
In the Matter of the Compensation of
JAMES G. GILLILAND, Claimant
WCB Case No. 11-02391
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Herman. Member Langer concurs in part and dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that upheld the self-insured employer's denial of claimant's medical services claim for his current mental condition. On review, the issues are scope of acceptance, claim processing, medical services, and compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We summarize the pertinent facts.

Claimant was compensably injured in 1984 when a forklift fell on his head and right shoulder. The employer accepted the injury claim, but no Notice of Acceptance specifying any "accepted conditions" issued at that time. (Ex. 7).¹ A 1987 Determination Order and August 1988 Stipulation awarded 30 percent (96 degrees) unscheduled permanent partial disability benefits. (Exs. 18C, 18D).

Beginning in 1997, claimant treated with Dr. Tongue for post-traumatic stress disorder (PTSD). (Exs. 22-30). In June 1998, the employer accepted claimant's claim "for the additional diagnosis of [PTSD]." (Ex. 31).

As of July 1998, claimant also treated with Dr. Gold, his current attending physician. (See Exs. 37, 50, 77-116, 120). In November 2010, the employer's claim examiner asked Dr. Gold whether claimant's 1984 injury was the major cause of a recent EEG and CT head scan. (Ex. 115-1). Dr. Gold responded that he did not provide or perform workers' compensation evaluations. (Ex. 115-2). He noted that he had treated claimant for 13 years for a "constellation of issues," but could not determine the degree to which those issues currently related to the 1984 work injury. (*Id.*)

¹ As the employer notes, there was no statutory requirement in 1984 to issue a "Notice of Acceptance" specifying all accepted conditions.

Dr. Gold subsequently clarified that he did not typically treat workers' compensation patients, and that he focused his concerns on treatment, as opposed to "parceling out what portion of treatment is due to a particular cause." (Ex. 121-1). Dr. Gold further explained that "assign[ing] a particular percentage to the portion of [his] treatment that is specifically associated with [claimant's] 1984 injury and his PTSD" could be "detrimental to [his] doctor[-]patient relationship." (*Id.*)

Nevertheless, Dr. Gold was comfortable with stating that the 1984 injury was a material cause of claimant's PTSD and need for treatment, including currently prescribed medications. (*Id.*) Although Dr. Gold's treatment also included other "conditions and issues," he explained that it was "difficult to separate those other conditions and issues from [the PTSD because] there was some relationship, or link, between these other conditions and issues and [claimant's PTSD] caused by his 1984 on-the-job injury." (Ex. 121-1, -2).

In February 2011, Dr. Goranson examined claimant at the employer's request. Dr. Goranson concluded that claimant had no psychiatric disorder, including PTSD, related to the January 1984 work incident. (Ex. 117-50). Dr. Goranson noted that a diagnosis of PTSD had "apparently been accepted, but [that] a careful reading of the contemporaneous records fail[ed] to support [that diagnosis]." (Ex. 117-51). Dr. Goranson concluded that claimant suffered from a non-work-related "personality disorder," and expressed surprised "that so many trained health professionals, including psychiatrists, [had] neglected to explore this area in detail." (*Id.*)

After reiterating his skepticism about a PTSD diagnosis, Dr. Goranson stated that, in any event, "most patients with PTSD recover within six months, and any symptomatology beyond that time is related to non-trauma related factors[,] such as personality disorder." (Ex. 117-52). Dr. Goranson did not believe that claimant required any treatment for PTSD or any other condition related to the 1984 work injury. (Ex. 117-51 through 53).

Thereafter, Dr. Goranson clarified that his analysis was based on an assumption that claimant sustained a work-related head injury in 1984, despite his skepticism about that claim. (Ex. 122-1). Dr. Goranson also reiterated his doubts that claimant ever had PTSD. (Ex. 122-1, -2). Assuming, however, that claimant had that condition "at the time of his injury," Dr. Goranson did not believe that claimant currently satisfied the criteria for PTSD. (Ex. 122-2). Dr. Goranson maintained that the 1984 injury and accepted conditions "were not even a *de minimis* contributor to [claimant's] current condition or need for treatment." (*Id.*)

Dr. Goranson also noted that he reviewed Dr. Gold's opinion, and did not interpret that opinion "as endorsing the concept that [claimant] currently suffers from [PTSD] * * * or any mental condition related to the 1984 injury." (Ex. 122-3) (emphasis in original). Dr. Goranson further opined that it was "evident" from Dr. Gold's chart notes that claimant's 1984 injury "ceased to be a factor in [claimant's] condition and need for treatment * * * quite some time ago * * *." (*Id.*) In sum, Dr. Goranson maintained that there was "no relationship" between the 1984 work injury/accepted condition and claimant's current mental conditions/need for treatment. (Ex. 122-3, -4).

The employer informed claimant that it had received bills for medical treatment allegedly related to the 1984 work injury, but that such injury was not a material contributing cause of claimant's current condition or conditions for which he was seeking treatment. (Ex. 119-1). Therefore, the employer denied "compensability of [claimant's] current condition for which [he was] seeking treatment." (*Id.*) Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

In upholding the employer's denial, the ALJ first determined that the employer accepted the following conditions: closed head injury, post-concussion syndrome, depression secondary to head injury, and PTSD. The ALJ then found Dr. Gold's opinion unpersuasive for not rebutting Dr. Goranson's opinion that claimant did not currently have PTSD. The ALJ further reasoned that Dr. Gold did not satisfactorily explain how claimant's current condition/need for treatment related to the 1984 work injury, in light of Dr. Gold's initial "statements that he could not determine how claimant's treatment related to" the work injury. Although the ALJ acknowledged that Dr. Goranson's initial opinion "appeared to ignore the law of the case regarding claimant's injury and accepted conditions," the ALJ concluded that Dr. Goranson's subsequent opinion did not suffer from that flaw.

On review, claimant first asserts that the ALJ too narrowly defined the accepted conditions. He further contends that under *Barbara J. Ferguson*, 63 Van Natta 2253 (2011), which issued subsequent to the ALJ's order, the employer's denial was procedurally invalid. Finally, claimant asserts that we should rely on Dr. Gold's opinion concerning the relationship between the denied medical services and the compensable injury.

We conclude that: (1) the employer's denial is procedurally valid under *Ferguson*; (2) Dr. Gold's opinion persuasively establishes a material relationship between claimant's accepted PTSD condition and his current need for medical services; and (3) the scope of all of claimant's accepted conditions need not be determined. We reason as follows.

The scope of a denial is a question of fact. *Longview Inspection v. Snyder*, 182 Or App 530, 536 (2002); *Ferguson*, 63 Van Natta at 2256. Here, the employer's denial specifically referenced "receiv[ing] bills for medical treatment" allegedly related to the accepted claim. (Ex. 119-1). That denial further stated that the accepted claim was not a material contributing cause of claimant's "current condition or conditions for which [he was] seeking treatment," and, therefore, claimant's "current condition for which [he was] seeking treatment" was denied. (*Id.*)

Under these circumstances, we conclude that the employer's denial is procedurally valid because it constitutes a denial of medical services under ORS 656.245(1)(a). In doing so, we disagree with claimant's assertion that the employer's denial is prohibited under the *Ferguson* rationale. In *Ferguson*, 63 Van Natta at 2257-59, we determined that the employer had issued a preclosure denial of an unclaimed condition, and that such a denial was prohibited. In reaching that conclusion, we specifically noted that the employer's denial was not issued in response to a medical services bill or a claim for medical services. 63 Van Natta at 2256. We further noted that the record did not establish an unpaid medical service or a currently claimed need for medical treatment. *Id.* at 2258-59.

Here, the employer's denial specifically mentions the receipt of bills for medical treatment allegedly related to the accepted claim. (Ex. 119-1). The denial also expressly mentions the "current condition for which [claimant is] seeking treatment." (*Id.*) Thus, unlike *Ferguson*, we do not interpret the employer as denying an unclaimed new/omitted medical condition. Rather, we interpret the employer as denying claimant's need for medical services as sufficiently related to his current condition; such a denial is procedurally valid. *See Ferguson*, 63 Van Natta at 2259 n 5 (denials of medical services claim, which refer to a "current condition," would be valid because a currently claimed medical service or need for treatment for that condition has been disputed).

We turn now to the merits of the employer's medical services denial. ORS 656.245(1)(a) provides, in relevant part:

“For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.”

If the claimed medical service is “for” an “ordinary” condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *aff’d*, 248 Or App 120 (2012). If the claimed medical service is “directed to” a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905.

Here, the parties do not dispute that the first sentence of ORS 656.245(1)(a) governs this medical services dispute. Thus, we must determine whether Dr. Gold’s disputed medical treatment was “for conditions caused in material part by the injury” under ORS 656.245(1)(a). *SAIF v. Swartz*, 247 Or App 515, 525 (2011). As explained by the court, “the ‘conditions’ are the current conditions for which treatment is sought.” *Id.* The “injury” or “compensable injury” is any previously accepted condition, which would include PTSD. (*See Ex. 31*). Properly reframed, then, the issues are: (1) whether claimant’s PTSD constitutes a material cause of claimant’s current psychiatric condition; and (2) whether Dr. Gold’s treatment is “for” that current condition. *See Swartz*, 247 Or App at 525 (citing *Sprague*, 346 Or at 673).

A “material cause” under ORS 656.245(1)(a) is a fact of consequence. *See id.* (citing *Mize v. Comcast Corp-AT & T Broadband*, 208 Or App 563, 569-71 (2006)). “Thus, the compensable injury could constitute a material cause if it makes ‘any contribution’ to claimant’s current condition.” *Id.* at 525-26 (emphasis in original).

Where there is a disagreement between physicians regarding the relationship between claimant’s compensable injury and the disputed medical services, the compensability issue presents a complex medical question that must be resolved

by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 282 (1992). When presented with disagreement among experts, we give more weight to those opinions that are well reasoned and based on the most complete relevant information. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003); *Somers v. SAIF*, 77 Or App 259, 263 (1986).

In the absence of persuasive reasons to the contrary, we generally give greater weight to the opinion of a treating physician where that practitioner has had a better opportunity to observe and evaluate a claimant's condition over an extended period of time. *Weiland v. SAIF*, 63 Or App 810, 814 (1983); *Shereena Oden*, 62 Van Natta 1754, 1756 (2010); *Angela S. Breitenstein*, 56 Van Natta 174, 177 (2004). However, we may properly give greater or lesser weight to the opinion of a treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Oden*, 62 Van Natta at 1756.

According to Dr. Gold's opinion, claimant's accepted PTSD condition was a material cause of his current condition for which he was receiving treatment. (Ex. 121-1, -2).² Dr. Gold also clarified that, although he was also providing treatment for other conditions, he was providing medical services for that current condition, which included claimant's PTSD. (*Id.*)

As a treating physician for approximately 13 years, Dr. Gold's opinion is entitled to deference, unless there are persuasive reasons not to give his opinion greater weight. *Weiland*, 63 Or App at 814; *Oden*, 62 Van Natta at 1756; *Breitenstein*, 56 Van Natta at 177. The employer contends that such a persuasive reason exists because Dr. Gold did not begin treating claimant until approximately 13 years following the injury. It does not necessarily follow, however, that Dr. Gold, who has treated claimant for the past 13 years, did not have a more advantageous opportunity than Dr. Goranson to observe and evaluate claimant's condition over an extended period of time.

² We disagree with the employer's assertion that Dr. Gold only related claimant's accepted PTSD condition as a material contributing cause to his condition at the time of the injury, as opposed to his current condition for which he was receiving treatment. Dr. Gold's opinion was specifically in response to a dispute about claimant's "current need for treatment." (Ex. 121-1) (emphasis added). Moreover, Dr. Gold continues to treat claimant's PTSD (and other psychiatric conditions) and framed portions of his opinion in the present tense (*i.e.*, "treatment that *is* specifically associated with [claimant's] 1984 injury and his [PTSD," and "there *is* some relationship between these other conditions and issues and [claimant's PTSD] * * *"). (Ex. 121-1, -2) (emphasis added).

Finally, as the employer notes as part of a different argument, Dr. Gold did not treat claimant at the time of his original injury, but rather began such treatment approximately 13 years later. Under such circumstances, we conclude that the most reasonable interpretation of Dr. Gold's opinion is that it concerned claimant's current condition for which Dr. Gold continued to provide treatment.

The employer next asserts that Dr. Gold's opinion was unexplained, particularly with respect to previous statements that he was unable to determine the degree to which claimant's current issues related to his 1984 work injury. (*See* Exs. 115, 120). Dr. Gold, however, explained that his initial reluctance to provide a causation opinion was due to a concern that "assign[ing] a particular percentage to a portion of [his] treatment that is specifically associated with [claimant's] 1984 injury and his [PTSD]" might "be detrimental to" the doctor-patient relationship. (Ex. 121-1; *see also* Ex. 118). Once Dr. Gold understood that he only needed to address a "material cause" relationship, he was comfortable providing such an opinion. (Ex. 121-1). Thus, we disagree with the employer that Dr. Gold did not explain the basis for the purported "change" of opinion.

The employer further requests that we should find Dr. Gold's opinion unpersuasive because, after 2002, claimant's chart notes do not mention PTSD. The employer also asserts that we should discount Dr. Gold's opinion because his chart notes did not typically list a "diagnosis." We disagree with those assertions. As the employer acknowledges, Dr. Gold's chart notes routinely provided a narrative description of claimant's evolving psychiatric well-being, and frequently did not list an express "diagnosis." We do not conclude that, in order to rely on Dr. Gold's opinion concerning the cause of claimant's current need for treatment, his chart notes were required to provide a PTSD diagnosis.

Finally, the employer contends that Dr. Gold did not "rebut" Dr. Goranson's final opinion. The record establishes, however, that Dr. Gold reviewed Dr. Goranson's initial 54-page report, and reached a contrary conclusion. (*See* Exs. 118, 121). Although Dr. Goranson authored a subsequent four-page report in response to Dr. Gold's opinion, we do not agree that Dr. Gold was then required to author another responsive report indicating that he continued to abide by his earlier opinion, which issued after reviewing Dr. Goranson's earlier, more expansive opinion. This is particularly true, given that, as set forth below, we are not persuaded by Dr. Goranson's opinion.

With respect to Dr. Goranson's opinion, we note that the employer has accepted, among other conditions, claimant's PTSD. (*See* Ex. 31). Thus, it is the "law of the case" that the PTSD condition is compensable. *See Kayla L. Sjogren*, 61 Van Natta 1024, 1025 (2009); *Lyle E. Sherburn*, 59 Van Natta 632, 635 (2007).

In *SAIF v. Kuhn*, 73 Or App 768, 770 (1985), a prior final order had rejected the opinion of the carrier's consulting physician, and determined that the claimant suffered permanent impairment as a result of her work injury. In a subsequent

aggravation claim, that physician “maintained that claimant's condition [was] entirely due to her congenital abnormalities.” *Id.* at 772. The court held:

“Although [the physician] was entitled to reiterate his original conclusion, it conflicts with the law of the case, which is that permanent disability resulted from her industrial injury. As a legal matter, it is wrong. * * * Therefore, his conclusion must be discounted.” *Id.* (citations omitted.)

Here, Dr. Goranson opined that, despite the employer’s acceptance, “a careful reading of the contemporaneous records fails to support” a PTSD diagnosis. (Ex. 117-51). Although the employer does not argue that such an observation is consistent with “the law of the case,” the employer contends that Dr. Goranson’s subsequent report (Ex. 122) cured that defect by clarifying that his conclusion was based on “assumptions” that claimant sustained a head injury, and that PTSD was “accepted.” (See Ex. 122-1). Despite those “assumptions,” however, Dr. Goranson continued to question that claimant *ever* had PTSD, “even at the time of the original injury.” (Ex. 122-1, -2).

Thus, Dr. Goranson’s subsequent opinion continues to suggest that he was questioning the validity of the accepted claim. (*Id.*) Although Dr. Goranson was “entitled to” that belief, “[as] a legal matter, it is wrong.” *Kuhn*, 73 Or App at 772; see also *Shanna C. Macpherson*, 63 Van Natta 763, 766-67 (2011). In any event, even if not contrary to “the law of the case,” Dr. Goranson’s opinion does not otherwise provide us with persuasive reasons not to give greater weight to the opinion of Dr. Gold, claimant’s longstanding treating physician. See *Weiland*, 63 Or App at 814; *Oden*, 62 Van Natta at 1756; *Breitenstein*, 56 Van Natta at 177.

In sum, for the aforementioned reasons, we find that claimant has established, by a preponderance of evidence, that his PTSD condition is a material cause of his current psychiatric condition, and that Dr. Gold’s treatment is “for” that current condition.³ See *Swartz*, 247 Or App at 525 (citing *Sprague*, 346 Or at 673). Therefore, we reverse.

³ Consequently, it is not necessary to determine whether other accepted conditions also constitute a material cause of claimant’s current condition for which medical services have been denied, or to resolve the parties’ differences concerning the scope of the employer’s acceptance.

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 \$11,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, his counsel's fee submission, and the employer's objection), 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 September 6, 2011 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$11,000, 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 June 5, 2012

Member Langer concurring in part and dissenting in part.

I agree with the majority that the employer's denial is procedurally valid. I disagree, however, with the majority's decision to set aside that denial. I reason as follows.

Claimant was compensably injured in 1984. Approximately 13 years later, Dr. Tongue, PhD, assessed PTSD. (Ex. 24). Claimant also simultaneously treated with Dr. Gold, beginning in 1998. (Exs. 37, 120).

Subsequent to 2002, claimant's chart notes are devoid of a PTSD diagnosis. He nevertheless continued to treat with Dr. Gold for a "constellation of issues." (See Ex. 115-2). Dr. Gold initially stated that he was unable to determine the degree to which those issues were related to claimant's 1984 injury. (*Id.*) He subsequently stated that he was "comfortable" stating that the work injury was a material cause of claimant's PTSD and need for treatment. (Ex. 121-1).

Dr. Gold, however, did not provide a persuasive explanation as to why claimant's current need for treatment was caused in material part by his accepted PTSD. I find this omission particularly significant given the absence of a PTSD diagnosis in claimant's chart notes for approximately 10 years.

Moreover, despite whatever misgivings Dr. Goranson had concerning the initial assessment/acceptance of a PTSD diagnosis, he persuasively explained why claimant did not *currently* satisfy the criteria for such a diagnosis. (Ex. 117-51, -52, 122-2, -3). In light of that opinion, I would find Dr. Gold's conclusory assertion concerning the relationship between his treatment and claimant's PTSD to be insufficient to satisfy claimant's burden of proof. Because the majority determines otherwise, I respectfully dissent from that portion of the majority's opinion.