

In the Matter of the Compensation of
VICKI L. WILLIAMSON, Claimant

WCB Case No. 08-07347

ORDER ON REVIEW

Dale C Johnson, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Mundorff's order that: (1) upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for a post-traumatic endolymphatic hydrops (PEH) condition; and (2) did not assess penalties and attorney fees for an allegedly unreasonable denial. On review, the issues are compensability, penalties and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," except for the "Findings of Ultimate Fact."

CONCLUSIONS OF LAW AND OPINION

On March 16, 2006, claimant fell at work and hit her head on a large steel door. SAIF accepted a "concussion, scalp laceration, left hip contusion, cervical strain, fractured teeth #5 & #9 and post concussion syndrome." (Ex. 13).

Claimant's "post injury" symptoms included a roaring sound in her ears, with a feeling of pressure and fullness. Eventually, she also had daily headaches and internal ear pain. The initial loud roaring became more of a buzzing or ringing sensation. Claimant treated primarily with Dr. Mossberg, her longtime caregiver.

On April 16, 2006, Dr. Coale, otolaryngologist, examined claimant at SAIF's request. According to Dr. Coale, claimant had PEH, due to her work injury. (Ex. 5). Claimant filed a claim for that condition, which SAIF denied.

After a hearing, the ALJ upheld the denial, finding that claimant did not have the claimed PEH condition. The ALJ rejected Dr. Coale's diagnosis, reasoning that the doctor did not confirm it, and considering the lack of supporting

findings by other experts. The ALJ also discounted Dr. Coale's opinion, stating that neither he nor Dr. Mossberg addressed or explained claimant's lack of hearing loss and salt sensitivity, factors identified as diagnostic hallmarks.¹

Claimant argues that Dr. Coale's opinion is better reasoned than the contrary opinions. We agree, reasoning as follows.

In a new/omitted medical condition claim, claimant bears the initial burden of proving that the claimed condition exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (to establish compensability of a new or omitted medical condition claim, the claimant must establish the existence of the claimed condition). Claimant must also establish that her compensable injury was at least a material cause of the need for treatment/disability for the claimed condition. ORS 656.005(7)(a); ORS 656.266(1). Because diagnosis is disputed, this case presents a complex medical question which must be resolved by expert evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283, (1993). We rely on medical opinions that are well-reasoned and based on accurate and complete histories. *Somers v. SAIF*, 77 Or App 259, 263, (1986).

Dr. Coale examined claimant and reviewed her history, including the examination reports and opinions of other physicians. He also discussed claimant's situation with other examining physicians. After that, Dr. Coale opined:

"I believe she has a posttraumatic endolymphatic hydrops. She has certainly suffered a significant head blow, falling, hitting her head and chipping her teeth with whiplash symptoms in her neck which suggests a significant head blow. In addition, from the very beginning she has had complaints of the four cardinal elements of endolymphatic hydrops – pressure or fullness in the ears, ringing or roaring, hyperacusis or hearing loss (both documented),

¹ We find that Dr. Coale addressed hearing loss and salt sensitivity. (Ex. 5-2). Regarding the latter, Dr. Coale reported that claimant was "salt sensitive" and, further, that a month or two on a low salt diet with a diuretic "would confirm the [PEH] diagnosis." (Exs. 5-2, 8-1). On the other hand, Dr. Huynh, another otolaryngologist, reported that low or high sodium did *not* affect claimant's symptoms. (Exs. 9-1, 16-2). Because this historical inconsistency is unresolved in the record, we find the evidence addressing the diagnostic significance of salt sensitivity inconclusive. (*See* Exs. 5-2, 8-1, 9-1 16-2).

Regarding hearing loss, Dr. Coale relied on his own test results showing low tone hearing loss, noting that Dr. Wilson's audiogram did not show it. (Ex. 5-2).

and chronic imbalance or vertigo. In addition secondary [] changes of memory and distraction, primarily from imbalance have continued and she has also had problems with fatigue, feeling tired at the end of the day, and having some mental confusion. These are typical of this diagnosis.” (Ex. 5-2; *see* Ex. 8-1-2).

Thus, Dr. Coale concluded that his examination findings and claimant’s clinical course since the injury satisfied the diagnostic criteria for injury-related PEH.

SAIF relies on the opinions of Drs. Buchanan, Huynh, and Wilson, who opined that claimant does not have PEH. We do not find the opinions of Drs. Buchanan or Wilson persuasive, because they are conclusory. (Exs. 11, 18).²

Dr. Huynh, otolaryngologist, opined that the absence of sensorineural hearing loss and true vertigo make it unlikely that claimant “has an otologic or peripheral vestibular problem.” (Ex. 9-2). Dr. Huynh relied on what he described as normal neurotologic exam, normal audiogram, normal “VNG,” and normal “ECoG” (electrophysiologic testing with electrocochleography, *see* Ex. 5-7) -- for at least one ear.³ (*Id.*)

Dr. Coale disagreed, for several reasons. He explained that claimant *did* have low tone hearing loss, based on an audiogram that he performed. (Ex. 5-2; *compare* Exs. 9-2, 11). He also explained that *his* “ECoG” testing of claimant’s symptomatic left ear was “non-interpretable” (due to “unusual wave [*sic*] form patterns.”). (Ex. 5-2). Thus, Dr. Coal explained the test results that he obtained: Claimant’s low tone hearing loss supported a PEH diagnosis, but the ECoG offered no “additional insight into her problem.” (Ex. 8-1).

² Dr. Buchanan opined, “I feel her sx are post concussive. I do not find support for endolymphatic hydrops in her hx.” (Ex. 11). Dr. Wilson checked a box indicating his belief that claimant “has never suffered from endolymphatic hydrops as a result of the fall on March 16, 2006.” (Ex. 18).

³ Dr. Hunyh referred to a “VNG: 6/12/06 within normal limits.” (Ex. 9-2. We find no other reference to a “VNG.” However, Dr. Coale responded to Dr. Hunyh’s opinion about claimant’s many tests, specifically mentioning *ENG* evaluations and “positional studies.” (Ex. 5-2). Considering Dr. Coale’s thorough evaluation of claimant’s records, it appears that the “VNG” results and “ENG” evaluations likely refer to the same tests. Moreover, Dr. Coale explained that normal ENG studies and positional studies do “not prove or suggest that [claimant’s] vestibular system is normal * * * [because] usually findings on these exams are normal in cases of endolymphatic hydrops [.]” (*Id.*)

Dr. Coale specifically acknowledged that some test results (other than his audiogram) were inconclusive or interpreted by others as “normal.” Nonetheless, he disagreed with other examiners’ conclusions that these tests meant that claimant did not have PEH. Instead, Dr. Coale explained that normal “EMG and positional studies” would not prove that claimant’s vestibular system was “normal” because results would indicate abnormality only if the tests were “exactly coordinated with the patient’s spells.” (*Id.*; see n 3, *supra*). Thus, Dr. Coale disagreed with Dr. Huynh’s conclusion that normal test results meant that claimant did not have PEH. According to Dr. Coale, such test results “simply mean that abnormalities could not be found [based on those tests].” (Ex. 5-2; see Ex. 5-7). As noted, Dr. Coale relied on *his* test results (specifically indicating low tone hearing loss) and claimant’s clinical course to conclude that claimant had PEH due to her work injury.

According to Dr. Coale, the injury-related PEH diagnosis was “consistent with virtually all of [claimant’s] chart work” and supported by “a very strong history and accurate representation of her problems[.]” (Exs. 5-3; 8-2). In this regard, Dr. Coale specifically observed that claimant’s symptom complex is mentioned throughout her chart (and in some examining physicians’ reports) and “[t]his symptom complex remains reasonably reported throughout her clinical course, starting from her accident and to the present date.”⁴ (Ex. 5-1).

Dr. Coale also participated in a telephone conference with Dr. Wicher, a psychologist, who examined claimant at SAIF’s request as part of a multidisciplinary independent medical examination. (*See* Exs. 5-1, 5-3). Dr. Wicher suspected that claimant was faking symptoms. Dr. Coale disagreed and opined that claimant’s somatic focus was “completely understandable, from the point of view that she really has a complaint; that is, chronic imbalance and dizziness.”⁵ (Ex. 5-3).

⁴ Dr. Coale described claimant’s symptom complex -- a consistent complaint of pressure and fullness or plugging in her ears, ringing and roaring in her ears (worse on the left than the right), hyperacusis, tinnitus, imbalance punctuated by spells of more intense imbalance or vertigo. (Ex. 5-1).

⁵ SAIF relies on a psychologist, ophthalmologist, and neurologist who questioned the reliability of claimant’s self-reporting and opined that she “somaticized.” (Exs. 1-6, 2-15, 4-8). We do not find these opinions persuasive, in part because these doctors are less qualified than the otolaryngologists to evaluate *ear* problems. We particularly note that none of the otolaryngologists share the “nonspecialists”

concerns about the authenticity of claimant’s reporting. Dr. Huynh, for example, acknowledged claimant’s complaints of “persistent non-specific dizziness, imbalance, bilateral aural fullnes [*sic*] and tinnitus” and he did not question claimant’s reporting. (Ex. 9-2).

Moreover, we find Dr. Coale’s thorough analysis of particulars persuasive. His diagnosis and causation opinion were based on claimant’s entire clinical course, whereas the opinions of the doctors who questioned claimant’s reliability were based primarily on test results conducted during their “one time”

Dr. Coale's reasoning and conclusions are supported by Dr. Mossberg, who examined claimant more often than any other physician. She and Dr. Coale unambiguously concluded that claimant's complaints were real. (Exs. 5-7, 12).

We find Dr. Coale's opinion persuasive, because it is well-reasoned and based on (and consistent with) a thorough examination and incisive review of claimant's records. We also find Dr. Coale's opinion persuasive because it rebuts Dr. Huynh's opinion, explaining that Dr. Huynh (and the other otolaryngologists) relied on test results that Dr. Coale found different from his own, inconclusive, or unnecessary for an injury-related PEH diagnosis.⁶ Moreover, Dr. Coale explained that claimant's clinical history was consistent with the diagnosis, whereas the contrary opinions relied only on tests results (and a questionable history of salt sensitivity).

Accordingly, on this record, we find Dr. Coale's opinion better reasoned and more persuasive than the contrary opinions. Based on Dr. Coale's opinion, we find that claimant has carried her burden of proof. *See Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty not required; a preponderance of evidence may be shown by medical probability).

Finally, claimant argues entitlement to a penalty and attorney fees for an allegedly unreasonable denial. *See* ORS 656.262(11)(a).

We decide whether SAIF's denial was unreasonable by determining whether, from a legal standpoint, it had a legitimate doubt as to its liability. *See Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the denial was not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

examinations. Also, Dr. Coale responded directly to the psychologist's suggestion that claimant had an anxiety disorder. Dr. Coale acknowledged that claimant had markedly increased anxiety, but he explained that this was *consistent* with chronic imbalance and dizziness. (*Compare* Exs. 4-9 and 5-3).

⁶ We also discount Dr. Huynh's opinions because we find them facially inconsistent. On one hand, Dr. Huynh checked boxes indicating that he agreed that claimant does not have endolymphatic hydrops, because she does not have hearing loss, a low sodium diet did not improve her symptoms, and "there is no test result to even suggest endolymphatic hydrops." (Ex. 16-2-3). On the other hand, in the same document, Dr. Huynh checked a box indicating that he *disagreed* that claimant does not meet the diagnostic criteria for endolymphatic hydrops; disagreed that she did not have hearing loss; and disagreed that a low sodium diet did not improve her symptoms. (Ex. 16-2).

Here, we find that SAIF had a legitimate doubt about its liability for the claim when the denial issued, based on Dr. Buchanan's inability to find support for a PEH diagnosis in claimant's history. (*See Ex. 11*). Consequently, penalties and attorney fees are not appropriate.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review for finally prevailing over SAIF's denial. ORS 656.386(1). 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 at hearing and on review regarding the compensability issue is \$8,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellate briefs, claimant's counsel's attorney fee request, and SAIF's objection to that request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may 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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated July 8, 2009 is reversed in part and affirmed in part. The SAIF Corporation's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$8,500, payable by SAIF. 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.

Entered at Salem, Oregon on February 10, 2010