

In the Matter of the Compensation of
MICHAEL J. JOERRES, Claimant
WCB Case No. 02-05241
ORDER ON REVIEW
Parker Bush & Lane, Claimant Attorneys
Reinisch Mackenzie et al, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Langer.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) affirmed a 33 percent (49.5 degrees) scheduled permanent disability award for loss of use or function of claimant's right leg, as awarded by an Order on Reconsideration; and (2) awarded a \$2,500 assessed attorney fee pursuant to ORS 656.382(2). On review, the issues are extent of scheduled permanent disability and attorney fees.

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

Claimant compensably injured his right knee in March 2000. (Exs. 1; 4). The condition initially accepted was "right knee strain." (Ex. 44).

Right knee arthroscopy by Dr. Cook (attending physician) revealed "chonromalacia patella, extensor malalignment, partial ACL tear, and medial plica." (Ex. 49). The insurer subsequently amended its acceptance to include "partial tear anterior cruciate ligament right knee." (Ex. 80).

On September 10, 2001, claimant was evaluated by Drs. Denekas and Duff (insurer-arranged medical examiners). (Ex. 89). They reported extension to 0 degrees and flexion of 122 degrees. (Ex. 89-5). Additionally, the panel reported grade I instability. (Ex. 89-6). Drs. Denekas and Duff believed that the right knee instability affected both the medial collateral ligament and the anterior cruciate ligament. (Ex. 89-8). All findings were attributable to the March 2000 work injury. (Ex. 89-9). Dr. Cook concurred with the Denekas/Duff evaluation. (Ex. 94).

On February 19, 2002, the insurer closed the claim by Notice of Closure with an award of 19 percent (28.5 degrees) scheduled permanent disability. (Ex. 97). Claimant requested reconsideration.

On April 2, 2002, claimant returned to Dr. Cook with complaints of swelling in his right knee.¹ (Ex. 100). Dr. Cook noted right knee swelling (among other things) and authorized palliative care.² (Ex. 101). Claimant received physical therapy on April 5, 2002, and April 17, 2002. (Exs. 102; 104). The April 17, treatment appears to have been directed (in part) to his right knee. (Ex. 104).

Drs. Lawlor, Koon, and Ward performed a medical arbiter evaluation. (Ex. 105). They found extension to 2 degrees and flexion of 90 degrees. (Ex. 105-4). Additionally, those doctors found grade I medial instability with specific involvement of the right medial collateral ligament. (Exs. 105-4; 105-5). The arbiter panel expressly stated their findings were valid and attributable to the “accepted conditions.” (Ex. 105-5).

A June 18, 2002 Order on Reconsideration, using the medical arbiter evaluation to rate impairment, awarded 33 percent (49.5 degrees) scheduled permanent disability for loss of use or function of claimant’s right leg. (Ex. 106). The insurer requested a hearing challenging: (1) the impairment awarded pursuant to the medical arbiters’ range of motion findings; and (2) the impairment awarded pursuant to the medical arbiters’ grade I laxity finding.³

The ALJ determined that: (1) the medical arbiters’ impairment findings should be used to rate claimant’s impairment; and (2) the Order on Reconsideration had correctly applied the Director’s rating standards to the medical arbiters’ impairment findings. Consequently, the ALJ affirmed the Order on Reconsideration’s permanent disability award. Having concluded that the Order on Reconsideration award should be affirmed, the ALJ awarded a \$2,500 assessed attorney fee pursuant to ORS 656.382(2).

¹ Claimant also had complaints referable to his shoulder and back, both of which sustained injury in the March 2000 work event but are not at issue here.

² Dr. Cook used an 827 form to authorize palliative care. (Ex. 101). In doing so, Dr. Cook checked a box marked “report of aggravation,” but immediately adjacent to it wrote “actually palliative care.” (*Id.*)

³ The impairment award for the range of motion findings was 21 percent. The impairment award for the Grade I laxity finding was 10 percent.

On review, the insurer contends that the medical arbiters' range of motion findings should not be used to rate claimant's impairment.⁴ Additionally, the insurer asserts that it did not accept a medial collateral ligament condition, and therefore, reasons that claimant is not entitled to an impairment award for knee joint laxity. Finally, the insurer asserts that the ALJ's assessed attorney fee is excessive.

Evaluation of a worker's disability is as of the date of the reconsideration order. ORS 656.283(7). For the purpose of rating permanent disability, only the opinions of claimant's attending physician at the time of claim closure, or any findings with which he or she concurred, and the medical arbiter's findings, if any, may be considered. *See* ORS 656.245(2)(b)(B), 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 by the medical arbiter, except where a preponderance of medical opinion establishes a different level of impairment. OAR 436-035-0007(14).

Here, the medical arbiters' evaluation was performed 11 days prior to the June 18, 2002 Order on Reconsideration. In contrast, the Denekas/Duff evaluation was performed approximately nine months prior to the Order on Reconsideration. Because the medical arbiters' evaluation was performed much closer in time to the Order on Reconsideration, we find the medical arbiters' evaluation more probative. *See Kelly J. Zanni*, 50 Van Natta 1188 (1998) (findings of a medical arbiter made less than three weeks prior to reconsideration order determined more persuasive than attending physician-ratified findings made more than five months before reconsideration order). Consequently, we conclude that the medical arbiters' evaluation should be used to rate claimant's impairment. OAR 436-035-0007(14).

The insurer argues that the medical arbiters' range of motion findings were unreliable because they were affected by a "transient symptomatic reaction to work;" *i.e.*, right knee swelling. We note, however, that, although the medical arbiters expressly reported right knee swelling, they did not state that the swelling

⁴ The insurer does not assert that the Director's standards have been incorrectly applied to the medical arbiters' range of motion findings. Rather, the insurer asserts that the range of motion findings from the Denekas/Duff evaluation should be used to rate impairment.

problem was temporary (transient).⁵ Nor did they indicate that the swelling invalidated their findings. To the contrary, the medical arbiters expressly stated that their findings were valid and the condition of the knee was permanent. Moreover, we are not persuaded that a single physical therapy treatment (partly directed to the right knee) supports the insurer's conclusion that claimant's right knee condition was not medically stationary at the time of the medical arbiters' evaluation. Consequently, because no evidence supports a finding that claimant's knee problems were "transient," we reject the insurer's argument.

We turn to the right knee laxity issue. The evaluations of Denekas/Duff and the medical arbiters establish that claimant has a grade I instability of the right knee as a result of the March 200 work injury. (Exs. 89; 105). The question presented here is whether the knee instability involving the medial collateral ligament is to be rated absent an "accepted" injury to that ligament. If so, then claimant is entitled to 10 percent impairment for his grade I right knee joint instability. OAR 436-035-0230(3).

OAR 436-035-0230(3)(a) provides: "Valid instability in the knee substantiated by clinical findings shall be valued pursuant to this section *as if* the ligament stabilizing the knee were injured." (Emphasis added). Under the express language of the rule, entitlement to impairment for knee instability does not depend on an *actual* injury to the stabilizing ligament. Rather, under the rule, valid findings of instability "shall be valued as if the ligament stabilizing the knee were injured."

Here, the medical arbiters found valid knee joint instability, substantiated by clinical findings, associated with the medial collateral ligament. Consequently, we find that claimant is entitled to 10 percent impairment for knee joint instability. *See Catherine Reinken*, 54 Van Natta 1784 (2002) (impairment value awarded for valid loss of muscle strength not resulting from actual muscle or nerve loss). We turn to attorney fees.

Pursuant to OAR 438-015-0010(4), we consider several factors in assessing a reasonable attorney fee. Those factors include the time devoted to the case, the complexity of the issues, the value of the interest involved, the skill of the attorneys, the nature of the proceedings, the benefits secured, and the risk that an

⁵ Claimant told the medical arbiters that his knee swelled about twice a week. (Ex. 105-3). He also described his knee problems as "persistent." (Ex. 105-1). Claimant's statements are consistent with the medical arbiters' conclusion that claimant's knee disability is permanent.

attorney's efforts may go uncompensated. *See Schoch v. Leupold & Stevens*, 162 Or App 242 (1999) (Board must explain the reasons why the factors considered lead to the conclusion that a specific fee is reasonable).

Here, the case was submitted on the written record without a hearing. There were 106 exhibits, all but one were submitted by the insurer. Claimant's counsel submitted a five-page response to the insurer's written closing argument. The value of the interest involved to claimant at hearing was significant, involving entitlement to 14 percent scheduled permanent disability. The legal issues involving interpretation of the administrative rule were of average complexity as compared to a typical permanent disability case in this forum. Both counsels were skilled and experienced. No frivolous issues or defenses were asserted. Based on the insurer's arguments in requesting a hearing, there was a risk that claimant's counsel might go uncompensated.

Based on the factors in OAR 438-015-0010(4), we find that a reasonable fee for claimant's attorney's services at the hearing level under ORS 656.382(2) is \$2,500, payable by the insurer. *See Rick W. Donahue-Birran*, 55 Van Natta 379 (2003).

Claimant's attorney is entitled to an assessed fee for services on review related to the permanent disability issue. 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 \$1,200, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved. Claimant's counsel is not entitled to an attorney fee for services on review devoted to the attorney fee issue. *Dodson v. Bohemia, Inc.*, 80 Or App 233 (1986).

ORDER

The ALJ's order dated October 28, 2002 is affirmed. For services on review, claimant's attorney is awarded a \$1,200 fee payable by the insurer.

Entered at Salem, Oregon on March 25, 2003