

In the Matter of the Compensation of
WILLIAM D. O'CONNOR, Claimant

WCB Case No. 06-06536

ORDER ON REVIEW

Black Chapman et al, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that: (1) increased his award of scheduled permanent partial disability (PPD) for loss of use or function of the right forearm (wrist) from 15 percent (22.5 degrees), as granted by an Order on Reconsideration, to 17 percent (25.5 degrees); and (2) increased the award of scheduled PPD for loss of use or function of the left forearm (wrist) from 14 percent (21 degrees), as granted by the reconsideration order, to 15 percent (22.5 degrees). On review, the issue is extent of scheduled PPD.¹

We adopt and affirm the ALJ's order with the following supplementation and correction.²

On review, claimant argues that the ALJ erred in concluding that Dr. Gallagher, the medical arbiter, considered the bilateral wrist range of motion (ROM) findings to be invalid. Claimant also contends that, even if Dr. Gallagher considered the ROM findings invalid, he did not provide a written opinion based on sound medical principles explaining why he considered the ROM findings invalid. Based on the following reasoning, we disagree with claimant's arguments and affirm.³

OAR 436-035-0007(1) provides:

¹ Claimant requests an award of 20 percent (30 degrees) scheduled PPD for the right forearm (wrist) and 19 percent (28.5 degrees) scheduled PPD for the left forearm (wrist).

² In its respondent's brief, the insurer correctly notes that claimant requested a hearing regarding the September 11, 2006 Order on Reconsideration, not the insurer. As such, in the second sentence of the third full paragraph of page 3 of the Opinion and Order, we replace "the insurer" with "claimant."

³ Claimant's claim was closed by a Notice of Closure dated April 21, 2006. Thus, the applicable standards are found in WCD Admin. Order No. 05-074 (eff. January 1, 2006). OAR 436-035-0003(1).

“[A] worker is entitled to a value under these rules only for those findings of impairment that are permanent and were caused by the accepted compensable condition * * *.”

OAR 436-035-0007(12) provides:

“Upon examination, findings of impairment which are determined to be ratable under these rules are rated unless the physician determines the findings are invalid and provides a written opinion, based on sound medical principles, explaining why the findings are invalid.”

Here, Dr. Gallagher reported that claimant’s “motion in both wrists is markedly abnormal and much more so than noted on previous examinations in the medical record.” (Ex. 31-2). Dr. Gallagher stated, “I cannot say with any medical probability whether the motion is valid or not. It is, in my opinion, much more restricted than I would expect following the two carpal tunnel surgeries on each hand.” (*Id.*) Dr. Gallagher further reported that, while the loss of sensation findings were valid, he could not “say within any medical probability that the abnormal wrist motion findings are valid.” (Ex. 31-3). Claimant argues that such statements do not establish that Dr. Gallagher considered the wrist ROM findings invalid, and, even if such statements do establish invalidity of the impairment findings, Dr. Gallagher’s explanation does not comport with the requirements of OAR 436-035-0007(12).

We confronted a similar argument in *Sherry M. Bouris*, 59 Van Natta 297 (2007). In *Bouris*, the claimant argued that the medical arbiter’s opinion explaining why he found the ROM findings invalid was not based on sound medical principles as required by OAR 436-035-0007(12). 59 Van Natta at 299. The arbiter in *Bouris* explained, “[t]he cervical ranges of motion, as measured by me, I would consider invalid since they are considerably less than that measured by Dr. Hill and I would expect ROM to get better with time, not worse.” *Id.* The record contained no medical evidence rebutting the arbiter’s explanation that the ROM measurements were invalid because of the expectation that they would improve over time rather than get worse. We concluded that, in the absence of contrary medical opinion, the arbiter’s explanation regarding the invalidity of the claimant’s ROM findings was “based on sound medical principles.” *Id.* at 299-300.

We find the circumstances here similar to those in *Bouris*. As explained above, Dr. Gallagher, like the arbiter in *Bouris*, indicated that the ROM findings for claimant's wrists were "much more restricted than I would expect following the two carpal tunnel surgeries on both hands." (Ex. 31-2). Dr. Gallagher also noted that the loss of ROM in both of claimant's wrists was "much more so than noted on previous examinations." (*Id.*) There is no countervailing medical opinion on this issue in the record. To the contrary, Dr. Melson, who examined claimant at the insurer's request, reported that "there may be some progress in the recovery, especially in the left hand, which is only six months post-surgery." (Ex. 26-5). Dr. Worland, claimant's attending physician, concurred with this opinion. (Ex. 27). Dr. Worland also noted in a prior report that claimant's "range of motion of all joints is entirely normal." (Ex. 25).

Under such circumstances, we agree with the ALJ that Dr. Gallagher's explanation regarding the invalidity of the ROM findings meets the requirements of OAR 436-035-0007(12), as it is a written opinion based on sound medical principles.

Next, claimant argues that, because Dr. Gallagher did not clearly declare the ROM findings invalid but only questioned their validity, the findings should be considered valid. We disagree with this contention.

Dr. Gallagher initially could not "say with any medical probability whether the motion is valid or not." (Ex. 31-2). Subsequently, he reported that he could not state "within any medical probability that the abnormal wrist motion findings are valid." (Ex. 31-3).

Viewing Dr. Gallagher's opinion as whole, we conclude that it establishes that he considered the wrist ROM findings invalid. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency); *Worldmark the Club v. Travis*, 161 Or App 644, 650 (1999); *Andrena M. Olsen*, 59 Van Natta 1500 (2007). Under such circumstances, claimant is not entitled to a PPD award based on Dr. Gallagher's ROM findings. OAR 436-035-0007(12).

Alternatively, even if we found that the portion of Dr. Gallagher's report pertaining to the bilateral wrist ROM findings was ambiguous and does not clearly establish that those findings were invalid, we would still reach the same result. We reason as follows.

For the purpose of rating permanent disability, only the opinion of claimant's attending physician at the time of claim closure, other medical findings with which the attending physician concurred, and the findings of the medical arbiter, may be considered. 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's objective findings, except where a preponderance of medical opinion demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's unambiguous impairment findings. *Hicks v. SAIF*, 194 Or App 655, 659-60, *on recons*, 196 Or App 146 (2004).

Here, assuming that Dr. Gallagher's bilateral wrist ROM impairment findings are ambiguous, claimant's ROM impairment may be established only by Dr. Worland.

On January 20, 2006, Dr. Worland reported that "[r]ange of motion of all joints is entirely normal." (Ex. 25). Dr. Worland also stated that claimant's "range of motion is full." (*Id.*) Thus, Dr. Worland's opinion does not support a finding that claimant had permanent impairment from bilateral wrist ROM loss. *See Debbie C. Martinez*, 56 Van Natta 2136 (2004) (no permanent impairment awarded where the claimant's attending physician reported that the claimant had full range of motion in her hand and wrist). As such, assuming Dr. Gallagher's bilateral wrist ROM impairment findings are ambiguous, and Dr. Worland's findings are used to determine such impairment, claimant would still not be entitled to an award of scheduled PPD for ROM loss in his bilateral wrists. *See Avery A. Rosendahl*, 59 Van Natta 1509 (2007) (where medical arbiter's report was ambiguous and the claimant's attending physician concluded that the claimant had no impairment due to the compensable injury, the claimant was not entitled to an impairment award).

Accordingly, for these reasons, as well as those expressed by the ALJ, we affirm.

ORDER

The ALJ's order dated March 16, 2007 is affirmed.

Entered at Salem, Oregon on October 5, 2007