
In the Matter of the Compensation of
CHI T. NGUYEN, Claimant
WCB Case No. 10-01773
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) found that her bilateral lateral epicondylitis claim was not prematurely closed; and (2) affirmed an Order on Reconsideration that awarded 8 percent whole person impairment for her right and left forearm conditions, as well as work disability. On review, the issues are premature closure and extent of permanent disability (whole person impairment and work disability).

We adopt and affirm the ALJ's order with the following changes and supplementation. On page 5, we change footnote 2 to refer to "OAR 436-010-0280(4)." On page 6, we delete the second full paragraph and replace it with the following supplementation regarding claimant's "chronic condition."

We first provide the following summary of the relevant facts.

The self-insured employer accepted claimant's bilateral lateral epicondylitis. (Exs. 48, 59). On November 5, 2007, Dr. Layman performed a right lateral epicondylectomy and "periosteal stripping" surgery. (Ex. 61). He performed a similar surgery on the left on May 2, 2008. (Ex. 69).

On November 26, 2008, Dr. Layman conducted a closing examination, during which claimant indicated that repetitive activities in general were not a problem for her and that she had no cold interference with her ability to do work-related activities. Dr. Layman found that claimant had impairment related to decreased grip strength bilaterally at grade 4/5. (Ex. 86). Dr. Layman later explained that a work capacity evaluation (WCE) was necessary to gauge claimant's permanent work restrictions. (Ex. 88).

On January 29, 2009, claimant participated in a WCE, which determined that she was capable of working in the "light" level of physical demand. (Exs. 90, 91, 92). The evaluator noted that claimant reported hypersensitivity to cold in both arms. (Ex. 91-6).

In a February 14, 2009 concurrence letter from the employer's attorney, Dr. Layman reviewed the WCE and agreed that claimant was released to perform her job at injury. Dr. Layman opined that claimant was medically stationary as of the November 26, 2008 closing examination with permanent impairment as documented in his closing examination findings. (Ex. 93).

The employer issued a Notice of Closure on February 27, 2009, which was rescinded on July 2, 2009. (Exs. 94, 102).

On June 25, 2009, claimant signed an affidavit that provided information regarding her regular job with the employer. She also attested that the "cold sensitivity referred to in the [WCE] is genuine and occurs at a temperature consistent with exposure to cold tap water." (Ex. 100).

In a June 28, 2009 concurrence letter from claimant's attorney, Dr. Layman agreed that claimant could only return to her regular job with the employer with job modifications. Claimant's attorney informed Dr. Layman that claimant's cold sensitivity occurred at approximately 55 to 60 degrees Fahrenheit. Dr. Layman agreed that claimant had cold intolerance that resulted in a loss of use or function below 15 degrees Centigrade. (Ex. 101).

In an August 11, 2009 concurrence letter from the employer's attorney, Dr. Layman continued to rely on his November 26, 2008 closing examination to rate claimant's impairment, with some supplementation. He concluded that claimant was not capable of returning to her job at injury. Regarding claimant's reported cold intolerance, Dr. Layman explained that his June 28, 2009 concurrence with claimant's attorney's letter was based on representations regarding claimant's subjective cold intolerance complaints. Dr. Layman opined that a vascular examination was needed to obtain the objective findings necessary to assess and rate claimant's reported cold intolerance. (Ex. 105).

On September 8, 2009, Dr. Foley performed a peripheral vascular study and cold immersion testing. Dr. Foley concluded that claimant's peripheral vascular study was "normal" and the cold immersion test was "negative." (Ex. 106). Dr. Layman concurred with the results of Dr. Foley's test. (Ex. 107).

An October 14, 2009 Notice of Closure awarded claimant 8 percent whole person impairment for her right and left forearms, as well as work disability. (Ex. 108). A March 10, 2010 Order on Reconsideration affirmed the Notice of Closure. (Ex. 112). Claimant requested a hearing.

Cold Intolerance

The Appellate Review Unit (ARU) did not award an impairment value under OAR 436-035-0110(7), explaining that Dr. Layman had concurred with Dr. Foley's September 8, 2009 cold intolerance test that reflected a normal peripheral vascular study and a negative cold inversion test. (Ex. 112-2). At hearing, claimant contested ARU's decision.

The ALJ determined that Dr. Foley's test was the only objective medical evidence relating to claimant's alleged cold intolerance. The ALJ explained that Dr. Layman had previously acknowledged that it was necessary to objectively verify claimant's reported (subjective) cold intolerance and that Dr. Layman had concurred with Dr. Foley's report. The ALJ concluded that claimant's contention that her intolerance to ice water after 24 seconds established a "cold intolerance" was speculative and lacked medical verification.

On review, claimant argues that OAR 436-035-0110(7) (WCD Admin. Order 07-060; eff. January 1, 2008) does not require her to demonstrate vascular dysfunction or a diagnosis of Raynaud's phenomenon to meet the requirements for a cold intolerance rating. She argues that Dr. Foley did not actually perform cold sensitivity testing and, therefore, Dr. Layman's concurrence with that study is meaningless. According to claimant, her intolerance to an ice water bath after 24 seconds objectively establishes a cold intolerance of at least class 2 under OAR 436-035-0110(7)(b). Claimant also relies on Dr. Layman's opinion that she has cold intolerance.

Claimant has the burden to prove the nature and extent of her disability. ORS 656.266(1); *Chad Dexter*, 54 Van Natta 2704 (2002). Moreover, as the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000).

We need not determine whether claimant must demonstrate vascular dysfunction or a diagnosis of Raynaud's phenomenon to meet the requirements for a rating for cold intolerance under OAR 436-035-0110(7)¹ because we find that, in any event, the medical evidence is not sufficient to establish an impairment rating for cold intolerance. We reason as follows.

¹ OAR 436-035-0110(7) provides that "[v]ascular dysfunction of the upper extremity is valued according to the affected body part, using the following classification table * * *." The rule includes five classes, which refer to various symptoms. The five classes include "or cold intolerance (e.g., Raynaud's phenomenon) which results in a loss of use or function that occurs" with exposure to temperatures of varying degrees. OAR 436-035-0110(7).

For the purpose of rating claimant's permanent impairment, only the opinion of the attending physician at the time of claim closure, or any findings with which he or she concurred, or a medical arbiter's findings may be considered. ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). Because no arbiter examination was performed in this case, only Dr. Layman's findings, and those with which he concurred, can be used for rating impairment.

To begin, we do not agree with claimant's argument that Dr. Layman concurred with the WCE finding that she had a cold tolerance problem. Dr. Layman was aware of the WCE report, but we are not persuaded that he concurred with all the WCE findings.² In any event, the WCE report merely explained that claimant "reports hypersensitivity to cold" in both arms. (Ex. 91-6). The WCE evaluator did not expressly determine that claimant had "cold intolerance."

Claimant relies on Dr. Layman's opinion that she had a cold intolerance, and contends that he did not retract or alter that statement. We disagree.

In the November 26, 2008 closing examination, Dr. Layman reported that claimant indicated that "she had no cold interference with her ability to do work-related activities." (Ex. 86). After the January 2009 WCE referred to claimant's reported hypersensitivity to cold in both arms (Ex. 91-6), an affidavit was prepared in which claimant attested that the "cold sensitivity referred to in the [WCE] is genuine and occurs at a temperature consistent with exposure to cold tap water." (Ex. 100).

In the June 28, 2009 concurrence letter from claimant's attorney, Dr. Layman was informed that claimant's cold sensitivity occurred at approximately 55 to 60 degrees Fahrenheit. Based on that information, Dr. Layman agreed that claimant had cold intolerance that resulted in a loss of use or function below 15 degrees Centigrade. (Ex. 101). In a July 28, 2009 note, Dr. Layman said that it "appears that [claimant's] cold sensitivity would be related to her lateral epicondylitis conditions as with upper extremity injuries there frequently is a sympathetic mediated cold intolerance." (Ex. 103).

² See analysis in "Strength Loss" section, *infra*.

After discussing claimant's cold sensitivity with the employer's attorney, however, Dr. Layman explained that it could be objectively measured with cold sensitivity testing. (Ex. 104). In a concurrence letter with the employer's attorney, Dr. Layman explained that his June 28, 2009 opinion regarding claimant's cold intolerance was based on representations regarding her subjective cold intolerance complaints, but he opined that a "vascular examination needs to be performed to obtain the objective findings necessary to assess and rate [claimant's] reported cold intolerance." (Ex. 105).

Thus, although Dr. Layman initially agreed that claimant had cold intolerance (Ex. 101), he later explained that his opinion was based on her subjective complaints and he clarified that a vascular examination was needed to obtain the objective findings necessary to assess and rate her reported cold intolerance. (Ex. 105). We find this to be a reasonable explanation for Dr. Layman's change of opinion. *See Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (changed opinion persuasive where there was a reasonable explanation for the change). Consequently, we find that Dr. Layman's June 28, 2009 opinion regarding claimant's cold intolerance is entitled to little weight.

The record does not include persuasive medical evidence from Dr. Layman establishing that claimant is entitled to a rating for cold intolerance. Dr. Layman concurred with the September 8, 2009 test by Dr. Foley, who concluded that claimant's peripheral vascular study was normal and the cold immersion test was negative. (Exs. 106, 107). Claimant contends that the September 8, 2009 test, which showed her intolerance to an ice water bath after 24 seconds, objectively establishes at least a class 2 rating of cold intolerance. We disagree.

Dr. Foley explained that claimant's hands were immersed in an ice bath, which could only be tolerated for 24 seconds. He said that "[f]ollowing immersion in an ice water bath, there was some decreased amplitude in the thumb waveforms, however, they did not extinguish." Dr. Foley concluded that this was a "negative cold immersion test, at least at the duration of time [claimant] was able to keep [her] hands in the ice water bath." (Ex. 106).

We do not interpret Dr. Foley's test to mean that claimant had cold intolerance, particularly since he concluded that it was a "negative cold immersion test." Furthermore, we do not have the medical expertise to reach that conclusion in the absence of a persuasive medical opinion. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical

evidence, it is not free to reach its own medical conclusions in the absence of such evidence). Therefore, we decline to interpret Dr. Foley's test to conclude that she has cold intolerance pursuant to OAR 436-035-0110(7).

Alternatively, claimant criticizes Dr. Foley's testing, arguing that it did not demonstrate that she did not have a cold intolerance and that it did not objectively determine the temperature at which she had a significant cold intolerance. However, there is no medical evidence indicating that Dr. Foley's test was invalid and we do not have the medical expertise to reach that conclusion. In any event, as the employer notes, if the testing was invalid, claimant is not entitled to any permanent impairment. *See* OAR 436-035-0007(12) ("When findings are determined invalid, the findings receive a value of zero.").

In summary, we conclude that the medical evidence is not sufficient to establish that claimant is entitled to an impairment value for cold intolerance under OAR 436-035-0110(7).

Strength Loss

At hearing, claimant argued that she was entitled to additional values for loss of strength for elbow flexion and forearm supination based on the January 2009 WCE. The ALJ determined that Dr. Layman did not concur with the WCE impairment findings. Instead, the ALJ concluded that Dr. Layman relied on his November 26, 2008 closing examination, with some added comments regarding claimant's residual functional capacity and work release.

On review, claimant argues that Dr. Layman concurred with the WCE findings and, therefore, she is entitled to an increased value for loss of strength. The record, however, does not include a report from Dr. Layman expressly stating that he concurred with the entire WCE. Nevertheless, claimant asks us to find that, based on Dr. Layman's concurrence with parts of the WCE, the WCE findings are suitable for rating impairment not otherwise discussed by Dr. Layman. We disagree.

In the November 28, 2008 closing examination, Dr. Layman found that claimant had impairment related to decreased grip strength bilaterally at grade 4/5. (Ex. 86-3, -4). On December 15, 2008, Dr. Layman recommended a WCE to gauge claimant's permanent work restrictions and confirmed that the impairment ratings for loss of strength in his November 2008 examination were accurate. (Ex. 88).

In the February 14, 2009 concurrence letter from the employer's attorney, Dr. Layman reviewed the January 2009 WCE and explained that he continued to believe that claimant was medically stationary as of the November 26, 2008 closing examination "with permanent impairment documented in your closing examination findings." (Ex. 93). On July 28, 2009, Dr. Layman explained that he had talked to the employer's attorney regarding the WCE and claimant's ability to return to her regular job at injury. Dr. Layman noted: "I have also indicated that the other aspects of my closing examination would probably stand as apparently no issues have been raised regarding that." (Ex. 103).

In the August 11, 2009 concurrence letter from the employer's attorney, Dr. Layman had reviewed the WCE and stated that he "continue[d] to rely on [his] November 26, 2008 closing examination to rate [claimant's] impairment, with the following supplementation." (Ex. 105). Dr. Layman commented on claimant's inability to return to her job at injury, as well as the lack of objective testing for her subjective cold intolerance complaints. However, Dr. Layman did not provide any supplementation regarding claimant's strength findings. After reviewing Dr. Layman's reports, we are not persuaded that he concurred with the impairment findings of reduced strength in the WCE. *See* ORS 656.245(2)(b)(C) (only the impairment findings of the claimant's attending physician at the time of claim closure, and other medical findings with which he or she concurred, may be considered).

Alternatively, claimant argues that because Dr. Layman did not state that there was no loss of strength in the elbow or arm, and findings in the record suggested that there was a loss of strength associated with elbow extension and forearm supination, the record is inadequate for review and the Notice of Closure must be set aside as premature. Claimant cites *Socorro Sanchez*, 50 Van Natta 2550 (2008), arguing that the failure to obtain impairment findings prior to claim closure requires that a Notice of Closure be set aside. For the following reasons, we reject that argument.

In *Sanchez*, the ALJ determined that the carrier lacked sufficient information to determine permanent disability when it closed the claim. The ALJ reasoned that a "post-closure" report from the attending physician did not provide "sufficient information" because, although it was available when the reconsideration order issued, it did not exist at claim closure. We agreed with the ALJ that the carrier lacked sufficient information to close the claim when it issued its notice of closure and that the claim was prematurely closed. *Id.* at 2551. Citing *Judith Brown*,

56 Van Natta 2213, *recons*, 56 Van Natta 2628 (2004), we explained that the appropriate time for determining whether sufficient information exists to close a claim is when the claim is closed, not during the reconsideration proceeding.

Here, unlike *Brown* and *Sanchez*, Dr. Layman did not provide any additional findings after the October 14, 2009 Notice of Closure. Moreover, unlike those cases, we are not persuaded by claimant's argument that the employer lacked sufficient information to close the claim when it issued its closure notice. The Order on Reconsideration stated that the issues raised by the parties were extent of disability (impairment and social factors). (Ex. 112-1). Nevertheless, ARU affirmed the medically stationary date and determined that the claim closure was not premature. ARU explained the claim qualified for closure based on Dr. Layman's findings and his concurrence with Dr. Foley's findings. (Ex. 112-2). Based on this record, we are not persuaded that claimant has established error in the reconsideration process. *See* ORS 656.266(1); *Callow*, 171 Or App 183-84.

Chronic Condition

ARU did not award claimant an impairment value under OAR 436-035-0019, explaining that a chronic and permanent medical condition that would significantly limit repetitive use of either elbow was not identified. (Ex. 112-2).

The ALJ agreed, concluding that Dr. Layman's opinion was not sufficient to establish a "chronic condition" award under OAR 436-035-0019.

On review, claimant argues that the record establishes that she has a limitation in the ability to repetitively use her arms. She contends that Dr. Layman has indicated that such a limitation exists and prevents her from returning to her job at injury. Claimant relies in part on the WCE findings.

Claimant is entitled to a 5 percent impairment value if a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, she is "significantly limited in the repetitive use" of her forearms or arms. OAR 436-035-0019(1)(c), (d). To determine the sufficiency of a medical opinion in establishing a "chronic condition" award, we consider the medical opinion in context and as a whole in order to determine its sufficiency. *Maria C. Perales-Castaneda*, 54 Van Natta 634, 635 (2002). Although "magic words" are not required to establish a "chronic condition" limitation, and we may make reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions in the absence of such evidence. *See Buss v. SAIF*, 182 Or App 590, 594-95 (2002); *Benz*, 170 Or App at 25; *Jon M. Schleiss*, 62 Van Natta 2567, 2569 (2010).

In the November 26, 2008 closing examination, Dr. Layman explained that claimant indicated that repetitive activities in general were *not* a problem for her. (Ex. 86). After reviewing the WCE, Dr. Layman concluded that claimant could not return to her job at injury. (Exs. 101, 105). However, he adhered to his closing examination in other regards in order to rate claimant's impairment. (Ex. 105).

Even if we assume that the WCE findings were sufficient to establish that claimant was significantly limited in the repetitive use of her forearms or arms, Dr. Layman did not concur with the WCE and, therefore, the WCE findings cannot be considered in rating claimant's disability. Although claimant relies on Dr. Layman's opinion that she could not perform her job at injury, a "chronic condition" impairment value under OAR 436-035-0019 must focus on significant limitations on the repetitive use of the relevant body part, rather than on a claimant's ability to perform work. *Gonzalez v. SAIF*, 183 Or App 183, 190-91 (2002); *Delia A. Shaver*, 62 Van Natta 335, 338 (2010). Accordingly, we conclude that the medical evidence is insufficient to establish that claimant was significantly limited in the repetitive use of her forearms or arms.³

In sum, for the foregoing reasons, we find that claimant has not established error in the reconsideration process. *See Callow*, 171 Or App at 183. Accordingly, we affirm.

ORDER

The ALJ's order dated August 30, 2010 is affirmed.

Entered at Salem, Oregon on March 25, 2011

³ Claimant raises the alternative argument that if we determine that we cannot address the issue of chronic condition impairment without a statement from Dr. Layman that there was a "significant limitation," the Notice of Closure must be set aside. As we have previously explained, we do not require Dr. Layman to have expressly stated that claimant had a significant limitation in the repetitive use of her forearms or arms. Rather, we have reviewed the medical record as a whole, evaluated it in context, and determined that the medical evidence is insufficient to establish a "chronic condition" award.