

In the Matter of the Compensation of
APRIL R. DAHL-CHAMBERLAIN, Claimant

WCB Case No. 07-07236

ORDER ON REVIEW

Edward J Hill, Claimant Attorneys

Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) found that claimant's left ankle strain claim was not prematurely closed; (2) found that claimant's condition was medically stationary on January 3, 2007; (3) did not award additional temporary disability benefits; and (4) affirmed an Order on Reconsideration that did not award permanent disability for claimant's left ankle condition. On review, the issues are premature closure, medically stationary date, and extent of temporary and permanent disability (impairment).

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

Claimant contends that her compensable left ankle strain condition was not medically stationary on January 3, 2007, the medically stationary date determined by a June 1, 2007 Notice of Closure and affirmed by an October 20, 2007 Order on Reconsideration and the ALJ. Claimant also contends that her claim was prematurely closed, because her condition was not medically stationary on June 1, 2007, when her claim was closed. Alternatively, claimant seeks a permanent disability award for a chronic and permanent medical condition significantly limiting repetitive use of her left ankle.

Regarding her first contention, claimant relies on her treating physicians' provision of ongoing treatment and their February 13, 2007, February 21, 2007, and April 27, 2007 "check-the-box" notations indicating that her condition was not medically stationary on those dates. (Exs. 22A, 25A, 26A).¹

However, the physicians who treated or examined claimant's left ankle after January 3, 2007 repeatedly expressed doubts and concerns about the cause of her ongoing left ankle complaints and the possible efficacy of further treatment. They

¹ Dr. Sheedy, claimant's former treating physician, indicated that claimant was not medically stationary on "02/13/06." (Ex. 22A). Because the same document listed the date of treatment as "02/13/07," we understand that the doctor intended to say that claimant was not medically stationary on that day in 2007, rather than 2006.

also noted minimal findings on physical and MRI examination, ultimately indicating that claimant's ongoing left ankle condition was not injury-related.² (See Exs. 21-3, 22, 25-2, 28, 31, 33-8, -9, -11, 34). Considering the physicians' misgivings regarding claimant's complaints and the relationship of those complaints to her accepted left ankle condition, these opinions do not persuasively support claimant's contention that the January 3, 2007 medically stationary date should be modified. Instead, these opinions suggest that claimant's *accepted* left ankle strain condition *was* medically stationary on and after January 3, 2007.³ (See Exs. 33-3-4, -8-9; 37-1).

Furthermore, we find the May 3, 2007 opinion of Dr. Green, examining neurologist, persuasive, because it is thorough, well reasoned, and based on an accurate and complete history. (Ex. 33). Having considered claimant's history and her findings, Dr. Green opined that claimant's compensable condition was medically stationary on January 3, 2007. (*Id.* at, 9, -11). He also concluded that it was "unclear why [claimant] is having persistent symptomatology" and her ongoing limitations are due to idiopathic factors, unrelated to the work injury. (*Id.*)

Dr. McWeeney, claimant's most recent treating physician, concurred with the aforementioned opinion without reservation. (Ex. 34). Under these circumstances, we are not persuaded that there was a reasonable expectation of material improvement in claimant's compensable condition on January 3, 2007, or on June 1, 2007 (when the claim was closed). See ORS 656.005(17); see also *Maarefi v. SAIF*, 69 Or App 527, 531 (1984) (the term "medically stationary" does not mean that there is no longer a need for continuing medical treatment); *Jesus M. Zarzosa*, 56 Van Natta 1683, 1684 (2004), *aff'd without opinion*, 201 Or App 216 (2005) (recommendation for pain treatment did not, by itself, support a reasonable expectation of material improvement in the claimant's compensable condition). Thus, a preponderance of the persuasive medical evidence establishes that claimant's compensable left ankle condition was medically stationary on January 3, 2007.

² The medical arbiter did not express such concerns. However, because the remainder of the record indicates that the cause of claimant's ongoing left ankle problem was not injury-related, we do not rely on the arbiter's implicit contrary causation opinion.

³ We also find that the above-mentioned "check-the-box" notations indicating that claimant was not medically stationary lack persuasive force, in light of the doctors' contemporaneous concerns about the nature of claimant's condition.

Alternatively, claimant seeks a permanent partial disability (PPD) award for a chronic condition. In this regard, claimant relies on the medical arbiter, who opined, “Given her current state, [claimant] is limited in the ability to repetitively use her ankle due to her diagnosed condition.” (Ex. 37-4). We do not find the arbiter’s opinion in this regard persuasive because the remainder of the record casts substantial doubt on whether claimant’s ongoing left ankle problems are injury-related, as explained above.⁴ Moreover, and in any event, the arbiter’s opinion does not persuade us that claimant is *significantly* limited in the repetitive use of her ankle (as required by the applicable rule). See OAR 436-035-0019(1)(a) (WCD Admin. Order 05-074 (effective January 1, 2006)).

In conclusion, claimant has not established error in the reconsideration process. See, e.g., *Marvin Wood Products. v. Callow*, 171 Or App 175, 183 (2000) (the party challenging an Order on Reconsideration bears the burden of establishing error in the reconsideration process); *Rogasiano Sanchez*, 58 Van Natta 1674 (2006) (same). Accordingly, we affirm.

ORDER

The ALJ’s order dated April 22, 2008 is affirmed.

Entered at Salem, Oregon on January 28, 2009

⁴ 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 based on objective findings of the medical arbiter, except where a preponderance of the 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); *Sergio Zavaleta*, 57 Van Natta 345, 346 (2005). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter’s impairment findings. *Hicks v. SAIF*, 194 Or App 655, 659, *modified on recons*, 196 Or App 146 (2004); *Antonio L. Martinez*, 57 Van Natta 1812, 1814 (2005).

Here, based on Dr. McWeeney’s May 21, 2007 concurrence with Dr. Green’s findings and opinion (which we find persuasive as explained herein), we find that a preponderance of the evidence demonstrates that claimant’s ongoing left ankle limitations are unrelated to the work injury. Under these circumstances, we disregard the medical arbiter’s opinion relating claimant’s limited ability to repetitively use her left ankle to the “diagnosed condition.” (See Exs. 33, 34, 37-4).

Member Weddell dissenting.

The majority concludes that the October 2007 Order on Reconsideration correctly determined that claimant's compensable left ankle condition was medically stationary on January 3, 2007. In reaching this conclusion, the majority essentially relies on Dr. Green's May 3, 2007 opinion regarding claimant's status four months earlier. (*See Ex. 33*).

Claimant argues that the record establishes that she was not medically stationary on January 3, 2007, nor was she medically stationary on June 1, 2007, when the claim was closed. Claimant relies on the medical evidence addressing her condition at the pertinent time, on and after January 3, 2007. I agree and would find the claim prematurely closed, reasoning as follows.

First, Dr. Green examined claimant once, almost 7 months after the compensable injury and over 4 months after the medically stationary date that he proposed. Dr. Green was clearly not in a good position to evaluate claimant's condition during the many months before he saw her. I would find his opinion unpersuasive for that reason alone.

The majority also relies on Dr. McWeeney's May 27, 2007 "check-the-box" concurrence with Dr. Green's report. (*Ex. 34*). I would find that evidence unpersuasive, because it amounts to an unexplained change of opinion. That is, Dr. McWeeney's summary concurrence is materially inconsistent with his prior clear opinions addressing claimant's condition during her ongoing treatment for the compensable injury, on and after January 3, 2007. I would also find Dr. McWeeney's concurrence with Dr. Green's report unpersuasive because it is inconsistent with the remainder of the record addressing claimant's medically stationary status, discussed below.

Three different doctors saw claimant on six occasions during the period on and after January 3, 2007, the day that Dr. Green identified as the date that claimant's condition "should have been" medically stationary. Dr. Sheedy, claimant's then current treating physician, examined claimant that day, continued her work restrictions and prescribed ongoing treatment. Dr. Sheedy *did not* declare claimant's left ankle condition medically stationary. (*Exs. 20, 20A*). Dr. Sheedy referred claimant to Dr. Anderson, who examined claimant on February 1, 2007. Dr. Anderson noted that claimant's work related diagnosis was a left ankle sprain. He *did not* declare claimant's condition medically stationary. (*Ex. 21*).

Dr. Sheedy examined claimant again on February 13, 2007. She continued claimant's treatment and work restrictions. (Exs. 22, 22A). Dr. Sheedy specifically indicated that claimant's condition was *not* medically stationary. (Ex. 22A).

On February 21, 2007, Dr. McWeeney examined claimant and became her attending physician for her work injury. (Exs. 24, 25). He specifically indicated that claimant's condition was *not* medically stationary. (Ex. 24). Dr. McWeeney examined claimant again on March 26, 2007. (Exs. 26, 26A, 26B). He continued claimant's treatment and work restrictions. Dr. McWeeney also specifically indicated that claimant's condition was *not* medically stationary. (Ex. 26A-2). Finally, Dr. McWeeney examined claimant on May 2, 2007, noted her ongoing objective findings, and continued her work restrictions. (Exs. 31, 32). Again, Dr. McWeeney did not declare claimant's left ankle condition medically stationary.

The very next day, Dr. Green opined that claimant's condition should have been medically stationary within 12 weeks after her injury. (Ex. 33-9; *see id.* at 11). Clearly, Dr. Green's opinion in this regard (and Dr. McWeeney's summary concurrence with it) is inconsistent with, and unsupported by, the remainder of the record.

In summary, claimant was seen six times by three different physicians on or after the examining physician, Dr. Green, said that claimant "should have been" medically stationary. Those treating physicians either specifically said that claimant was not medically stationary or did not declare claimant medically stationary. Under these circumstances, I would find that a preponderance of the persuasive contemporaneous medical evidence establishes that there was a reasonable expectation of material improvement in claimant's compensable condition at all times. Accordingly, on this record, claimant's injury claim was prematurely closed. Because the majority concludes otherwise, I must dissent.