
In the Matter of the Compensation of
SHERRIE L. BREWER, Claimant
WCB Case No. 11-00473
ORDER ON REVIEW
Strooband & Ousey PC, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

The insurer requests review of Administrative Law Judge (ALJ) Smith's order that set aside its denial of claimant's current combined low back condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact and provide the following summary of the relevant facts.

Claimant was compensably injured on September 25, 2007, and the insurer initially accepted a lumbosacral strain. (Exs. 3, 6). She was treated by Dr. Lowengart, who determined that her condition was medically stationary on February 14, 2008. (Ex. 7). Claimant was awarded 16 percent whole person impairment for the lumbosacral strain. (Ex. 12).

Claimant began treating with Dr. O'Sullivan in June 2008. On November 25, 2008, the insurer modified the acceptance to include "lumbosacral strain combined with unrelated pre-existing spondylolisthesis." (Exs. 14, 15).

In December 2010, Dr. Weinman examined claimant on behalf of the insurer. (Ex. 21). On January 21, 2011, the insurer issued a partial denial, explaining that claimant's lumbosacral strain was no longer the major contributing cause of her disability or need for treatment. (Ex. 22). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that the medical evidence was insufficient to establish that claimant's otherwise compensable injury was no longer the major contributing cause of her disability or need for treatment for the combined condition. Consequently, the ALJ set aside the insurer's denial.

On review, the insurer relies on the opinions of Drs. Weinman and Lowengart to support its denial. The insurer contends that Dr. O’Sullivan’s opinion is entitled to little weight because he did not address whether the lumbosacral strain resolved and ceased to be the major contributing cause of the combined condition.

Under ORS 656.262(6)(c), a carrier may deny an accepted combined condition if the “otherwise compensable injury” ceases to be the major contributing cause of the combined condition. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006). To support its denial under ORS 656.262(6)(c), SAIF must prove a change in claimant’s condition or circumstances such that the otherwise compensable injury is no longer the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.262(6)(c); ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

The effective date of the combined condition acceptance provides a baseline for determining whether the worker’s condition has changed so that the “otherwise compensable injury” is no longer the major contributing cause of the disability or need for treatment of the combined condition. *Bacon*, 208 Or App at 210. Here, the parties’ stipulation explained that the insurer agreed to accept claimant’s claim for a lumbosacral strain combined with preexisting spondylolisthesis “as of 9/25/07,” the date of injury. (Ex. 13A-2). Therefore, the relevant dates for determining whether there has been any “change” in claimant’s condition or circumstances are September 25, 2007, the effective date of its acceptance, and January 21, 2011, the date of the denial.

The insurer must establish, with persuasive medical evidence, that the compensable lumbosacral strain component of the accepted combined condition is no longer the major contributing cause of claimant’s disability or need for treatment for the combined condition. *See Reid v. SAIF*, 241 Or App 496, 503 (2011) (under ORS 656.005(7)(a)(B), it is correct to focus on the compensable injury that was shown to have combined with the preexisting condition, and on the actual combined condition that was accepted and then denied); *William A. Drey*, 63 Van Natta 2010, 2019 (2011).

The insurer relies primarily on Dr. Weinman, who examined claimant on one occasion in December 2010. For the following reasons, however, we do not find Dr. Weinman’s opinion persuasive.

Dr. Weinman diagnosed a lumbar sprain resulting from the work injury and preexisting L5-S1 spondylolisthesis and lumbar spondylosis. (Ex. 21-14, -15). He opined that claimant's current need for treatment was related to her preexisting spondylolisthesis and lumbar spondylosis, and that those preexisting conditions were the major cause of her disability and need for treatment. (Ex. 21-15). He stated that the major contributing cause "shifted three months after the injury when soft-tissue healing was complete." (*Id.*)

Although Dr. Weinman reviewed Dr. Lowengart's chart notes and was aware that she treated claimant for a lumbar strain until February 2008 (Ex. 21-4), he did not explain why he believed that claimant's "soft tissue healing" was complete much earlier, by December 2007, or what changes in her clinical findings or subjective complaints supported his opinion. On this record, we are not persuaded that Dr. Weinman's opinion is sufficiently directed to claimant's particular circumstances.¹ See *Sherman v. Western Employer's Ins.*, 87 Or App 602, 606 (1987) (physician's comments that were general in nature and not addressed to the claimant's situation in particular were not persuasive); *Judi Whitney*, 61 Van Natta 392 (2009) (medical opinion that presumed a change in the claimant's condition within a certain time frame was not persuasive). Consequently, we are not persuaded by Dr. Weinman's conclusory opinion. See *Moe v. Ceiling Systems*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory medical opinions).

The insurer also relies on the opinion of Dr. Lowengart, who determined that claimant's condition was medically stationary on February 14, 2008. (Ex. 7). "Medically stationary" means, in the opinion of the medical experts, the compensable condition has reached a point where it will not materially improve with further treatment or the passage of time. ORS 656.005(17). While it is possible that the medically stationary status may coincide with a change in the compensability of a combined condition pursuant to ORS 656.262(6)(C), whether these two events occur on the same date depends on the facts of each case. *Minkyu Yi*, 61 Van Natta 2664, 2671 n 6 (2009).

Here, absent Dr. Lowengart's specific opinion addressing this question, we cannot infer from her 2008 chart note that there has been any "change" in claimant's condition or circumstances between September 25, 2007, and

¹ Dr. O'Sullivan did not agree with Dr. Weinman's opinion that all soft tissue injuries heal within three months, particularly since claimant did not have prior low back symptoms or treatment. (Ex. 23).

January 21, 2011, such that the compensable lumbosacral strain component of the accepted combined condition was no longer the major contributing cause of her disability and need for treatment for the combined condition. *See SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (because the Board is not an agency with specialized medical expertise, its findings must be based on medical evidence in the record). Because a persuasive medical opinion does not support the insurer's denial, it must be set aside. *See Donna M. Alexander*, 62 Van Natta 1565 (2010).

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 \$3,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

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 insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 18, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, to be paid by the insurer. 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 insurer.

Entered at Salem, Oregon on November 28, 2011