
In the Matter of the Compensation of
JAIME O. LOPEZ, Claimant
WCB Case Nos. 11-05596, 11-02856
ORDER ON REVIEW
Scott M McNutt Sr, Claimant Attorneys
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that upheld the SAIF Corporation's denial of his new/omitted condition claims for degenerative disc disease at C3-4, C4-5 and C5-6, C3-4 disc herniation, C4-5 disc herniation, and degenerative disc disease and disc disruptions at T12, L1-2, and L2-3.¹ On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We provide the following summary of the pertinent facts.

Claimant was compensably injured on February 19, 2010, when he fell about 22 feet from a scaffold. SAIF accepted a fractured posterior left tenth rib, left thigh contusion, lumbar strain, subacute compression fracture at T12, left-sided subacute fracture at L3, cervical strain, left shoulder bursitis, and left shoulder rotator cuff tendinitis with small bursal-sided tear. (Exs. 11, 18, 34, 46; *see* Exs. 35, 45, 57A).

Claimant was treated by several doctors, including Dr. Kranenburg. He received epidural steroid injections at L5-S1 and the L4 foramen. (Exs. 14, 17). In August 2010, Dr. Saviers performed electrodiagnostic studies and found no evidence of myopathy, left-sided lumbosacral radiculopathy/plexopathy, left peroneal or tibial entrapment or general peripheral neuropathy. (Ex. 16).

¹ SAIF's October 18, 2011 denial also denied compensability of claimant's new/omitted medical condition claim for "degenerative disk disease at L5-S1 and L4-5 neuroforaminal stenosis with radiculopathy[.]" (Ex. 45; *see* Ex. 41). At hearing, claimant's attorney stated that claimant was pursuing the conditions addressed by the October 18, 2011 and June 20, 2012 denials. (Tr. I-3). However, in closing arguments, neither attorney referred to the claim for "degenerative disk disease at L5-S1 and L4-5 neuroforaminal stenosis with radiculopathy [.]" (Tr. II). The ALJ's order does not refer to the new/omitted medical condition claim for "degenerative disk disease at L5-S1 and L4-5 neuroforaminal stenosis with radiculopathy" or to SAIF's denial of those conditions. The parties do not refer to those conditions on review. Consequently, we do not consider those conditions to be contested on review. In any event, the persuasive medical evidence establishes that those conditions are not compensable. (Exs. 44, 48).

On November 18, 2010, Dr. Kranenburg reported that claimant's low back and leg pain was essentially resolved. He concluded that the fractures in the lumbar spine were healed and asymptomatic. He performed a closing examination for the lumbar spine injuries and the thoracic spine fracture. He recommended a cervical MRI and an MRI of both shoulders regarding claimant's neck and shoulder pain. (Ex. 20).

A December 2010 cervical MRI was interpreted as showing mild degenerative changes, with a C4-5 disc bulge osteophyte complex causing moderate left neural foraminal narrowing. (Ex. 21). Dr. Saviers performed electrodiagnostic studies on January 13, 2011, and found no cervical radiculopathy. However, he determined that claimant had mild carpal tunnel syndrome (CTS) and mild left ulnar neuropathy at the elbow. (Ex. 27).

In February 2011, Dr. Kranenburg concluded that claimant's cervical strain due to the work injury was medically stationary and had resolved without impairment. He also diagnosed preexisting and nonwork-related degenerative disc disease at C3-4 and C4-5, symptomatic. He explained that claimant had mild bilateral CTS, left cubital tunnel syndrome, and bilateral shoulder bursitis, all of which had an unclear relationship with the work injury. Dr. Kranenburg concluded that claimant's thoracic and lumbar fractures were medically stationary. (Ex. 29). In April 2011, he determined that the lumbar strain was medically stationary. (Ex. 31).

On April 13, 2011, claimant was examined by Dr. Brenneke, orthopedic surgeon, on behalf of SAIF. He evaluated claimant's upper extremity complaints. (Ex. 32).

In October 2011, Dr. Kranenburg concluded that claimant's C5-6 degenerative disc disease, as well as the degenerative disc disease at L5-S1 and the L4-5 neuroforaminal stenosis with radiculopathy, were preexisting and nonwork-related. (Ex. 44).

On November 7, 2011, claimant sought treatment from Dr. Bert, orthopedic surgeon, reporting ongoing low back pain, neck pain, and left shoulder discomfort. Dr. Bert reviewed claimant's MRIs and reported that he had degenerative changes and healed fractures in his lumbar spine, as well as C3-4 and C4-5 disc herniations. He noted that the left shoulder showed a minor rotator cuff tear. Dr. Bert recommended treatment for the neck and rotator cuff tear, but determined that claimant's lumbar condition was medically stationary. (Ex. 47A).

In August 2011, claimant filed a new/omitted medical condition claim for degenerative disc disease at C3-4, C4-5, and C5-6, a left shoulder rotator cuff tendonitis with bursal-sided tear, degenerative disc disease at L5-S1, and L4-5 neuroforaminal stenosis with radiculopathy. (Ex. 41). SAIF accepted the rotator cuff tendonitis condition, but denied compensability of the remaining conditions. (Exs. 45, 46). Claimant requested a hearing.

On January 16, 2012, claimant was examined by Dr. Vessely, orthopedic surgeon, on behalf of SAIF. (Ex. 47D).

In January 2012, claimant filed a new/omitted medical condition claim for C3-4 and C4-5 disc herniations and degenerative disc disease and disc disruptions at T12, L1, L1-2, and L2-3. (Ex. 50). After SAIF denied the claim (Ex. 57A), claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that, even assuming the existence of the claimed new/omitted medical conditions, the medical evidence was not sufficient to establish compensability of the claimed conditions.

On review, claimant relies on Dr. Bert's opinion to establish compensability of his new/omitted medical condition claims for at C3-4, C4-5 and C5-6 "disc conditions" and T12, L1-2, and L2-3 "disc disputations."² SAIF responds that claimant did not establish that his work injury was a material contributing cause of any of the claimed conditions. SAIF also relies on a "combined condition" defense.

To prove compensability of his new/omitted medical condition claims, claimant must establish that the claimed conditions exist and that the work injury was a material contributing cause of the disability or need for treatment for those conditions. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If a carrier asserts that a claimed condition is a "combined condition," it must prove that: (1) claimant suffers from a statutory "preexisting condition"; (2) claimant's condition is a "combined condition," and (3) the "otherwise compensable injury" is not the major contributing cause of the

² Although claimant's brief refers to "disc conditions" and "disc disputations," we assume that he is referring to SAIF's denials of his new/omitted medical condition claims for degenerative disc disease at C3-4, C4-5 and C5-6, C3-4 disc herniation, C4-5 disc herniation, and degenerative disc disease and disc disruptions at T12, L1-2, and L2-3. (Exs. 45, 57A).

disability/need for treatment of a combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Dr. Bert examined claimant on one occasion, almost two years after the work injury. Under these circumstances, Dr. Bert's opinion is not entitled to any deference as a treating physician. See *McIntyre v. Standard Util. Contractors*, 135 Or App 298 (1995) (treating physician's opinion was less persuasive when the physician did not observe the claimant until two months after the injury).

We first address compensability of C5-6 degenerative disc disease. Dr. Bert explained that claimant had a "problem at C5-6" that resulted from a combination of the work injury and "preexisting pathology." (Ex. 49). However, he did not explain the nature of the "preexisting pathology" or the "problem at C5-6." Dr. Bert's conclusory statements do not support the existence of C5-6 degenerative disc disease or that the work injury was a material contributing cause of the disability/need for treatment for that condition. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Even assuming the existence of C5-6 degenerative disc disease, Dr. Kranenburg, who treated claimant on several occasions, concluded that the C5-6 degenerative disc disease was preexisting and nonwork-related. (Ex. 44). Dr. Vessely also concluded that the C5-6 degenerative disc disease preexisted claimant's work injury. (Ex. 48-2, -3). Dr. Vessely explained that C5-6 degenerative disc disease was part of claimant's cervical spondylosis, which was an arthritic condition involving the inflammation of joints in the spine elicited by destruction of tissues due to metabolic and constitutional causes, which resulted in the breakdown, degeneration, or structural change in the joint. (Exs. 48-2, 56-4). Such a description meets the requirements for a statutory "preexisting" condition. See ORS 656.005(24); *Hopkins v. SAIF*, 349 Or 348, 364 (2010) (defining "arthritis" as "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change").

To the extent that the work injury played some role in the need for treatment for C5-6 degenerative disc disease, Dr. Vessely concluded that the work injury was never the major contributing cause of the disability/need for treatment for a combined C5-6 degenerative disc disease condition. (Ex. 48-4, -5). Thus, even if we assume that claimant established an "otherwise compensable" C5-6 degenerative disc disease, we conclude that, based on Dr. Vessely's

persuasive opinion, he had a statutory “preexisting condition,” as well as a “combined condition,” and the work injury was never the major contributing cause of the disability/need for treatment of a C5-6 combined condition.

The record also does not support compensability of the claimed C3-4 and C4-5 disc herniations. Nevertheless, even assuming the existence of C3-4 and C4-5 disc herniations, Dr. Bert’s opinion is not sufficient to sustain claimant’s burden of proof for the following reasons.

Dr. Bert’s opinion is not persuasive because he changed his opinion without explanation. In February 2012, he opined that the C3-4 and C4-5 disc herniations were “caused 100%” by the work injury. (Ex. 49). But in September 2012, Dr. Bert stated that claimant had preexisting weakened osteophyte discs at C3-4 and C4-5 and that the injury caused the C3-4 and C4-5 discs to “bulge and herniate further causing the disability and need for medical treatment.” (Ex. 58). Because Dr. Bert did not explain his apparent change of opinion and the record does not provide a reasonable explanation for such a change, his opinion is entitled to little weight. *See Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (physician not persuasive where there was no reasonable explanation in the record for changed opinion); *cf. Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (where there was a reasonable explanation in the record for a physician’s change of opinion, that opinion was persuasive).

Furthermore, we are not persuaded that Dr. Bert’s history was sufficiently complete. In reaching his conclusion, Dr. Bert relied on “a history of acute neck pain following the fall.” (Ex. 49). But Dr. Vessely explained that Dr. Bert’s opinion was inconsistent with the medical records after the February 19, 2010 injury. Dr. Vessely concluded that claimant did not suffer an injury to his cervical discs, noting that he did not report cervical pain after the fall at work. (Ex. 59). On February 19, 2010, Dr. Cadden, emergency room physician, reported that claimant did not hit his head in the injury and did not lose consciousness. He found that claimant was nontender to palpation over his cervical vertebrae and paravertebral muscles. Dr. Cadden did not diagnose a neck condition. (Ex. 2). Dr. Vessely determined that the emergency room physician had performed a thorough physical examination, and he concluded that there was no evidence of a cervical injury. (Ex. 59).

In light of Dr. Vessely’s opinion, we are not persuaded that Dr. Bert had a sufficiently complete or accurate history of claimant’s symptoms after the February 2010 fall. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician’s opinion and does not exclude information that would make the

opinion less credible); *Miller v. Granite Constr. Co.*, 28 Van Natta 473, 476 (1977) (a medical opinion that is based on an incomplete or inaccurate history is not persuasive).

Furthermore, Dr. Vessely concluded that there was no evidence that the work injury caused a worsening of disc pathology at C3-4 and C4-5 and no evidence that claimant's C3-4 and C4-5 discs became symptomatic after the fall. (Ex. 59). He agreed with Dr. Brenneke's opinion that it was difficult to ascertain whether claimant's complaints were coming from the cervical or shoulder areas. (Ex. 47D-13). Dr. Vessely also explained that claimant's examination findings were inconsistent with the MRI findings and that the nerve conduction study was negative for cervical radiculopathy. He noted that claimant may have an ulnar nerve problem or CTS, which would explain his upper extremity symptoms, but those were not related to the work injury. (Ex. 59). Dr. Saviers had performed electrodiagnostic studies in January 2011 and determined that claimant had mild bilateral CTS and mild left ulnar neuropathy at the elbow, but he found no evidence of cervical radiculopathy. (Ex. 27).

Dr. Bert opined that claimant's "correlating symptoms" from the cervical disc herniations were related in major part to the work injury. (Ex. 49). He opined that claimant had radiculopathy into the left arm and shoulder consistent with an injury to the C3-4 and C4-5 discs. (Ex. 58). But Dr. Bert did not address the fact that claimant's nerve conduction study was negative for cervical radiculopathy, nor did he address the possible contribution from the diagnosed CTS, ulnar neuropathy, and shoulder conditions. We are not persuaded by Dr. Bert's opinion because it lacks adequate explanation. *See Moe*, 44 Or App at 433 (rejecting conclusory medical opinions).

We conclude that the medical evidence is not sufficient to establish that claimant's work injury was a material contributing cause of his need for treatment/disability for his C3-4 and C4-5 disc herniations. Moreover, even assuming that claimant established "otherwise compensable" C3-4 and C4-5 disc herniations, we conclude that, based on Dr. Vessely's persuasive opinion, claimant had a statutory "preexisting condition,"³ as well as a "combined condition," and that the work injury was never the major contributing cause of the disability/need for treatment for C3-4 and C4-5 disc herniations. (Exs. 48, 56, 59).

³ Dr. Vessely explained that C3-4 and C4-5 degenerative disc disease was part of claimant's cervical spondylosis, which was an arthritic condition involving the inflammation of joints in the spine resulting in the breakdown, degeneration, or structural change in the joint. (Exs. 48-2, 56-4). Such a description meets the requirements for a statutory "preexisting" condition. *See* ORS 656.005(24); *Hopkins*, 349 Or at 364.

We turn to claimant's new/omitted medical condition claim for degenerative disc disease at C3-4 and C4-5. Claimant relies on Dr. Bert's opinion to establish compensability. Dr. Bert explained that claimant had a preexisting "weakened osteophyte disk at C3-4 and C4-5." He also indicated that the work injury caused the C3-4 and C4-5 discs to bulge and herniate further. (Ex. 58). As noted above, Dr. Bert had previously stated that the C3-4 and C4-5 disc herniations were "caused 100%" by the work injury. Because he did not explain his change of opinion and we are unable to reconcile the inconsistencies, his opinion is entitled to little weight. We conclude that Dr. Bert's opinion is not sufficient to establish compensability of degenerative disc disease at C3-4 and C4-5.

In any event, we are more persuaded by Dr. Vessely's opinion. He explained that claimant had preexisting degenerative disc disease at C3-4 and C4-5, which qualifies as a statutory "preexisting condition." (Exs. 48-2, 56-4). To the extent the work injury combined with the preexisting degenerative disc disease at C3-4 and C4-5, we conclude that, based on Dr. Vessely's persuasive opinion, the work injury was never the major contributing cause of the disability/need for treatment for the combined C3-4 and C4-5 degenerative disc disease condition. (Exs. 48, 56, 59).

Claimant also filed a new/omitted medical condition claim for degenerative disc disease and disc "disruptions" at T12, L1-2, and L2-3. (Ex. 50). Dr. Bert's opinion is not sufficient to establish compensability of those conditions for the following reasons.

When Dr. Bert initially examined claimant in November 2011, he explained that the MRIs showed that claimant had degenerative changes and healed compression fractures in the lumbar spine. He determined that claimant's lumbar condition was medically stationary. (Ex. 47A).

In a February 1, 2012 concurrence letter from claimant's attorney, Dr. Bert explained that claimant's compression fractures at "L2" and T12 combined with lumbar disc disease at L2-3, L1-2, T12, and L1.⁴ He concluded that the work injury was the major contributing cause of the disability/need for treatment of the combined conditions at those levels. According to Dr. Bert, the loading and compression from the injury also resulted in "rupturing internally in the disc both below and above each compression fracture." (Ex. 49).

⁴ Dr. Bert incorrectly understood that SAIF accepted a compression fracture at L2. Instead, SAIF accepted compression fractures at T12 and L3. (Ex. 18).

In September 2012, Dr. Bert explained that claimant's treatment was initially focused on the painful compression fractures, but after they healed, the disc pain presented itself "due to the altered pathology from healing of the fracture." (Ex. 58-2). He opined that when the compression fracture heals, the smooth surface of the bone is roughened and you have "disruption of the end plate of the vertebrae and early disintegration" of the discs. According to Dr. Bert, the roughening and irregular surface causes friction on the disc that will accelerate a degenerative process of the disc. He noted that this "late term consequence" is generally apparent about six months after the injury and that process becomes the "primary pain generator." Dr. Bert concluded that claimant's work injury was the major cause of the "current low back" degenerative disc disease. (*Id.*)

We are unable to reconcile Dr. Bert's various opinions regarding claimant's lumbar conditions. In November 2011, he found that claimant had degenerative changes and healed fractures in the lumbar spine and he determined that claimant's lumbar spine condition was medically stationary. (Ex. 47A). But in February 2012, he described claimant's ruptured discs "below and above each compression fracture," and stated that the work injury was the major contributing cause of the disability and need for treatment. (Ex. 49). In September 2012, he opined that the work injury was the major cause of the "current low back degenerative disk disease." (Ex. 58).

Dr. Bert did not explain why claimant's lumbar condition required treatment in February 2012, when he had previously stated that the lumbar spine condition was medically stationary and he had not identified any "ruptured" lumbar discs in his initial opinion. Furthermore, we are unable to reconcile his various causation theories. He opined that the work injury ruptured the lumbar discs and then stated that the compression fracture accelerated the degenerative process of the discs. (Exs. 49, 58). Dr. Bert's conclusory and inconsistent reports are not sufficient to establish compensability. *See Moe*, 44 Or App at 433 (rejecting unexplained or conclusory opinion).

Furthermore, we are more persuaded by the opinion of Dr. Vessely because it is well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). We reason as follows.

Dr. Vessely disagreed with Dr. Bert's opinion that the work injury caused lumbar disc ruptures. (Exs. 56, 59). Dr. Vessely acknowledged that compression fractures can cause a disc injury, but he explained that in claimant's case, there was no posterior cortex involvement and the compression fracture was very minor.

He concluded that the work injury was not severe enough to cause a disc injury. Dr. Vessely opined that there was no evidence that claimant's spine bore the brunt of the impact, which was demonstrated by the minor degenerative changes in the lumbar spine and minor compression fractures. (Ex. 59-2). He determined that the compression fractures had healed with no residual problems.

Dr. Vessely also concluded that there was no objective medical evidence that claimant's injury caused or worsened his low back degenerative disc disease, explaining that there was no evidence of neuro-encroachment at any level and no nerve conduction studies to support radiculopathy. (*Id.*) He opined that the T12 to L3 discs were not of any clinical significance. (Ex. 56-4). He also noted that it was difficult to identify the cause of claimant's pain because of symptom magnification. (Exs. 48-1, -2, 56-4).

Because we are most persuaded by Dr. Vessely's opinion, we find that claimant has not established the existence of disc "disruptions" at T12, L1-2, and L2-3. Furthermore, the medical evidence is insufficient to establish that the work injury was a material contributing cause of claimant's disability/need for treatment for degenerative disc disease and disc disruptions at T12, L1-2, and L2-3. Therefore, we affirm.

ORDER

The ALJ's order dated February 14, 2013 is affirmed.

Entered at Salem, Oregon on August 7, 2013