dr. Williams’s opinion did not adequately rebut Dr. Hart’s more detailed opinion concerning: (1) the significant temporal connection between the work injury and the onset of claimant’s symptoms; (2) the notable absence of any symptoms or need for treatment for the preexisting degenerative condition before the work injury; and (3) the importance of the resolution of claimant’s symptoms following the C3-4 disc surgery. As such, we do not rely on Dr. Williams’s opinion.

² Dr. Alaimo did not provide an opinion concerning the cause of disability/need for treatment for the C3-4 disc bulge.

Consequently, we find that claimant has established that the work injury was a material contributing cause of the disability/need for treatment for the claimed C3-4 disc bulge.³ Therefore, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is \$9,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, 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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated July 29, 2010 is reversed. The employer's denial is set aside and the claim is remanded for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$9,500, to be paid by the 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 May 12, 2011

³ The parties do not contend that the medical evidence establishes a "combined condition." Consequently, ORS 656.005(7)(a)(B) is inapplicable.