
In the Matter of the Compensation of
DANIEL L. MARTIN, Claimant
WCB Case No. 15-01511
ORDER ON REVIEW
Dennis O'Malley, Claimant Attorneys
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Reviewing Panel: Members Johnson and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) found that claimant's injury claim for that condition was not prematurely closed; and (2) affirmed an Order on Reconsideration that awarded 35 percent whole person impairment for an acute adjustment disorder with mixed anxiety. On review, the issues are premature closure and the extent of permanent disability (impairment).

We adopt and affirm the ALJ's order with the following supplementation regarding the permanent disability issue.

The ALJ affirmed the March 31, 2015 Order on Reconsideration award based on the impairment findings of Dr. Turco, the medical arbiter. On review, the employer contends that Dr. Turco's opinion is not persuasive, and that the impairment findings of Dr. Wicher, as ratified by Dr. Carver (claimant's attending physician), are more accurate and should be used to rate claimant's permanent impairment.¹ For the following reasons, we disagree.

Evaluation of a worker's disability is as of the date of issuance of the reconsideration order. ORS 656.283(6). On reconsideration, where a medical arbiter is used, impairment is established based on 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).²

¹ In July 2013 and September 2014, Dr. Wicher performed psychological examinations at the employer's request. (See Exs. 17, 40). Dr. Carver concurred with Dr. Wicher's September 2014 closing examination report. (Exs. 41, 42).

² Because the Notice of Closure issued on November 26, 2014, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). (Ex. 45A-1). OAR 436-035-0003(1).

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). 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).

On March 6, 2015, Dr. Turco performed a medical arbiter mental status examination. (Ex. 48). He noted that claimant seldom went out after the work incident, and preferred to stay home. (Ex. 48-2-3). On the occasions that claimant did go out, he sat in a "defensive position" where he could watch everyone around him. (Ex. 48-2). Claimant reported that he had given up most of his friends and hobbies, and had lost interest. (*Id.*) Dr. Turco also noted that claimant had nightmares on a regular basis since the work incident, with some weeks being better than others, and that he had a sense of anxiety a few times a day. (Ex. 48-2-3). Claimant reported that he was able to function at his special duty job, but experienced a significant loss of self-esteem and anxiety. (*Id.*) Dr. Turco referenced Dr. Wicher's reports, as well as specific reports by Dr. Klecan dated February 20, 2014 and by Dr. Leland dated June 28, 2013. (Ex. 48-3).³

Dr. Turco classified claimant's permanent impairment resulting from the accepted acute adjustment disorder with mixed anxiety and direct medical sequela as "Class 2 with moderate symptoms," which included anxiety, depressive, and phobic symptoms. (Ex. 48-4). In doing so, Dr. Turco noted that claimant was deficient with regard to social and other interactions. (*Id.*) Dr. Turco opined that claimant required continued treatment for approximately six months, and strongly suggested that he return to his former treating psychologist Dr. Leland, as well as continued use of medication. (Ex. 48-4-5). Dr. Turco believed that claimant's "overall prognosis will be quite good." (Ex. 48-4).

³ On February 20, 2014, Dr. Klecan performed a psychiatric evaluation at the employer's request. (Ex. 29). On June 28, 2013, Dr. Leland performed a psychological assessment at the employer's request, and was claimant's treating clinical psychologist until November 18, 2013, when he stopped offering claimant any additional therapy. (Exs. 10, 11, 12, 13, 15, 18, 20, 23, 24).

We disagree with the employer's argument that Dr. Turco's opinion was based on an inaccurate history, particularly compared to Dr. Wicher. Dr. Turco reviewed Dr. Wicher's reports, and stated that her information was consistent with the information received from claimant. (Ex. 48-3).⁴ Dr. Turco was also aware that claimant did (and was able to) return to bus driving, but that he had been working on special duty work at the time of the examination. (Ex. 48-2). Dr. Wicher's reports included interviews with claimant and his subjective reports of symptoms, discussions of his medical, social, and mental health history, mental status evaluations, as well as her MMPI-2-RF⁵ testing results. (Exs. 17, 40).

We also do not consider Dr. Turco's understanding that claimant did not have prior psychological issues to be contradicted by Dr. Wicher's reports that he had treated for psychological difficulties related to a previous work incident. Specifically, Dr. Wicher's reports (which Dr. Turco reviewed) referred to that history, and she expressly noted that claimant had recovered from that incident without lasting psychological difficulties and that he had no preexisting personality or mental disorders. (Exs. 17-3-4, -10-11, 40-3-4).

After reviewing this record, we find that Dr. Turco's opinion was based on an accurate history and understanding of claimant's symptoms.⁶ *See Lester Guyse*, 52 Van Natta 2006 (2000) (medical arbiter opinion relied on a complete and accurate history based on review of the claimant's medical history and accurate reports of statements of the claimant's current mental symptoms).

Furthermore, although Dr. Turco did not perform an MMPI-2-RF test, it is not required to determine claimant's permanent impairment related to his accepted acute adjustment disorder with mixed anxiety. Instead, the Director's standards

⁴ Dr. Turco also referred to Dr. Klecan's February 20, 2014 "30-page report," which documented Dr. Klecan's extensive interview with claimant, including a social and mental health history, a mental status examination, as well as detailed recitations of the police and medical/mental health treatment reports and evaluations. (Exs. 29, 48-3).

⁵ Dr. Wicher noted that the Minnesota Multiphasic Personality Inventory-2 – Restructured Form (MMPI-2-RF) was a psychological testing protocol. (Exs. 17-1, 40-2).

⁶ We acknowledge the employer's argument that Dr. Turco relied on an inaccurate history of a gunman actually pointing a gun at claimant and threatening him, whereas there is contrary evidence that the gunman swept a group of people with his gun while trying to protect his family from another man. However, we agree with the ALJ's reasoning that this is a distinction without a difference. Moreover, the employer accepted claimant's injury claim for acute adjustment disorder with mixed anxiety condition due to the June 20, 2013 work incident. (Ex. 19).

require the physician to describe claimant's permanent changes in mental function in terms of their affect on his activities of daily living, social functioning, and deterioration or decompensation in work or work-like settings (*e.g.*, repeated failure to adapt to stressful circumstances), as required to determine and rate permanent impairment and loss of function attributable to permanent symptoms of affective, anxiety, and adjustment disorders. *See* OAR 436-035-0400(3), (5).⁷

Here, Dr. Turco performed a "Mental Status Examination" and described claimant's anxiety, depressive, and phobic symptoms (including his accepted left eye tic as a psychophysiological symptom) and their affects on his ability to adapt to social and other interactions. Specifically, Dr. Turco noted that claimant wanted to stay at home, placed himself in a "defensive position" so that he could watch everyone around him when he did go out, had lost interest and given up his hobbies and friends, had nightmares on a regular basis, and experienced a significant loss of self-esteem and anxiety when performing his special job duties. (Ex. 48-2-4). We find that Dr. Turco's opinion properly and adequately described the loss of function attributable to permanent symptoms in concluding that claimant's accepted acute adjustment disorder with mixed anxiety was "Class 2" with moderate symptoms.⁸ OAR 436-035-0400(5).

In contrast, we do not find that Dr. Wicher's September 2014 impairment findings, as ratified by Dr. Carver, are more accurate and should be used. We reason as follows.

In her September 12, 2014 report, Dr. Wicher noted that claimant became anxious and nervous when an "unsavory" person got on his bus or when there were people who looked like threats, that he was always on guard when he was away from home (such as being hypervigilant and facing the door when in public), had nightmares and recurring dreams about the gunman about once or twice per week, and had trouble sleeping particularly when he was alone. (Ex. 40-3). She also reported that claimant had been more irritable since the work incident and that his daughter moved out because of his irritability. (Ex. 40-5). Dr. Wicher further

⁷ There is also no dispute that claimant's accepted mental disorder for the purposes of rating permanent impairment was diagnosed as required pursuant to OAR 436-035-0400(1), (2). (*See* Exs. 17, 19).

⁸ We disagree with the employer's assertion that Dr. Turco's opinion that he "strongly suggest" claimant return for further psychological treatment establishes that claimant's loss of function was *not* attributable to permanent symptoms of his mental disorder. (Ex. 48-4-5). Specifically, the Director's standards note that "Class 2" anxiety symptoms "[m]ay require extended treatment." OAR 436-035-0400(5)(b).

noted that he could not watch suspenseful shows or shows involving guns. (*Id.*) According to Dr. Wicher, claimant did not wish to return to his previous bus route. (Ex. 40-8).

Dr. Wicher opined that claimant's accepted and diagnosed adjustment disorder with mixed anxiety had resolved, and was medically stationary without permanent impairment. (Ex. 40-6-8). She explained that, because claimant's reports of ongoing symptoms of anxiety did not cause "clinically significant stress to a significant degree," and that he did not report "clinically significant distress or significant impairment in functioning," his symptoms were not at a level that would support a diagnosable mental disorder. (Ex. 40-6). In doing so, Dr. Wicher noted that claimant "has not sought any mental health treatment since November 2013, a reflection of the likelihood that his symptoms have diminished considerably and that his distress is not at a high enough level that he feels the need for treatment." (Ex. 40-6-7).

Dr. Wicher opined that claimant was "currently functioning relatively well and does not experience sufficient distress to wish to pursue any mental health treatment." (Ex. 40-7). However, claimant reported to Dr. Turco that his treatment with Dr. Leland was extremely helpful, and that "he feels he requires more therapy." (Ex. 48-3). Moreover, the medical records show that claimant was continuing to attempt to seek counseling and therapy with Dr. Leland in 2014. (Exs. 25-2, 29-6, -27, 30-2, 35-1).

Dr. Wicher also stated that claimant did not report or demonstrate significant impairment in work or interpersonal relationships and, although he was more irritable, he described "good relationships with his wife, family, and others." (Ex. 40-7). Yet, in that same report, Dr. Wicher described claimant's complaints of anxiety at work and in public, trouble sleeping at home especially when alone, avoiding shows involving guns, his daughter moving out because of his irritability, recurring nightmares, and his desire to not return to his previous bus route. (Ex. 40-3, -5-8).

Considering Dr. Wicher's own descriptions of claimant's reported symptoms, we do not consider her opinion that claimant's mental disorder/illness resolved without impairment in functioning to be well reasoned.⁹ Therefore, we

⁹ We acknowledge Dr. Wicher's statements that it was "possible" that claimant's symptoms "may be" residual effects from his childhood traumas, and that his past traumas "could also have predisposed him to reacting strongly to stressful situations." (Ex. 40-7). However, those statements were couched in terms of possibility, rather than medical probability. See *Gormley v. SAIF*, 52 Or App 1055, 1060 (1981); *Donald E. Adams*, 58 Van Natta 2815, 2820 (2006).

are not persuaded that a preponderance of evidence demonstrates that the different findings by Dr. Wicher, as ratified by Dr. Carver, are more accurate. OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45; *Hicks*, 196 Or App at 152. Accordingly, the employer has not met its burden of establishing error in the reconsideration process (in which ARU relied on the medical arbiter's impairment findings). *Callow*, 171 Or App at 183-84.

In sum, we find that Dr. Turco persuasively establishes that claimant's accepted mental disorder condition was properly rated as "Class 2" impairment with moderate symptoms. In particular, Dr. Turco described claimant's permanent changes in mental function in terms of their affect on his activities of daily living, social functioning, and deterioration or decompensation in work or work-like settings (*e.g.*, repeated failure to adapt to stressful circumstances), as required to determine permanent impairment and loss of function attributable to permanent symptoms of affective, anxiety, and adjustment disorders. *See* OAR 436-035-0400(3), (5). Consequently, 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 issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.¹⁰

ORDER

The ALJ's order dated October 8, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, payable by the employer.

Entered at Salem, Oregon on June 2, 2016

¹⁰ Claimant's counsel did not request a specific attorney fee for services on review.