

In the Matter of the Compensation of
DIANNE R. WEIKER, Claimant

WCB Case No. 11-03645

ORDER ON REVIEW

Hollander & Lebenbaum, Claimant Attorneys
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Reviewing Panel: Members Langer and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Naugle's order that: (1) set aside its denial of claimant's medical services claim for a proposed aortobifemoral bypass surgery; and (2) awarded claimant's counsel a \$10,500 assessed attorney fee award. On review, the issues are medical services and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. In the second paragraph on page 3, we change the second sentence to refer to the "injured popliteal artery" rather than the "injured iliac artery." We replace the last sentence in that paragraph with the following: "Dr. Landry explained that the stent and grafts were necessary in 1999 to adequately repair the injury to the popliteal artery."

We provide the following summary of the pertinent facts.

Claimant was compensably injured on February 11, 1999, and the employer accepted a distal left femur fracture and "traumatic occlusion of the popliteal artery at fracture site." (Exs. 21, 31). Dr. Landry and other physicians performed surgery to treat the popliteal artery occlusion, which included a right iliac angioplasty, right to left femoral-femoral bypass, left above-knee to below-knee popliteal bypass, left femoral to above-knee popliteal bypass, and four-compartment left leg fasciotomy. (Ex. 14).

Claimant's claim was closed in October 2002, and she was ultimately awarded 38 percent scheduled permanent disability for her left leg. (Exs. 32, 25).

In February 2009, an angiogram showed stenosis of the right iliac system and occlusion of the left external iliac artery. (Ex. 51). Dr. Landry recommended an "aortobifemoral bypass for bilateral lower extremity arterial occlusive disease." (Ex. 52). Dr. Duncan performed a records review on behalf of the employer. (Ex. 60).

After the employer asserted that the proposed surgery was not causally related to the accepted conditions, claimant requested administrative review. On July 22, 2011, the Workers' Compensation Division (WCD) issued a Transfer Order for a determination of whether the proposed surgery was related to the accepted conditions. (Ex. 72).

CONCLUSIONS OF LAW AND OPINION

The parties agreed before the ALJ that the first sentence of ORS 656.245(1)(a) governed the dispute because it involved an "ordinary" condition. Based on the opinions of Drs. Duncan and Landry, the ALJ determined that the aortobifemoral bypass was directed to the accepted popliteal injury and because the accepted condition was caused in material part by the injury, there was a sufficient causal relationship regarding the proposed surgery.

On review, the employer argues that the "condition" to be treated by the proposed aortobifemoral bypass is artery occlusive disease, which is the same as the denied condition of peripheral vascular disease. The employer argues that the accepted traumatic occlusion of the left popliteal artery is not a material contributing cause of claimant's artery occlusive disease.

Claimant disagrees that the condition to be treated by the surgery is artery occlusive disease. She contends that the medical evidence establishes that the proposed surgery is necessary to maintain the patency¹ of the popliteal graft at the site of the traumatic occlusion of the popliteal artery. For the following reasons, we reverse the ALJ's decision.

ORS 656.245(1)(a) provides, in part:

"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

¹ "Patency" is the "state of being freely open or exposed." *Stedman's Electronic Medical Dictionary*, Version 7.0 (2007).

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.”

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. *SAIF v. Sprague*, 346 Or 661, 664 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *aff’d*, 248 Or App 120 (2012). Here, the parties do not dispute that the first sentence of ORS 656.245(1)(a) applies to this dispute.

We first determine the “condition” to which the claimed medical service (proposed aortobifemoral bypass) relates. *See Sprague*, 346 Or at 672; *Bonita E. Dunne*, 63 Van Natta 853, 856 (2011). Accordingly, we turn to the record to determine the subject of the proposed surgery. *See Charles E. Pharis, Jr.*, 62 Van Natta 406, 408 (2010).

Dr. Duncan opined that the proposed aortobifemoral bypass would treat the “progression of [claimant’s] long standing, underlying arteriosclerosis and not the left leg injury.” (Ex. 60-7). He explained that arteriosclerosis was a form of occlusive disease in which the blockages or narrowing were the result of the accumulation of cholesterol plaqueing. (Ex. 73-2). He described “arterial occlusive disease” as the blockage of an artery and noted that arteriosclerosis was the most common type of that disease. (*Id.*) Dr. Duncan explained that “peripheral artery disease” included arteriosclerosis. (*Id.*)

Dr. Landry proposed claimant’s “aortobifemoral bypass for bilateral lower extremity arterial occlusive disease.” (Ex. 52). He agreed with Dr. Duncan that claimant had “severe underlying atherosclerotic occlusive disease.” (Ex. 74). He also agreed with Dr. Duncan that claimant’s iliac arterial disease was caused by atherosclerosis,² not the work injury. (Ex. 63). Dr. Landry explained that claimant had chronic iliac artery occlusive disease before her work injury. (Ex. 75-9). Dr. Landry noted that she required so many grafts after the injury because her left iliac artery was occluded (*i.e.*, plugged) before the injury.³ (*Id.*) Dr. Landry

² “Atherosclerosis” is the most common form of arteriosclerosis. *Stedman’s Electronic Medical Dictionary*, Version 7.0 (2007).

³ Dr. Landry testified that claimant’s left popliteal artery was injured in 1999 as a result of the femur fracture. (Ex. 75-14). To repair that artery, a vein was harvested from the right leg and used to replace the injured part of the left popliteal artery. (Ex. 75-8). Because claimant did not have adequate

attributed the cause of claimant's preexisting occlusive disease to atherosclerosis (hardening of arteries). (Ex. 75-10). Dr. Landry explained that "atherosclerosis" fell within the broader term of "peripheral vascular disease" and stated that the occlusion of claimant's iliac artery fell within the category of "peripheral vascular disease."⁴ (*Id.*) Dr. Landry concluded that claimant's occlusive disease was not related to the 1999 injury. (*Id.*)

Dr. Landry explained that the need for the aortobifemoral bypass was partially related to claimant's "work injury," but the underlying atherosclerotic vascular disease was a more significant contributing factor.⁵ (Ex. 59). He stated that claimant presented now with occlusion of the femoral-femoral bypass. Her femoral-popliteal bypass, which was placed for the original injury, remained open, but it had inadequate inflow due to the occlusion of the femoral-femoral bypass. Dr. Landry explained further:

"In order to maintain the patency of the femoral-popliteal graft in the left leg, we feel that the inflow to the graft needs to be optimized. This is the reason for recommending the aortobifemoral bypass graft. *The aortobifemoral bypass graft is recommended due to significant arterial disease in the iliac arteries bilaterally.* The iliac artery disease is not the result of her work injury. This is the result of chronic atherosclerosis. However, in order to maintain the patency of the left leg graft, which was placed as a result of the work injury, the aortobifemoral bypass is recommended." (*Id.*; emphasis added).

In a deposition, Dr. Landry testified that the proposed aortobifemoral bypass was recommended because some of claimant's 1999 grafts had "plugged up" due to the progression of preexisting occlusive disease, but he also noted that was also

inflow into the popliteal artery to sustain a graft, she required additional grafts placed above that graft to supply adequate blood flow. Dr. Landry explained that required three procedures: placing a stent in the right iliac artery, a femoral-femoral graft from the right femoral artery to the left femoral artery, and a femoral-popliteal graft from the left femoral artery to the left popliteal artery. (Ex. 75-8, -9).

⁴ The employer asserts that its denial of claimant's new/omitted medical condition claim for peripheral vascular disease is final as a matter of law. (Ex. 24).

⁵ In May 2009, Dr. Landry explained that the "prior injury" was the major contributing cause of the requested surgery. (Ex. 52). In a concurrence letter from claimant's attorney, Dr. Landry concluded that the recommended bypass surgery was caused in material part by the "work injury" and the need to maintain the patency of the left leg graft. (Ex. 64).

the nature of grafts. (Ex. 75-11, -12). He agreed that the vascular pathology for which the surgery was recommended was caused in major part by the chronic iliac artery occlusive disease, not the work injury. (Ex. 75-12). Dr. Landry testified that “the surgery that’s being proposed right now is because of the underlying atherosclerotic disease involving the iliac arteries.” (Ex. 75-12, -13). However, Dr. Landry noted that the proposed surgery was also directly connected “downstream” to the area that was previously injured. (Ex. 75-13).

Dr. Landry explained that claimant’s 1999 femoral-femoral graft had plugged up. (Exs. 74, 75-17, -20). Her left leg femoral-popliteal graft, which was placed as a result of the injury, had stayed open, but it did not have optimal flow and was at risk for occluding. (Exs. 74, 75-17). He testified that the proposed surgery was necessary to improve and maintain the flow into the femoral-popliteal graft in the left leg. (Ex. 75-21, -22).

Although Dr. Landry commented generally on the causal connection with claimant’s “work injury,” Dr. Duncan focused specifically on the accepted condition. Dr. Duncan opined that the initial surgeries after the work injury successfully restored circulation to claimant’s left leg. He explained that the bypass “fully resolved the acute traumatic occlusion[.]” (Ex. 73-2). He also reported that the “arterial insufficiency brought on by the traumatic occlusion fully resolved.” (Ex. 73-3). Dr. Duncan noted that everything that had transpired after the injury and initial surgeries was within the natural history of claimant’s occlusive disease. (*Id.*) He concluded that 100 percent of the need for the proposed surgery was unrelated to the accepted condition. (*Id.*) Thus, based on Dr. Duncan’s opinion, the “condition” to which the aortobifemoral bypass relates is the progression of claimant’s underlying arteriosclerosis, which was not an accepted condition.

Similarly, we find that Dr. Landry’s opinion establishes that the “condition” to which the aortobifemoral bypass relates is claimant’s arterial occlusive disease, which resulted from chronic atherosclerosis, not the work injury. (Exs. 52, 59). Although Dr. Landry explained that the proposed surgery was necessary to improve and maintain the flow into the femoral-popliteal graft in the left leg, that graft had stayed open and was not occluded. Dr. Landry was concerned that, because the left leg femoral-popliteal graft did not have optimal flow, it was “at risk” for occluding. (Exs. 74, 75-17, -22). But Dr. Landry did not dispute Dr. Duncan’s opinion that the accepted “traumatic occlusion of the popliteal artery at fracture site” had fully resolved after the initial surgeries.

Based on the opinions of Drs. Duncan and Landry, we find that the “condition” to which the aortobifemoral bypass relates is arteriosclerosis/ atherosclerosis. Unlike *Sprague*, where the “condition” at issue was the claimant’s arthritic knee condition that had been accepted by the carrier, 346 Or at 673-74, there is no accepted claim for claimant’s arteriosclerosis/atherosclerosis.

Moreover, although claimant argues that the proposed surgery is necessary to maintain the popliteal graft, she does not describe medical evidence that establishes that the surgery is necessary to treat the accepted condition of “traumatic occlusion of the popliteal artery at fracture site.”⁶ See *SAIF v. Swartz*, 247 Or 515, 525 (2011); *Horner*, 62 Van Natta at 2095. Dr. Landry explained that claimant’s left femoral-popliteal graft was *not* occluded. Furthermore, Dr. Landry did not rebut Dr. Duncan’s opinion that the accepted “traumatic occlusion of the popliteal artery at fracture site” had fully resolved after the initial surgeries. See *Damon M. Bailey*, 63 Van Natta 1133, 1137-38 (2011) (because the medical evidence established that the accepted right scapular strain had resolved and there was no indication that the proposed shoulder surgery was for or directed to the accepted condition, the proposed surgery was not compensable as treatment for the compensable injury).

In summary, we conclude that the medical evidence is not sufficient to establish that the proposed aortobifemoral bypass is “for conditions caused in material part by the injury[.]” ORS 656.245(1)(a). Therefore, we reverse.⁷

ORDER

The ALJ’s order dated May 31, 2012 is reversed. The employer’s denial of claimant’s proposed surgery is reinstated and upheld. The ALJ’s \$10,500 assessed attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on October 26, 2012

⁶ The medical evidence does not indicate that the proposed surgery is related to the accepted left femur fracture.

⁷ In light of our conclusion, it is not necessary to address the employer’s argument that the ALJ’s attorney fee award was excessive.