
In the Matter of the Compensation of
REBECA F. RAMOS, Claimant
WCB Case No. 08-05154
ORDER ON RECONSIDERATION
Guinn & Munns, Claimant Attorneys
David Runner, SAIF Legal

Reviewing Panel: Members Weddell and Lowell.

The SAIF Corporation requests reconsideration of those portions of our April 21, 2010 Order on Review that: (1) concluded that a “post-reconsideration” medical arbiter examination was not effectively cancelled by the Appellate Review Unit (ARU) and thus the arbiter’s report was admissible under ORS 656.268(6)(f); and (2) relied on the medical arbiter’s findings to award claimant an additional 9 percent whole person impairment. Specifically, SAIF challenges our admission of the medical arbiter’s report, contending that such a “theory” was not raised by claimant. Alternatively, SAIF contends that there is no statutory or regulatory authority for requiring the ARU to successfully provide notice to the appointed arbiter of a cancellation of a medical arbiter examination.¹ Finally, on the merits, SAIF disputes our reliance on the arbiter’s impairment findings. Based on the following reasoning, we adhere to our previous decision.²

¹ The examination was conducted, and the report was issued, by Dr. Tatsumi.

² With its brief, SAIF has included a copy of the ARU’s “Cancellation Notice for Medical Arbiter Examination,” which was allegedly sent to claimant, her attorney, and SAIF, on July 29, 2008. Because this document was not previously admitted into the record, we treat this submission as a motion to remand. *See Judy A. Britton*, 37 Van Natta 1262 (1985).

We may remand to the ALJ if we find that the case has been improperly, incompletely or otherwise insufficiently developed or heard by the ALJ. ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000). A compelling reason exists when the new evidence: (1) concerns disability; (2) was not obtainable with due diligence at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *see Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Edward M. Johnston II*, 58 Van Natta 2972, 2974 (2006) (compelling reasons to remand did not exist where the offered documents were unlikely to affect the outcome of the case).

SAIF has offered no reasons why this document was not obtainable with due diligence at the time of hearing. Furthermore, because our decision is solely premised on lack of notice to the *medical arbiter*, consideration of the letter to claimant will not likely affect the outcome of the case. Therefore, we find no compelling reason to remand.

To begin, we briefly recap the pertinent facts. Claimant requested reconsideration of a June 16, 2008 Notice of Closure, raising (among other things) disagreement with the impairment findings used to rate disability regarding her right knee condition. (Ex. 35-2). As required by ORS 656.268(7)(a), claimant's claim was referred to a medical arbiter and an examination was scheduled for August 14, 2008, with Dr. Tatsumi.

However, on July 30, 2008, the ARU issued an Order on Reconsideration. It explained that because medical information indicated that claimant's condition was no longer medically stationary, and SAIF did not consent to postpone the proceeding (although claimant did), the record developed at closure would be used to rate impairment. Based on those findings, the Notice of Closure was affirmed. (Ex. 35).

After the Notice of Closure, but before July 30, 2008 (the date of the reconsideration order), Dr. Zenoniani, claimant's then-attending physician, issued a report. He reported that, if claimant's "functional deficit" was permanent, she would not be able to return to her "pre-injury" work due to the physical demands. Dr. Zenoniani's assessment was of chronic internal derangement of the knee and internal derangement of the right knee medial meniscus. (Ex. 10).

Dr. Tatsumi, the assigned medical arbiter, examined claimant as scheduled on August 14, 2008. He reported findings of reduced range of motion (ROM) in the right knee and concluded that claimant was significantly limited in her ability to repetitively use her right knee due to her accepted conditions. He also noted that claimant was currently treating with Dr. Zenoniani and awaiting an MRI. He did not mention having received notice of a cancellation, either from ARU or one of the parties. (Ex. 36).

On August 29, 2008, the ARU informed claimant's counsel that it had "unexpectedly" received a copy of Dr. Tatsumi's arbiter report, which it considered to be "non-viable" because Dr. Tatsumi had "no standing" in the reconsideration proceeding. The ARU explained that it had cancelled the August 14 examination based on medical evidence indicating that claimant was under active treatment and not fit for an arbiter evaluation. According to the ARU, on July 29, "all parties to this claim" were notified of the cancellation, as was Dr. Tatsumi.³ (Ex. 37). Claimant requested a hearing.

³ The ARU represented that it notified Dr. Tatsumi via email. (*Id.*)

The ALJ admitted Dr. Tatsumi's August 14 report under ORS 656.268(6)(f), despite SAIF's objection. Relying on the record at closure, the ALJ affirmed the reconsideration order's impairment award. Claimant requested review.

On review, we agreed with the ALJ that Dr. Tatsumi's report was admissible as an "arbiter" report under ORS 656.268(6)(f). However, based on Dr. Tatsumi's findings, we increased claimant's permanent impairment award.

On reconsideration, we first address SAIF's contention that the basis for our decision to admit Dr. Tatsumi's report (*i.e.*, that the arbiter's examination was not effectively cancelled due to lack of successful notice), was not raised by claimant at any level of this proceeding. According to SAIF, although claimant requested that the report be admitted and considered, she consistently acknowledged that the arbiter examination was "improperly scheduled."

While our "ineffective cancellation" basis for finding Dr. Tatsumi's report admissible under ORS 656.268(6)(f) was not specifically argued by claimant, it was not a new "issue." *See Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing). Rather, our analysis and conclusion was consistent with claimant's fundamental request that Dr. Tatsumi's report be admitted and considered as an "arbiter's report." *See Daniel V. Covert*, 52 Van Natta 2066 (2000) (alternative "legal theories," as opposed to new issues, can be considered for the first time on Board review if there is no prejudice to the adverse party); *see also Mosley v. Sacred Heart Hosp.*, 113 Or App 234, 237 (1992) ("Under ORS 656.295(5) and (6), the Board has *de novo* review authority to decide all matters arising from the record."). Furthermore, SAIF does not argue that it has been prejudiced by our consideration of this new "theory" and, in fact, addressed the theory (without raising an objection) in its respondent's brief.⁴ (SAIF's Respondent's Brief, pp. 4-5).

Next, SAIF asserts that there is no statute or rule that requires the ARU to "successfully provide notification of the cancellation to the arbiter." While that may be true, there is also no statute or rule addressing the "cancellation" of an

⁴ We also note that our *de novo* review authority includes determining which legal standard or law applies to the facts of a particular case. Thus, we apply the law as the record and the evidence leads us. *See DiBrito v. SAIF*, 319 Or 244, 248 (1994) (when reviewing the record of a workers' compensation claim, the Board's first task is to determine which provisions of the law apply); *Edison L. Netherton*, 50 Van Natta 771, 772 (1998) (*de novo* review includes determining which law applies to the facts of a particular case, including identifying any applicable administrative rules).

arbiter's appointment or examination if the examination has already been scheduled *before* the Director determines that the claimant's condition is not medically stationary at the time of reconsideration, which is what occurred in this case.⁵

Under these circumstances (and in the absence of a rule to the contrary), we find it more reasonable to analyze this procedural dilemma in a manner that finds an "arbiter cancellation" effective only if it can be persuasively established that the arbiter received "pre-examination" notification that the appointment was withdrawn.⁶ Here, the ARU represented that Dr. Tatsumi was notified, but there is no documentation supporting that representation.⁷ Instead, the record includes

⁵ SAIF asserts that the ARU did not interpret its rules to provide such a requirement, and that we should have deferred to the ARU's interpretation of its own rules on the issue of the non-viability of Dr. Tatsumi's "erroneously" produced report. However, as noted, there is no rule governing this particular scenario. If the Director wishes to adopt a rule prescribing procedures for cancelling arbiter examinations or rescinding arbiter appointments, such an action would appear to be within the Director's authority. ORS 656.726(4). But in the absence of such a rule, we apply the analysis detailed in our prior order, as supplemented herein.

⁶ We recognize that when both parties do not consent to a postponement of the reconsideration proceeding, OAR 436-030-0165(9) gives the ARU discretion to either obtain a medical arbiter examination or a medical arbiter record review, or issue an Order on Reconsideration based on the record available at closure. However, when the carrier has opposed postponement of the reconsideration proceedings, and the ARU chooses the latter option, such as occurred in this case, the consequences are troubling. First, the aforementioned rule neither expressly nor impliedly authorizes the ARU to *cancel* an arbiter that *has already been appointed*. Nor, for that matter, are there any rules that prescribe procedures or standards applied by the ARU in determining whether a claimant's condition is no longer medically stationary or has "substantially changed." See ORS 656.268(7)(i)(A), (B). Thus, it is unclear how the ARU makes such determinations.

Finally, proceeding with reconsideration based on the documentary record (without the participation of an arbiter) effectively gives the carrier unilateral authority to prevent a claimant from receiving the medical arbiter report to which he/she is statutorily entitled. We question whether such circumstances are in keeping with the objective of the workers' compensation system to provide a "fair and just administrative system" that reduces litigation and eliminates the adversarial nature of the compensation proceedings to the greatest extent practicable. See ORS 656.012(2)(b). To the contrary, when a claimant's condition has become nonmedically stationary, it is difficult to identify a reasonable basis for a carrier's opposition to the postponement of the proceedings other than a tactical one. We encourage the Director to pay particular attention to situations involving ORS 656.268(7)(i)(A), (B), and the above rule, to avoid possible instances of gamesmanship.

⁷ SAIF asserts that claimant did not provide any evidence to contradict the ARU's representation that it provided notice of the cancellation to Dr. Tatsumi. However, as discussed above and in our prior order, the ARU's unsupported representation has been persuasively rebutted by the arbiter's report, which did not mention any receipt of notice or any knowledge of the cancellation. Thus, to the extent it is claimant's burden to prove error in the reconsideration process, she has met that burden. See *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000).

Dr. Tatsumi's arbiter report, which makes no mention of a cancellation of the examination.⁸

Accordingly, we adhere to our previous conclusion that the record does not establish that Dr. Tatsumi received notification of the ARU's cancellation before conducting his examination. Thus, we continue to consider Dr. Tatsumi's report admissible as an arbiter's report.⁹ ORS 656.268(6)(f).

Finally, regarding the extent of permanent disability, SAIF argues that Dr. Tatsumi's reference to "at this time" when reporting that claimant was significantly limited in her ability to repetitively use her right knee due to her accepted conditions indicates that her condition was not yet medically stationary. Rather, SAIF asserts that such "phrasing" reflects that Dr. Tatsumi considered claimant to be limited at the time of his examination, but that such limitation was not necessarily permanent, especially given claimant's then-current medical treatment and upcoming MRI. We disagree with SAIF's interpretation.

As explained in prior order, Dr. Tatsumi did not report that claimant's condition was not medically stationary. To the contrary, he described that claimant was significantly limited in her ability to repetitively use her right knee due to her accepted conditions, which is consistent with the Director's "chronic condition" rule. *See* OAR 436-035-0019(1). By stating that the limitation was "at this time," Dr. Tatsumi was more likely recognizing that the finding was made as of the evaluation date, rather than implying that the limitation was not permanent. In any event, as discussed in our prior order, in the absence of a statement from Dr. Tatsumi that claimant's condition was not medically stationary or had worsened, the reference to "at this time" is insufficient to establish that his "significant limitation" finding should not be used.

⁸ We emphasize that our decision, as adhered to on reconsideration, is based on the lack of successful notice to the *medical arbiter*, and not on a lack of successful notice to claimant or her attorney. Thus, to the extent our prior order noted that claimant's appearance at the August 14, 2008 examination provided support for the proposition that the ARU's cancellation notice was not successfully transmitted to claimant, such a comment was *dicta* and not determinative in reaching our decision.

⁹ Had Dr. Tatsumi's report mentioned notice of the attempted cancellation, whether directly from ARU or indirectly from claimant, or if the ARU had other corroborating evidence of notification (*e.g.*, certified mail or a response from Dr. Tatsumi's office) our decision would likely be different.

Accordingly, we withdraw our April 21, 2010 order. On reconsideration, as supplemented, we republish our April 21, 2010 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 20, 2010