

In the Matter of the Compensation of
VICTOR JIMENEZ-HERNANDEZ, Claimant
WCB Case No. 12-06561
ORDER ON REVIEW

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Reviewing Panel: Members Johnson and Weddell.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Brown's order that set aside its denials of claimant's new/omitted medical condition claims for right shoulder subacromial impingement and right shoulder bursitis. On review, the issue is compensability.

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

In December 2010, claimant compensably injured his left shoulder. (Ex. 1). He underwent arthroscopic surgery in July 2011. (Ex. 48). A left shoulder strain and SLAP tear were ultimately accepted. (Ex. 63).

After claimant's initial evaluation for his left shoulder symptoms, he was placed on light duty restrictions. (Ex. 3-2).

On February 19, 2011, claimant was evaluated by Dr. Bohman, who diagnosed a shoulder strain and restricted left arm lifting to 15 pounds. (Exs. 9, 10).

On March 4, 2011, claimant was examined by Dr. Thrall, who prescribed physical therapy and limited left arm lifting to 25 pounds, with no lifting or pushing hay bales. (Exs. 13, 14).

In September 2011, claimant notified the employer that he was struggling with right shoulder pain. (Ex. 68). He asked about expanding his claim or initiating a new claim to include the right shoulder. (*Id.*) In August 2012, the employer denied "right shoulder sharp pain and numbness," asserting that it was a symptom and not a medical condition. (Ex. 154).

In September 2012, claimant was evaluated by Dr. Degan who diagnosed subacromial rotator cuff impingement. (Ex. 165). Claimant then filed a new/omitted medical condition claim for "right shoulder subacromial impingement." (Ex. 164). In November 2012, the employer denied the claim. (Ex. 186).

In February 2013, claimant was examined by Dr. Strum at the employer's request. (Ex. 204). Dr. Strum did not consider claimant's work activities to be sufficiently repetitive or forceful enough to be causative of his right shoulder symptoms, and he did not consider them to be related to his left shoulder injury. (Ex. 204-26).

In March 2013, a right shoulder MRI was interpreted as showing mild partial thickness undersurface tears of the supraspinatus and infraspinatus rotator cuff tendons, as well as degenerative changes in the AC joint with mild impingement. (Ex. 207).

In October 2013, Dr. Strum reviewed the MRI results and considered claimant's onset of right shoulder symptoms to be related to the preexisting degenerative right shoulder conditions of the rotator cuff and AC joint. (Ex. 228-3).

In December 2013, claimant was evaluated by Dr. Puziss, who diagnosed right subacromial bursitis and impingement and overuse syndrome of the right shoulder. (Ex. 224a-9). He commented that an MRI showed moderate to moderately severe degenerative arthritic change of the right AC joint. (*Id.*) Based on his physical examination, Dr. Puziss suspected the presence of labral pathology. (Ex. 229a-10). He recommended an MRI with contrast to further evaluate claimant's right shoulder condition. (*Id.*)

Dr. Puziss explained that claimant's AC joint pain was either caused by aggravation of preexisting AC joint arthritis, or by the adjacent subacromial bursitis. (Ex. 229a-10). He recommended a steroid and local anesthetic AC joint injection to distinguish the cause of claimant's AC joint pain. (*Id.*)

Dr. Puziss noted that claimant's shoulder joint did not have any documentable preexisting derangements or significant rotator cuff tendinopathy. (*Id.*) Dr. Puziss believed that claimant's partial symptom relief following a subacromial shoulder injection confirmed the right shoulder impingement diagnosis. (*Id.*) Dr. Puziss considered claimant's physical examination findings to be objective, reproducible, and consistent with the diagnosed conditions. (Ex. 229a-11).

In March 2014, Dr. Strum disagreed with Dr. Puziss's conclusions, stating that claimant's work activities did not meet the AMA criteria for increased risk of tendinopathy, impingement, and rotator cuff tears. (Ex. 235-3). He disagreed with

Dr. Puziss's description of claimant's work activities, stating that claimant had given him a different description, which did not satisfy the criteria for highly repetitive use. (*Id.*)

On March 24, 2014, Dr. Puziss considered claimant's AC joint pain unrelated to the AC joint arthritis, but rather caused by the adjacent bursitis in the right shoulder joint. (Ex. 236). Dr. Puziss noted that he had treated numerous patients that had developed shoulder pathology due to overuse of the contralateral shoulder following an injury. (*Id.*) He reiterated that claimant's physical examination and response to orthopedic testing was reliable. (*Id.*)

On April 16, 2014, claimant requested acceptance of right shoulder bursitis as a new/omitted medical condition. (Ex. 237).

In May 2014, Dr. Strum stated that bursitis would be subsumed under the more general diagnosis of shoulder impingement. (Ex. 238). Based on claimant's equivocal physical examination, Dr. Strum continued to question the diagnosis of right shoulder impingement. (*Id.*)

On May 30, 2014, Dr. Degan concurred with Dr. Strum. (Ex. 240).

In June 2014, the employer denied claimant's new/omitted condition claim for right shoulder bursitis. (Exs. 242, 243).

In July 2014, Dr. Strum acknowledged that the right shoulder MRI was consistent with some degree of impingement and bursitis. (Ex. 246). However, because claimant's physical examination was inconsistent with those conditions, Dr. Strum maintained that there was insufficient evidence for the diagnosis. (*Id.*)

Considering claimant's history of manual labor, Dr. Strum concluded that work activities would have combined with his preexisting shoulder conditions, but that they would not have pathologically worsened the preexisting conditions. (Ex. 246-2). Dr. Strum did not consider claimant's work activities to be the major contributing cause of the combined condition.

Claimant testified that, after injuring his left shoulder, he continued his regular duties in the quality control position until he received Dr. Thrall's restrictions and physical therapy prescription in March 2011. (Tr. 12). Claimant testified that from March 2011, until his July 2011 surgery, he worked with a machine tying up hay bales. (Tr. 13). He stated that he was still required to pick up hay bales weighing up to 150 pounds regularly because they would frequently

fall while being moved by the fork lifts. (Tr. 14). Claimant's supervisor disagreed that hay bales regularly fell off the fork lifts, and stated that he instructed claimant not to lift them. (Tr. 25-26). The supervisor also testified that claimant did not return to his regular work, and that he hired a replacement for claimant in January 2011. (Tr. 24).

The ALJ found, based on claimant's demeanor while testifying, that his description of the nature and extent of his work activities was credible. The ALJ further reasoned that Dr. Puziss's opinion persuasively established that the claimed right shoulder bursitis and impingement conditions existed and were caused, in major part, by the compensable left shoulder injury. Accordingly, the ALJ set aside the employer's denials of claimant's new/omitted medical condition claims.

On review, the employer asserts that claimant's description of his work activities was refuted at hearing, and, consequently, Dr. Puziss relied on an inaccurate description of claimant's work activities. Based on the following reasoning, we affirm.

Because claimant contends that his right shoulder bursitis and impingement conditions are compensable as consequential conditions, he must prove that these conditions exist and that the compensable left shoulder injury was the major contributing cause of the claimed consequential conditions. ORS 656.005(7)(a)(A); ORS 656.266(1); *English v. Liberty Northwest Ins. Co.*, 271 Or App 211, 215 (2015); *Terrie J. Tandy*, 62 Van Natta 1944, 1945 (2010) (analyzing left shoulder consequential condition claim following compensable right shoulder injury); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005); see *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997). Compensability of the right shoulder bursitis and impingement conditions is a complex medical question that must be established by expert medical opinion. See *Uris v. Comp. Dep't*, 247 Or 420 (1967). When there is a dispute between medical experts, more weight is given to those medical opinions that are well reasoned and based on complete information. See *Somers v. SAIF*, 77 Or App 259, 263, (1986).

The employer contends that claimant's testimony was refuted by his supervisor, who disagreed with his description of his work activities and the periods in which he worked in different positions for the employer. We reject the employer's contentions.

As noted above, the ALJ found that claimant's testimony was credible based on demeanor. In evaluating the credibility of a witness's testimony, we generally defer to an ALJ's demeanor-based credibility findings. See *Erck v.*

Brown Oldsmobile, 311 Or 519, 526 (1991). Further, the substance of the record and claimant's testimony presents no compelling reason to disturb the ALJ's credibility finding. See *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987) (where evaluation of a witness's credibility is based on the substance of the testimony rather than demeanor, the Board is equally suited to make a determination). Accordingly, we accept claimant's comparatively detailed and responsive testimony.

We turn to the physicians' opinions concerning the disputed right shoulder conditions. Based on the following reasoning, we conclude that such evidence supports the compensability of the claimed conditions.

The employer contends that the medical evidence does not establish the existence of the claimed right shoulder impingement and bursitis conditions. Yet, after reviewing claimant's right shoulder MRI and conducting a physical examination, Dr. Puziss diagnosed right shoulder subacromial bursitis and impingement, as well as preexisting bilateral AC arthritis that had been aggravated on the right. (Ex. 229a-9). He considered claimant's physical examination and objective findings to be consistent with the diagnosed conditions and did not believe that claimant exhibited embellishment or pain behavior. (Ex. 229a-11).

Dr. Strum did not diagnose impingement of the right shoulder because of claimant's diffuse pain complaints and inconsistent physical examination. (Ex. 204-27). However, Dr. Strum conceded that the later MRI was interpreted to show a mild degree of bursitis and impingement, and while stating that he could not make the diagnosis, acknowledged that there "may be" a mild degree of right shoulder bursitis. (Ex. 246-1, -2). He also considered shoulder bursitis to be subsumed within a diagnosis of impingement syndrome. (Ex. 238-1). Based on the variety of observations expressed by Dr. Strum, we consider his opinion to be equivocal and therefore, unpersuasive. See *Barbara A. Lewis*, 58 Van Natta 867, 869 (2006); *Deborah L. Fuston*, 54 Van Natta 1618, 1619 (2002) (equivocal opinion unpersuasive).

Dr. Stanley and Dr. Degan both concurred with Dr. Strum's opinion regarding the nonexistence of the claimed conditions. (Exs. 205-2, 213-2). However, Dr. Degan's May 2014 concurrence represented a change of opinion from his December 2012 chart note in which he diagnosed right shoulder impingement versus bursitis. (Exs. 193-1, 240). Moreover, in his deposition, Dr. Degan agreed with Dr. Puziss's diagnosis regarding the right shoulder, but only disagreed regarding the causation of the conditions. (Ex. 233-16). Yet, in a

subsequent concurrence (in contradiction of his deposition testimony), Dr. Degan concurred with Dr. Strum's opinion regarding the right shoulder impingement and bursitis conditions. (Ex. 247). We find that Dr. Degan's medical opinion regarding the existence of the claimed conditions is unpersuasive due to his multiple unexplained changes of opinion. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Kurtis L. Kohl*, 66 Van Natta 1796, 1799 (2014).

Similarly, Dr. Stanley changed his opinion regarding the existence of the claimed conditions without offering reasoning for that modification. (Exs. 241, 245). Finally, to the extent that both Drs. Degan and Stanley rely on Dr. Strum's opinion, we discount their opinions.

Accordingly, we conclude that the record persuasively establishes the existence of the claimed right shoulder bursitis and impingement conditions. See *Vicki L. Galvin*, 58 Van Natta 886, 889 (2006) (a new medical condition claim for specific conditions requires that the asserted conditions in fact exist).

The employer also contends that the record does not establish that claimant's compensable left shoulder injury was the major contributing cause of the claimed right shoulder conditions. The employer relies on Dr. Strum's conclusion that claimant's right shoulder condition was most likely due to preexisting degenerative joint disease of the acromioclavicular joint and degenerative rotator cuff tendinopathy. (Ex. 204-24).

For the following reasons, we find Dr. Puziss's opinion more persuasive than Dr. Strum's. Dr. Puziss concluded that claimant's left shoulder injury and subsequent work activities were the major contributing cause of overuse of the right shoulder and resulting subacromial bursitis and impingement. (Ex. 229a-10). In reaching this conclusion, Dr. Puziss reasoned that claimant was unable to use his left arm to push heavy bales to the left on a stacking machine, but instead, had to use his right arm in an awkward position that caused abduction of approximately 90 degrees. (*Id.*) Dr. Puziss noted that claimant's right shoulder became symptomatic during the course of this work activity involving the right arm and shoulder. (*Id.*) Finally, he reported that claimant had no history of right shoulder medical treatment until after the left shoulder injury. (*Id.*)

Dr. Strum stated that claimant had given him a different history than that recorded by Dr. Puziss. (Ex. 235-3). Specifically, Dr. Strum understood that claimant pushed the bales at waist level, or about 30 degrees of forward flexion

and abduction. (*Id.*) Claimant also told Dr. Strum that he would occasionally have to pull “bad bales” off the chain and lower them to the floor, and would occasionally have to lift those bales back onto the chain. (Ex. 204-2). Dr. Strum did not consider such activity to satisfy the AMA criteria for increased risk of shoulder injury, which requires greater than 60 degrees of abduction. (Ex. 235-3) Dr. Strum also did not believe that the frequency of claimant’s pushing the bales was sufficiently repetitive. (*Id.*) Moreover, Dr. Strum erroneously believed that claimant’s right shoulder symptoms began at a time that he was not working.

In his initial report, Dr. Strum noted in his history of the left shoulder injury that claimant would be “pushing with his left upper extremity at a height of waist level.” (Ex. 204-1, -2). Although he noted claimant “used his right upper extremity preferentially to protect his left upper extremity” after the work injury, Dr. Strum did not record how claimant used his right arm or shoulder differently. (Ex. 204-25). Thus, Dr. Strum’s more specific description of work activities pertained to the period before the left shoulder injury. When he later disagreed with Dr. Puziss’s description of claimant’s “post-left shoulder injury” work activities, Dr. Strum referred to the description of work activities that he had initially obtained. (Exs. 204-1, -2, 235-3). Thus, Dr. Strum based his opinion on an inaccurate description of the work activities relevant to the right shoulder condition due to his failure to question claimant closely about the use of his right shoulder, rather than any inconsistency on claimant’s part.

Comparatively, Dr. Puziss noted that during the time that claimant was not using his left shoulder, he had to lean forward and push the bales of hay to the right in an awkward position. (Ex. 229a-10). Thus, in contrast to Dr. Strum’s opinion, Dr. Puziss’s description accurately described claimant’s work duties *after* the left shoulder injury and *before* the *right* shoulder injury.

As previously noted, the claimed right shoulder conditions are subject to a “consequential condition” analysis. Under such an analysis, a description of claimant’s work activities *before* his left shoulder injury is not probative regarding the cause of his right shoulder conditions. Rather, the probative description is the one considered by Dr. Puziss, namely, claimant’s work activities after the left shoulder injury. (*Id.*)

Furthermore, consistent with Dr. Puziss’s description of “post-left shoulder injury” work duties, claimant testified that he returned to his regular job. (Tr. 12). While he did not specifically testify to pushing bales through the stacker with his right arm, he described relying on his right arm more for other duties.

(Tr. 16, 18). Claimant's testimony did not contradict the description noted by Dr. Puziss regarding use of the right arm in pushing bales through the stacker. (See Ex. 229a-10). Further, the remainder of the record does not establish that Dr. Puziss's understanding of claimant's work activities was inaccurate.

Moreover, Dr. Strum believed that claimant was not working when his right shoulder symptoms began in May 2011. (Ex. 228-2). While the record is unclear as to precisely when claimant stopped working for the employer, it establishes that he was working when his symptoms arose in May 2011. First, Dr. Gramstad noted that claimant's job ended in September 2011. (Ex. 96). Second, claimant testified that he was working until he took time off for his left shoulder surgery, which occurred in July 2011. (Tr. 9; Ex. 48). In the absence of contrary evidence, the record supports Dr. Puziss's opinion, which correlated claimant's symptoms with his work activities involving the right shoulder. (Ex. 229a).

The employer contends that Dr. Puziss described claimant's work injury as occurring during a period when he did not use the left shoulder, but claimant testified that he only reduced the amount of use of the left shoulder. (Ex. 229a-10; Tr. 8, 14). However, Dr. Strum did not comment on the proportion of right arm and left arm work activities as a reason for his disagreement with Dr. Puziss's conclusions. Moreover, because Dr. Puziss's opinion regarding development of the right shoulder bursitis and impingement was based on "overuse" of the right shoulder, rather than exclusive use of the right shoulder, we do not consider this discrepancy to materially diminish the persuasiveness of his opinion. See *Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible); *Dorothy S. Calliham*, 59 Van Natta 137, 138 (2007) (where other medical opinions attached no significance to certain facts, a physician's failure to evaluate those facts did not undermine the persuasiveness of the physician's medical opinion).

The employer also asserts that Dr. Puziss changed his opinion regarding the source of claimant's right shoulder pain. In doing so, the employer notes that Dr. Puziss initially could not determine whether claimant's right shoulder symptoms were due to aggravation of his preexisting AC joint arthritis, or due to adjacent subacromial bursitis, but later attributed claimant's right shoulder symptoms to the subacromial bursitis. (Exs. 229A-10, 236-1). The employer argues that these statements represent an unexplained change of opinion, rendering Dr. Puziss's opinion unpersuasive because the record does not indicate how Dr. Puziss later determined the source of claimant's pain complaints between the two causes.

We disagree with this argument. The precise source of claimant's right shoulder pain is not the issue for decision before us. Rather, the existence of the claimed right shoulder conditions and their relationship to adjustments in claimant's work activities related to his compensable left shoulder injury are the determinative questions. Because Dr. Puziss persuasively diagnosed right shoulder bursitis and impingement and explained how claimant's left shoulder injury was the major contributing cause of the development of those conditions, we consider his opinion to have resolved the relevant questions regarding the compensability of claimant's right shoulder new/omitted condition claims.

Based on the foregoing reasoning, we conclude that Dr. Puziss's opinion is based on a more accurate description of claimant's work activities and the relationship between claimant's "post-compensable left shoulder injury" work activities and the onset of his right shoulder condition.¹ Consequently, we consider Dr. Puziss's opinion to be more persuasive. *See Somers*, 77 Or App at 263; *Shanda D. Bogue*, 67 Van Natta 1148, 1157 (2015).

Accordingly, we conclude that claimant has met his statutory burden to establish the compensability of his consequential right shoulder impingement and bursitis conditions. *See* ORS 656.005(7)(a)(A); ORS 656.266(1). Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$4,000, payable by the employer. In reaching this conclusion we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the case, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the

¹ Dr. Degan also did not consider claimant's right shoulder condition to be related to the left shoulder injury. (Ex. 240). However, he did so by concurring with the opinion of Dr. Strum. (Ex. 233-19). Moreover, Dr. Degan did not distinguish his understanding of claimant's work activities or his understanding of claimant's work status at the time that the right shoulder symptoms arose. (*Id.*) Accordingly, based on the reasoning expressed above, we consider Dr. Puziss's opinion to be more persuasive.

denials, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 14, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, payable by the employer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by the employer.

Entered at Salem, Oregon on January 21, 2016