
In the Matter of the Compensation of
COZMIN I. GADALEAN, Claimant
WCB Case No. 14-05541
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson, Weddell and Somers. Member Johnson dissents.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that set aside its denial of claimant's new/omitted medical condition claim for L5-S1 disc bulge and annular tear conditions. On review, the issue is compensability.

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

In setting aside SAIF's denial, the ALJ found that claimant's July 2013 work injury was a material contributing cause of his disability/need for treatment for the low back conditions. Moreover, the ALJ concluded that although all of the doctors agreed that the work injury had combined with preexisting lumbar spondylosis, SAIF had not met its burden of proving that the work injury was not the major contributing cause of disability/need for treatment of the combined condition. *See* ORS 656.266(2)(a). In so concluding, the ALJ relied on Dr. Graffeo's medical opinion, rather than that of Dr. Rosenbaum.

On review, SAIF contends that the medical evidence does not persuasively establish that the July 2013 work injury was a material contributing cause of claimant's disability/need for treatment of his L5-S1 disc bulge or annular tear conditions. Moreover, SAIF argues that, even if the work injury was a material cause, it was not the major contributing cause of claimant's disability/need for treatment of the combined low back conditions. Based on the following reasoning, we affirm.

To prevail on his new/omitted medical condition claim, claimant must prove that the conditions exist, and that the July 2013 work injury was a material contributing cause of his disability or need for treatment for those conditions.¹

¹ SAIF does not contest the existence of the requested conditions.

ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant meets that burden and the medical evidence establishes that the “otherwise compensable injury” combined at any time with a “preexisting condition” to cause or prolong disability or a need for treatment, SAIF has the burden to prove that the “otherwise compensable injury” (*i.e.*, the “work-related injury incident”) was not the major contributing cause of the disability or need for treatment of the combined low back conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*; 233 Or App 499, 505 (2010); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827 (2014). The “major contributing cause” is the cause, or combination of causes, that contributed more than all other causes combined. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133 (2001).

Because of the disagreement between medical experts regarding the cause of claimant’s condition, need for treatment, and disability, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

After reviewing this record, we consider Dr. Graffeo’s opinion more persuasive than that of Dr. Rosenbaum.

Dr. Graffeo opined that claimant’s work injury was the major contributing cause of his L5-S1 disc bulge and annular tear conditions.² (Ex. 65-2). His opinion is clear and consistent, and supported in large part by the depositions of Drs. Rosenbaum and Kane. Specifically, Dr. Rosenbaum opined that claimant had “referred” pain, which did not require objective findings in a specific dermatomal pattern, as compared with a radiculopathy. (Ex. 69). Dr. Kane opined that claimant had a “nerve root irritation,” which did not require specific dermatomal findings. (Ex. 70-10, -11). Dr. Graffeo agreed that claimant had referred/non-dermatomal pain, but attributed the symptoms to claimant’s L5-S1 disc bulge and annular tear based on the mechanism of injury and the onset and duration of his symptoms. (Ex. 65-3). Consequently, Dr. Graffeo’s persuasive opinion is supported by the testimonies of Drs. Rosenbaum and Kane.

² For the reasons expressed in the ALJ’s order, we find that Dr. Versoza’s opinion is unpersuasive.

In addition, Dr. Graffeo treated claimant close in time to the injury and for a substantial amount of time thereafter. He was in the best position to evaluate the cause of claimant's condition, need for treatment, and disability due to his longitudinal history and multiple examinations. *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012) (physician's longitudinal history with the claimant rendered his opinion more persuasive). Consequently, we accord greater weight to Dr. Graffeo's opinion.³

In contrast, Dr. Rosenbaum provided internally inconsistent opinions. We consider his opinion unpersuasive.

Dr. Rosenbaum distinguished between "referred" pain and "radiculopathy," explaining that referred pain need not follow a specific radicular/dermatome pattern and is more diffuse. (Ex. 69-2, -3, -19). He concluded that claimant had "referred" pain. (Ex. 69). Dr. Rosenbaum agreed that annular tears cause pain symptoms, and that "once you have pain in there, you have referred pain." (Ex. 69-17). Despite these statements that claimant had "referred" pain, and that the claimed disc conditions can cause "referred" pain, he rationalized his causation opinion based on a lack of clinical correlation with an L5 radiculopathy. (Ex. 69-42, -43). Without further explanation, we cannot reconcile such statements and, therefore, consider his opinion unpersuasive. *See Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

In addition, Dr. Rosenbaum did not rebut Dr. Graffeo's opinion that the nerves within the disc itself were causing referred pain. (Ex. 65-3). Although Dr. Rosenbaum stated that there was no examination technique to directly identify the cause of referred pain, he did not squarely address Dr. Graffeo's conclusion. Because Dr. Rosenbaum did not rebut Dr. Graffeo's persuasive opinion, we further discount Dr. Rosenbaum's opinion.⁴ *See Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008) (failure to rebut contrary opinion rendered physician's opinion unpersuasive).

³ SAIF contends that Dr. Graffeo's opinion is unpersuasive because he did not explain why claimant's symptoms did not appear closer in time to the July 2013 work injury. While this was a factor in Dr. Rosenbaum's concurrence letter, Dr. Rosenbaum dismissed the significance of it during his deposition. (Exs. 67, 69). He explained that there was some variability with respect to the onset of symptoms. (Ex. 69-26). He also considered this factor less significant than "clinical correlation." (*Id.*)

⁴ Because Dr. Kane concurred with the opinions of Dr. Rosenbaum, and thus his opinions contain the same flaws, we also find his opinion unpersuasive. (Exs. 64, 68, 70).

In conclusion, based on the foregoing reasoning, in addition to that expressed in the ALJ's order, the medical record persuasively establishes that claimant's work-related injury-incident was a material contributing cause of the need for treatment/disability of the claimed conditions. Moreover, for the reasons expressed above, the medical record is insufficient to meet the employer's burden of proof under ORS 656.266(2)(a). Consequently, we conclude that claimant's new/omitted medical condition claim is compensable. Accordingly, we affirm.

Claimant's counsel is entitled to an attorney fee for services on review. ORS 656.382. 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 \$4,500, to be paid by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the value of the interest involved, and the risk that claimant's counsel might go 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 is August 6, 2015 is affirmed. For services on review, claimant's attorney is awarded \$4,500, payable by SAIF. Claimant is also awarded reasonable expenses and expenses for records, expert opinions and witness fees, if any, incurred in finally prevailing over SAIF's denial, to be paid by SAIF.

Entered at Salem, Oregon on March 21, 2016

Member Johnson dissenting.

In finding claimant's L5-S1 disc bulge and annular tear conditions compensable, the majority relies on Dr. Graffeo's opinion. Because I find the opinions of Dr. Rosenbaum and Kane more persuasive than that of Dr. Graffeo, I respectfully dissent.

To prevail on his new/omitted medical condition claim, claimant must prove that the conditions exist, and that the July 2013 work injury was a material contributing cause of his disability or need for treatment for those conditions.⁵ ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant meets that burden and the medical evidence establishes that the “otherwise compensable injury” combined at any time with a “preexisting condition” to cause or prolong disability or a need for treatment, SAIF has the burden to prove that the “otherwise compensable injury” (*i.e.*, the “work-related injury incident”) was not the major contributing cause of the disability or need for treatment of the combined low back conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*; 233 Or App 499, 505 (2010); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827 (2014). The “major contributing cause” is the cause, or combination of causes, that contributed more than all other causes combined. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133 (2001).

Because of the disagreement between medical experts regarding the cause of claimant’s condition, need for treatment, and disability, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

There are four causation opinions on this record. Dr. Graffeo, a chiropractor, and Dr. Versoza, a family physician, support a conclusion that claimant’s July 2013 work injury was a material and major contributing cause of the conditions, need for treatment and disability for the claimed L5-S1 disc conditions. In contrast, the opinions of Dr. Rosenbaum, a neurosurgeon, and Dr. Kane, the attending physician and physiatrist, do not support a causal relationship between the work injury and the claimed conditions. Further, Drs. Rosenbaum and Kane did not opine that the conditions require treatment/result in disability, or that the work injury was ever the major contributing cause of the need for treatment/disability for combined L5-S1 disc bulge and annular tear conditions. For the following reasons, I would find the opinions of Drs. Rosenbaum and Kane most persuasive.

⁵ SAIF does not contest the existence of the requested conditions.

Dr. Graffeo opined that the July 2013 work injury was the major contributing cause of the L5-S1 disc bulge and annular tear. (Ex. 65-2, -4). He considered Dr. Verzosa's right-sided ankle jerk finding on examination consistent with an L5 nerve root encroachment. (Ex. 65-2, -3). Although he acknowledged that claimant's pain did not correspond with a dermatomal pattern (which would be indicative of nerve root compression), he diagnosed a symptomatic L5-S1 disc bulge and annular tear based on referred pain, coming from the disc itself and nerve root irritation. (Ex. 65-3). Finally, he stated, without explanation, that claimant's preexisting conditions were not a significant contributing cause of his need for treatment. (Ex. 65-2).

Dr. Versoza also opined that claimant's July 2013 work injury was the major contributing cause of the low back conditions. (Ex. 66-2). She determined that claimant's ankle jerk finding and "the frequency and lack of other corroborating findings" were consistent with L5 nerve root irritation. (*Id.*) She concluded, without further explanation, that the L5 symptoms were not from the preexisting condition. (Ex. 66-2, -3).

Dr. Kane ultimately concurred with Dr. Rosenbaum's opinion that the claimed conditions were asymptomatic and were not caused by the July 2013 work injury. (Exs. 64, 68, 70-28). In November 2014, Dr. Kane performed an EMG/nerve conduction study of the lower extremities, which was normal without evidence of radiculopathy. (Exs. 61, 63). Moreover, he found no evidence of nerve root irritation on examination. (Ex. 70-16-19).

Dr. Rosenbaum performed an examination at the employer's request. (Ex. 59). After taking a history from claimant, reviewing the medical records, and interpreting the MRI, he determined that claimant's July 2013 work injury did not cause the claimed conditions, and that those conditions were asymptomatic. (Exs. 59, 67, 69).

After reviewing the causation opinions, I conclude that Dr. Rosenbaum's opinion, as supported by the attending physician, Dr. Kane, is the most well-reasoned and explained. While Dr. Rosenbaum thought it possible that the work injury was consistent with causing the claimed conditions, that annular tears could produce referred pain, and that there was L5 nerve root abutment, he ultimately rejected those possibilities. (Ex. 69). He explained that, in order to determine the most likely explanation of claimant's condition, he evaluated all possibilities. (*Id.*) Specifically, he looked to the MRI findings at multiple levels, the appearance of the disc bulge, the referred pain symptoms, lack of clinical correlation, the

complaints consisting of primarily low back pain, and the delayed and “staggered” onset of radicular type pain, which he determined were all consistent with degenerative conditions, rather than acute. (Exs. 67, 69). In the end, without objective, verifiable, reproducible information/findings to support the position that claimant’s referred leg pain was caused by a traumatic L5-S1 disc bulge or annular tear, he concluded that the underlying spondylosis was the cause. (Ex. 69-36-38). Because Dr. Rosenbaum’s opinion is well-reasoned and explained, I consider his opinion to be persuasive. *Somers*, 77 Or App at 263.

In contrast, Dr. Graffeo’s opinion is largely unexplained to the extent that he concluded, to a medical probability, that the claimed conditions are symptomatic or acute. Specifically, Dr. Graffeo concluded that Dr. Versoza’s ankle jerk findings were consistent with nerve root irritation and referred pain, and that they resulted, in part, from the L5-S1 disc bulge causing neural foraminal narrowing. (Ex. 65). However, Dr. Rosenbaum persuasively explained that Dr. Versoza’s findings were consistent with an S1 nerve root rather than the L5. (Ex. 69-28, -34, -35). Drs. Graffeo and Versoza never responded to Dr. Rosenbaum’s opinion. This greatly undermines the persuasive force of Dr. Graffeo’s opinion.⁶ *See Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008) (failure to rebut contrary opinion rendered physician’s opinion unpersuasive).

Dr. Graffeo’s opinion that claimant’s annular tear caused referred pain is also unavailing. Although he concluded that claimant’s preexisting condition was not a significant contributor, he never explained how the tear was a more likely culprit. Without further explanation, I consider his opinion unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained opinion); *Brynn Larson*, 67 Van Natta 512, 515 (2015).

The majority relies on Dr. Graffeo, in part, because they afford him a “longitudinal” advantage. However, Dr. Graffeo did not rely on his own examination findings or his length of treatment in rendering his causation opinion. (Ex. 65). Rather, he relied on his interpretation of claimant’s MRI and the findings elicited by Dr. Versoza. (Ex. 65-2, -3). Consequently, I disagree that his opinion is entitled to any special deference due to longitudinal history.

⁶ For the reasons expressed in the ALJ’s order, I find Dr. Versoza’s opinion unpersuasive.

Considering the conclusory opinion of Dr. Graffeo and the persuasive opinion of Dr. Rosenbaum, as supported by Dr. Kane, I would conclude that claimant has not proven the compensability of his L5-S1 disc bulge or annular tear conditions.⁷ Therefore, I would reverse the ALJ's order that affirm SAIF's denial. Accordingly, I respectfully dissent.

⁷ Even assuming that claimant proved that the work injury was a material contributing cause of the need for treatment/disability for the claimed conditions, for the reasons expressed above, I find that Dr. Rosenbaum's persuasive opinion, as supported by Dr. Kane, establishes that the work injury was never the major contributing cause of the need for treatment/disability for a combined L5-S1 disc and annular tear condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a).