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In the Matter of the Compensation of  
**JAIME MARTINEZ-MEDINA, Claimant**  
WCB Case No. 15-00791  
ORDER ON REVIEW  
Dunn & Roy PC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that affirmed an Order on Reconsideration that did not award any permanent impairment for his right ankle condition. On review, the issue is extent of permanent disability (impairment).

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

Claimant injured his right ankle. The SAIF Corporation accepted a right ankle posterior medial malleolar tibial fracture and right ankle syndesmosis ligament disruption. (Ex. 18).

Claimant's attending physician, Dr. Kahn, concurred with Dr. Wong's closing examination report, which included decreased range of motion findings. (Exs. 15, 16). Based on those findings, SAIF issued a Notice of Closure that awarded 3 percent permanent impairment.<sup>1</sup> (Ex. 17-3). Claimant requested reconsideration and a medical arbiter examination. (Ex. 19).

Dr. Takacs, a medical arbiter, examined claimant. (Ex. 21). She reviewed claimant's medical records and identified the accepted right ankle conditions. (Ex. 21-1). Dr. Takacs found that claimant's range of motion was normal, and that he had no strength loss or instability, and no significant limitation in the repetitive use of his right ankle. (Ex. 21-3). Dr. Takacs concluded that claimant had no impairment due to the accepted conditions. (Ex. 21-3-4).

Relying on Dr. Takacs's arbiter report, the Appellate Review Unit (ARU) issued an Order on Reconsideration that reduced claimant's permanent impairment award to zero. Claimant requested a hearing, contending that Dr. Wong's findings, with which his attending physician, Dr. Kahn, had concurred, should be used instead of Dr. Takacs's findings.

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<sup>1</sup> Because claimant's claim was closed by a November 19, 2014 Notice of Closure, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). See OAR 436-035-0003(1).

The ALJ determined that the medical arbiter's report was persuasive and affirmed the Order on Reconsideration. On review, claimant contends that Dr. Wong's findings are more accurate and should be applied. Based on the following reasoning, we disagree.

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, he also has the burden of establishing error in the reconsideration process. ORS 656.283(6); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000); *Chi T. Nguyen*, 63 Van Natta 664, 666 (2011). For the following reasons, we find that claimant has not satisfied that burden.

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. Takacs, identified the accepted conditions. (Ex. 21-1). Furthermore, she reviewed claimant's medical records, and evaluated claimant. (Ex. 21-1-2). During examination, Dr. Takacs reported that claimant required "quite a few cues" to perform correct inversion and eversion because of "rather dramatic pain behavior in the right foot with co-contraction[.]" (Ex. 21-3). However, she also reported that "once he understood the directions range of motion was good." (*Id.*) Thus, Dr. Takacs found normal range of motion in claimant's right ankle. (Ex. 21-3). Notwithstanding claimant's "poor effort, co-contraction, and non-anatomical findings[.]" Dr. Takacs concluded that his normal range of motion findings were valid. (Ex. 21-3).

Claimant contends that because the examination conducted by Dr. Wong identified no pain behavior and met validity criteria which was not addressed by Dr. Takacs, Dr. Wong's findings are more accurate. We disagree.

As detailed above, Dr. Takacs took into consideration claimant's pain behavior and poor effort and, nonetheless, concluded that the normal range of motion findings were valid. The remainder of Dr. Takacs's impairment findings was entirely consistent with Dr. Wong's findings. After reviewing this record, we find that the preponderance of the evidence does not persuasively demonstrate that Dr. Wong's impairment findings, as ratified by Dr. Kahn, were more accurate and should be used. Consequently, we rely on the medical arbiter's (Dr. Takacs'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, claimant has not met his burden of establishing error in the reconsideration process. *See Callow*, 171 Or App at 183-84. Therefore, we affirm.

### ORDER

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

Entered at Salem, Oregon on January 20, 2016