

In the Matter of the Compensation of
JONATHAN PARISH, Claimant
WCB Case No. 12-04086, 12-03393
ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that upheld the self-insured employer's denials regarding claimant's multiple conditions. On review, the issues are hearing procedure and remand.

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

Claimant alleged injuries from lifting at work on June 1, 2012, and on June 19, 2012, the day of his employment termination. (Exs. 124, 139). His employer asserted that he did not mention a work injury during his "termination" meeting, but rather called the office from the employer's parking lot after the meeting to report the injury. (Ex. 133).

Throughout April, May and June 2012, claimant had received chiropractic treatment, massage therapy, evaluation regarding migraine headaches and emergency room treatment for headaches, neck, upper back, lower back, and left shoulder pain. (Exs. 114-121). Before his June 19 termination, claimant had attributed his symptoms to an April 2012 motor vehicle accident (MVA). (*Id.*) He had also been involved in a July 2011 MVA for which he had received chiropractic treatment from Dr. Wilcox for neck and mid back pain until March 2012. (Exs. 24-32, 35-45, 46-76).

On June 19, 2012, Dr. Mirtorabi reported that claimant had injured his spine while lifting heavy objects at work. (Ex. 123). On July 3, 2012, claimant went to the emergency room, stating that he had been involved in another MVA, in which he had been rear-ended causing worsening head, neck and back pain. (Exs. 150, 152).

Claimant was evaluated by Dr. McNeill at the employer's request. Dr. McNeill stated that claimant denied receiving treatment of his neck, back, and hips before June 19, 2012. (Ex. 199-3). Dr. McNeill also noted multiple invalid and nonorganic findings, attributing claimant's complaints to nonorganic symptom magnification. (Ex. 199).

Dr. Kafrouni, an orthopedist, and Dr. Harden, a chiropractor, initially related claimant's symptoms to his claimed work injuries. (Exs. 208, 210). However, after reviewing prior treatment records and Dr. McNeill's report, they disavowed their original opinions, concluding that they could not relate any of claimant's conditions or complaints to either alleged June 2012 work injury. (Exs. 211, 212).

Claimant's hearing on the denials was postponed on six occasions. (Hearing File). Two of these postponements were due to the withdrawal of his attorney of record. (*Id.*) Claimant was successively represented by three attorneys, all of whom withdrew their representation prior to hearing. (*Id.*)

On February 21, 2014, an earlier ALJ granted a sixth postponement of the scheduled hearing. (*Id.*) In doing so, that ALJ notified claimant that the newly scheduled hearing would not be postponed based on claimant's request to retain another attorney. (Hearing File)

At the scheduled June 11, 2014 hearing, the ALJ confirmed that claimant had read and understood the Notice of Rights and Procedures.¹ (I-Tr.2; Ex. A). Thereafter, the hearing was continued and reconvened on July 15, 2014, and October 7, 2014. Testimony was taken at each hearing date and claimant proceeded *pro se* throughout the proceedings (including closing arguments).

The ALJ upheld the denials. In doing so, the ALJ was not persuaded that the compensability of the claimed conditions had been established.

On review, claimant contends that the ALJ did not properly inform him regarding the issues for the hearing, his burden of proof, and hearing procedures. He specifically asserts that the ALJ did not assist him in obtaining an additional report from Dr. Rask, erroneously excluded from the record an illustration from Dr. Rask, and did not extend his discovery request for requested surveillance footage. Claimant, therefore, moves for remand for further development of the record. Based on the following reasoning, we find no error in the ALJ's handling of the hearing and conclude that remand is not warranted.

ORS 656.283(7) provides that an ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. Thus, the ALJ has broad discretion regarding the admissibility of evidence. *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review

¹ The Board's "NOTICE OF RIGHTS AND PROCEDURES IN WORKERS' COMPENSATION HEARINGS" is provided to *pro se* litigants to inform them of the detailed provisions enumerated in ORS 183.413 (2)(a) through (o).

the ALJ's evidentiary ruling for an abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002). In doing so, we consider whether the record supports the ALJ's discretionary ruling. *Id.* at 406. If the record would support the ALJ's decision, but would also support a different decision, there is no abuse of discretion. *Id.*

Our review is limited to the record developed by the ALJ. 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 when the new evidence: (1) concerns disability; (2) was not obtainable at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986).

On review, claimant asserts that he was essentially referred to a "boilerplate notice sheet"² without further explanation or answers to his confusion as to how to proceed in the hearing. However, the hearing record shows that, after referring claimant to the written notice, the ALJ asked him whether he had any questions about it and he responded "No, I'm fine. I understand." (I-Tr. 2). Additionally, the ALJ inquired into, and then restated, the issues, as well as explained claimant's burden of proof, including how he could present evidence to meet his burden. (I-Tr. 18-26).³

Moreover, throughout the hearing, the ALJ provided ongoing assistance to claimant in developing the record. For example, the ALJ asked claimant questions during his direct examination (I-Tr. 44-78), reminded claimant to clarify his response to cross-examination (II-Tr. 10, 32), participated in the questioning of a witness called by claimant (III-Tr. 111-116), provided assistance to claimant in his questioning of witnesses, and explained the rebuttal and argument process. (II-Tr. 13, 23, 32, 44, 48, 50, 63, 78, 100, 101, 114, 121; III-Tr. 16, 32, 52, 65, 67, 81, 97, 105, 109, 119, 125).

Based on our review, this record establishes that the ALJ provided ample assistance to claimant in developing the hearing record. *See David R. McKenzie*, 63 Van Natta 89 (2011); *Judith Lynne*, 53 Van Natta 48 (2001) (remand not warranted where the record established that the claimant was properly advised

² Claimant refers to the Board's "Notice of Rights," which is described in footnote 1.

³ Claimant additionally contends that the ALJ did not instruct him regarding his burden of proof until closing arguments. However, the ALJ *did* instruct claimant regarding his burden of proof early in the proceeding before testimony was offered, and the ALJ's statement at the time of closing arguments was a repeated instruction in response to claimant's subsequent misstatement of his burden. (I-Tr. 20-21).

of her rights pursuant to ORS 183.413); *cf. Charles W. Brach*, 52 Van Natta 1084 (2000) (remand warranted where the claimant was not read or otherwise made aware of his rights pursuant to ORS 183.413 and was not allowed to testify, despite his statement that he wished to correct inaccuracies in the record). Accordingly, we find no legal error in the ALJ's conduct of the hearing.

Likewise, we find no error in the ALJ's handling of claimant's discovery request for surveillance footage from June 1, 2012 and June 19, 2012.⁴ In reply to the employer's response that such footage did not exist, the ALJ questioned the employer's attorney and discussed the matter with claimant. (I-Tr. 7-18). The ALJ explained to claimant that he could testify regarding how, when and where he was injured. (Tr. 12).

Finally, claimant contends that it was error for the ALJ not to admit proposed Exhibit B. This exhibit is a set of informational medical diagrams that depicts various types of shoulder pathology, and provides general information about shoulder pathology and how it is surgically treated. (Exhibit B). Claimant stated that the diagrams were given to him by Dr. Rask as he explained that his shoulder injury was due to the work injury. (I-Tr. 32). After examining the exhibit, the ALJ did not consider the diagram to be relevant evidence because there was no information in it that was specific to claimant; *e.g.*, a report from Dr. Rask explaining the applicability of the diagrams to claimant's condition. (*Id.*)

Claimant further contends that it was error for the ALJ to not seek an explanatory report from Dr. Rask, or grant him leave to do so. Yet, there is no indication that claimant made such a request once the ALJ excluded the diagram. In any event, the record already contains Dr. Rask's medical opinion, which

⁴ Claimant conceded that footage on or around June 1, 2012, would not be relevant because he alleged an injury while he was offsite making deliveries on that date. Furthermore, the broadening of the discovery request for footage on June 19, 2012 (which was the date of his employment termination), even assuming that it showed claimant engaged in lifting activities, would not change the outcome of this disputed claim.

First, claimant testified that he had pain in his left armpit, right groin area and his hip as he was lifting. (I-Tr. 56). However, he had previously treated for the same or similar symptoms before both of the alleged dates of injury. (Exs. 23, 76A, 82, 91). Moreover, one of claimant's treating chiropractors, Dr. Harden, commented that "there appears to be a gross lack of medical evidence of injury as reported on the supposed dates." (Ex. 211). Finally no other physician supported a causal relationship between claimant's alleged work injuries and his claimed conditions. Under such circumstances, even if a more expansive discovery request had uncovered probative evidence to corroborate claimant's version of events, the medical record would still be insufficient to establish that claimant's claimed conditions were compensably caused by his claimed work injuries.

unequivocally did not relate claimant's shoulder condition to his alleged work injuries because the described mechanism of injury was inconsistent. In addition, Dr. Rask unambiguously considered claimant's shoulder condition to be more consistent with an injury attributable to one of the prior MVAs. (Ex. 207).

Under such circumstances, we find no legal error or abuse of discretion in the ALJ's handling of the hearing and evidentiary rulings. Consequently, remand is not warranted. Accordingly, we affirm.

ORDER

The ALJ's order dated December 22, 2014 is affirmed.

Entered at Salem, Oregon on June 8, 2015