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In the Matter of the Compensation of  
**KENNETH G. MCFEETERS, Claimant**  
WCB Case No. 15-04573  
ORDER ON REVIEW  
Unrepresented Claimant  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant, *pro se*,<sup>1</sup> requests review of Administrative Law Judge (ALJ) Smith's order that upheld the self-insured employer's denial of claimant's injury claim for a pulmonary condition. On review, the issue is compensability.<sup>2</sup>

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

In early 2015, claimant, a truck driver, reported that he was exposed to carbon monoxide from a faulty exhaust system. (Ex. 2). He filed an injury claim. (*Id.*) After the employer denied the claim, claimant requested a hearing.

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<sup>1</sup> Inasmuch as 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:

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

<sup>2</sup> Claimant has submitted additional documents that were not admitted as evidence at the hearing. Our review is limited to the record developed at hearing. ORS 656.295(5). Nonetheless, we may remand to the ALJ should we find that the hearings record has been "improperly, incompletely or otherwise insufficiently developed." See ORS 656.295(5); *Phillip Emerson*, 66 Van Natta 1690 (2014); *Judy A. Britton*, 37 Van Natta 1262 (1985). To merit remand for consideration of additional evidence, it must clearly be shown that the evidence was not obtainable with due diligence at the time of the hearing and that the evidence is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 249 (1988). There must be a compelling reason for remanding a case to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000); *Robert W. Bell*, 67 Van Natta 2140, 2141 (2015).

Here, claimant has included the following documents with his appellant's brief: (1) "Emissions Analytics — DPF Regeneration Mysteries" and (2) "Health effects of nitrogen oxides." However, there is no explanation for why these materials could not have been presented at the hearing. In any event, consideration of those materials would not be reasonably likely to affect the outcome of this case involving the compensability of the disputed condition. See *Theresa J. Kolibaba*, 52 Van Natta 960 (2000). Accordingly, remand for further development is not warranted.

Relying on claimant's testimony, the ALJ found that claimant had been exposed to exhaust fumes in the cab of his truck during the four days that he was stranded in ice storms. The ALJ concluded that such exposure should be analyzed as an injury due to the short time period involved, but that the medical evidence did not establish that claimant's injury was a material contributing cause of his disability/need for treatment of his pulmonary condition.

On review, claimant contends that his work exposure to carbon monoxide caused his disability/need for treatment for his pulmonary condition.<sup>3</sup> For the following reasons, the record does not persuasively support that contention.

Claimant has the burden of proving, by a preponderance of the evidence, that his injury (work exposure) was a material contributing cause of his disability/need for treatment of his pulmonary condition. ORS 656.005(7)(a); ORS 656.266(1); *Weyerhaeuser Co. v. Woda*, 166 Or App 73, *rev den*, 330 Or 361 (2000) (finding that the claimant's claim for a respiratory condition that arose suddenly from exposure to fumes at work was properly analyzed as an injury); *Colleen B. Walker*, 60 Van Natta 1147 (2008), *aff'd without opinion*, 232 Or App 439 (2009) (same).

Because of the possible alternate causes of claimant's condition, expert medical opinion must be used to resolve the question of causation. *Barnett v. SAIF*, 122 Or App 279 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, claimant was diagnosed with chronic obstructive pulmonary disease (COPD). (Exs. 5-4, 9-2, 16-5). He has a history of smoking cigarettes (about a pack a day) for about 15 years, many years ago. (Ex. 16-1).

Dr. Barker, who reviewed medical records at the employer's request, opined that claimant likely has advanced stage COPD that preexisted his work exposure to carbon monoxide. (Ex. 20-1). He stated that "COPD symptoms typically escalate, in stages, over months or years." (Ex. 20-1). He opined that "smoking cigarettes

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<sup>3</sup> We acknowledge the employer's argument that claimant's condition is more appropriately analyzed as an occupational disease because of the "steady and gradual development" of the alleged pulmonary condition over the course of his work trip. We need not resolve whether the claim should be analyzed as an injury or an occupational disease, because the medical evidence does not establish the compensability of his claimed condition under either theory.

is medically regarded as a leading cause of COPD.” According to Dr. Barker, “there was no objective evidence [c]laimant experienced acute or chronic carbon monoxide poisoning.” (Ex. 20-2).

Dr. Wilson, claimant’s attending physician, concurred with Dr. Barker’s opinions. (Ex. 21-1).

While recommending a pulmonary consultation, Dr. Wilson reported that claimant has persistent symptoms, which “*may* be due to a combination of his exposure [to carbon monoxide] and underlying pulmonary disease.” (Ex. 9-2). Because Dr. Wilson’s opinion was phrased in terms of “possibility” (rather than probability), it is insufficient to establish the compensability of the claim. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (medical opinions must be stated in terms of probability rather than possibility); *see also Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2209) (the words “can be” and “may be” indicate only possibility, not medical probability).

For similar reasons, Dr. Giacoppe’s opinion is likewise insufficient to establish the claim’s compensability. Dr. Giacoppe questioned whether claimant’s work exposure may have worsened or accelerated his preexisting pulmonary condition. (Ex. 16-5). But, he also explained that “it would be necessary to get his old lung function tests \* \* \* in order to compare.” (*Id.*) There is no indication that Dr. Giacoppe made such a comparison or offered a medical opinion phrased in probabilities.

Under such circumstances, the record lacks a persuasive medical opinion (phrased in reasonable medical probabilities) supporting a causal relationship between claimant’s work exposure to carbon monoxide and his need for treatment/disability for his pulmonary condition. In the absence of such evidence, we agree with the ALJ’s conclusion that the claimed pulmonary condition is not compensable. Accordingly, we affirm.

### ORDER

The ALJ’s order dated December 29, 2015, as reconsidered February 11, 2016, is affirmed.

Entered at Salem, Oregon on August 12, 2016