
In the Matter of the Compensation of
SUSAN E. DESHON, Claimant
WCB Case No. 09-04415
ORDER ON REVIEW
Martin L. Alvey, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Rissberger's order that: (1) upheld the self-insured employer's denial of claimant's medical services claim for her current back condition; and (2) did not award a penalty or attorney fee under ORS 656.262(11)(a) for allegedly unreasonable claim processing. On review, the issues are medical services, penalties, and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

Claimant was compensably injured in 1984 as a result of moving fixtures in a department store. The employer accepted the injury claim, identifying the nature of the injury as a "pulled back." (Ex. 7). In 1987, claimant was awarded 20 percent (64 degrees) unscheduled permanent disability. (Ex. 48).

Claimant received intermittent care for continuing low back pain. Beginning in 1993, she treated with Ms. Danforth, a nurse practitioner. (*See Exs. 76, 77*).

In 2004, Drs. Williams and Woodward examined claimant at the employer's request and diagnosed "chronic intermittent lumbosacral back pain originating in 1984 * * *." (Ex. 178-5). They opined that claimant's current condition and need for treatment was unrelated to the compensable 1984 injury, but only to "degenerative changes of natural aging." (Ex. 178-6). Danforth disagreed with that opinion. (Ex. 179).

From 2004 until at least February 2009, claimant continued to treat with Danforth for her intermittent low back pain. Her medical services included chiropractic treatment, massage, acupuncture, physical therapy, anti-inflammatory medication and muscle relaxants. (*See, e.g., Exs. 181 through 220, 224-1, -2*).

In June 2009, the employer issued a denial, stating that claimant's 1984 claim was accepted for "lumbosacral strain," and that her "current need for medical treatment [was not] compensably related to [the] accepted strain." (Ex. 221).

In September 2010, Drs. Swanson and Green examined claimant at the employer's request. (Ex. 223). They opined that claimant had a congenital lumbarization anomaly that predated the April 1984 work injury and initially "combined with" that injury. (Ex. 223-22). They also stated that claimant had spondylosis of the lumbar spine, but described its existence before the April 1984 injury as "unknown." (*Id.*) They believed that claimant sustained a lumbar strain as a result of the 1984 work injury, and that any symptoms after December 1984 "could not have been due to" that strain. (*Id.*) Drs. Swanson and Green concluded that claimant's symptoms and need for treatment after December 1984 were due to her lumbar spondylosis and/or congenital lumbarization. (Ex. 223-22, -23).

Danforth disagreed with that opinion. (Ex. 224-2). Danforth stated that her treatment for claimant, which spanned approximately 20 years, was "primarily muscular or soft tissue related" and not "specifically directed * * * toward any underlying degenerative condition." (Ex. 224-1, -2). Danforth also characterized that care as "palliative in nature and designed to keep [claimant] employed." (*Id.*) Danforth stated that the April 1984 work injury remained a material contributing cause of claimant's need for medical treatment. (Ex. 224-2).

Claimant requested a hearing, contesting the employer's June 2009 denial and seeking penalties and attorney fees under ORS 656.262(11)(a).

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer's denial, which the parties treated as a "medical services denial" under ORS 656.245(1)(a) for claimant's current low back condition. In upholding the denial, the ALJ reasoned that claimant's current back condition was a "combined condition," and that no expert medical opinion concluded that the combined current back condition was "caused in major part" by the initial compensable injury. *See* ORS 656.245(1)(a); *SAIF v. Sprague*, 346 Or 661, 673 (2009).

On review, claimant disputes the characterization of her current back condition as a "combined condition." Consequently, she argues that "the major contributing cause" standard does not apply, and that Danforth's opinion establishes that her current need for treatment was necessitated in material part

by the compensable injury. *See* ORS 656.245(1)(a); *Cameron J. Horner*, 62 Van Natta 2094, 2095 (2010). The employer maintains that claimant’s current back condition should be treated as a “combined condition” for purposes of ORS 656.245(1)(a).¹

We agree with claimant that the employer’s denial should be set aside. We reason as follows.

ORS 656.245(1)(a) provides:

“For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.”²

If the claimed medical service is “for” an “ordinary” condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *Sprague*, 346 Or at 672; *Horner*, 62 Van Natta at 2905. If the claimed medical service is “directed to” a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905.

¹ Despite that assertion, the employer has never processed claimant’s claim as a “combined condition.” In other words, the employer has never accepted a “combined condition” or issued a denial of such a condition pursuant to ORS 656.262(6)(c). Rather, the employer issued a denial of claimant’s “current need for medical treatment,” the propriety of which it concedes is determined under ORS 656.245(1)(a) and the controlling precedent of *Sprague*. Therefore, this order addresses only that issue.

² Although claimant contends that an earlier version of ORS 656.245 applies to her medical services claim because of her 1984 date of injury, the relevant statutory changes to that provision were made “fully retroactive” and applicable to “all claims or causes of action existing or arising on or after June 7, 1995, regardless of the date of injury * * *.” Or Laws 1999, ch 6, § 1; *see also* Or Laws 1995, ch 332, §§ 25, 25a, 66. *See also Robert F. Shelton*, 48 Van Natta 133 (1996).

Consistent with *Sprague*, we must first classify the condition for which the denied medical services were “for” or “directed to,” and then “apply the appropriate legal standard under ORS 656.245(1)(a).” *Charles E. Pharis, Jr.*, 62 Van Natta 406, 409 (2010). In other words, we must determine whether claimant’s current back condition is an “ordinary” condition or a “combined condition.”³

A “combined condition” consists of two components: (1) “an otherwise compensable injury”; and (2) a statutory “preexisting condition.” ORS 656.005(7)(a)(B). *See also Hollis L. Strickland*, 62 Van Natta 2790, 2792 n 1 (2010) (a “combined condition” analysis is not appropriate in the absence of an “otherwise compensable injury”); *Virginia L. Gould*, 61 Van Natta 2206, 2210 (2009) (in the absence of a statutory “preexisting condition,” the claimant did not establish that the existence of her claim for a “combined condition”).

Moreover, a “combined condition” also requires that the compensable work injury “merge” or “exist harmoniously” with the statutory “preexisting condition,” or that there is an “integration” or “close relationship” between the compensable injury and the “preexisting condition.” *David J. Tikunoff*, 62 Van Natta 2359, 2362-63 (2010). *See also Luckhurst v. Bank of Am.*, 167 Or App 11, 17 (2000) (a combined condition may exist where there are “two conditions that merge or exist harmoniously”); *Multifoods Specialty Distrib. v. McAfee*, 164 Or App 654, 662 (1999) (a “combined condition” may exist as “either an integration of two conditions or the close relationship of those conditions, without integration”).

Here, two expert medical opinions addressed the nature of claimant’s *current* back condition: (1) Drs. Swanson and Green; and (2) Danforth.⁴ Drs. Swanson and Green opined that claimant’s current back condition (for which she required medical services) was limited to non-work-related lumbar spondylosis and/or a congenital lumbarization. (Ex. 223-22, -23). Drs. Swanson and Green

³ The parties do not contend that claimant’s current back condition is a “consequential” condition.

⁴ Drs. Williams and Woodward only addressed the nature of claimant’s back condition in 2004. The employer denied claimant’s current need for treatment in 2009. Therefore, we do not find the opinion of Drs. Williams and Woodward, which issued some five years earlier, probative concerning the employer’s medical services denial of claimant’s *current* back condition.

Moreover, even if we did consider that opinion, it also does not support a “combined condition” for the reasons set forth above regarding the opinion of Drs. Swanson and Green. Specifically, Drs. Williams and Woodward described claimant’s back condition (and need for medical services) in 2004 as being related only to a degenerative condition. (Ex. 178-6).

unequivocally stated that claimant's current symptoms and need for treatment were unrelated to her compensable 1984 work injury. (*Id.*) Thus, Drs. Swanson and Green do not support the proposition that claimant's *current* back condition is a "combined condition."⁵

Danforth also did not characterize claimant's current back condition as a "combined condition," and stated that the focus of the care had been primarily related to a "muscular or soft tissue" condition. (Ex. 224-2). Although Danforth's chart notes/records at times identified a degenerative disc/joint disease condition, Danforth also stated that her care was not specifically directed at that condition. (*See, e.g.*, Exs. 183, 196, 213, 222, 224-2).

Moreover, the record does not establish that claimant's degenerative disc/joint condition predated the compensable 1984 work injury. Specifically, a June 1984 imaging study of claimant's lumbar spine was interpreted as showing a "normal lumbosacral spine," with the exception of the congenital lumbarization. (Ex. 10). Drs. Swanson and Green concluded that it was "unknown" whether claimant's preexisting degenerative condition predated the April 1984 work injury, noting that imaging studies did not show the presence of such a condition until May 1986. (Ex. 223-22). Although Drs. Swanson and Green simultaneously suggested that claimant's degenerative lumbar condition may have preceded the April 1984 work injury, that suggestion was based in part on an incorrect understanding that claimant was prescribed a back brace in February 1984, whereas the record shows that the back brace was prescribed in February 1986, after the compensable injury. (*See* Exs. 29, 30). Furthermore, Drs. Swanson and Green separately conceded that imaging studies did not document the presence of a degenerative lumbar condition until May 1986. (Ex. 223-22).

Under these circumstances, we do not find that the record establishes that claimant's degenerative lumbar disc/joint condition preceded the April 1984 compensable injury. Consequently, it does not qualify as a statutory "preexisting condition."⁶

⁵ Although Drs. Swanson and Green stated that, initially, claimant's 1984 injury (which they characterized as a "lumbar strain") combined with non-work-related spinal conditions, they concluded that claimant's *current* back condition consisted only of the latter. (Ex. 223-22, -23). Pursuant to *Sprague*, it is claimant's *current* back condition with which we are concerned, not claimant's back condition in 1984.

⁶ Because both of the potentially applicable versions of ORS 656.005(24) require that a "preexisting condition" precede the onset of an initial injury claim, we reach this conclusion regardless of which version of ORS 656.005(24) applies. *See* Or Laws 1995, ch 369, § 1(24); Or Laws 2001, ch 865, § 22(1).

In any event, Danforth's opinion does not support a conclusion that claimant's current back condition consisted of the compensable work injury "merging" or "existing harmoniously" with the degenerative lumbar condition, or that there was an "integration" or "close relationship" between the compensable injury and the degenerative condition, as would be necessary for us to find a "combined condition." See *Tikunoff*, 62 Van Natta at 2362-63; *Luckhurst*, 167 Or App at 17; *McAfee*, 164 Or App at 662. As set forth above, Drs. Swanson and Green also did not so characterize claimant's current back condition.

Although the record supports a conclusion that claimant's congenital lumbarization preceded the onset of the initial injury claim, the persuasive opinion of Danforth does not establish that the congenital condition contributed to claimant's need for treatment for her current back condition. (Ex. 224). Therefore, her opinion does not establish that claimant's current back condition involves a "combined condition."

Likewise, Drs. Swanson and Green's opinion does not establish a "combined condition," albeit for different reasons. According to their opinion, claimant's current back condition did not involve an "otherwise compensable injury"; rather, that condition consisted of only non-work conditions, including the congenital lumbarization. (Ex. 223-22, -23). Therefore, even if we found their opinion persuasive, which we do not, that opinion would not persuasively establish that claimant's current back condition involved a "combined condition" consisting of the compensable work injury and the congenital lumbarization.

Therefore, because claimant's current back condition is an "ordinary" condition-*i.e.*, neither a "combined" nor a "consequential" condition-the first sentence of ORS 656.245(1)(a) applies. In accordance with that sentence, the disputed medical services are compensable if treatment was necessitated in material part by the "compensable injury," which is the condition or conditions previously accepted. *SAIF v. Martinez*, 219 Or App 182, 190-91 (2008); *Andrew C Kahl*, 62 Van Natta 2959, 2962 (2010); *Horner*, 62 Van Natta at 2905. "In material part" means "fact of consequence." *Mize v. Comcast Corp.-AT&T Broadband*, 208 Or App 563, 569-70 (2006); *Todd R. Ferguson*, 62 Van Natta 304 (2010).

Here, the employer accepted "pulled back" and "lumbosacral strain." (Exs. 7, 221). According to Danforth, her treatment of claimant's current back condition was necessitated in material part by such conditions, which she described as a lumbosacral strain that was "muscular or soft tissue related." (See Ex. 224).

The employer does not dispute the proposition that Danforth attributed the disputed medical services to the accepted conditions. Rather, it asserts that we should rely on the opinion of Drs. Swanson and Green, who attribute those services solely to non-work-related lumbar conditions (the aforementioned degenerative lumbar disc/joint condition and/or the congenital lumbarization).

Because of the conflicting medical opinions, expert medical opinion must be used to resolve this issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). The persuasiveness of a medical opinion depends on whether it is well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

In the absence of persuasive reasons to the contrary, we generally give greater weight to the opinion of an attending practitioner. *Weiland v. SAIF*, 63 Or App 810, 814 (1983); *Shereena Oden*, 62 Van Natta 1754, 1756 (2010). We accord such deference because, generally, that practitioner has had a better opportunity to observe and evaluate a claimant's condition over an extended period of time. *Oden*, 62 Van Natta at 1756; *Angela S. Breitenstein*, 56 Van Natta 174, 177 (2004). However, we may properly give greater or lesser weight to the opinion of a treating practitioner, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Oden*, 62 Van Natta at 1756; *Michael J. Perkins*, 56 Van Natta 1744, 1745 (2004).

Here, we do not find persuasive reasons to disregard the opinion of Danforth, who was in the advantageous position of treating claimant's low back condition for approximately 20 years. According to Danforth, claimant's current back condition required treatment that included physical therapy, heat, massage, acupuncture, anti-inflammatory medication, and muscle relaxants. (Ex. 224). She disagreed with Drs. Swanson and Green's opinion that the compensable strain had resolved, explaining that the aforementioned treatment was primarily directed at muscular/soft-tissue conditions, which is consistent with the accepted conditions, and was necessitated in part by the compensable injury. (*Id.*) We find that Danforth's opinion convincingly relates claimant's need for medical treatment to her accepted conditions.

Although Drs. Swanson and Green concluded to the contrary, we are not persuaded by their opinion, which did not address in sufficient detail the medical services that Danforth identified as necessary to treat claimant's current back condition. Rather, Drs. Swanson and Green stated in a conclusory fashion that claimant required only treatment for a degenerative condition unrelated to the work

injury. (Ex. 223-22, -23). Despite Danforth stating that claimant's current back condition involved muscle and soft-tissue elements that required, *inter alia*, muscle relaxants, Drs. Swanson and Green did not explain why that treatment would be limited to treating the degenerative lumbar disc/joint condition. Given Danforth's more specific discussion of the particular medical services and how they were related to a muscle/soft-tissue condition, we find Drs. Swanson and Green's opinion inadequately explained and unpersuasive. Therefore, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. 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 is \$7,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that 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 the employer. *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).

Penalties/Attorney Fees

Because the ALJ upheld the denial, he did not award a penalty or attorney fee under ORS 656.262(11)(a), as requested by claimant. Under that statute, if a carrier unreasonably delays or refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under that section. The standard for determining unreasonableness is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available to the carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

Claimant contends that the employer's denial was unreasonable because Drs. Swanson and Green had not examined claimant or issued their report at the time that the denial issued. The employer was in possession of other medical evidence, however, that would establish a legitimate doubt as to its liability for the

disputed medical services when it issued the denial. Specifically, some of the medical records proximate in time to the denial included other low back conditions that have yet to be accepted, or referenced recent events as separately responsible for some of claimant's need for treatment. (*See* Exs. 213, 214, 216, 217, 218, 220). The employer subsequently received Drs. Swanson and Green's report, which provided further support for its denial. Therefore, we find that the employer had a legitimate doubt concerning its medical services liability. Consequently, its denial was not unreasonable. Accordingly, we affirm that portion of the ALJ's order that did not award a penalty or attorney fee under ORS 656.262(11).

ORDER

The ALJ's order dated September 20, 2010 is affirmed in part and reversed in part. That portion of the ALJ's order that upheld the employer's denial is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$7,500, to be paid 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. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 11, 2011