
In the Matter of the Compensation of
GILBERT K. BROWN, Claimant
WCB Case No. 11-02595
ORDER ON REVIEW
Merkel & Associates, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that: (1) upheld the self-insured employer's denials of claimant's new/omitted medical condition claims for "deviated nasal septum" and "thoracic strain"; and (2) upheld the employer's "ceases" denial of a "combined" diabetes condition. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In September 2010, claimant, a tow truck driver, suffered numerous injuries when he was struck by a motor vehicle while standing on the side of a road. The employer accepted multiple conditions, including a combined condition. The effective date of the employer's combined condition acceptance was September 26, 2010 (the date of injury). (*Id.*) Effective December 26, 2010, the employer denied the combined condition, asserting that the otherwise compensable injury ceased to be the major contributing cause of the combined condition and its need for treatment. (Ex. 241).

Claimant also requested that the employer accept deviated nasal septum and thoracic strain as new/omitted medical conditions. The employer denied those claims. Claimant requested a hearing concerning the employer's "ceases" denial,¹ as well as its denials of his new/omitted medical condition claims.

The ALJ upheld the employer's denials. Concerning the "ceases" denial, the ALJ reasoned that Dr. Berney, who examined claimant at the employer's request, persuasively explained that claimant's combined diabetes condition changed, such that the work injury ceased to be the major contributing cause of claimant's need for treatment, as of December 26, 2010. In upholding the employer's denial of the new/omitted medical condition claim for a deviated nasal

¹ Claimant agrees there is a combined condition. (Appellant's Brief, P. 2).

septum, the ALJ also relied principally on the opinion of Dr. Berney. Finally, the ALJ upheld the employer's denial of claimant's new/omitted medical condition claim for a thoracic strain, reasoning that that the opinion of Dr. Strum, who examined claimant at the employer's request, was more persuasive than the opinion of Dr. Johns, claimant's treating chiropractor.

On review, claimant challenges each of those determinations. We affirm, addressing claimant's specific contentions as follows.

"Ceases" Denial

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); *Heron J. Strong*, 62 Van Natta 1363, 1365 (2010). The word "ceases" presumes a change in circumstances or a change in the claimant's condition. *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 414 (2008); *State Farm Ins. Co. v. Lyda*, 150 Or App 554, 559 (1997); *Strong*, 62 Van Natta at 1365.

The "effective date" of the combined condition acceptance determines the "baseline" for determining whether there has been a "change" in claimant's condition or circumstances to justify a denial under ORS 656.262(6)(c). *Bacon*, 208 Or App at 210; *Strong*, 62 Van Natta at 1365. In the absence of evidence showing such a change at the time of the denial's issuance, the employer's denial will be set aside. *Washington County-Risk v. Jansen*, 248 Or App 335, 345 (2012); *Bacon*, 208 Or App at 208–11.

Here, claimant's combined diabetes condition was accepted as of the date of injury, September 26, 2010. (Ex. 237). Accordingly, the employer must establish a change in claimant's circumstances or accepted combined diabetes condition between September 26, 2010, and December 26, 2010, the effective date of its denial, such that the otherwise compensable September 26, 2010 injury ceased to be the major contributing cause of the combined diabetes condition. *See* ORS 656.262(6)(c); *Strong*, 62 Van Natta at 1365.

The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's condition and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995). Because of the possible alternative causes of claimant's condition, expert medical opinion must be used to resolve the question

of causation. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we “place more emphasis on opinions that are well reasoned and based on the most complete relevant information.” *Jackson County v. Wehren*, 186 Or App 555, 559 (2003); *accord Karl W. Gayler*, 64 Van Natta 1916, 1918 (2012).

According to Dr. Berney, claimant’s September 26, 2010 work injury aggravated his preexisting diabetes mellitus condition, with the work injury initially being the major cause of that combined diabetes condition “for two to three months.” (Ex. 235-6 through 8; *see also* Ex. 262). Dr. Berney explained, however, that within three months of the work incident (i.e., by December 26, 2010), claimant’s “bones healed and his nutrition improved,” such that the otherwise compensable injury was no longer the major cause of the combined diabetes condition and need for treatment. (Exs. 235-6 through 8, 262).

Claimant contends that Dr. Berney’s opinion is unpersuasive because it is “contrary to the medical evidence” that claimant is now “insulin-dependent,” whereas he previously used “oral agents” for his diabetes condition. Dr. Berney explained, however, that “patients are often switched from oral agents to insulin while in the hospital” (as claimant was), and that such a “switch is often maintained in the outpatient setting.” (Ex. 235-6; *see also* Ex. 262). Moreover, Dr. Berney explained that insulin “would have been the preferred therapy in the two years prior to” claimant’s work injury. (Exs. 235-8, -9, 262).

Although Dr. Becker opined that claimant’s otherwise compensable injury remained the major cause of his combined diabetes condition after December 26, 2010 (Ex. 256C-1), we find that opinion conclusory, and neither as thorough nor as well reasoned, as that of Dr. Berney. Therefore, the ALJ properly relied on Dr. Berney’s opinion in upholding the employer’s “ceases” denial. *See Moe v. Ceiling Systems*, 44 Or App 429, 433 (1980) (conclusory medical opinions unpersuasive); *Shirley Fong*, 63 Van Natta 1632, 1635 (2011) (same); *see also Wehren*, 186 Or App at 559 (more emphasis given to medical opinions that are well reasoned); *Gayler*, 64 Van Natta at 1918 (same). Accordingly, we affirm this portion of the ALJ’s order.

New/Omitted Medical Condition Claims

To prevail on his new/omitted medical condition claims for deviated nasal septum and thoracic strain conditions, claimant must establish the existence of those conditions, and that his work injury is a material contributing cause of the

disability/need for treatment for those conditions. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition).² Here, we find the medical evidence insufficient to satisfy claimant's burden regarding both claimed conditions.

With regard to the claim for a deviated nasal septum, the parties do not dispute the existence of that condition. Claimant relies on the opinion of Dr. Leedy, one of his treating physicians.³ Dr. Leedy opined that claimant's September 2010 work injury was the major contributing cause of the claimed deviated nasal septum and need for treatment. (Ex. 254B). When asked to provide the basis of that opinion, Dr. Leedy referenced his record of December 13, 2010. (*Id.*) That record, however, merely diagnosed a deviated nasal septum "secondary to [claimant's] motor vehicle accident, byposmia, and possible chronic sinus disease," without additional discussion. (Exs. 131, 132A).

Dr. Berney, on the other hand, concluded that claimant's deviated nasal septum could not be attributed to the September 2010 work injury, explaining that such a condition was "common," and that the condition could have existed before that work injury. (Ex. 259-2). In reviewing the updated medical records, Dr. Berney indicated that there was not sufficient evidence to support claimant's new/omitted medical condition claim for a deviated nasal septum. (*Id.*)

Likewise, Dr. Rydlund stated that "deviated nasal septums are actually quite common in the general population and can occur at birth, naturally over time or acutely." (Ex. 255-1). "In [claimant's] case," Dr. Rydlund concluded that "there was no way * * * to tell if his deviated nasal septum was acute or otherwise pre-existed the [work] injury." (*Id.*) Therefore, in terms of medical probability, Dr. Rydlund was unable to relate claimant's deviated nasal septum to the work injury. (*Id.*)

In sum, Dr. Leedy provided the only opinion supportive of claimant's new/omitted medical condition claim for the deviated nasal septum. That opinion, however, was conclusory, and did not persuasively address the contrary opinions of Drs. Berney and Rydlund, which indicated other possible causes of the claimed condition.

² The employer has not asserted that the claimed conditions involve statutory "preexisting conditions" or "combined conditions."

³ Claimant acknowledges that Dr. Becker's opinion does not support his claim for the deviated nasal septum.

Under such circumstances, we find that claimant has not satisfied his burden of proving, with persuasive medical evidence, the compensability of his claim. Accordingly, we affirm that portion of the ALJ's order.

Finally, we address claimant's new/omitted medical condition claim for a thoracic strain. According to Dr. Johns, claimant sustained such a condition as a result of the September 2010 work injury. (Ex. 256B-2). Dr. Johns acknowledged a delay in claimant reporting thoracic pains after the work injury, but assigned significance to a "gating phenomenon," wherein claimant's non-ambulatory hospitalization resulted in "minimal subjective complaints" in the mid-back. (*Id.*) Dr. Johns further stated that once claimant "was ambulating again," he experienced more "spinal region symptoms consistent with late sequelae of sprain-strain injuries." (*Id.*)

Dr. Strum disagreed that claimant sustained a thoracic strain as a result of the September 2010 work injury, or that such a condition existed after that injury. (Exs. 234-16, 258). Dr. Strum reasoned that claimant's thoracic symptoms were related to accepted bilateral rotator cuff tears and rib fractures, not to any thoracic strain. (*Id.*) Dr. Strum further observed that claimant directly denied any thoracic symptoms following the work injury. (Ex. 258-2). Moreover, Dr. Strum stated that Dr. Johns's theories of a "late-sequelae of sprain-strain injuries" and "gating phenomenon" were not supported by medical literature. (*Id.*)

Dr. Johns did not persuasively address Dr. Strum's opinion that claimant's thoracic symptoms were attributable to other accepted conditions. Moreover, Dr. Johns did not further elaborate on his "gating phenomenon" theory, which Dr. Strum discounted.

Under these circumstances, we rely on Dr. Strum's opinion, which we find more thorough and better reasoned than the opinion of Dr. Johns. Consequently, claimant has not established that he sustained a thoracic strain, or that the work injury was a material contributing cause of any disability/need for treatment for such a condition. Accordingly, we affirm that portion of the ALJ's order.

ORDER

The ALJ's order dated May 10, 2012 is affirmed.

Entered at Salem, Oregon on June 19, 2013