In the Matter of the Compensation of
NOEL C. LESIECKI, Claimant
WCB Case No. 15-00925
ORDER ON REVIEW
Shlesinger & Devilleneuve Medford, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Smith's order that reduced claimant's total whole person permanent impairment for a left shoulder condition from 14 percent, as awarded by an Order on Reconsideration, to 10 percent. On review, the issue is permanent disability (impairment).

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

In evaluating claimant's left shoulder permanent impairment, the ALJ determined that the range of motion findings of Dr. Miller, claimant's attending physician, were more accurate than those of Dr. Morrison, the medical arbiter. *See* OAR 436-035-0007(5). In doing so, the ALJ reasoned that Dr. Morrison's opinion concerning the validity of claimant's left shoulder range of motion findings were ambiguous and unpersuasive.

On review, claimant contends that Dr. Morrison's range of motion findings were more accurate than those of Dr. Miller and were unambiguous with respect to their validity. For the following reasons, we affirm the ALJ's decision.

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, 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). Only findings of impairment that are permanent and caused by the accepted condition, direct medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's

impairment." *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146,152 (2004); *cf. John C. Fowler*, 61 Van Natta 2218, 2221-22 (2009) (declining to rely on medical arbiter's report that contained ambiguities as to whether the impairment findings were due to the compensable conditions). However, 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 establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, Dr. Morrison originally opined that claimant's left shoulder range of motion findings were invalid.[1] Specifically, he stated that "[h]is range of motion of the shoulders seems somewhat inconsistent with what is noted in the reviewed medical records and suggests that those findings are, in all medical probability, invalid." (Ex. 9-8). However, when subsequently asked by the Appellate Review Unit (ARU) to clarify whether claimant's left shoulder findings were valid, Dr. Morrison responded "yes." (Ex. 10-4).

When a physician has changed an opinion, we review the record to determine whether there is a reasonable explanation for the change of opinion. *See Moe v. Ceiling Systems*, 44 Or App 429 (1980) (unexplained change of opinion given little probative weight); *Douglas D. Flath*, 58 Van Natta 2876, 2878-79 (2006) (medical arbiter's opinion regarding impairment findings found unpersuasive and were not used for rating purposes where it was inconsistent with arbiter's previous opinion and there was no reasonable explanation for the change of opinion); *cf. Kelso v. City of Salem*, 87 Or App 630, 634 (1987) (where there was a reasonable explanation in the record for a physician's change of opinion, that opinion was persuasive). Here, we are unable to reconcile Dr. Morrison's opinions regarding claimant's permanent impairment.[2] Therefore, Dr. Morrison's subsequent opinion concerning the validity of claimant's left shoulder range of motion findings is unpersuasive.

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[1] We acknowledge that Dr. Morrison also stated that the "[h]ard findings of range of motion appear to be valid." (Ex. 9-8). However, that statement was followed with a discussion of the right elbow condition. Moreover, the same paragraph in Dr. Morrison's report expressly addressed the left shoulder range of motion findings as invalid. (*Id.*) That opinion was supported by an explanation referencing inconsistencies in the record pertaining to shoulder ranges of motion. These findings and assessments were neither addressed nor reconciled in Dr. Morrison's subsequent conclusory statement that claimant's findings were valid.

[2] Dr. Morrison's subsequent report stated that claimant's findings "appear to be valid as they were consistent and reproducible." (Ex. 10-3). However, that statement addressed whether claimant's "right arm" findings were "valid," rather than his "left shoulder" findings. (*Id.*)

According to Dr. Miller, the attending physician, claimant's left shoulder range of motion findings were within normal range, except for flexion and internal rotation. (Ex. 5-1). However, Dr. Miller did not attribute these deficits to the accepted conditions or their direct medical sequelae. (*Id*.) Accordingly, whether the impairment findings of the medical arbiter or those from the attending physician are considered, neither finding confirms ratable left shoulder range of motion impairment. *See Stuart C. Yekel*, 67 Van Natta 1279, 1284 (2015) (finding that "statutory and administrative authority make clear that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions").

Alternatively, even if we assume that Dr. Morrison ultimately opined that claimant's range of motion findings were valid, claimant is not entitled to an additional permanent impairment award. We reason as follows.

Dr. Morrison opined that claimant's range of motion findings were consistent with unaccepted left shoulder conditions. (Ex. 9-7). Yet, when findings are due to conditions that have not been accepted and are not direct medical sequelae of the accepted conditions, it is premature to rate them.[3] *See Yekel*, 67 Van Natta at 1284.

Here, Dr. Morrison did not attribute claimant's permanent impairment to his accepted left shoulder condition. Consequently, claimant is not entitled to additional permanent impairment for his left shoulder condition.

Accordingly, based on the aforementioned reasoning and that expressed in the ALJ's order, we conclude that claimant is not entitled to additional permanent impairment award for his left shoulder condition. Therefore, we affirm.

ORDER

The ALJ's order dated June 23, 2015, as "revised" June 24, 2015, is affirmed.

Entered at Salem, Oregon on January 5, 2016

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[3] Any identified conditions that have not been accepted can be claimed at a later time. *See* ORS 656.267. If those conditions are ultimately compensable, that claim may then be processed and rated for those conditions. *See* OAR 436-035-0007(3)(a); *Thomas L. Hinson*, 57 Van Natta 150, 155 n 6 (2005) (citing *Arvin D. Lal*, 55 Van Natta 816, 822-823 (2003)).