
In the Matter of the Compensation of
PHILLIP EMERSON, Claimant
WCB Case No. 13-04742, 12-04973, 12-01793
ORDER ON REVIEW
Unrepresented Claimant
Thaddeus J Hettle & Assoc, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant, *pro se*,¹ requests review of Administrative Law Judge (ALJ) Lipton's order that upheld the self-insured employer's denial of claimant's injury and occupational disease claims for bilateral shoulder conditions. Claimant's attending physician has submitted an additional medical report, which we treat as a motion for remand to the Hearings Division. *See Judy A. Britton*, 37 Van Natta 1262 (1985). On review, the issues are remand and compensability.

We adopt and affirm the ALJ's order with the following supplementation.²

On February 10, 2012, August 1, 2012, and July 29, 2013, the employer denied claimant's injury and occupational disease claims for bilateral shoulder conditions. Claimant's requests for hearing were consolidated. Reasoning that the persuasive medical evidence did not establish that claimant's history of work-related shoulder injuries and cumulative work activities were the major contributing cause of his bilateral shoulder conditions, the ALJ upheld the denials.

On review, claimant contends that his claim should be analyzed as one for an injury and, because the employer has not established a "preexisting condition" as defined by ORS 656.005(24), his claim is subject to the "material contributing cause" standard. Alternatively, claimant asserts that his bilateral shoulder condition is compensable under the "major contributing cause" standard.

¹ Because claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers, whose job it is to assist 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 On page 6, we change the date of Dr. Cullen's consultation to "January 25, 2013."

Additionally, claimant argues that his rights to due process under the Oregon and United States constitutions have been violated. Finally, we have received a letter from Dr. Schwartz, his attending physician, which we treat as a motion to remand.

Remand

We may remand to the ALJ if we find that the case has been improperly, incompletely, or otherwise insufficiently developed. ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000). A compelling reason exists where the new evidence: (1) concerns disability; (2) was not obtainable through the exercise of due diligence at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986).

Insofar as the additional report submitted by Dr. Schwartz addresses disability, it does so in a conclusory fashion and is cumulative of reports that are currently in the record. (Exs. 148, 177). Accordingly, it would not be reasonably likely to affect the outcome of the case. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1080) (rejecting unexplained or conclusory opinion); *Joanne L. Banzer*, 61 Van Natta 2448 (2009) (remand motion denied where the proposed evidence was cumulative). Additionally, there is no indication that such evidence was unobtainable with the exercise of due diligence at the time of the hearing. Therefore, we deny claimant's motion to remand.

Due Process

Claimant asserts that his constitutional right to "due process" has been violated. Yet, the record does not establish that he raised this constitutional challenge at the hearing. Under such circumstances, we are not inclined to consider this challenge for the first time on review.³ *See Stevenson v. Blue Cross of Oregon*, 108 Or App 247 (1991) (Board may refuse to consider issues raised on review that are not presented at hearing); *Justin D. Morris*, 65 Van Natta 812, 815 (2013) (declining to consider constitutional challenge raised for the first time on review).

³ In any event, claimant's "due process" challenge appears to be based on the premise that ORS 656.225 prevents him from obtaining benefits to which he is entitled. As discussed below, ORS 656.225 has no application to this case. Further, claimant had the opportunity to request a hearing to contest the employer's denial and present evidence in support of his claim. Accordingly, we would find no violation of his constitutional rights.

Compensability

In an injury claim, the claimant bears the initial burden to show that the work injury was the material contributing cause of his disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Knaggs v. Allegheny Techs.*, 233 Or App 91 (2008). If the claimant makes that showing, but the otherwise compensable injury combined with a preexisting condition, the employer may prove that the combined condition was not compensable by showing that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined condition.⁴ ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

In an occupational disease claim, however, the claimant bears the burden to prove that employment conditions, including work-related injuries and cumulative work activities, were the major contributing cause of the condition. ORS 656.266(1); ORS 656.802(2)(a); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, *rev den*, 300 Or 722 (1986). If the occupational disease claim is based on the worsening of a preexisting condition, claimant must prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.266(1); ORS 656.802(2)(b). In the “occupational disease” claim context, determination of the “major contributing cause” requires weighing the relative contribution of all causes, regardless of whether they are “preexisting conditions” under ORS 656.005(24). *Bowen v. Fred Meyer Stores*, 252 Or App 558, 563 (2005).

⁴ Claimant contends that if a preexisting condition contributed to his current injury, compensability would be determined under ORS 656.225 because the preexisting condition was worsened by work conditions or events. ORS 656.225 provides:

“In accepted injury or occupational disease claims, disability solely caused by or medical services solely directed to a worker’s preexisting condition are not compensable unless:

“(1) In occupational disease or injury claims other than those involving a preexisting mental disorder, work conditions or events constitute the major contributing cause of a pathological worsening of the preexisting condition.”

Because this claim does not involve disability solely caused by, or medical services solely directed to, a worker’s preexisting condition in an accepted injury or occupational disease claim, ORS 656.225 would not apply regardless of whether a work injury worsened a preexisting condition.

An “occupational disease” is distinguished from an “injury” by its gradual onset, whereas an injury arises suddenly due to an identifiable event or has an onset traceable to a discrete period. *Mathel v. Josephine County*, 319 Or 235, 240 (1994); *Smirnoff v. SAIF*, 188 Or App 438, 443 (2003). When distinguishing between an “injury” and an “occupational disease,” it is the onset of the condition, rather than the onset of symptoms, that is relevant. *Smirnoff*, 188 Or App at 446.

The ALJ noted that Dr. Schwartz attributed claimant’s bilateral shoulder conditions to previous shoulder injuries and cumulative work activities. We agree with this interpretation of Dr. Schwartz’s opinion, and additionally note that claimant’s bilateral shoulder conditions were not attributed to a specific work event. (Exs. 148-1, 177-2). Such evidence would support a compensability analysis under “occupational disease” standards.⁵ Accordingly, claimant must establish that his bilateral shoulder conditions were caused in major part by employment conditions.

The causation issue presents a complex medical question that must be resolved by expert medical opinion. *Uris v. State Comp. Dep’t*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1983). Whether we give more or less weight to a claimant’s treating physician depends on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *see also Allie v. SAIF*, 79 Or App 284 (1986) (no special credit given to the opinion of the treating physician where the case turned on expert analysis rather than expert external observation).

Here, Dr. Schwartz based his opinion on claimant’s extensive history of left shoulder work injuries, as well as the cumulative effects of work activities.⁶ (Ex. 177-2). He acknowledged that claimant’s history of shoulder injuries

⁵ Dr. Schwartz opined that three of claimant’s work-related incidents, by themselves, would have been sufficient to precipitate claimant’s right shoulder rotator cuff tear. (Ex. 177-8-9). However, he did not opine that any of these incidents probably, rather than possibly, was the injury that caused the rotator cuff tear. Such evidence does not persuasively support an injury theory of compensability. *See Gormley v. SAIF*, 52 Or App 1055, 1059 (1981).

⁶ Claimant has an extensive prior history of work-related left shoulder injuries and incidents. Accepted left shoulder work injuries occurred in 1982, 2005, and 2010. (Exs. 6, 7, 90, 130). A 2003 injury, which was accepted for a thoracic strain, involved pain in the left shoulder blade area. (Exs. 76, 68). A 1992 left shoulder injury was denied on responsibility grounds, but medical evidence attributed his left shoulder injury to the work incident. (Exs. 41, 42). Work incidents in 2002, 2003, and 2006 provoked left shoulder symptoms that prompted him to seek treatment. (Exs. 68, 71, 119). Dr. Schwartz recounted this history and noted that claimant had experienced other work incidents involving his shoulders. (Ex. 177-2-9).

primarily involved the left shoulder, but identified the ergonomics of claimant's use of his right hand for certain tasks, as well as several specific incidents, as potentially causing his shoulder conditions. (Ex. 177-8-9). He reasoned that contrary medical opinions failed to consider the nature of claimant's work activities or his history of work injuries. (Ex. 177-10). We disagree.

Dr. Brenneke, who examined claimant on referral from Dr. Schwartz, opined that employment conditions were not the major contributing cause of claimant's bilateral shoulder conditions. (Ex. 158-3). He acknowledged that cumulative trauma or a series of discrete injuries could cause torn rotator cuffs. (Ex. 172-22). He reviewed claimant's history of shoulder problems. (Ex. 172-35-47). However, considering that claimant's history of work-related trauma primarily involved the left shoulder, he opined that the bilateral nature of claimant's rotator cuff conditions suggested that they were degenerative rather than caused by trauma. (Ex. 172-32). Consequently, Dr. Brenneke opined that degeneration, rather than employment conditions, was the major contributing cause of claimant's bilateral shoulder conditions. (Ex. 172-33, 48).

Dr. Bowman, who examined claimant on referral from Dr. Brenneke, also opined that employment conditions were not the major contributing cause of claimant's bilateral shoulder conditions. (Ex. 173-39). After claimant's attorney provided a thorough description of claimant's history of work related shoulder injuries and work activities, Dr. Bowman noted that not all such injuries related to the rotator cuff. (Ex. 173-34-35). He acknowledged that several of claimant's past work injuries could have contributed to his bilateral shoulder conditions, but opined that the conditions were consistent with aging and degeneration. (Ex. 173-36). Considering the specific mechanics of claimant's ordinary work activities, Dr. Bowman also acknowledged that they probably made some contribution, but he explained why he did not believe that contribution to have been great. (Ex. 173-28, -37-39). Dr. Bowman opined that in light of the fact that work activities and prior injuries primarily involved the left shoulder, the extent of claimant's right-sided complaints indicated that degeneration was a more significant cause of the bilateral shoulder conditions. (Ex. 173-40).

Drs. Brenneke and Bowman offered well-reasoned opinions that considered the nature of claimant's bilateral shoulder conditions, his history of work injuries, and his work activities. They persuasively explained that the bilateral nature of claimant's shoulder conditions indicated that employment conditions (*i.e.*, primarily left-sided injuries and left-sided work activities) were probably not the major contributing cause of the bilateral shoulder conditions. Additionally, they

explained that claimant's shoulder degeneration was a cause of, and not merely a susceptibility to, his bilateral shoulder conditions. Dr. Schwartz did not persuasively address such reasoning.

Under such circumstances, we find the opinions of Drs. Brenneke and Bowman more persuasive. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion less persuasive when it did not address contrary opinions). Accordingly, the record does not persuasively establish that claimant's employment conditions were the major contributing cause of his bilateral shoulder conditions. Therefore, we affirm.

ORDER

The ALJ's order dated December 20, 2013 is affirmed.

Entered at Salem, Oregon on October 7, 2014