

In the Matter of the Compensation of
ANA TORJ, Claimant
WCB Case No. 15-02442
ORDER ON REVIEW
Unrepresented Claimant
Randy Rice AAL, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant, *pro se*,¹ requests review of Administrative Law Judge (ALJ) Otto's order that affirmed an Order on Reconsideration that did not award any permanent impairment for her accepted right elbow ulnar neuropathy condition. On review, the issue is extent of permanent disability (impairment).²

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

Claimant injured her right elbow. The self-insured employer accepted a right elbow contusion and right elbow ulnar neuropathy. (Ex. 64).

Claimant's attending physician, Dr. Chang, concurred with Dr. Borman's impairment findings, consisting of a loss of two-point discrimination to the right small fingertip. (Exs. 63-3, 66). Based on those findings, the employer issued a Notice of Closure that awarded 1 percent permanent impairment.³ (Ex. 68). Claimant requested reconsideration and a medical arbiter examination. (Ex. 72).

¹ Inasmuch as claimant is unrepresented, she may wish to consult the Ombudsman for Injured Workers. She 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

² We are statutorily limited to the record developed during the reconsideration proceeding. ORS 656.283(6) (evidence on an issue regarding a Notice of Closure not submitted at the reconsideration is not admissible). Neither the ALJ nor the Board may consider evidence outside the reconsideration record. *See Sandi Jones*, 59 Van Natta 44 (2007). Thus, to the extent that claimant's brief refers to matters not contained in the reconsideration record, such information cannot be considered.

³ Because claimant's claim was closed by a January 23, 2015 Notice of Closure, the applicable standards are found in WCD Admin. Order (eff. January 1, 2013). *See* OAR 436-035-0003(1).

Dr. Kane, a medical arbiter, examined claimant. (Ex. 72-1). He reviewed claimant's medical records and identified the accepted right elbow contusion and right elbow ulnar neuropathy. (*Id.*) Dr. Kane found that claimant had normal strength and sensation, with no permanent impairment due to the accepted conditions. (Ex. 72-4).

Relying on Dr. Kane's arbiter report, an Order on Reconsideration reduced claimant's permanent impairment award to zero. (Ex. 73-5). Claimant requested a hearing, contending that Dr. Borman's findings, with which her attending physician, Dr. Chang, had concurred, should be used instead of Dr. Kane's findings.

Determining that the medical arbiter's examination report was persuasive, the ALJ affirmed the Order on Reconsideration. On review, claimant renews her contention that Dr. Borman's impairment findings are more accurate and should be applied. Based on the following reasoning, we disagree with claimant's contention.

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 the 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). We must accept the opinion of the medical arbiter unless other medical opinion establishes a different level of impairment. *Hicks v. SAIF*, 194 Or App 655, 659, *modified on recons*, 196 Or App 146 (2004). Such other medical opinion may come from the findings of the attending physician, or from physicians with whom the attending physician concurs. *Id.*

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 established that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (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).

Here, the medical arbiter, Dr. Kane, identified the accepted conditions. (Ex. 72-1). Furthermore, he reviewed the medical records and evaluated claimant. (*Id.*) During claimant's examination, Dr. Kane found no impairment findings attributable to the accepted conditions. (Ex. 72-4). He found normal strength and normal sensation. (*Id.*) In doing so, Dr. Kane completed a two-point discrimination test and found normal sensation on the palmar surfaces of the hands. (*Id.*)

Dr. Chang, claimant's attending physician, concurred with Dr. Borman's September 2014 impairment findings. However, at the time of that evaluation, Dr. Borman concluded that claimant was not medically stationary. (Exs. 48-9, 53).

Thereafter, in a January 2015 addendum, Dr. Borman explained that "the only factors of impairment * * * would be loss of two-point discrimination to the right small fingertip." (Ex. 63-3). However, at the time of this report, Dr. Borman had not examined claimant since September 4, 2014. Dr. Chang concurred with Dr. Borman's addendum report. (Ex. 66).

After reviewing this record, we do not find by a preponderance of the evidence that Dr. Borman's impairment findings (with which Dr. Chang concurred) are more accurate than Dr. Kane's findings. Consequently, we rely on Dr. Kane's findings to rate claimant's permanent impairment. OAR 436-035-0007(5); *Young K. Tunguyen*, 65 Van Natta 1427, 1429 (2013).

In conclusion, based on the aforementioned reasoning, the record does not establish error in the reconsideration process. See *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000); *Chi T. Nguyen*, 63 Van Natta 664, 666 (2011). Therefore, we affirm.

ORDER

The ALJ's order dated October 13, 2015 is affirmed.

Entered at Salem, Oregon on February 16, 2016