
In the Matter of the Compensation of
SARAH E. MORGAN, Claimant
WCB Case No. 13-01038
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer and Lanning.

The self-insured employer requests, and claimant cross-requests, review of those portions of Administrative Law Judge (ALJ) Fulsher's order that: (1) reversed an Order on Reconsideration that rescinded a Notice of Closure as premature; (2) awarded 8 percent whole person permanent impairment for right ankle conditions; and (3) awarded 17 percent work disability. On review, the issues are premature closure and permanent disability (impairment and work disability). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

As a result of claimant's compensable July 19, 2011 injury, the employer accepted right ankle sprain, anterior talofibular and calcaneofibular ligament tear and post traumatic synovitis, peroneal tendinitis, and tenosynovitis. Claimant underwent right ankle surgery on October 3, 2011 and November 22, 2011. She continued to report pain, particularly when standing for extended periods.

On August 18, 2012, Dr. Ghodadra, an employer-arranged medical examiner, opined that claimant's conditions were medically stationary. (Ex. 67-10-11). He also opined that there was permanent impairment due to range of motion (ROM) loss, but, based on disproportionate and inconsistent pain reporting, stated that claimant was malingering and required no further treatment. (*Id.*) He found no evidence of reflex sympathetic dystrophy (RSD) and concluded that claimant could return to regular work. (Ex. 67-12).

On November 6, 2012, the employer closed the claim with no permanent disability award. (Ex. 90-1). The Notice of Closure stated that claimant's conditions were medically stationary on August 18, 2012, and that claimant had been released to regular work. (*Id.*) Claimant requested reconsideration.

On January 29, 2013, the Appellate Review Unit (ARU) issued an Order on Reconsideration, finding that claimant's conditions were not medically stationary. (Ex. 94-2). The employer requested a hearing regarding the Order on Reconsideration.

The ALJ acknowledged claimant's contention that she suffered from a direct medical sequela of the accepted conditions, specifically RSD or nerve injury, which was not medically stationary before claim closure. However, the ALJ concluded that the existence of such sequelae had not been established. Accordingly, the ALJ found the accepted conditions medically stationary before claim closure.

The ALJ then awarded 8 percent whole person permanent impairment based on Dr. Ghodadra's ROM findings. Finally, based on the last work release from Dr. Kawahara, claimant's attending physician, the ALJ concluded that claimant had not been released to regular work and awarded 17 percent work disability.

On review, the employer contends that the ALJ's permanent disability awards should be reversed because claimant had not preserved those issues at hearing. In her cross-request, claimant asserts that the claim was closed prematurely because a direct medical sequela of the accepted condition was not medically stationary. As explained below, we agree with claimant's contention.

ORS 656.268(1)(a) authorizes claim closure when the worker's conditions have become medically stationary and there is sufficient information to determine impairment. A condition is "medically stationary" no further material improvement would reasonably be expected from medical treatment or the passage of time. ORS 656.005(17). Whether a condition is medically stationary is primarily a medical question to be decided based on competent medical evidence, not limited to the opinion of the attending physician. *Harmon v. SAIF*, 54 Or App 121, 125 (1981).

If an accepted condition has a "direct medical sequela," the sequela must also be medically stationary at claim closure. *See Manley v. SAIF*, 181 Or App 431, 437-39 (2002). OAR 436-035-0005(6) defines a "direct medical sequela" as "a condition which originates or stems from an accepted condition that is clearly established medically."

Here, Dr. Blatt, a consulting pain specialist, asserted that Dr. Ghodadra's assessment of "malingering" was not adequately supported by either Dr. Ghodadra's recorded findings or his own clinical findings.¹ (Ex. 92-2-3). Dr. Blatt opined that claimant's ongoing symptoms could result from either of two possibilities: RSD or a skin nerve that was cut during one of the surgical procedures. (Ex. 92-1).

Dr. Blatt explained that RSD findings may not all be present at all times, noting that he had made some findings consistent with RSD, and that claimant had reported other symptoms consistent with RSD. (Ex. 92-2). He commented that diagnostic treatment would be required to determine which diagnosis was actually the cause of her symptoms. (Ex. 92-3-4). However, he opined that either diagnosis would have been caused by the original injury or by reasonable and necessary treatment.² (Ex. 92-2). He further concluded that the medical sequela was not medically stationary because it had not been appropriately treated. (Id.)

Dr. Kawahara concurred with Dr. Blatt's opinion. (Ex. 93-2). She also stated that claimant had experienced improvement with a trial of gabapentin, and experienced worsening when that treatment was discontinued. (Id.) She opined that these results also indicated that claimant's conditions were not medically stationary. (Id.) Additionally, she acknowledged that she had earlier indicated

¹ The employer contends that Dr. Blatt could not rule out malingering. Yet, Dr. Blatt explained that, because he had only met claimant once, he could not assess malingering. (Ex. 92-3). Moreover, he considered it "inappropriate to describe any patient as malingering unless there was legitimate evidence for the conclusion," and found Dr. Ghodadra's rationale for the "malingering" assessment to be inconsistent with his own examination. (Ex. 92-2-3).

² Dr. Blatt opined that, regardless of whether claimant suffered from RSD or symptoms of a nerve injury, "the condition would be related to the original injury or the consequences of reasonable and necessary treatment." (Ex. 92-2). In the context of his overall opinion, we interpret Dr. Blatt's reference to "the original injury or the consequences of reasonable and necessary treatment" to refer to the accepted conditions and the treatment of those conditions.

Citing *Multnomah County v. Shultz*, 243 Or App 354 (2011), the employer contends that this opinion is insufficient to establish that the condition "originate[d] or stem[med] from an accepted condition." In *Shultz*, the court held that a medical opinion that the claimant's coronary artery disease and cardiomyopathy were "related to" the accepted myocardial infarction did not establish whether the coronary artery disease and cardiomyopathy caused, or were caused by, the accepted condition. 243 Or App at 362. Here, by contrast, Dr. Blatt explained how such diagnoses would have been caused by the accepted conditions or treatments, and did not suggest the possibility of another type of "relationship." In this context, his opinion attributes causation to the accepted conditions.

agreement with Dr. Ghodadra's opinion,³ but explained that she had, at the same time, recommended that claimant be evaluated by a pain specialist, and that her opinion had changed as a result of Dr. Blatt's evaluation and the results of treatment. (Ex. 93-1-2).

The opinions of Drs. Blatt and Kawahara are more persuasive than Dr. Ghodadra's opinion that claimant's conditions were medically stationary. Dr. Ghodadra reasoned that claimant was malingering, based on inconsistent and disproportionate pain reporting, but noted impairment findings and did not explain how his assessment of malingering indicated that no further material improvement would reasonably be expected from medical treatment or the passage of time.

Dr. Blatt, by contrast, explained how his findings were consistent with RSD and discussed the testing required to determine whether claimant was suffering from RSD or a nerve injury, as well as the treatment that he expected to result in further material improvement. Additionally, Dr. Kawahara explained why claimant's response to treatment indicated that further material improvement would reasonably be expected from treatment.

The employer notes that Dr. Gentile, claimant's attending physician, concurred with Dr. Ghodadra's opinion. We acknowledge that Dr. Gentile was "in accord" with Dr. Ghodadra's opinion, and signed a concurrence indicating agreement "in every particular." (Exs. 82, 83). However, at the same time, Dr. Gentile opined that claimant should be referred to a pain management clinic and that her work restrictions would be "open ended" until her response to pain management could be evaluated. (Ex. 82). Thus, such comments appear to be inconsistent with the proposition that Dr. Gentile believed that it was unlikely that claimant's conditions would improve with further treatment. Accordingly, we do not consider that Dr. Gentile's opinion persuasively supports a conclusion that claimant's conditions were medically stationary.

The employer also argues that the opinions of Drs. Blatt and Kawahara, taken at face value, do not support a "direct medical sequela" because they do not "clearly establish medically" a "condition," as required by OAR 436-035-0005(6).

³ On October 23, 2012, Dr. Kawahara opined that claimant's depression was playing a role in her slow recovery. (Ex. 86). However, rather than opining that claimant's conditions were medically stationary or that she was malingering, or could return to regular work, Dr. Kawahara opined that she should see a pain specialist for further treatment. (*Id.*) Additionally, on November 19, 2012, Dr. Kawahara stated that claimant's conditions were medically stationary, but based that statement only on the fact that no further *surgical* intervention was indicated. (Ex. 91-2). She stated that claimant should go forward with treatment recommended by Dr. Blatt. (*Id.*)

Specifically, it asserts that their opinions were ambivalent regarding whether claimant's symptoms were due to RSD or a nerve injury, and therefore do not establish either condition.

However, as discussed above, the opinions of Drs. Blatt and Kawahara persuasively establish that claimant suffered from either RSD or a nerve injury caused by the surgical procedures for claimant's accepted conditions, and that in either event, the condition was caused by the accepted conditions. Thus, regardless of the correct diagnosis, a "condition which originates or stems from an accepted condition" has been "clearly established medically."⁴ In other words, their opinions establish that there is a direct medical sequela, even if the specific diagnosis for that direct medical sequela has not been established.

Under such circumstances, we agree with the ARU's conclusion that claimant suffers from a direct medical sequela of the accepted conditions, and that the direct medical sequela is not medically stationary. Accordingly, claim closure was premature.

Because we find that the reconsideration order rescinding the Notice of Closure should not be reversed as a result of the employer's hearing request and arguments on review, it is appropriate to award claimant's counsel a carrier-paid attorney fee for services expended at the hearing level and on Board review regarding the premature closure issue. ORS 656.382(2); *SAIF v. DeLeon*, 352 Or 130, 143 (2012); *Justin D. Morris*, 65 Van Natta 334 (2013).

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable fee for claimant's attorney's services at the hearing level and on Board review regarding the premature closure issue is \$6,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellate briefs, and his counsel's uncontested fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

⁴ Under such circumstances, we need not address claimant's contentions regarding the rule's validity and what constitutes a "medical sequela."

ORDER

The ALJ's order dated July 18, 2013 is reversed. In lieu of the ALJ's order and permanent disability awards, the Order on Reconsideration is reinstated and affirmed. For services at hearing and on review regarding the premature closure issue, claimant's attorney is awarded an assessed fee of \$6,000, payable by the employer.

Entered at Salem, Oregon on January 27, 2014