
In the Matter of the Compensation of
CREIGHTON E. KENNEY, Claimant
WCB Case No. 12-05737
ORDER ON REVIEW
Unrepresented Claimant
David Runner, SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Crummé's order that: (1) declined to reopen the record for the presentation of additional materials and evidence including the depositions of his surgeon and an insurer-arranged medical examiner; and (2) upheld the SAIF Corporation's partial denial of his new/omitted medical condition claim for bilateral leg atrophy.¹ On review, the issues are evidence and compensability.²

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

The ALJ declined to reopen the record to receive additional materials consisting of appellate court briefs from another proceeding involving claimant's denied left ACL rupture and depositions of physicians claimant's former counsel allegedly failed to depose. The ALJ reasoned that the appellate court briefs were not relevant to the currently denied atrophy condition and no persuasive reason had been provided for why claimant could not have reasonably deposed Drs. Pollard and James by the time of the hearing.

¹ Because claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

OMBUDSMAN FOR INJURED WORKERS
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405

² Claimant has requested oral argument before the Board. We do not ordinarily entertain oral argument. OAR 438-011-0015(2). We may, nevertheless, allow oral argument where the case presents an issue of first impression that could have a substantial effect on the workers' compensation system. OAR 438-011-0031(2); *e.g.*, *Joe R. Ray*, 48 Van Natta 325, *recons*, 48 Van Natta 458 (1996); *Jeffrey B. Trevitts*, 46 Van Natta 1767 (1994). The decision to grant such a request is solely within our discretion. OAR 438-011-0031(3). Here, because the written arguments adequately present the parties' positions, we do not consider oral argument to be necessary. *See Patricia J. Schiffer*, 62 Van Natta 3012 n 1 (2010).

On review, claimant contests the ALJ's decisions.³ For the following reasons, we uphold the ALJ's evidentiary rulings.

The ALJ's evidentiary discretion continues after the hearing and closure of the record, and we review "post-closure" evidentiary decisions for abuse of discretion. *See* OAR 438-007-0025(1) (ALJ may reopen the record and reconsider a decision before a request for review is filed or, if none is filed, before the time for requesting review expires); *Rodney C. Walters*, 63 Van Natta 114 (2011) (it was within the ALJ's discretion to admit evidence that was submitted after the initial written argument); *Howard D. Smith*, 57 Van Natta 1796 (2005) (admission of "post-hearing" evidence was within the ALJ's discretion).

Here, the record does not suggest that claimant was prohibited from presenting evidence, requesting depositions, or offering any testimony at the hearing. Moreover, claimant was asked whether he had anything to add to the record before the proceedings were concluded. He stated "No, sir." (Tr. 25).

Claimant, however, later sought to present additional materials consisting of appellate court briefs from another proceeding involving his denied claim for left ACL rupture and to depose physicians his former counsel allegedly failed to cross-examine. Nevertheless, even if the briefs from the other proceeding (which concern a different denied claim) were considered, they would not change the outcome of this case. Specifically, the record does not persuasively establish that claimant's previously accepted 2004 left knee medial meniscus tear/knee strain was the major contributing cause of either his left or right leg atrophy. *See* ORS 656.005(7)(a)(A).

With respect to the requested depositions, there is no explanation why they could not have been obtained before the hearing record closed or why a request for depositions could not have been made at or before the hearing. Under such circumstances, we find no abuse of discretion in the ALJ's decision declining to reopen the record.

³ It has come to our attention that claimant submitted a letter by means of email to the Board's "request for hearing/review" email address. Yet, that email address is exclusively designed for the "filing" of requests for hearing/review. *See* OAR 438-005-0046(1)(f). Furthermore, claimant has been reminded on numerous occasions that his appellate arguments must be filed by means of the U.S. mail, FAX, and physical delivery. *See* OAR 438-005-0046(1)(a), (h). Likewise, it has been previously explained to claimant that any document filed with the Board must include his certification that a copy has also been provided to the other party. *See* OAR 438-005-0046(1)(i), (2)(a). Finally, the time has expired for the filing of his reply brief. Because of these numerous rule violations (all occurring after he received notification of these requirements), we are disinclined to address claimant's submission. Nonetheless, even if this submission was considered, it would not alter any of the reasoning and conclusions expressed above.

Claimant also questions the ALJ's finding that he sustained a left knee injury in 1983. However, the portion of the ALJ's order to which claimant objects consists merely of a reference to a finding in a prior ALJ's 2005 order that has become final. (Ex. 26-2). Nevertheless, even if we disregarded the ALJ's reference to the prior ALJ's finding and determined that claimant did not sustain a left knee injury in 1983, no physician supports a conclusion that claimant's accepted left meniscus tear/knee strain was the major contributing cause of his claimed bilateral leg atrophy. Consequently, this record does not establish a compensable consequential condition under ORS 656.005(7)(a)(A), whether or not claimant sustained a 1983 left knee injury.⁴

Finally, claimant asserts that his constitutional rights have been violated, referring to a rule change in 2006 that allegedly created a lack of oversight, a conflict of interest and a violation of "due process." The ALJ's decision, however, was based on the medical record and applicable statutes as enacted by the legislature. Furthermore, the ALJ's decision is reviewable by the Board, the Court of Appeals and, potentially, the Oregon Supreme Court. ORS 656.295; 656.298. Such an appellate process does not support claimant's contention that the workers' compensation system lacks oversight.⁵ Moreover, we do not perceive any conflict of interest or violation of due process in this matter, which simply involved a contested case hearing concerning a denied claim, the parties' opportunity to present testimonial and documentary evidence (as well as to submit arguments in support of their respective positions), an ALJ's decision applying the controlling law to the facts in the record, and our review of the record, the ALJ's order and the parties' arguments.⁶

⁴ Dr. James expressly concluded that the accepted conditions were not the major contributing cause of the bilateral atrophy conditions. (Ex. 67). Even if we disregarded Dr. James's opinion, it is claimant's burden to prove the compensability of his claim. ORS 656.266(1). Because the record lacks a medical opinion affirmatively supporting the compensability of his currently claimed conditions, we would still uphold SAIF's denial.

⁵ Although not entirely clear from his submission, claimant's reference to a 2006 rule change may concern the amendments that authorized the Board's ALJs to conduct hearings regarding appeals of WCD administrative review decisions. Should that be the basis of claimant's "oversight" and "conflict of interest" concerns, this case does not involve such a situation. Instead, the issue in dispute pertains to a denied new/omitted medical condition claim, which has always been litigated before the Hearings Division, with appellate review by the Board and the reviewing courts. Thus, the 2006 "rule changes" had no effect on this longstanding statutorily authorized process.

⁶ Referring to his legal representation in a previous proceeding, claimant asserts that he was deprived of competent legal representation. However, we are not the proper forum for litigating the adequacy of legal representation. See *Kathleen M. Depping*, 57 Van Natta 1049 (2005); *Becky L. Degenhardt*, 54 Van Natta 1189 (2002).

Having reviewed this matter *de novo*, we agree with the ALJ's reasoning and conclusions. Therefore, the ALJ's order is affirmed.

ORDER

The ALJ's order dated October 10, 2013, as reconsidered on December 23, 2013, is affirmed.

Entered at Salem, Oregon on May 7, 2014