In the Matter of the Compensation of
LUTHER ROLLE, Claimant
WCB Case No. 12-00196
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
Wallace Klor & Mann PC, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Mills's order that awarded 25 percent work disability for claimant's right shoulder condition, whereas an Order on Reconsideration did not make such an award. On review, the issue is extent of permanent disability (work disability). We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

On August 10, 2010, claimant, a shelf stocker, injured his right shoulder while lifting a rack weighing greater than 100 pounds. (*See* Exs. 14, 17, 32, 34). The employer accepted a right shoulder anterior labral tear. (Exs. 22, 43).

On October 11, 2010, Dr. Bowman, claimant's attending physician, performed arthroscopic surgery to repair the labral tear. (Ex. 25). Claimant did not return to work until December 16, 2010, when Dr. Bowman released him to light duty. (Ex. 28).[1]

In February 2011, Dr. Bowman recommended that claimant be evaluated for a work hardening program. (Ex. 31). In March 2011, claimant was evaluated at Northwest Occupational Medical Center (NWOMC), and was determined to be a good candidate for the program. (Exs. 32 through 34).

[1] There is no dispute that claimant was released to modified work from August 13, 2010 until the date of his surgery.

Dr. Bowman continued to release claimant to light duty, pending the work hardening program. (Ex. 35). Claimant participated in the program from April 5, 2011, through June 15, 2011. (Exs. 35, 38, 39).

In the June 15, 2011 NWOMC discharge report, the evaluators noted that "the feasibility of [claimant] returning back to his job at injury was not safe and that that job is well within the heavy physical demand category[.]" The evaluators determined that claimant was capable of "Light-medium" work, with restrictions of lifting up to 53 pounds occasionally. (Ex. 38).

On July 5, 2011, Dr. Bowman examined claimant for the purposes of claim closure, noting that claimant was not able to return to his "job-at-injury" based on the NWOMC report. Dr. Bowman found "no restrictions for the job at injury due to the accepted condition" and that there was "no impairment as a result of the industrial injury." He further stated that claimant's condition was medically stationary "and the restrictions are outlined in the light medium category, as per the 06/15/2011 [NWOMC] Discharge Note." Dr. Bowman also concurred with the evaluator's range of motion and strength assessments. (Ex. 39).

That same day, Dr. Bowman completed a "Release to Return to Work" form indicating that claimant was released to "modified duty." Dr. Bowman further commented, "See permanent restrictions on work conditioning discharge summary June 15, 2011." (Ex. 40).

On August 11, 2011, the employer issued a Notice of Closure that did not award permanent disability. (Ex. 42). Claimant requested reconsideration and the appointment of a medical arbiter. On November 23, 2011, Dr. Lee performed a medical arbiter examination. (Ex. 44).

On December 14, 2011, an Order on Reconsideration awarded 9 percent whole person impairment based on the medical arbiter's findings. However, relying on Dr. Bowman's July 5, 2011 statement that claimant had no restrictions as a result of the accepted condition, the reconsideration order did not award work disability. (Ex. 45-3). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant was entitled to a work disability award. The ALJ reasoned that Dr. Bowman's statement that claimant had "no restrictions for the job at injury due to the accepted condition" was unpersuasive in light of the

NWOMC report, as ratified by Dr. Bowman. The ALJ also found that the medical arbiter's opinion supported a conclusion that claimant was not released to regular work. We agree that claimant is entitled to a work disability award, although our reasoning differs from the ALJ's.

The employer argues that Dr. Bowman's July 5, 2011 statement that claimant had no restrictions as a result of the accepted condition constitutes a release to regular work. Therefore, it contends that claimant has not established error in the reconsideration process. For the following reasons, we disagree with the employer's contentions.[2]

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, he also has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000); *see also Erik M. Kunz*, 64 Van Natta 606 (2012). Thus, because claimant challenges that portion of the reconsideration order that found that he was not entitled to a work disability award, he must establish that the Order on Reconsideration erroneously concluded that he was not released to regular work by his attending physician. *See generally Scott A. Benson*, 63 Van Natta 1437 (2011); *see also Lawrence W. Clement*, 62 Van Natta 578 (2010).

Under ORS 656.726(4)(f)(E) (Or Laws 2007, ch 274, §§ 2, 8), impairment is the only factor to be considered in evaluation of a worker's disability under ORS 656.214 (Or Laws 2007, ch 274, §§ 1, 8) if "the worker has been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has returned to regular work at the job held at the time of injury."[3] *Kunz*, 64 Van Natta at 607. "Regular work" means "the job the worker held at injury." ORS 656.214(1)(d); OAR

[2] The employer makes several arguments pertaining to what types of "other medical opinions" can be used to determine a claimant's residual functional capacity (RFC). *See* OAR 436-035-0012(10). Because the issue before us is claimant's *entitlement* to a work disability award (*i.e.*, consideration of social-vocational factors), and because the employer does not dispute the calculation of the work disability award, we need not address the employer's arguments regarding claimant's RFC.

[3] Because claimant's injury occurred after January 1, 2008, the 2007 amended versions of ORS 656.214(2) and ORS 656.726(4)(f)(E) apply. *See Jon M. Schleiss*, 62 Van Natta 2567 (2010), *aff'd*, *Schleiss v. SAIF*, 240 Or App 458 (2012).

436-035-0005(15).[4] The attending physician's release to work (not the medical arbiter's opinion) determines whether a claimant is entitled to work disability. *See Jon M. Schleiss*, 62 Van Natta 2567 (2010), *aff'd*, *Schleiss v. SAIF*, 240 Or App 458 (2012).

Here, there is no contention that claimant "returned to regular work"; rather, the only disputed issue is whether he was "released to regular work by [his] attending physician." *See* ORS 656.726(4)(f)(E). Therefore, his entitlement to work disability depends on whether Dr. Bowman released him to return to regular work.

Based on Dr. Bowman's statement that claimant had "no restrictions for the job at injury due to the accepted condition," the Order on Reconsideration determined that claimant was released to return to regular work. (Exs. 39, 45-3). However, in that same report, Dr. Bowman concurred with the NWOMC discharge report, which determined that claimant could not return to his "regular work," and restricted him to "light medium work." (Exs. 38, 39). Moreover, in a separate "Release to Return to Work" form Dr. Bowman checked the box releasing claimant to "modified duty" and further commented, "See permanent restrictions on work conditioning discharge summary June 15, 2011." (Ex. 40).

We acknowledge that Dr. Bowman's singular statement that claimant had "no restrictions" is inconsistent with the remainder of his report. However, as noted above, Dr. Bowman on two occasions referred to the work restrictions in the NWOMC discharge report. Thus, evaluating his opinion in context and based on the record as a whole, we find that Dr. Bowman did not release claimant to return to regular work. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency); *cf Clement*, 62 Van Natta at 585-86 (finding the attending physician's repeated and consistent releases constituted a preponderance of the evidence that the claimant had been released to regular work).[5]

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[4] Because the Notice of Closure issued on August 11, 2011, the applicable standards are found in WCD Admin. Order 10-051 (eff. June 1, 2010). OAR 436-035-0003(1).

[5] Based on those reports, the employer performed a job assessment and concluded that it was unable to offer claimant his "job-at-injury" with the accommodations. Instead, the employer offered claimant modified work. (Ex. 41). This further supports our conclusion that claimant was not released to regular work.

We also disagree with the employer's assertion that, because Dr. Bowman did not attribute restrictions to claimant's accepted conditions, any restrictions would be due to claimant's preexisting conditions. However, both Dr. Bowman and the work hardening program evaluators were aware of claimant's prior history of right shoulder injury. There is no opinion that attributed any impairment to the preexisting condition, or referred to such conditions in addressing claimant's work restrictions. (*See* Exs. 17, 21, 23, 24, 27, 28, 30 through 36, 38, 39, 40).

Based on the foregoing reasons, the preponderance of the record supports a conclusion that claimant was not released to return to regular work at the time of injury. Accordingly, claimant has met his burden of proving error in the reconsideration process. Consequently, we affirm.

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 $5,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, and his counsel's uncontested attorney fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated July 2, 2012, as corrected on July 17, 2012, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of $5,000, to be paid by the employer.

Entered at Salem, Oregon on February 27, 2013