
In the Matter of the Compensation of
GEORGE W. LICHTER, JR., Claimant
WCB Case No. 12-05156
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) found that his claim was not prematurely closed; and (2) awarded 20 percent whole person impairment and 26 percent work disability for his right arm and shoulder conditions. In its respondent's brief, the SAIF Corporation seeks a reduction in claimant's permanent disability awards. On review, the issues are premature closure and extent of permanent disability (impairment and work disability). We affirm in part and modify in part.

FINDINGS OF FACT

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

On December 6, 2010, claimant, a paving foreman, was compensably injured when he fell off a scaffold. (Ex. 1). SAIF ultimately accepted the following conditions: right shoulder strain, right elbow strain, SLAP lesion of the right shoulder, labral tear of the right shoulder, and biceps tendonitis of the right shoulder. (Exs. 2, 19).

On April 21, 2011, Dr. Bell performed right shoulder surgery, which he subsequently described as "arthroscopy with labral repair and subacromial decompression." (See Ex. 9-1).

On December 15, 2011, claimant underwent a work capacity evaluation (WCE) by Mr. Breuer. (Ex. 4). He found the following right/left shoulder ranges of motion (ROM): 130/165 degrees flexion; 40/70 degrees extension; 110/165 degrees abduction; 20/50 degrees adduction; 40/80 degrees internal rotation; and 60/90 degrees external rotation. (Ex. 4-4). Mr. Breuer found 4-/5 strength in claimant's right shoulder with flexion, adduction, and internal rotation, as well as 3+/5 strength with extension, abduction, and external rotation. (*Id.*). Claimant's contralateral left shoulder had 5/5 strength. (*Id.*) Mr. Breuer

determined that claimant was capable of “Light” level work, with a maximum lifting capacity of 20 pounds, and documented that he was able to only occasionally lift up to 17 pounds from waist-to-shoulder and 7 pounds from waist-to-overhead level, and frequently lift up to 8 pounds from waist-to-shoulder and zero pounds from waist-to-overhead level. (Ex. 4-2-3).

Dr. Law, claimant’s attending physician, concurred with the WCE findings. (Exs. 6, 7). He also agreed with Dr. Bell’s determination that claimant’s conditions were medically stationary on October 10, 2011. (*Id.*) Dr. Law stated that claimant was significantly limited in the repetitive use of the right shoulder due to the accepted conditions. (Ex. 7-2). He opined that claimant did not have any impairment related to the accepted right elbow condition. (Ex. 7-3). Dr. Law considered the impairment findings to be valid and due to the accepted conditions. (*Id.*)

On June 20, 2012, SAIF closed claimant’s injury claim with an award of 26 percent whole person impairment, and 32 percent work disability (based on a social-vocational value of 6 percent). (Ex. 20). Both parties requested reconsideration and a medical arbiter examination. (Exs. 21, 29). Claimant also raised the issue of premature closure. (Ex. 29).

On July 19, 2012, Dr. Hoellrich examined claimant for a second opinion regarding his ongoing bicipital pain. He recommended an MR arthrogram to evaluate the status of claimant’s right rotator cuff and labrum. (Exs. 24, 25).

In an August 10, 2012 letter to claimant’s counsel, Dr. Law stated that he believed that claimant was “not yet medically stationary in October 2011, though his plateau in progress at that time did suggest this.” Dr. Law’s opinion was based on an April 2012 medical review committee’s approval of additional physical therapy and recommendation for an orthopedic evaluation, as well as communication from claimant’s wife. (Ex. 28).

A September 13, 2012 Order on Reconsideration rescinded the June 20, 2012 Notice of Closure, finding that claimant’s conditions were not medically stationary at the time of claim closure. (Ex. 30-3). SAIF requested a hearing.

The ALJ initially found that claimant’s condition was medically stationary. Consequently, the ALJ reinstated the Notice of Closure and directed the parties to contact the Appellate Review Unit (ARU) to arrange a medical arbiter examination. Thereafter, claimant requested Board review of the ALJ’s order.

On review, we vacated the ALJ's order and remanded the case to the ALJ to await the medical arbiter examination and report. We also directed the ALJ, thereafter, to proceed with review of the remaining issues arising from the claim closure, including the determination of permanent disability. *George W. Lichte*, 65 Van Natta 1325 (2013).

On May 7, 2013, Drs. Dekker, Harris, and Rischitelli performed a medical arbiter panel examination. (Exs. 31, 32). The panel found the following right/left elbow ROM: 136/145 degrees flexion; 0/-10 degrees extension; 80/80 degrees pronation; and 90/90 degrees supination. (Ex. 31-9). They noted that claimant did not have any previous history of injury or disease to the contralateral left elbow joint. (Ex. 31-5). The panel found no other impairment in claimant's right elbow. They opined that claimant's right elbow ROM findings were valid and due to the accepted conditions. (Exs. 31-6, 32-2).¹

The medical arbiter panel also found the following right/left shoulder ROM: 162/165 degrees flexion; 26/45 degrees extension; 166/170 degrees abduction; 36/42 degrees adduction; 68/85 degrees internal rotation; and 66/85 degrees external rotation. (Ex. 31-9). They noted that claimant had no previous history of injury or disease to the contralateral left shoulder joint. (Ex. 31-5). The arbiter panel opined that claimant had 5-/5 strength in the right supraspinatus muscle (innervated by the suprascapular nerve) and 5-/5 strength in the right shoulder abductor muscles (innervated by the suprascapular nerve). (*Id.*) The arbiters concluded that claimant was significantly limited in the repetitive use of his right shoulder due to a chronic and permanent medical condition arising out of the accepted conditions. (Ex. 31-6). The shoulder findings were considered to be valid and due to the accepted conditions. (Exs. 31-6, 32-2). Finally, the medical arbiter panel opined that claimant was capable of lifting/carrying up to 50 pounds occasionally, 20 pounds frequently, and 10 pounds continuously with his right shoulder. (Ex. 31-7).

CONCLUSIONS OF LAW AND OPINION

Based on Dr. Law's statement that claimant had a "plateau in progress" in October 2011, the ALJ determined that claimant's condition was medically stationary at the time of claim closure. Finding that the impairment findings by

¹ Because the medical arbiter panel "apportioned" 50 percent of the right elbow ROM findings to the *accepted* right elbow strain, and the other 50 percent to the *accepted* right biceps tendonitis condition, we find that the panel attributed 100 percent of the right elbow ROM findings to the accepted conditions. (Ex. 32-2).

the WCE, as ratified by Dr. Law, preponderated over those by the medical arbiter panel, the ALJ awarded claimant 20 percent whole person impairment and 26 percent work disability for his right arm and shoulder conditions. The ALJ's whole person impairment award included a 5 percent impairment value for a partial acromion resection, but no award for a partial clavicle resection. The ALJ also relied on the WCE, as ratified by Dr. Law, to determine claimant's residual functional capacity (RFC).

In response to the parties' arguments on review, we resolve the contested issues as follows.

Premature Closure

We adopt and affirm that portion of the ALJ's order that found that claimant's injury claim was not prematurely closed.

Permanent Disability

On review, claimant does not dispute the ALJ's finding that permanent disability (impairment and work disability) should be rated based on the findings of the WCE, as ratified by Dr. Law (his attending physician). However, claimant argues that he is entitled to additional impairment values based on a partial clavicle resection, as well as strength loss. In response, SAIF argues that the medical arbiter panel findings should be used to rate claimant's permanent disability (impairment and work disability). It further contends that claimant is not entitled to surgical impairment values for the partial acromion resection and alleged partial clavicle resection. For the following reasons, we modify the ALJ's permanent disability awards.

Because the Notice of Closure issued on June 20, 2012, the applicable standards are found in WCD Admin. Order 10-051 (eff. June 1, 2010). OAR 436-035-0003(1). Evaluation of claimant's permanent disability shall be as of the date of issuance of the reconsideration order (*i.e.*, September 13, 2012). ORS 656.283(6).

For the purpose of rating 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. ORS 656.245(2)(b)(C); ORS 656.268(7); *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 medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, 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). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, Drs. Dekker, Harris, and Rischitelli (the medical arbiter panel) performed a thorough and complete examination. (Exs. 31, 32). We recognize that the medical arbiter panel did not review Dr. Hoellrich's "post-July 19, 2012" medical reports. (Ex. 31-4). Nevertheless, Dr. Law (the attending physician) expressly acknowledged that he did not review any of Dr. Hoellrich's reports. (Ex. 28). In any event, the arbiter panel noted that claimant underwent biceps tendondesis surgery and the resultant effects, and particularly considered the surgery in concluding that their findings were valid for the purposes of rating claimant's permanent impairment. (Ex. 31-4, -6). They unambiguously attributed claimant's impairment findings to the accepted conditions. (Exs. 31, 32).

After reviewing this record, we find no preponderance of the evidence persuasively demonstrating that the different findings by the WCE, as ratified by Dr. Law, were more accurate and should be used. Consequently, we rely on the medical arbiter panel findings to rate claimant's permanent impairment. OAR 436-035-0007(5); *Yoong K. Tunguyen*, 65 Van Natta 1427, 1429 (2013).

We begin with claimant's right arm (elbow) impairment. The medical arbiter panel found the following right/left elbow ROM: 136/145 degrees flexion; 0/-10 degrees extension²; 80/80 degrees pronation; and 90/90 degrees supination. (Ex. 31-9). Because claimant does not have a previous history of injury or disease to the left elbow, a contralateral joint comparison is appropriate. OAR 436-035-0011(3). Therefore, he receives the following impairment values for his right elbow ROM: 2.7 percent for flexion; zero percent for extension; zero percent for pronation; and zero percent for supination.³ OAR 436-035-0100(1), (2), (4). These values are added, for a total impairment value of 2.7 percent, which is rounded to 3 percent for right elbow ROM. OAR 436-035-0011(2), (4).

There are no other ratable right elbow impairment findings. Therefore, claimant's total right elbow impairment is 3 percent. Based on claimant's December 2010 date of injury, his 3 percent arm (elbow) impairment is converted to 2 percent whole person impairment. OAR 436-035-0115(4).

We now determine claimant's right shoulder impairment findings. The medical arbiter panel found the following right/left shoulder ROM: 162/165 degrees flexion; 26/45 degrees extension; 166/170 degrees abduction; 36/42 degrees adduction; 68/85 degrees internal rotation; and 66/85 degrees external rotation. (Ex. 31-9). Because claimant has no previous history of injury or disease in his left shoulder, a contralateral joint comparison is appropriate. OAR 436-035-0011(3). Therefore, claimant receives the following right shoulder impairment findings: 0.3 percent for flexion; 1 percent for extension, zero percent for abduction; zero percent for adduction; 0.8 percent for internal rotation; and zero percent for external rotation.⁴ OAR 436-035-0330(1), (3), (5), (7), (9), (11). These values are added, for a total impairment value of 2.1 percent, which is rounded 2 percent for right shoulder ROM. OAR 436-035-0011(2), (4).

² The arbiter panel clarified that claimant's left elbow was in 10 degrees hyperextension. (Ex. 31-9).

³ We compare claimant's right/left elbow flexion findings as follows: $136/145 = X/150$; $X = 140.7$, which is rounded to 141 degrees; 141 degrees receives an impairment value of 2.7 percent. OAR 436-035-0011(3), (4); OAR 436-035-0100(1).

Given claimant's left elbow extension, pronation, and supination findings, the result is the same whether the standards or a contralateral joint comparison is used. OAR 436-035-0007(13); OAR 436-035-0011(3); OAR 436-035-0100(2), (4).

⁴ We compare claimant's right/left shoulder flexion findings as follows: $162/165 = X/180$; $X = 176.7$, which is rounded to 177; 177 degrees receives an impairment value of 0.3 percent. OAR 436-035-0011(3), (4); OAR 436-035-0330(1).

The medical arbiter panel also opined that claimant was significantly limited in the repetitive use of his right shoulder due to the accepted conditions. (Ex. 31-6). Therefore, claimant receives a 5 percent impairment value for a “chronic condition” limitation in the right shoulder. OAR 436-035-0019(1)(g).

The arbiter panel found 5-/5 right shoulder strength in claimant’s supraspinatus and abductor muscles, which they reported are innervated by the suprascapular nerve. (Ex. 31-5). The suprascapular nerve has a shoulder impairment value of 9 percent. OAR 436-035-0330(17). 5-/5 strength receives a value of 5 percent. OAR 436-035-0011(7)(a). Because these muscles are innervated by the same nerve (suprascapular nerve), we must determine a single percentage of impairment for the involved nerve by averaging the percentages of impairment for the involved muscles. *See* OAR 436-035-0011(8).

Therefore, we calculate the strength loss for each muscle as follows: 5 percent times 9 percent equals 0.45 percent (supraspinatus); and 5 percent times 9 percent equals 0.45 percent (abductor). Consequently, we add these percentages of impairment for a total of 0.9 percent, which is then averaged (0.9 divided by 2) to arrive at a single percentage of impairment of 0.45 percent, which is rounded to 1 percent for the right shoulder suprascapular nerve. OAR 436-035-0011(4), (8).⁵

We compare claimant’s right/left shoulder extension findings as follows: $26/45 = X/50$; $X = 28.9$, which is rounded to 29; 29 degrees receives an impairment value of 1 percent. OAR 436-035-0011(3), (4); OAR 436-035-0330(3).

We compare claimant’s right/left shoulder abduction findings as follows: $166/170 = X/180$; $X = 175.8$, which is rounded to 176; 176 degrees receives an impairment value of zero percent. OAR 436-035-0011(3), (4); OAR 436-035-0330(5).

We compare claimant’s right/left shoulder adduction findings as follows: $36/42 = X/50$; $X = 42.9$, which is rounded to 43; 43 degrees receives an impairment value of zero percent. OAR 436-035-0011(3), (4); OAR 436-035-0330(7).

We compare claimant’s right/left shoulder internal rotation findings as follows: $68/85 = X/90$; $X = 72$; 72 degrees receives an impairment value of 0.8 percent. OAR 436-035-0011(3); OAR 436-035-0330(9).

We compare claimant’s right/left shoulder external rotation findings as follows: $66/85 = X/90$; $X = 69.9$, which is rounded to 70; 70 degrees receives an impairment value of zero percent. OAR 436-035-0011(3), (4); OAR 436-035-0330(11).

⁵ Because claimant’s left shoulder muscles have 5/5 strength, a contralateral comparison yields the same result. OAR 436-035-0011(3).

Claimant underwent right shoulder surgery in April 2011. Claimant argues that he is entitled to a 5 percent impairment value for a partial acromion resection, and a 5 percent impairment value for a partial clavicle resection. SAIF responds that claimant is not entitled to a surgical impairment value for the surgery. For the following reasons, we agree with SAIF's contentions.

Here, Dr. Bell subsequently described claimant's procedure as "right shoulder arthroscopy with labral repair and subacromial decompression." (Ex. 9-1).⁶ In a February 2012 report, Dr. Bell was asked whether the April 2011 surgery included a partial resection of the acromion and, if so, what condition necessitated the partial acromion resection. (Ex. 11). Dr. Bell checked the box "YES," and commented that it was necessitated for "preventative treatment/ Impingement." (*Id.*) Dr. Bell was also asked what condition necessitated the right shoulder partial resection of the clavicle, to which he answered "Impingement." (*Id.*)

In a subsequent June 2012 report, Dr. Bell agreed with the statement that "[claimant] did sustain an impingement syndrome in his right shoulder," and added that "impingement syndrome is a symptom." He also stated that the impingement syndrome was *not* caused by the work injury. Dr. Bell was further asked whether a distal clavicle resection was performed. He indicated "NO" and expressly added, "subacromial decompression but no distal clavicle resection." (Ex. 18).

Although Dr. Bell consistently reported that a partial acromion resection was performed, he expressly stated that the acromion resection was performed to address the impingement syndrome, which was not caused by the work injury. (Exs. 11, 18). Because the partial acromion resection was not attributed to the accepted right shoulder conditions or direct medical sequelae, claimant is not entitled to a surgical impairment finding for that procedure. *See Percy W. Brigham*, 63 Van Natta 1519, 1520-21 (2011) (no impairment rating for a partial acromion resection whether the medical evidence did not attribute the procedure to the accepted right shoulder conditions or direct medical sequelae).

We also find that claimant is not entitled to a surgical impairment value for a partial clavicle resection. In doing so, we acknowledge that Dr. Bell's February 2012 opinion that the right shoulder partial resection of the clavicle was necessitated by "Impingement" implies that such a procedure was performed.

⁶ Dr. Bell's operative report is not in the record.

(Ex. 11). However, Dr. Bell later expressly clarified that no distal clavicle resection was performed. (Ex. 18). Thus, the record does not persuasively establish that such a procedure was performed.⁷ Under these particular circumstances, claimant is not entitled to surgical impairment values for a partial acromion resection or partial clavicle resection. OAR 436-035-0330(13).⁸

There are no other ratable right shoulder impairment findings. Therefore, we combine claimant's right shoulder impairment values as follows: 5 percent (chronic condition) combined with 2 percent (ROM) equals 7 percent; 7 percent combined with 1 percent (strength) results in a total right shoulder impairment value of 8 percent. OAR 436-035-0011(6). Claimant's 8 percent right shoulder impairment value is combined with the 2 percent whole person impairment value (as converted for the right arm), which results in a total whole person impairment value of 10 percent. *Id.*

The parties agree that claimant is entitled to a work disability award. *See* ORS 656.214(2) (Or Laws 2007, ch 274, §§ 1, 8); ORS 656.726(4)(f)(E) (Or Laws 2007, ch 274, §§ 2, 8). Therefore, we determine claimant's social-vocational factors in evaluating his work disability award.

The parties do not dispute claimant's age, education, or base functional capacity. On review, claimant argues that his residual functional capacity (RFC) should be established by the WCE report, as ratified by Dr. Law. SAIF responds that claimant's RFC should be based on the medical arbiter panel's report. For the following reason, we rely on the WCE, as ratified by Dr. Law, to establish claimant's RFC.

RFC is evidenced by the attending physician's release unless a preponderance of medical opinion describes a different RFC. OAR 436-035-0012(10)(a). The "other medical opinion" must include at least a level-2 physical capacity evaluation (PCE), or WCE as defined in the rules, or "a medical evaluation which addresses the worker's capability for lifting, carrying, pushing/pulling, standing, walking, sitting, climbing, balancing, stooping,

⁷ In any event, if a clavicle resection was performed, Dr. Bell also attributed the procedure to "impingement," which he expressly stated was not caused by the work injury. (*Id.*) Consequently, no impairment value for a partial clavicle resection would be granted. *See Bingham*, 63 Van Natta at 1520-21.

⁸ Although claimant's April 2011 surgery also involved a labral repair, that procedure is not among the ratable surgeries under the rules. OAR 436-035-0330(13).

kneeling, crouching, crawling and reaching.” OAR 436-035-0012(10)(b). Here, both the WCE and the medical arbiter panel reports may be considered in determining claimant’s RFC. *Id.*

Unlike the WCE, the medical arbiter panel expressly described the lifting and carrying limitations “for [claimant’s] *right* shoulder.” (*See* Exs. 4-2-3, 31-7). In contrast, the WCE documented claimant’s overall specific lifting abilities, as well as validity findings. (Ex. 4). Finally, Dr. Law (attending physician) concurred with the WCE findings. (Ex. 7). Under these circumstances, we rely on the WCE (as ratified by Dr. Law) and Dr. Law’s release to determine claimant’s RFC.

Because SAIF does not dispute claimant’s calculation of his social-vocational value based on the WCE, we find that claimant’s social-vocational value is 6 percent (as calculated in SAIF’s Notice of Closure). (*See* Ex. 20-2). Therefore, adding claimant’s 10 percent whole person impairment value to the 6 percent social-vocational value, claimant is entitled to a 16 percent work disability award.

In summary, the ALJ’s permanent impairment and work disability awards (which totaled 20 percent whole person impairment and 26 percent work disability) are modified. Those awards are reduced to 10 percent whole person impairment and 16 percent work disability.

ORDER

The ALJ’s order dated February 10, 2014, as reconsidered on April 28, 2014, is affirmed in part and modified in part. In lieu of the ALJ’s 20 percent whole person impairment and 26 percent work disability awards, claimant is awarded 10 percent whole person impairment and 16 percent work disability. The ALJ’s “out-of-compensation” attorney fee award is modified consistent with this order. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on September 29, 2014