
In the Matter of the Compensation of
ELIZABETH A. MILLER, Claimant
WCB Case No. 14-05157
ORDER ON REVIEW
Randy M Elmer, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Somers. Member Johnson dissents in part.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Marshall's order that: (1) admitted a physician's report into the record; and (2) set aside SAIF's denial of claimant's injury claim for her low back condition. On review, the issues are evidence and compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary and supplementation.

On May 28, 2014, claimant experienced low back pain while lifting a trailer onto a trailer hitch at work. (Ex. 9; Tr. 11). Expecting the symptoms to resolve, she did not immediately seek medical treatment. (Tr. 12).

Claimant had intermittent low back pain for many years. (Tr. 12). In 2010, she saw Dr. Peffley, her family physician, for severe low back pain radiating to the bilateral buttocks. (Ex. 1). She did not associate these symptoms with any injury and also noted that this was her third such episode. (*Id.*) On April 22, 2014, claimant told Dr. Peffley that she was having intermittent back pain radiating to the left leg. (Ex. 2-2). Dr. Peffley sent claimant for x-rays and told her to return if her symptoms persisted. (*Id.*)

On June 24, 2014, following the May 2014 work incident, claimant returned to Dr. Peffley for persistent low back pain radiating to the left hip, thigh, and foot. (Ex. 4-1). The onset was noted as "3 months ago." (*Id.*) Claimant did not recall specific trauma, reporting that the lower back/left hip pain "just sorta popped up" and progressively worsened. (*Id.*)

Claimant began a physical therapy program on June 26, 2014. She told Mr. Darrington, the therapist, that she had had back pain for years and that her left leg pain began "insidiously." (Ex. 5-1). Mr. Darrington described the mechanism of injury as "unknown trauma." (*Id.*)

On July 11, 2014, claimant told Dr. Joynt, a chiropractor, that she did not know how her back problems began, but most recently she lifted something that was too heavy. (Ex. 7-1).

Claimant filed a workers' compensation claim on August 20, 2014. (Ex. 9). On August 21, 2014, she told Dr. Peffley that, in retrospect, she recalled lifting a trailer at work and this "sparked" the pain she was having, which was unlike anything she had had before. (Ex. 10-1).

An August 31, 2014 lumbar MRI showed an L4-5 disc herniation. (Ex. 14). Claimant told Dr. Hubbard, a consulting neurosurgeon, that her chronic low back pain had not changed, but her left buttock and leg pain were new and began after lifting the trailer at work. (Ex. 18-1).

On October 6, 2014, Dr. Rosenbaum, a neurosurgeon, performed an examination at SAIF's request. Considering Dr. Peffley's April 22, 2014 chart note to document symptoms consistent with an L4-5 herniated disc, Dr. Rosenbaum opined that the disc herniated spontaneously as a result of the degenerative process, before the work event. (Ex. 19-7, -8, -9). He further noted that claimant had not associated her symptoms with the work injury for several months, and, therefore, concluded that the work event was not significant or a material cause of her need for treatment. (Ex. 19-8).

On October 14, 2014, SAIF denied the claim, asserting that claimant's back injury was not compensably related to her employment. (Ex. 20). Claimant requested a hearing.

On February 5, 2015, Dr. Peffley opined that claimant did not present with radicular symptoms until after the work event. (Ex. 20A-2). He acknowledged that claimant had a prior "instance of low back pain with local radiation to mid back and buttocks," but maintained that she did not have "true radicular pain into the leg, calf, and foot causing a loss of functionality." (*Id.*)

On March 22, 2015, Dr. Taylor, a pain care specialist, opined that the L4-5 herniated disc was probably caused by lifting the heavy trailer at work. (Ex. 21). Dr. Peffley concurred with Dr. Taylor's opinion. (Ex. 22).

At the hearing, SAIF objected to Dr. Taylor's report (Ex. 21) under ORS 656.310(2). SAIF argued that Dr. Taylor was not a resident of Oregon and had not treated or examined claimant. (Tr. 2). Claimant testified that Dr. Taylor performed an examination similar to that of Dr. Rosenbaum. (Tr. 18). SAIF declined the opportunity to cross-examine Dr. Taylor. (Tr. 4).

CONCLUSIONS OF LAW AND OPINION

Finding that claimant credibly testified that she was examined by Dr. Taylor, the ALJ admitted Dr. Taylor's report. In setting aside SAIF's denial, the ALJ found Dr. Taylor's opinion, as supported by Dr. Peffley, to be based on an accurate history and more persuasive than that of Dr. Rosenbaum.

On review, SAIF argues that Dr. Taylor's report was improperly admitted under ORS 656.310(2). SAIF also contests the ALJ's evaluation of the medical evidence, asserting that the medical opinion of Dr. Rosenbaum was well-reasoned and explained and based on a complete history, whereas the opinions of Drs. Peffley and Taylor were not. For the following reasons, we affirm the ALJ's order.

Evidentiary Ruling

SAIF asserts that the ALJ erred in admitting Dr. Taylor's report, Contending that this out-of-state physician based his opinion on a records review, rather than on his examination of claimant. *See* ORS 656.310(2); *Downey v. Halvorson-Mason*, 20 Or App 593 (1975); *Harold T. Bird*, 43 Van Natta 1732 (1991), *aff'd without opinion*, 113 Or App 233 (1992) (a medical report from an out-of-state physician who neither treated nor examined the claimant was not admissible). SAIF also argues that claimant's testimony describing her interaction with Dr. Taylor did not establish a "bona fide" medical examination.

ORS 656.310(2) provides for the admission of medical records "from any treating or examining doctor who is not a resident of Oregon," provided that the opposing party has 30 days to cross-examine the doctor.

Here, claimant's testimony (that Dr. Taylor's examination was similar to that of Dr. Rosenbaum) was not disputed. (Tr. 18). Furthermore, SAIF declined the opportunity to cross-examine Dr. Taylor. (Tr. 4). Under these circumstances, we find no abuse of discretion in the ALJ's admission of Dr. Taylor's report. *See Melvin O. Roberts*, 43 Van Natta 2771 (1991), *recons*, 44 Van Natta 33 (1992) (a letter prepared by the carrier's counsel and signed by an out-of-state physician was admissible under ORS 656.310(2) where the claimant's attorney declined the opportunity to cross-examine the physician).

Compensability

Claimant has the burden of proving that her work injury was a material contributing cause of her disability/need for treatment of her claimed low back condition. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Considering the disagreement among medical experts regarding the cause of claimant's low back condition, causation must be established by expert medical opinion. *Uris v. Comp. Dep't*, 247 Or 420, 427 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). For the following reasons, we find the opinions of Drs. Taylor and Peffley persuasive.

Dr. Peffley ultimately adopted Dr. Taylor's opinion that claimant's L4-5 disc herniation was caused by lifting the heavy trailer at work. (Exs. 21, 22). SAIF argues that Dr. Taylor relied on an inaccurate history and that Dr. Peffley changed his opinion without explanation. For the following reasons, we disagree.

Dr. Peffley did not know about the May 2014 work event until August 21, 2014, when he noted that claimant retrospectively recalled lifting a trailer at work and that this "sparked" the pain that she had been having. (Ex. 10-1). On that day, he also reported that, while claimant had had intermittent back pain, this was different. (*Id.*) Because she had never had any symptoms like those she experienced after the work event, Dr. Peffley concluded that the radiculopathy with lower leg symptoms was directly related to lifting the trailer at work. (Ex. 10-2). He also stated that the "inciting event seems pretty clear." (*Id.*)

On September 5, 2014, Dr. Peffley opined that claimant was experiencing back pain caused by disc disease in her lumbar spine. (Ex. 16). In doing so, he did not refer to the work event. Yet, on February 5, 2015, he reasoned that claimant's "preexisting pain" was different from her presentation after the work event. He explained that, although he saw her intermittently for back pain and she did have "an instance of low back pain with local radiation to mid back and buttocks," she never presented with radicular symptoms (*i.e.*, "true radicular pain into the leg, calf, and foot causing a loss of functionality") before the work event. (Ex. 20A-2). Ultimately, on April 16, 2015, he concurred with Dr. Taylor's opinion that claimant's acute disc herniation was caused by lifting the heavy trailer. (Exs. 21-2, 22).

Based on our review of this record, we do not consider Dr. Peffley's concurrence with Dr. Taylor's opinion to constitute a change of opinion concerning the cause of claimant's radicular symptoms after the work event. Dr. Peffley's opinion that claimant's *back* pain was caused by lumbar disc disease is not necessarily inconsistent with his opinion that claimant's *radicular* pain was due to the work event. Moreover, this opinion was consistent with claimant's report that her chronic low back pain had not changed, whereas the left buttock and leg pain were new and began after lifting the trailer at work. (Ex. 18-1). Under such circumstances, we do not consider Dr. Peffley's opinion that the work event caused these new symptoms to have changed. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency); *Robert A. Hagar*, 65 Van Natta 551, 558 n 4 (2013) (physician's opinion about the etiology of the claimant's condition did not change over time when his opinions were evaluated in context and based on the record as a whole).

We turn to Dr. Taylor's opinion. In formulating his opinion, Dr. Taylor stated that "there is no mention in the medical records prior to the injury of any radiculopathy." (Ex. 21-2). Asserting that claimant presented with "back pain with radiation to left leg" before the work incident, SAIF contends that Dr. Taylor's opinion is based on an inaccurate history. For the following reasons, we disagree.

After Dr. Rosenbaum's examination, Dr. Peffley reviewed the chart note and medical records from before the work event. As described above, he concluded that claimant "never presented with radicular symptoms before [the work event]." (Ex. 20A-2). Dr. Peffley's opinion is supported by his records. Before claimant's work event, Dr. Peffley documented back pain with radiation to the left leg. (Ex. 2-2). After the work event, Dr. Peffley reported back pain radiating to the left hip, thigh, and foot. (Ex. 4-1). Dr. Peffley further clarified that claimant had "an instance of low back pain with local radiation to mid back and buttocks," but "no true radicular pain into the leg, calf, and foot causing a loss of functionality" until after the work event. (Ex. 20A-2).

As claimant's treating physician, Dr. Peffley had the advantage of observing and evaluating claimant's low back condition both before and after the May 28, 2014 work event. *See Kienow's Food Stores v. Lyster*, 79 Or App 416, 421 (1986) (greater probative weight accorded top physician's opinion who had observed the claimant's condition before and after the pivotal event). Accordingly, we conclude that Dr. Taylor relied on an accurate history concerning claimant's radiculopathy.

For these same reasons, we conclude that Dr. Rosenbaum's opinion (that the disc herniated before the work event) was based on inaccurate information (that claimant had a left leg radiculopathy before the work event). Accordingly, we do not find his opinion persuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (a medical opinion that rests on inaccurate information is not persuasive).

Therefore, consistent with the ALJ's reasoning (and as supplemented above), we find that Dr. Peffley's opinion persuasively establishes the compensability of claimant's low back injury claim. Thus, 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 \$4,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and her counsel's uncontested fee submission), the complexity of the issue, the value of the interest involved, and the risk of going uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 22, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on January 4, 2016

Member Johnson dissenting in part.

I agree with the majority opinion regarding the ALJ's admission of Dr. Taylor's report (Ex. 21). However, because I disagree with the majority's evaluation of the medical evidence, I respectfully dissent. For the following reasons, I find Dr. Rosenbaum's opinion to be the most persuasive.

Dr. Rosenbaum opined that claimant's disc herniated when she initially had symptoms, which Dr. Peffley documented on April 22, 2014. (Ex. 19-7, -9). Accordingly, Dr. Rosenbaum concluded that claimant treated for the disc herniation before the May 28, 2014 work event. (Ex. 19-8). He also determined that, because claimant significantly delayed seeking treatment and reporting the work event, the event was not significant or a material contributing cause of claimant's need for treatment. (Ex. 19-8, -9). He reasoned that if the event had been significant, it would have presented as such. (*Id.*)

After reviewing the record, I conclude that it supports Dr. Rosenbaum's conclusions. At hearing, claimant explained that when she initiated the claim, the work event was the only thing she could remember having done to hurt her back. (Tr. 15). Yet, when she saw Dr. Peffley in June 2014, a month after the work event, she did not mention the event. Instead, she reported persistent low back pain that began three months earlier. (Ex. 4-1). Moreover, Dr. Peffley noted that the "lower back/left hip pain just sorta popped up. No recollection of specific trauma." (*Id.*) Similarly, on June 26, 2014, claimant did not tell Mr. Darrington, the physical therapist, about the injury. Mr. Darrington described the etiology as "unknown." (Ex. 5-1). Additionally, in August 2014, claimant told Dr. Joynt, a chiropractor, that she felt pain *later* and did not relate it to the work activity at the time. (Ex. 11). Instead, she later reasoned that her symptoms "must be related" to the lifting event. (*Id.*) In view of the contemporaneous medical record, I do not find claimant's reconstruction of events months later to be reliable. *See Pamela R. Blake*, 62 Van Natta 216, 225 (2010) (contemporaneous records found more reliable than testimony given long after the pertinent event).

Furthermore, claimant testified that, on May 28, 2014, when she lifted the trailer, she experienced back pain instantly and knew that she had hurt her back. (Tr. 11). She also testified that she had never had radiating leg pain before she lifted the trailer. (Tr. 13). Yet, the medical record shows that claimant had back pain radiating to her left leg before the work event. (Ex. 2-2). On April 22, 2014, Dr. Peffley sent her for x-rays and told her to return for further evaluation if her symptoms persisted. (*Id.*) Claimant returned to Dr. Peffley on June 24, 2014, for lower back pain that began three months earlier and had progressively worsened. (Ex. 4-1). She did not recall specific trauma or mention the work event. (*Id.*) These reports are more reflective of a continuation of claimant's April 2014 complaints, not a new injury, which is consistent with Dr. Rosenbaum's opinion.

Therefore, even though claimant appeared credible to the ALJ, I find her testimony unreliable when compared to the medical record. *See George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005)

(factual inconsistencies in the record raised such doubt that Board was unable to conclude that claimant's material testimony was credible); *David A. Peper*, 46 Van Natta 1656 (1994) (inconsistencies in the record may be basis for disagreeing with an ALJ's credibility determination if they raise such doubt that we are unable to conclude that material testimony was credible).

Additionally, I do not find Dr. Peffley's support for the claim to be consistent with his contemporary chart notes. Dr. Peffley opined that claimant did not present with radicular symptoms until after the work event. (Ex. 20A-2). He explained that, although claimant had a prior "instance of low back pain with local radiation to mid back and buttocks," she did not have "true radicular pain into the leg, calf, and foot causing a loss of functionality." (*Id.*) Yet, while his explanation is consistent with his 2010 chart note (which documented low back pain radiating to the bilateral buttocks), it is not consistent with his April 22, 2014 chart note documenting back pain radiating to the left *leg*. (Exs. 1-1, 2-2).

Under such circumstances, Dr. Peffley's "clarification" conflicts with the contemporaneous record. Furthermore, Dr. Taylor's opinion relied on Dr. Peffley's "clarification" that claimant did not exhibit radiculopathy on April 22, 2014. (Ex. 21-2).

Accordingly, for the reasons expressed above, I would find that the opinions of Drs. Peffley and Taylor were not based on accurate and complete information. *See Jackson Co. 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); *Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977) (medical evidence based on inaccurate information was insufficient to prove compensability).

In contrast, Dr. Rosenbaum's well-reasoned and thoroughly explained opinion is consistent with the information in the contemporaneous medical record. Consequently, I would conclude that claimant has not carried her burden of proving compensability of her low back condition. *See* ORS 656.266(1). Therefore, I respectfully dissent.