

In the Matter of the Compensation of
ANGELICA M. SPURGER, Claimant

WCB Case No. 10-06324

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Dougherty's order that affirmed an Order on Reconsideration that awarded 1 percent whole person impairment and 17 percent work disability for a left hip condition. On review, the issue is extent of permanent disability (impairment and work disability).

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

Claimant sustained a compensable injury on January 2, 2009. SAIF accepted a lumbar strain, a left hip strain, and left trochanteric bursitis. Dr. Wong conducted a closing examination and Dr. Tran, claimant's attending physician, concurred with Dr. Wong's findings.

SAIF closed the claim with a September 3, 2010 Notice of Closure that awarded 1 percent whole person impairment and 17 percent work disability.

SAIF wrote to Dr. Wong and the doctor responded, checking a box indicating that claimant would have "some limitation" in the repetitive use of her left hip. (Ex. 16-2). Claimant wrote to Dr. Wong and the doctor responded, explaining that he had chosen "some limitation" from among three choices ("no limitation, some limitation, significant limitation"), absent guidance interpreting "significant." (Ex. 25-5). Dr. Wong also predicted that claimant would have difficulty squatting, standing still for long periods, and walking long distances. Dr. Tran concurred with the latter opinion, adding that he could not comment on whether these limitations were "significant." (Ex. 25-8).

An October 27, 2010 Order on Reconsideration affirmed the Notice of Closure. Claimant requested a hearing.

The ALJ affirmed the Order on Reconsideration, finding the record insufficient to establish entitlement to additional permanent disability compensation. We agree, reasoning as follows.

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

For the purpose of rating claimant's permanent impairment, only the opinion of the attending physician at the time of claim closure, or any findings with which he or she concurred, or a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). Here, because no medical arbiter examination occurred, we only consider the opinion of Dr. Tran, and any findings with which he concurred, in resolving the disputed issue.

The pivotal question is whether an impairment rating for a chronic left hip condition is warranted. Such a rating is warranted if the medical evidence establishes that repetitive use of claimant's left hip is significantly limited. *See* OAR 436-035-0019(1)(i);¹ *see also* OAR 436-035-0007 (7) ("If there is no measurable impairment under these rules, no award of permanent partial disability is allowed.") (WCD Admin. Order 10-051).

Claimant asserts that the activities of walking and standing are important activities of daily living and that "restrictions" in repetitively performing these activities will have a "significant" impact whether those activities are performed on or off the job.² Thus, according to claimant, her predicted difficulties support a conclusion that she is significantly limited in the repetitive use of her left hip.

¹ The rule provides in pertinent part:

"A worker is entitled to a 5% chronic condition impairment value for each applicable body part, when a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, the worker is significantly limited in the repetitive use of [his or her]

"* * * *

(i) Hip * * *."

² Referring to a dictionary definition of "significant," claimant proposes that the term means "clear, notable, and important."

However, Dr. Tran specifically declined to comment on whether he considered those difficulties “significant” – even if “significant” means “important, weighty or notable.”³ (Ex. 25-8). Under these circumstances, even assuming application of claimant’s proposed definition, Dr. Tran’s opinion would not support a conclusion that claimant’s physical restrictions reached the “significantly limited in repetitive use” requirement for a “chronic condition” rating.

In reaching this conclusion, we do not simply rely on the fact that the physicians used the term “some” limitation, rather than “significant” limitation. *See Buss v. SAIF*, 182 Or App 590, 594-95 (2002) (“magic words” not required for “chronic condition” rating when the record contained medical opinions from which it could be found the claimant was entitled to a “chronic condition” award); *see also Walter V. Hinz*, 59 Van Natta 3050, 3051-52 (2007) (same). Instead, in evaluating the sufficiency of relevant medical opinions we consider them as a whole and in the context in which they were rendered. *Maria C. Perales-Castaneda*, 54 Van Natta 634, 635 (2002).

Here (as noted), given choices as to whether claimant had no limitation, some limitation, or significant limitation in the repetitive use of her left hip, Dr. Wong checked a box choosing “some limitation” and Dr. Tran concurred. (Exs. 16-2, 19, 25-5, -8). However, the existence of a chronic condition is an “either/or” determination; a claimant’s repetitive use is either “significantly limited” or “not significantly limited.” *See Ryan D. Grassman*, 62 Van Natta 270, 272 n 2 (2010).

Under these circumstances, having considered Dr. Tran’s opinion as a whole and in context, we find it insufficient to warrant a chronic condition rating. *See James W. Mcvey*, 63 Van Natta 1101, 1104 (2011) (evidence of limited ability to perform certain tasks does not necessarily support a significant limitation in repetitive use; nor does evidence of limited repetitive use, without evidence establishing that such a limitation is significant). Consequently, we agree with the ALJ’s conclusion that claimant has not carried her burden of proving error in the reconsideration process.

ORDER

The ALJ's order dated April 21, 2011 is affirmed.

Entered at Salem, Oregon on November 29, 2011

³ Dr. Tran added, “There’s no clear criteria for ‘significant’ therefore [I] am unable to comment either way.” (Ex. 25-8).