
In the Matter of the Compensation of
ANDREW G. CONNOLLY, Claimant
WCB Case No. 13-05504
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Spangler's order that upheld the self-insured employer's denials of claimant's new/omitted medical condition claims for right calcaneonavicular coalition and right lateral epicondylitis. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation regarding the claimed right calcaneonavicular coalition condition.¹

To establish the compensability of his right calcaneonavicular condition, claimant must prove that the work injury was a material contributing cause of the disability/need for treatment for the condition.² See ORS 656.266(1); ORS 656.005(7)(a); *Betty J. King*, 58 Van Natta 977 (2006). He need not prove that his work injury caused the condition itself; rather, the relevant inquiry is whether it caused the disability/need for treatment for the condition. See *Jaymin Nowland*, 63 Van Natta 1377, 1382 n 3 (2010).

Claimant relies mainly on the opinion of Dr. Puziss, who performed a worker-requested medical examination on April 23, 2015, to support compensability of the disputed condition. Based on the following reasoning, we do not find Dr. Puziss's opinion persuasive.³

¹ Claimant sustained a gunshot wound to his right lower leg at work on August 11, 2012. (Exs. 12, 13). X-rays revealed a fracture of the fibula and a piece of bone out of the anterior aspect of the tibia. (Ex. 9). He was subsequently fitted with an orthopedic boot for immobilization. (Ex. 15). He apparently used the boot for about three to four months. (Exs. 119-15, 153-15).

² The existence of the claimed condition is not in dispute. See *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

³ Claimant also contends that the opinion of Dr. Zilkoski, who performed a right naviculocalcaneal coalition resection surgery in August 2013, supports the compensability of his claimed condition. Specifically, claimant points to Dr. Zilkoski's "post-surgery" statement that "I do think this on-the-job injury was likely the material cause of his current foot problems. We have discussed that the coalition is a genetic issue, however, he did not have any pain and was able to be fully functional at his

In his April 2015 report, Dr. Puziss stated that it was medically probable that the August 2012 injury (assuming it involved an ankle twist mechanism) or, alternatively, treatment following the injury, caused the coalition condition to become symptomatic. (Ex. 153-15). Again, in his July 10, 2015 concurrence letter, Dr. Puziss opined that the “industrial injury and treatment of same” were at least a material contributing cause of the need for treatment of the coalition condition. (Ex. 156-2). Regarding the “injury” component, Dr. Puziss explained that he could “not be certain” that claimant twisted his ankle during the work incident, and that he “may” have twisted his ankle. (*Id.*)

We agree with the ALJ’s conclusion that Dr. Puziss’s speculation that claimant “may” have directly injured his ankle/foot on the day of injury is not sufficient to prove there was such an injury, particularly given the absence of any reported mechanism of injury involving the ankle and the lack of complaints in the contemporaneous medical records that may support the occurrence of an ankle injury caused directly by the work incident.⁴ (Exs. 10 through 23); *see Gormley v. SAIF*, 52 Or App 1055 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words “can be” and “may be” indicate only possibility, not medical probability).

job prior to this.” (Ex. 130). However, after reviewing Dr. Mesnier’s opinion, Dr. Zilkoski agreed with Dr. Mesnier that it was more probable than not that claimant’s gunshot wound injury did not cause, worsen, or contribute to his preexisting calcaneonavicular coalition condition, or to the disability/need for treatment related to that condition. (Ex. 143-2). Dr. Zilkoski’s subsequent clarification of her opinion after reviewing Dr. Mesnier’s opinion represented a change from her initial “material cause” opinion. Therefore, we do not find her opinion supports compensability of the coalition condition as a direct result of the injury under a “material cause” standard.

⁴ While there are some early references to right lower extremity swelling and reduced ankle range of motion (Exs. 15, 17, 20, 23-1, 24-1, 51-1), such findings were either consistent with the residuals from claimant’s gunshot wound and fracture, or did not arise until he had been using the immobilization boot for a few months. (Ex. 140-2).

However, even assuming that an injury to the ankle/foot did occur on August 11, 2012, we would still not find Dr. Puziss’s opinion persuasive regarding causation. Dr. Puziss relied on a history that only claimant’s right calcaneonavicular coalition became symptomatic after the injury and the

period of immobilization. (Ex. 153-16, -17). He explained that the fact the left foot was not symptomatic was important to his causation analysis. (*Id.*) However, on February 13, 2013, a medical provider noted *bilateral* tenderness over the sinus tarsi. (Ex. 76-2). Dr. Dowd explained that this finding suggested that the left calcaneonavicular coalition was symptomatic, although likely not to the same degree as the right side. (Ex. 154-7). Because Dr. Puziss did not discuss this finding or the bilateral nature of claimant’s symptoms, we would find his “causation” opinion unpersuasive even if an ankle/foot injury had directly occurred. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977) (medical opinions based on incomplete or inaccurate information are not afforded persuasive force).

Dr. Puziss's causation opinion is also based on claimant's immobilization treatment. (Exs. 153-15, 156-2). Dr. Puziss reasoned that, even if claimant did not twist or strain his ankle during the work accident, the immobilization treatment caused his coalition condition to become symptomatic.⁵ (Ex. 153-15-16). Therefore, to the extent Dr. Puziss's opinion relates the symptomatic coalition condition to the immobilization treatment, such an analysis reflects a "consequential condition" theory, which claimant expressly withdrew at hearing.⁶ (Tr. 11-12); *see SAIF v. Walker*, 260 Or App 327 (2013) (finding a "consequential condition" where, although the disc herniation existed before the compensable injury, the worsening of the herniation was a consequence of the compensable injury); *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1996) (a consequential condition is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn results in back strain"); *Barrett Bus. Servs. v. Hames*, 130 Or App 190, 193, *rev den*, 320 Or 492 (1994) (when treatment for a compensable injury is the major contributing cause of a new condition, the compensable injury is deemed the major contributing cause of the consequential condition); *Clementita L. Mackenzie*, 60 Van Natta 1744 (2008) (worsening of a preexisting condition indicative of a "consequential condition" theory); *Linda D. Lunow*, 46 Van Natta 1120 (1994) (symptomatic flareup of a previously asymptomatic preexisting condition due to altered gait from right knee injury defined as a "consequential condition").

⁵ All the physicians who treated claimant (including Dr. Puziss) agree that his foot coalition condition was congenital and pre-dated the injury, and was not caused or worsened *directly* by the gunshot injury to the right lower leg on August 2012. (Exs. 99-3, 118, 119-14, -18, 125, 140-2, 143-2, 144-2, 145-2, 146-1, 153, 154-25, 156-2). Also, August 26, 2013 imaging studies of both feet revealed that the coalition condition was bilateral, with similar, but milder, findings present in the left foot. (Ex. 119-13, -17).

⁶ Claimant contends that because his coalition condition existed before the August 2012 injury, it was not a separate condition arising out of the compensable injury. However, although claimant's coalition condition existed before the August 2012 injury, it was asymptomatic and never required treatment. The record indicates that the subsequent immobilization of the right leg/foot as a result of the work injury contributed to make the previously asymptomatic congenital coalition condition symptomatic when the immobilization ended. (Exs. 119-18, 20, 140-2, 144-2, 153-15, 156-2). Therefore, the coalition condition is only causally related to the compensable injury indirectly, through a "consequential condition" relationship. *See Walker*, 260 Or App at 336; *Crompton*, 150 Or App at 536; *Hames*, 130 Or App at 193; *Lunow*, 46 Van Natta at 1121. Yet, as previously noted, claimant did not pursue a "consequential condition" theory at hearing. In any event, under a "consequential condition" theory, the compensable injury must be the major contributing cause of the claimed consequential condition itself, not just the worsening or need for treatment of the condition. *David A. Marquardt*, 62 Van Natta 969, 974-76 (2010).

Accordingly, Dr. Puziss's opinion is not sufficiently persuasive to establish that claimant's work-related injury was a material contributing cause of his need for treatment/disability for his right coalition foot condition. There are no other persuasive medical opinions addressing compensability of the claimed condition under a direct injury theory (*i.e.*, material contributing cause). Therefore, we affirm.

ORDER

The ALJ's order dated December 16, 2015 is affirmed.

Entered at Salem, Oregon on August 12, 2016