
In the Matter of the Compensation of
CODY L. ERVIN, Claimant
WCB Case No. 15-00702
ORDER ON REVIEW
J R Perkins III, Claimant Attorneys
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Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that: (1) excluded "post-reconsideration order" documents submitted by claimant; and (2) affirmed an Order on Reconsideration that did not award permanent impairment and work disability for a left knee condition. On review, the issues are evidence and permanent disability (impairment and work disability).

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

As a result of claimant's May 10, 2013 work injury, the insurer accepted a left knee contusion. (Ex. 6-1). Claimant's treating physician, Dr. Bolstad, diagnosed a left knee contusion and referred claimant to an orthopedist. (Exs. 3-3, 11-9).

On September 25, 2013, claimant was examined by Dr. Petit, an orthopedist, who recommended physical therapy and conditioning. (Ex. 15-1). In November 2013, Dr. Bolstad released claimant for modified work with restrictions. (Ex. 14-3).

In February 2014, Dr. Bolstad scheduled claimant for a functional capacity evaluation (FCE) because his condition was almost medically stationary. (Ex. 17-3). Claimant was again released to modified work, "with no climbing, squatting, and limited standing, walking" and no lifting over 20 pounds. (*Id.*) A March 2014 FCE indicated that, although claimant had given less than full effort and some of his examination findings were inconsistent, he could only tolerate medium strength, light duty work. (Ex. 18-1, -2, -29).

In April 2014, Dr. Bolstad found that claimant's left knee contusion was medically stationary. Dr. Bolstad identified the following permanent work restrictions: no squatting, no left-knee kneeling, no crawling, no carrying over 20 pounds, no lifting overhead 10 pounds, limited climbing, and limited right-knee kneeling. (Ex. 20-3).

In May 2014, at the insurer's request, Dr. Groman, an orthopedist, examined claimant. (Ex. 21). He concluded that claimant's left knee contusion had resolved and his symptoms were out of proportion to any objective findings on examination. (Ex. 21-15). Dr. Groman also concluded that claimant was not significantly limited in the repetitive use of his left knee and psychological factors could not be ruled out as a cause of his ongoing symptoms. (Ex. 21-17, -20).

Dr. Groman observed that claimant had no tenderness to the joint line on the medial or lateral side of his left knee. (Ex. 21-6). Dr. Groman further noted no infrapatellar tenderness and that the patellar tendon and the quadriceps were nontender, with no effusion in the left knee and no crepitus on flexion and extension of either knee. (*Id.*) Claimant's range-of-motion findings were 140 degrees flexion of the right knee, 135 degrees flexion of the left knee, and full 0 degrees extension of both knees. (*Id.*) He had 5/5 muscle strength in all muscles of the lower extremities, including knee flexors and extensors. (*Id.*)

Dr. Bolstad did not concur with all of Dr. Groman's findings and conclusions. (Exs. 22, 23). She continued to believe that claimant should follow the FCE recommendations. (Ex. 23). However, Dr. Bolstad agreed that Dr. Groman's examination measurements could be used for rating claimant's permanent impairment. (Ex. 24).

An October 17, 2014 Notice of Closure awarded no permanent impairment. (Ex. 27).¹ Claimant requested reconsideration.²

On January 12, 2015, an Order on Reconsideration affirmed the Notice of Closure. (Ex. 29). Claimant requested a hearing.

At the hearing, claimant offered the following "post-reconsideration order" concurrence letters from Mr. Harris (the therapist who conducted claimant's FCE) and Dr. Bolstad, claimant's treating physician. The insurer objected to the admission of these proposed exhibits.

The ALJ excluded the "post-reconsideration order" documents, relying on ORS 656.283(6). In doing so, the ALJ rejected claimant's argument that those documents clarified evidence within the reconsideration record and, thus, did not

¹Claimant's claim was closed by an October 17, 2014 Notice of Closure. (Ex. 27). Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1).

² No medical arbiter was requested.

amount to “new” medical evidence. The ALJ then concluded that claimant was not entitled to a “chronic condition” impairment value because the medical evidence established that the work injury had not resulted in any permanent left knee impairment. The ALJ further reasoned that, because there was no whole person impairment due to the work injury, claimant was not entitled to a work disability award.

On review, claimant contends that his proffered “post-reconsideration” documents should not be excluded under ORS 656.283(6) because they clarified evidence that *was* received in the reconsideration proceedings. He also argues that, as a result of the work injury, he is significantly limited in the repetitive use of his left knee, warranting a “chronic condition” impairment value. Additionally, claimant asserts that he should receive work disability award because he had not returned to his job at injury. Based on the following reasoning, we affirm the ALJ’s order.

Evidence

At the hearing level, claimant offered concurrence letters from his attending physician, Dr. Bolstad, and Mr. Harris (the physical therapist who conducted claimant’s FCE), which were not a part of the reconsideration record. The insurer objected to the admission of those letters, relying on ORS 656.283(6). The ALJ granted the insurer’s objection.

On review, claimant concedes that the disputed exhibits were not a part of the reconsideration record. He contends, however, that they are admissible because they “clarify” evidence properly admitted during the reconsideration process. We disagree.

ORS 656.283(6) provides that “[e]vidence on an issue regarding a notice of closure that was not submitted at the reconsideration required by ORS 656.268 is not admissible at hearing * * *.” The reconsideration record “consists of all documents and material received and date stamped by the director prior to the issuance of the Order on Reconsideration * * *.” OAR 436-030-0155(1)(a). Moreover, that record “includes all documents and other material relied upon in issuing the Order on Reconsideration as well as any additional material submitted by the parties, but not considered in the reconsideration proceeding.” OAR 436-030-0155(1); *see also Donald L. Ivie*, 61 Van Natta 1037, 1043-44 (2009).

Pursuant to ORS 656.268(8)(h), after reconsideration, “no subsequent medical evidence of the worker’s impairment is admissible before the director, the Workers’ Compensation Board or the courts for purposes of making findings of impairment on the claim closure.” *See also* OAR 436-060-0095(3) (“[e]xaminations after the worker’s claim is closed are subject to limitations in ORS 656.268(8)”; *Juana M. Lopez*, 52 Van Natta 1654 (2000) (because the medical report submitted by the claimant was not in the reconsideration record, it would not be admissible at hearing and there was no compelling reason to remand); *Larry A. Thorpe*, 48 Van Natta 2608, 2610 (1996) (supplemental or clarifying reports requested by a party are not considered “medical arbiter” reports for purposes of ORS 656.268(6)(e) and, therefore, are not admissible).

Here, claimant’s proffered exhibits constitute evidence on an issue regarding a Notice of Closure that was not submitted at the reconsideration proceeding. Accordingly, the ALJ did not err in excluding the proffered exhibits.

Claimant also raises a constitutional challenge to the ALJ’s evidentiary ruling, contending that the exclusion of this “post-reconsideration” evidence constitutes a violation of his rights to due process of law. Yet, claimant did not raise this constitutional argument at the hearing level. *Michael J. Kivet*, 62 Van Natta 3084, n 2 (2010) (constitutional argument was not considered on Board review when argument was not raised at the hearing level). In any event, ORS 656.268(6) provides the procedure to challenge the medical arbiter’s report and to provide further information respecting claimant’s condition. Claimant did not follow that procedure and, as such, exhaust his administrative remedies. Under such circumstances, he is barred from pursuing a constitutional challenge to the evidentiary limitations prescribed in ORS 656.283(6). *Trujillo v. Pacific Safety Supply*, 336 Or 349, 374-75 (2004).

Permanent Impairment

The ALJ concluded that claimant was not entitled to a “chronic condition” impairment value for a significant limitation in the repetitive use of his left knee. *See* OAR 436-035-0019. The ALJ reasoned that, based on the reports with which Dr. Bolstad (the attending physician) concurred, claimant was not significantly limited in the repetitive use of his left knee.

On review, claimant seeks a “chronic condition” impairment value based on his purported inability to kneel, squat, climb, or crawl, which he contends is a significant limitation “in that a material part of the joint function is involved.” (App. Br., p. 4). In doing so, he asserts that these activities are “a significant part of the work activity.” (App. Br., p. 5).

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, claimant also has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Based on the following reasoning, we are not persuaded that claimant has satisfied his statutory burden.

For the purpose of rating claimant's permanent impairment, only the opinion of the attending physician at the time of claim closure, or any findings with which he or she concurred, or a medical arbiter's findings may be considered. *See* 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). Where, as here, no medical arbiter was used, impairment is established based on objective findings of the attending physician, or findings with which the attending physician concurred. OAR 436-035-0007(5). Only findings of impairment that are permanent and caused by the accepted compensable conditions may be used to rate impairment. OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

In determining whether claimant is entitled to a "chronic condition" impairment value under OAR 436-035-0019(1), we must determine "whether the loss of function to a body part created a significant limitation in [his] ability to use the affected body part repetitively." *Gonzalez v. SAIF*, 183 Or App 183, 190 (2002). Thus, claimant is entitled to a 5 percent impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, he is significantly limited in the repetitive use of his left knee. OAR 436-035-0019(1)(g).

In *Angelica M. Spurger*, 67 Van Natta 1798, 1804 (2015) (on remand), a decision issued after the ALJ's order, we concluded that "the plain and ordinary meaning of 'significantly limited' denotes a limitation that is meaningful or important." In *Spurger*, we rejected the claimant's assertion that the phrase "significantly limited" refers to any repetitive-use limitation that is more than a *de minimus* one. *Id.* at 1802. We explained that the history of the "chronic condition" rule (the same version as applicable in this case) shows that it was designed to establish a "higher threshold for receiving an award of impairment than merely a partial loss of ability to repetitively use a body part[.]" *Id.*

Here, relying on Dr. Bolstad's permanent work restrictions and concurrence with the FCE, claimant contends that restricting the knee from kneeling and allowing only rare squatting, climbing or crawling constitute a significant limitation in the repetitive use of his left knee. Yet, our review of the record does not support claimant's contention.

Although Dr. Bolstad did not concur with all of Dr. Groman's findings and conclusions, she expressly agreed that Dr. Groman's measurements could be used to rate impairment. (Exs. 22 through 26). Dr. Bolstad also agreed with the FCE addendum report that claimant was in the medium physical demands category, including "occasional lifting of 20-50 pounds; frequent lifting of 10-25 pounds; and constant lifting of up to 10 pounds." (Exs. 25, 26).

The Order on Reconsideration relied on Dr. Groman's measurements to rate claimant's impairment. (Ex. 29-1). The reconsideration order referred to Dr. Groman's findings of "full extension in the left knee and flexion within 5 degrees of the contralateral side," full muscle strength, with no instability or plantar sensory loss. (Ex. 29-2). The order also noted Dr. Groman's finding that claimant was not significantly limited in repetitive use of the left knee due to the accepted contusion. (*Id.*) Thus, the Order on Reconsideration did not give a value under OAR 436-035-0019, because a "review of the [impairment] findings disclosed no objective evidence of loss of use or function due to the accepted contusion to the left knee and/or any direct medical sequelae." (Ex. 29-3). The reconsideration order concluded that "claimant [had] not proved existence of objective impairment due to the injury" and, thus, "[p]ursuant to OAR 436-035-0007(7), when there are no impairment findings, no permanent disability award is allowed." (*Id.*)

As previously noted, for purposes of rating claimant's permanent impairment, only the opinion of the attending physician, Dr. Bolstad, or any findings with which she concurred may be considered. ORS 656.245(2)(b)(C); ORS 656.268(7). We review those impairment findings to determine whether they establish a "significant" (*i.e.* "meaningful" or "important") limitation in the repetitive use of claimant's left knee. *Spurger*, 266 Or App at 192; *see* OAR 436-035-0007(5); *Owens*, 247 Or App at 414-15. After conducting our review, we conclude that those findings do not establish the requisite significant limitation in repetitive use. We reason as follows.

Dr. Bolstad agreed that Dr. Groman's impairment findings could be used to rate impairment. Accordingly, Dr. Groman's measurements are the "impairment findings" for rating purposes. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Watson*, 132 Or App at 485-86; *Koitzsch*, 125 Or App at 670. Those findings included full extension in the left knee and flexion within 5 degrees of the contralateral side upon formal measurement. Furthermore, Dr. Groman attributed no finding of decreased motion to the left knee contusion, finding normal range of motion, normal strength,

and no plantar sensory loss or instability. (Ex. 21-6, -18, -19). Such findings do not support a conclusion that claimant was experiencing meaningful and important limitations in the repetitive use of his left knee.

Dr. Bolstad released claimant to modified work with the following “permanent” work restrictions: no kneeling (left knee), limited climbing, no crawling, no squatting, no overhead lifting, no lifting over 10-20 pounds. (Ex. 20-4). Dr. Bolstad, however, ultimately concurred with the FCE addendum report that claimant was capable of performing work duties that fall in the medium physical demands category of work. (Exs. 25, 26). This record does not establish that such restrictions constitute a significant limitation in the repetitive use of claimant’s left knee.

Relying on Dr. Bolstad’s “permanent” work restrictions in her release of claimant for modified work (Ex. 20-4), claimant contends that no kneeling (left knee), limited climbing, no crawling, no squatting, no overhead lifting, no lifting over 10-20 pounds, constitute a significant limitation in the repetitive use of his left knee. Yet, even if we considered these restrictions relevant to a determination of a “chronic condition” impairment value, they do not constitute a significant limitation in the repetitive use of claimant’s left knee “as a whole.”³

In conclusion, claimant has not established an error in the Order on Reconsideration’s determination that the record did not satisfy the “significant limitation” requirement prescribed by the “chronic condition” rule. *See* ORS 656.266(1); *Callow*, 171 Or App at 183. Consequently, we affirm.

ORDER

The ALJ’s order dated May 26, 2015 is affirmed.

Entered at Salem, Oregon on January 5, 2016

³ OAR 436-035-0019(1) focuses on significant limitations on the repetitive use of the relevant body part, rather than on a claimant’s ability to perform work. *See Gonzalez*, 183 Or App at 190-91 (“chronic condition” rule focuses on limitations on the repetitive use of a body part and not on the worker’s ability to perform work); *Fidel Vivanco*, 59 Van Natta 1287, 1290 (2007) (work restrictions or statements about a claimant’s ability to perform particular activities were not sufficient to support a “chronic condition” limitation).