
In the Matter of the Compensation of
WCB Case No. 14-01855
DANIEL LAYTON, Claimant
ORDER ON REVIEW
Gary Borden, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson, and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Riechers's order that upheld the self-insured employer's denial of his new/omitted medical condition claim for an L4-5 disc condition, including an annular tear. In its respondent's brief, the employer challenges the ALJ's exclusion of Dr. Kuether's report (proposed Exhibit 83). On review, the issues are the ALJ's evidentiary ruling and compensability.

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

On October 19, 2006, claimant was compensably injured in a motor vehicle accident. (Ex. 2). The employer accepted cervical, thoracic, lumbar, and bilateral shoulder strains, left wrist, left knee, and chest wall contusions, and Type II dens/odontoid process fracture. (Exs. 13, 40, 48).

Claimant treated for low back pain after the accident, but the major focus of the treatment was his neck and upper back pain that led to a C1-2 surgical fusion procedure in March 2009. (Exs. 19, 24, 34, 44, 50; Tr. II-25, 26). Claimant's 2007, 2009, and 2013 lumbar MRIs showed, among other findings, an L4-5 disc bulge and annular tear. (Exs. 22, 59, 74, 82-1, 84-8). In 2007 and 2008, Dr. Andersen, claimant's then attending physician, and Dr. Antezana, consulting neurosurgeon, did not identify the lumbar MRI findings as acute or needing treatment. (Exs. 27, 44).

In November 2013, Dr. Kuether, a neurosurgeon, observed that claimant had been dealing with low back symptoms since the 2006 accident. (Ex. 73-1). He recommended a lumbar discography to determine whether the L4-5 annular tear was causing claimant's low back pain and could be addressed surgically. (Ex. 75).

On January 8, 2014, seven years after the injury, Dr. Brett, a neurosurgeon, performed an examination and assumed the role of claimant's attending physician.

(Ex. 77-3). Dr. Brett suspected that claimant's low back pain was from an L4-5 annular injury and recommended that claimant undergo a provocative diskogram to "better delineate and [evaluate] the pathologic level * * * of his low back pain." (Exs. 76, 77-3).

On January 10, 2014, claimant initiated a new/omitted medical condition claim for L4-5 disc injury/bulge/herniation/condition. (Ex. 78A). On February 26, 2014, the employer denied that the L4-5 disc condition was compensably related to the 2006 motor vehicle accident. (Ex. 80). Claimant requested a hearing.

On July 2, 2014, Dr. Brett opined that the 2006 accident was the major contributing cause of the L4-5 annular tear and need for treatment. (Ex. 82-2). He reasoned that claimant's history, the mechanism of injury, the findings noted on examination, and the MRI findings were more consistent with a traumatic, rather than a degenerative, cause. (*Id.*)

On September 12, 2014, Dr. Rosenbaum reviewed claimant's medical records and performed an examination at the employer's request. Dr. Rosenbaum observed that claimant demonstrated invalid lumbar range of motion and had no muscle spasm. (Ex. 84-6, -7, -11). Determining that claimant had never had any objective findings referable to the L4-5 abnormality, and that the abnormality was consistent with the degenerative process, Dr. Rosenbaum concluded that the 2006 injury was not a material cause of the L4-5 disc condition. (Ex. 85)

On October 30, 2014, Dr. Brett maintained that claimant's decreased lumbar range of motion and muscle spasm were consistent with L4-5 annular tearing, rather than a lumbar strain, any degenerative process, or facet joint arthritis. (Ex. 86-1). He further opined that claimant's lumbar MRI findings were consistent with the 2006 date and mechanism of injury. (*Id.*)

In upholding the employer's denial, the ALJ determined that Dr. Brett's opinion did not persuasively establish that the L4-5 annular tear was a material cause of claimant's need for medical treatment.¹ In doing so, the ALJ reasoned that Dr. Brett did not have the advantage of a long-term attending physician in evaluating causation and need for treatment, did not indicate that he had reviewed claimant's medical records (other than the MRIs and MRI reports), and relied on claimant's history of consistent and significant back pain after the injury, which

¹ At the hearing, claimant pursued the L4-5 disc condition/injury claim as an L4-5 disc bulge or annular tear. (Tr. I-6).

was not supported by the contemporaneous medical record. Finally, because the lumbar discography had not occurred, the ALJ concluded that Dr. Brett did not provide an adequate explanation for his opinion that claimant's L4-5 annular tear was causing the need for medical treatment.

On review, claimant argues that Dr. Brett's opinion persuasively establishes that his need for treatment/disability for his L4-5 annular tear was caused by the 2006 motor vehicle accident, whereas the employer argues that Dr. Rosenbaum's opinion establishes that the tear was degenerative.² For the following reasons, we affirm the ALJ's decision to uphold the employer's denial.

To establish the compensability of his new/omitted medical condition claim, claimant must prove that his 2006 work injury was a material contributing cause of the disability/need for treatment of the claimed condition.³ ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006). Because of the divergent medical opinions concerning the cause of claimant's condition and need for treatment, expert medical opinion must be used to resolve the issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). In evaluating the medical evidence, we rely on those opinions that are well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, claimant argues that the opinion of Dr. Brett supports the compensability of his L4-5 claim. Yet, both Drs. Brett and Kuether recommended that claimant undergo a lumbar discography to determine the pathologic level that was causing claimant's symptoms. (Exs. 75, 77-3). That diskogram was not performed. Nevertheless, Dr. Brett opined that the 2006 accident was the major

² The employer also challenges the ALJ's exclusion of a "check-the-box" opinion letter signed by Dr. Kuether, which the employer submitted after the ALJ had limited further development of the evidentiary record to treatment records, the report from an employer-requested examination, claimant's rebuttal evidence, and cross-examination. (Proposed Ex. 83). After considering claimant's objection and the parties' arguments, the ALJ excluded the proposed exhibit because it exceeded the scope of the exhibits that she had ruled could come into evidence. (Hearing File, Second Interim Order).

Generally, when the ALJ leaves the record open for a limited purpose, it is within the ALJ's discretion to exclude evidence that does not comport with that purpose. *See Clifford L. Conradi*, 46 Van Natta 854 (1994). Here, because Dr. Kuether's report fell outside the scope of the evidence allowed by the ALJ's ruling, the exclusion of such evidence was within the ALJ's discretion. *See Debra A. Meyer*, 64 Van Natta 2243, 2244 (2012) (ALJ did not abuse discretion in excluding a grip strength test report where the record was left open only for two doctors' depositions). Consequently, we find no abuse of discretion in the ALJ's exclusion of the proposed exhibit. *SAIF v. Kurcin*, 334 Or 399, 406 (2002) (Board review of ALJ's evidentiary ruling is for abuse of discretion).

³ The existence of the claimed L4-5 disc condition is not in dispute.

contributing cause of claimant's L4-5 annular tear and need for treatment. (Ex. 82-2). In doing so, he did not explain whether he subsequently decided that the diskogram was unnecessary or how he determined the pathologic level of claimant's low back pain in the absence of that information.

Moreover, in identifying claimant's reduced lumbar range of motion and muscle spasm as "objective findings one would expect from annular tearing at L4-5," Dr. Brett did not explain why those findings, which he documented in 2014, established tearing in 2006. Also, he did not indicate that those findings had been present since the injury.⁴ (Ex. 86-1). Furthermore, Dr. Brett did not address Dr. Rosenbaum's opinion that claimant had never had any objective findings that are referable to the L4-5 disc abnormality. (Exs. 84-9, 85-1, 86-1).

Under these circumstances, we do not consider Dr. Brett's opinion well reasoned or explained. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained opinion); *Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinion).

In conclusion, for the aforementioned reasons, in addition to those provided in the ALJ's order, the record does not persuasively establish that claimant's work injury was a material contributing cause of the disability/need for treatment for the claimed new/omitted L4-5 disc condition, including annular tear. Accordingly, we affirm.

ORDER

The ALJ's order dated May 22, 2015 is affirmed.

Entered at Salem, Oregon on February 12, 2016

Member Weddell dissenting.

I agree with that portion of the majority's opinion that affirms the ALJ's evidentiary ruling. Unlike the majority, however, I find Dr. Brett's opinion well reasoned and consistent with claimant's medical records. Therefore, I respectfully dissent from that portion of the majority's opinion.

⁴ In 2007, Dr. Beale, claimant's then-attending physician, documented normal range of motion and no muscle spasm. (Ex. 19-3). Dr. Brett did not indicate that he had reviewed this record.

On October 29, 2006, claimant was riding in the front seat of a car that collided with another vehicle at freeway speeds. (Ex. 3; Tr. II-16, 17). Claimant testified that he had back pain the next day, which persisted until 2014. (Tr. II-24, -26, -27).

The medical record supports claimant's testimony. On November 1, 2006, Dr. Piepgrass, an urgent care physician, documented low back pain. (Ex. 9). In 2007, Dr. Beale documented tenderness in claimant's lumbar paraspinal muscles and attributed his ongoing need for low back treatment to the 2006 accident. (Exs. 19-3, 31). In 2008, Dr. Andersen gave claimant an informational low back booklet and advice about exercises. (Ex. 44). In 2009, Dr. Andersen assessed chronic low back pain/lumbar spondylosis. (Ex. 62). In 2011, he again assessed chronic low back pain, associated with lumbar spondylosis, historically related to the 2006 work injury. (Ex. 67). In 2011, claimant began a two-year chiropractic regimen for his low back. (Ex. 68A). He obtained only temporary relief. (Ex. 71C). By September 2013, he had constant low back pain, which Dr. Andersen stated was "clearly related" to the 2006 injury. (Exs. 71, 72). In November 2013, Dr. Kuether, a neurosurgeon, observed that claimant had been dealing with low back symptoms since the 2006 accident, but that most of the medical attention had been directed to his cervical spine. (Ex. 73-1). He recommended lumbar discography to determine whether the L4-5 annular tear was causing claimant's low back pain and could be addressed surgically. (Ex. 75).

On January 8, 2014, Dr. Brett identified the 2006 injury as the cause of claimant's L4-5 discogenic pain and need for further assessment and treatment. (Ex. 76). Based on claimant's history, the mechanism of injury, and the findings on examination and MRI, Dr. Brett opined that the 2006 accident was the major contributing cause of the L4-5 annular tear and need for treatment. (Ex. 82-2). After Dr. Rosenbaum attributed claimant's symptoms and examination findings to degenerative lumbar spondylosis and functional overlay, Dr. Brett maintained that the L4-5 annular tear was consistent with the examination findings and the date and mechanism of injury. (Exs. 84-8, -11, 86-1).

The existence of the claimed L4-5 condition is not in dispute. Therefore, claimant must establish that the 2006 injury was a material contributing cause of the disability/need for treatment of the condition. ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006). Expert medical opinion is required to resolve the issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993).

When medical opinions diverge, we rely on those opinions that are well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Brett determined that the L4-5 tear was traumatic, rather than degenerative. In doing so, he reasoned that the MRIs show a “quite mild” degenerative process, which minimized contribution to the L4-5 annular tear. (Ex. 82-2). He further noted that claimant did not have low back pain before the accident, and had persistent low back pain afterward. (*Id.*) Lastly, he considered the mechanics of the accident, which involved a significant collision and likely low back torsion when claimant was thrown forward, putting sufficient stress on the L4-5 disc to cause annular tearing. (*Id.*) He opined that claimant’s findings on examination several years later (*i.e.*, decreased lumbar range of motion and palpable muscle spasm) were consistent with L4-5 annular tearing. (*Id.*)

I find Dr. Brett’s opinion to be thorough, well-reasoned, and consistent with the medical record. In contrast, Dr. Rosenbaum did not address the lack of prior low back problems, the mechanics of the accident, or the ensuing low back symptoms and findings. Consequently, I do not consider his opinion sufficient to rebut that of Dr. Brett. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinion).

In sum, I would find Dr. Brett’s opinion sufficient to establish that the 2006 motor vehicle accident was a material contributing cause of claimant’s need for medical treatment of the claimed L4-5 disc condition, including annular tear. Accordingly, I would set aside the employer’s denial. Therefore, I respectfully dissent.