

In the Matter of the Compensation of
KENNETH E. BRANDLE, Claimant
WCB Case No. 09-00049
ORDER ON REVIEW
Gatti Gatti et al, Claimant Attorneys
Mark P Bronstein, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The self-insured employer requests review of Administrative Law Judge (ALJ) McCullough's order that set aside its denial of claimant's current upper back injury claim. The employer has submitted a medical report that was not admitted into the record at hearing. We treat this submission as a motion to remand to the ALJ for the taking of additional evidence. *See Judy A. Britton*, 37 Van Natta 1262 (1985). On review, the issues are remand and compensability.

We deny the motion to remand, and adopt and affirm the ALJ's order with the following supplementation.

On review, the employer submits a September 1, 2009 report from Dr. Cottrill, claimant's treating physician. (Proposed Exhibit 27). The employer argues that the report could not have been obtained prior to the July 8, 2009 hearing and should be included in the record. Claimant objects to the employer's submission.

Our review is limited to the record developed by the ALJ. We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed[.]" 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 at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986). We consider the additional document only for the purpose of determining whether remand is appropriate.

On September 1, 2009, Dr. Cottrill performed a closing examination, explaining that he found claimant's condition medically stationary on July 14, 2009. Dr. Cottrill's impression was "myofascial pain to the thoracic spine, chronic." He explained:

“[Claimant] does have some limitations in range of motion through the cervical and thoracic spine. However, this is felt to be more of a chronic issue and not a direct consequence of his injury. I do not feel that there is any residual deficit or impairment as a result of the work injury.” (Proposed Exhibit 27).

According to the employer, Dr. Cottrill believed that claimant’s myofascial pain condition was not a direct consequence of his compensable thoracic strain. We disagree with the employer’s interpretation of Dr. Cottrill’s September 1, 2009 report. Dr. Cottrill did not believe that claimant had any impairment as a result of the work injury and he explained that claimant’s limited cervical and thoracic range of motion was more of a chronic issue and not a direct consequence of his injury. (Proposed Exhibit 27). Here, however, the issue is compensability of claimant’s current condition, not extent of permanent impairment. Dr. Cottrill’s belief that claimant’s limited range of motion was not a direct consequence of the work injury does not assist us in analyzing compensability.

Furthermore, Dr. Cottrill’s reference to “chronic” myofascial pain in the thoracic spine is cumulative to his other reports referring to chronic myofascial pain. (Exs. 16A, 19). Under these circumstances, we find that the proposed document is not reasonably likely to affect the outcome of the case. The employer’s motion for remand is denied.

We adopt and affirm the ALJ’s analysis and conclusion that claimant’s current upper back condition continues to be causally related to the accepted August 2008 injury. We write to address the employer’s argument that claimant was not a credible witness and that Dr. Cottrill’s opinion must be discounted to the extent that he relied on the validity of claimant’s subjective complaints.

The employer contends that the report from Dr. Ingle, claimant’s initial treating physician, which indicated that claimant preferred chiropractic treatment instead of physical therapy (Ex. 11-1), conflicts with claimant’s testimony that Dr. Ingle did not discuss physical therapy with him. (Tr. 20). But claimant testified that Dr. Ingle’s chart note indicating that he preferred chiropractic treatment was not accurate. (Tr. 22). We are more persuaded by claimant’s testimony than Dr. Ingle’s chart note. In any event, the issue of whether or not Dr. Ingle recommended physical therapy is not significant to resolving the compensability issue.

The employer argues that claimant was “creative” when discussing his pain complaints and that Dr. Cottrill’s opinion is not persuasive to the extent he relied on claimant’s subjective complaints. The employer refers to claimant’s testimony that, after being off work for seven months, his pain level was at “six to seven” (with 10 being the best level of health). (Tr. 13, 24). The employer contrasts that with the March 26, 2009 report from Dr. Arbeene, examining physician, who reported that claimant’s improvement was 90 percent. (Ex. 21-2). Claimant testified that his report to Dr. Arbeene of “90 percent improvement” meant on that particular day. (Tr. 23-24). According to the employer, claimant was either being disingenuous to Dr. Arbeene or he “lied” at hearing. We disagree.

Dr. Arbeene explained that claimant “indicates his overall symptomatic improvement now to be 90%, 100% representing normal status. He complains of occasional ‘flare-ups’ of ‘needles’ in his levator scapulae bilaterally.” (Ex. 21-2). Dr. Arbeene noted that claimant was “straightforward in his presentation.” (Ex. 21-5). Dr. Arbeene’s report is consistent with claimant’s testimony. At hearing, claimant testified that the numbness across his shoulders was gone, but he had occasional flare-ups where it felt like needles sticking him in his shoulders. (Tr. 13). He still had occasional flare-ups in pain. (Tr. 15). On some days, however, claimant did not have any pain. (Tr. 16, 24). We do not agree with the employer that claimant was being disingenuous to Dr. Arbeene or that he lied at hearing.

The employer also contends that claimant “lied” at hearing when he denied that he made a phone call to Dr. Cottrill after learning that he was released to regular work by Dr. Ingle. We acknowledge that claimant’s response to the employer’s question is subject to multiple interpretations.¹ In any event, to the extent there were inconsistencies with claimant’s testimony regarding this point, they were not material and were not sufficient to defeat his claim where, as here, the record as a whole supports his claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985).

Claimant’s attorney is entitled to an assessed fee for services on review. 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 \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issues, and the value of the interest involved.

¹ The ALJ did not make specific credibility findings regarding claimant’s testimony.

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 the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated July 17, 2009 is affirmed. For services on review, claimant's counsel is awarded an assessed fee of \$3,000, payable by the employer. 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 the employer.

Entered at Salem, Oregon on February 12, 2010