
In the Matter of the Compensation of
JUSTIN D. MORRIS, Claimant
WCB Case No. 12-01038
ORDER ON REVIEW
Hollander & Lebenbaum, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: *En Banc*. Members Langer, Weddell, Herman, Lowell, and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that awarded no permanent impairment for a right shoulder condition, whereas an Order on Reconsideration awarded 4 percent. On review, the issue is permanent disability (impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and provide a summary of the pertinent facts.

On June 3, 2010, claimant, a police officer, sustained a work-related bullet wound, which the self-insured employer accepted for a "right posterior back wound." (Exs. 12, 17). Dr. Izenberg performed two surgeries to remove the bullet and shrapnel pieces. (Ex. 10, 14).

In August 2010, claimant began treating with Dr. Rask for complaints of residual pain in his right acromioclavicular (AC) joint and rotator cuff. (Ex. 20). Dr. Rask provided an extended period of conservative treatment including physical therapy and a cortisone injection.¹ Over the course of claimant's treatment, Dr. Rask identified the additional diagnoses of right rotator cuff tendinitis/tendinosis, right AC joint posttraumatic arthrosis, right AC joint sprain, right biceps tendinitis with associated pectoral muscle spasm, right AC joint bursitis, and posterior capsular tightness.

On July 11, 2011, the employer denied claimant's request to expand its acceptance to include right shoulder rotator cuff tendinitis and AC joint posttraumatic arthrosis. (Ex. 79).

¹ Claimant's last visit to Dr. Rask was on October 12, 2011. (Ex. 82).

On November 11, 2011, Dr. Rask opined that claimant's accepted right posterior back wound was medically stationary with no permanent impairment. (Ex. 89). The employer closed the claim on November 21, 2011, with no permanent disability award. (Ex. 92). Claimant requested reconsideration and the appointment of a medical arbiter. (Ex. 95).

Dr. Mohabeer performed a medical arbiter examination on January 26, 2012. (Ex. 104). He identified reduced right shoulder motion, apportioning this loss 50 percent to the accepted right posterior back wound, and 50 percent to other conditions, including the denied right rotator cuff tendinitis and AC joint posttraumatic arthrosis. (Ex. 104-3).

Based on Dr. Mohabeer's arbiter report, a February 13, 2010 Order on Reconsideration awarded 4 percent permanent impairment for reduced right shoulder motion. (Ex. 106). The employer requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ reversed the Order on Reconsideration, concluding that Dr. Rask's opinion, rather than Dr. Mohabeer's, should be used to determine the extent of permanent impairment. On review, claimant asserts that Dr. Mohabeer's findings were valid, and that the reconsideration order's 4 percent permanent impairment award should be reinstated. Based on the following reasoning, we reverse.

For the purpose of rating claimant's permanent impairment, only the opinions of claimant's attending physician at the time of claim closure, other medical findings with which the attending physician concurred, and the findings of a medical arbiter may be considered. See ORS 656.245(2)(b)(C); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012).

Only findings of impairment that are permanent and caused by the accepted compensable condition may be used to rate impairment. OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994). When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's

permanent impairment to the compensable condition, “the medical arbiter’s report provides the default determination of a claimant’s impairment.” *Hicks v. SAIF*, 194 Or App 655, *adh’d to as modified on recons*, 196 Or App 146, 152 (2004).

Here, Dr. Mohabeer performed a medical arbiter examination and reviewed claimant’s medical records. (Ex. 104). He was aware that claimant had one accepted condition (right posterior back wound), and two denied conditions (right shoulder rotator cuff tendinitis and AC joint posttraumatic arthrosis). Dr. Mohabeer found that claimant had 5/5 strength in all right-sided muscle groups. (Ex. 104-3). Range of motion (ROM) testing revealed losses in the right shoulder, which Dr. Mohabeer apportioned 50 percent to claimant’s accepted condition, and 50 percent to the denied conditions. (*Id.*) He opined that claimant gave “good and consistent efforts,” in the physical examination and that the findings were valid. (Ex. 104-4).

Having reviewed Dr. Mohabeer’s report, we find no ambiguity regarding the impairment findings. Pursuant to *Hicks*, we are not free to disregard those unambiguous findings, absent persuasive contrary evidence. Here, the preponderance of medical opinion does not demonstrate that different findings by the attending physician, Dr. Rask, were more accurate and should be used.² See OAR 436-035-0007(5). We reason as follows.

Dr. Rask’s October 12, 2011 chart note does not provide specific ROM findings regarding claimant’s accepted right posterior back wound.³ (Ex. 82). Moreover, Dr. Rask subsequently reported that he had never treated claimant’s back wound condition.⁴ Finally, in a December 12, 2011 concurrence letter, Dr. Rask opined, without further explanation, that the back wound was medically stationary as of November 11, 2011, if not sooner. (Ex. 97-2). Under these circumstances, Dr. Rask’s comments do not constitute a preponderance of evidence demonstrating “different findings” more accurate than those of the medical arbiter, Dr. Mohabeer.

² Because claimant’s claim was closed in November 2011, the applicable standards are found in WCD Admin. Order 10-051 (eff. June 1, 2010). See OAR 436-035-0003(1).

³ In a December 12, 2011 concurrence letter, Dr. Rask opined, without further explanation, that claimant’s back wound was medically stationary as of November 11, 2011, if not sooner. (Ex. 97-2).

⁴ Although Dr. Rask prescribed physical therapy for claimant, it was directed to his denied conditions. (Ex. 97-2).

The employer asserts that Dr. Mohabeer did not address either Dr. Denard's⁵ or Dr. Rask's opinions. However, a medical arbiter is under no obligation to comment on another physician's assessments of impairment. *See Lourdes Brown*, 60 Van Natta 2065, 2067 (2008).

Based on the foregoing reasoning, we rate claimant's permanent impairment based on the medical arbiter's findings. Relying on those findings, we conclude that claimant is entitled to the 4 percent permanent impairment award granted by the Order on Reconsideration. Consequently, we reverse the ALJ's order.

Claimant seeks a carrier-paid attorney fee award under ORS 656.382(2). In doing so, he cites *SAIF v. DeLeon*, 352 Or 130, 143 (2012). Based on the following reasoning, we conclude that claimant is entitled to a carrier-paid attorney fee award for his counsel's services rendered at both the hearing level and on Board review.

In *DeLeon*, the claimant's position was that the decision of the tribunal that makes the final decision in the proceedings is determinative for purposes of establishing entitlement to a carrier-paid attorney fee award under ORS 656.382(2). *DeLeon*, 352 Or at 134. After considering that position, the court determined that the text of ORS 656.382(2) contains terms that the legislature intended the interpretation for which the claimant argued. 352 Or at 136.

Specifically, the court noted that the statute provides that once any of the reviewing tribunals concludes that compensation should not be disallowed or reduced and that a claimant is entitled to an attorney fee award, the carrier is required to pay a reasonable attorney fee "for legal representation * * * at and *prior to* the hearing, review on appeal or cross-appeal." (Emphasis added.) (*Id.*) Because the provision allows fees for representation at earlier stages in a proceeding, the court reasoned that the statute indicates that the legislature contemplated that the award of attorney fees would occur and depend on success at the final stage of the proceedings. (*Id.*) The court further reasoned that interpreting the statute to make the decision regarding an attorney fee award at the final stage of the proceedings controlling, no matter which party it favors, gives effect to the entirety of its text and furthers its stated purpose. 352 Or at 137.

⁵ Dr. Denard examined claimant at the employer's request. (Ex. 68).

Finally, the court concluded that from the time that the carrier first requests review of a compensation award, the issue before the first and all subsequent reviewing tribunals will be whether the award should or should not be disallowed or reduced. 352 Or at 139. Whether a carrier or claimant initiates review before the tribunal that makes the final decision in the case, the court determined that the tribunal will decide, in effect, whether an earlier award of compensation should or should not be disallowed. (*Id.*)

Based on such reasoning, the court found that, when a claimant obtains an award of compensation and a carrier initiates one of the listed forms of request for review of that award before one of the listed tribunals, and the final tribunal to consider the issue determines that the award should not be disallowed or reduced, the claimant is entitled to attorney fees incurred in representation at and prior to the final hearing. 352 Or at 143. In doing so, the court noted that the carrier had requested a hearing contesting claimant's compensation award (as granted by an Order on Recon). Because the final tribunal to consider the issue (the Board on review of the ALJ's order reducing the compensation award) concluded that the award of compensation should not be disallowed or reduced, the court held that the Board was authorized under ORS 656.382(2) to award attorney fees for claimant's representation before the ALJ (because that representation was "prior to" the Board's hearing). (*Id.*)

In reaching its conclusion, the court expressly noted that the claimant did not seek, in addition to the carrier-paid attorney fee for services at the hearing level, an attorney fee award for representation before the Board. 352 Or 143, n 5. Because the claimant only asked for the reinstatement of the Board's attorney fee award for services before the ALJ, the court acquiesced in that request.

The court did not discuss the Board's "out-of-compensation" attorney fee award for claimant's counsel's services on Board review. That award was based on OAR 438-015-0055(2).⁶ Thus, it does not appear that the court was aware of this administrative rule, which provides for an "out-of-compensation" attorney fee whenever the claimant requests review of an ALJ's TTD/PPD compensation award and obtains increased compensation. Nevertheless, in light of the court's analysis of ORS 656.382(2), it is reasonable to assume that the court would consider the aforementioned rule (at least in situations where the claimant is requesting review

⁶ OAR 438-015-0055(2) provides that: "If a claimant requests review of an Administrative Law Judge's order on the issue of compensation for permanent disability and the Board awards additional compensation, the Board shall approve a fee of 25 percent of the increased compensation provided that the total fees approved by the Administrative Law Judge and the Board shall not exceed \$6,000."

of an ALJ's order reducing a compensation award in response to a carrier's hearing request from an Order on Reconsideration and the Board reinstates or increases the reconsideration order's award) to be inconsistent with the controlling statute. In other words, the court's interpretation of ORS 656.382(2) essentially constitutes an implicit invalidation of the rule in cases such as this.

When an administrative rule is inconsistent with or seeks to limit a statutory provision, we are authorized to give no effect to the rule. *See SAIF v. St. Clair*, 134 Or App 316 (1995); *George G. Seely*, 47 Van Natta 1060 (1995). Consequently, consistent with that rationale, and in accordance with the *DeLeon* court's interpretation of ORS 656.382(2), it is appropriate to award claimant's counsel a carrier-paid attorney fee for services expended at the hearing level and on Board review, notwithstanding OAR 438-015-0055(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 at the hearing level and on Board review is \$7,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

ORDER

The ALJ's order dated July 5, 2010 is reversed. The Order on Reconsideration's 4 percent permanent impairment award is affirmed. For services at the hearing level and on Board review, claimant's counsel is awarded an assessed fee of \$7,500, payable by the employer.

Entered at Salem, Oregon on February 15, 2013