

In the Matter of the Compensation of
TIMOTHY P. KERR, Claimant

WCB Case No. 12-03385

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) affirmed an Order on Reconsideration's award of 19 percent whole person impairment; and (2) awarded 27 percent work disability, whereas the Order on Reconsideration had awarded no work disability. On review, the issue is extent of permanent disability (impairment and work disability). We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

After claimant's July 2006 work injury, the employer initially accepted left shoulder impingement. (Ex. 30-1). On September 7, 2006, claimant underwent surgery, which revealed left shoulder rotator cuff tear. (Ex. 29-1). Claimant underwent surgery again on May 10, 2007, for a recurrent left shoulder rotator cuff tear. (Ex. 55-2). On November 20, 2007, the employer issued a Notice of Closure that awarded 7 percent whole person impairment and no work disability. (Ex. 79-1).

On March 28, 2012, the employer accepted left shoulder rotator cuff tear and left shoulder recurrent rotator cuff tear as new/omitted medical conditions. (Ex. 98). On April 10, 2012, the employer issued a Notice of Closure that awarded no additional permanent disability. (Ex. 101-1). Claimant requested reconsideration and the appointment of a medical arbiter.

On June 28, 2012, the Appellate Review Unit (ARU) issued an Order on Reconsideration that increased claimant's whole person impairment award to 19 percent, including a 5 percent award for partial resection of the clavicle pursuant to OAR 436-035-0330(13).¹ (Ex. 108-3). Noting that only impairment

¹ Pursuant to that rule, a "[p]artial resection of either clavicle" results in a 5 percent impairment value.

is rated for those workers who have been released or returned to regular work, the Order on Reconsideration did not award work disability. (*Id.*) Claimant requested a hearing, asserting that he should receive a work disability award. In response, the employer contended that claimant should not receive an impairment award for partial resection of the clavicle.

Concluding that Dr. Black, claimant's attending physician, had verified that the September 2006 surgery had involved removal of a portion of the clavicle, the ALJ affirmed the Order on Reconsideration's whole person impairment award. Further reasoning that Dr. Black's release to regular work was inconsistent with his earlier work restrictions, the ALJ concluded that claimant was not released to regular work, and awarded 27 percent work disability.

Impairment

On review, the employer contends that, although the September 2006 surgery involved removal of an osteophyte from the clavicle, it did not involve partial "resection" of the clavicle. As the party challenging the reconsideration order's impairment award, the employer has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000). As explained below, the employer has not shown such error.

Dr. Black's September 2006 operative report stated:

"A decompression was then performed using a 6 mm bur. The inferior osteophyte on the distal clavicle was smoothed down. Preoperatively, the patient had no pain at the AC joint, so a distal clavicle resection was not performed." (Ex. 29-2).

Dr. Black was later asked, "For the record, did the surgery involve removal of any portion of the clavicle?" (Ex. 106-1). He answered, "Yes. (inferior osteophyte)." (*Id.*)

The employer contends that Dr. Black's ultimate opinion does not establish a partial "resection" of the clavicle. However, *Webster's Third New Int'l Dictionary* 1930 (unabridged ed. 1993) defines "resection" as "the surgical removal of part of an organ or structure." Likewise, *Dorland's Illustrated Medical Dictionary* 1142 (26th ed 1981) defines "resection" as "excision of a portion of an organ or other structure." Because Dr. Black clarified that his removal of an "inferior osteophyte on the distal clavicle" was a "removal of any portion of the clavicle," he ultimately indicated that he had partially resected claimant's clavicle.

Further, although Dr. Black had stated, in his operative report, that “a *distal* clavicle resection was not performed,” his later statement addressed “removal of *any* portion of the clavicle.” (Exs. 29-2, 106-1, emphasis supplied). Thus, his later statement is not inconsistent with his operative report; *i.e.*, whereas the operative report addressed the distal clavicle specifically, Dr. Black’s later statement addressed the entire clavicle, and explained that a partial clavicle excision had occurred.

The employer argues that this case is similar to *Deborah M. Brown*, 60 Van Natta 289 (2008) and *Salvador Quintero*, 48 Van Natta 2186 (1996). In *Brown*, we held that a surgery involving a “distal clavicle resection” and “subacromial decompression” did not involve a partial resection of the acromion. 60 Van Natta at 291. In reaching that conclusion, we reasoned that whereas the clavicle had been described as resected, the “subacromial decompression” had not been described as a resection, but probably referred to a “bursectomy,” which was noted elsewhere in the record. *Id.* In *Quintero*, we held that the resection of a spur from a clavicle did not constitute a resection of any part of the clavicle. 48 Van Natta at 2186. In reaching that conclusion, we relied on the surgeon’s description of the surgery. *Id.*

Here, in contrast to the surgeons in *Brown* and *Quintero*, Dr. Black specifically stated that he had removed a portion of the clavicle. (Ex. 106-1). Consequently, the holdings of *Brown* and *Quintero* are distinguishable from the present case.

The employer also contends that the partial clavicle resection was not related to the new/omitted medical conditions of rotator cuff tear or recurrent rotator cuff tear. *See Donald A. Westlake*, 50 Van Natta 1213 (1998) (no permanent disability award granted for partial clavicle resection where the resection was not a direct medical sequela of the accepted condition). However, Dr. Black’s postoperative diagnoses included left shoulder rotator cuff tear. (Ex. 29-1).

Therefore, the record supports the Order on Reconsideration’s award of 5 percent impairment for the partial clavicle resection.² Under such circumstances, the employer has not established error in the reconsideration record concerning

² We acknowledge that Dr. Black’s postoperative diagnoses also included a SLAP lesion with fraying of the biceps tendon, which is not an accepted condition. (Ex. 29-1). Nevertheless, as discussed above, the employer bears the burden of establishing error in the reconsideration process. Under these circumstances, it has not done so.

claimant's impairment award. Accordingly, we affirm that portion of the ALJ's order that affirmed the Order on Reconsideration's 19 percent whole person impairment award. After considering the factors prescribed 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 regarding this impairment issue is \$2,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and uncontested fee representation), the complexity of the issue, and the value of the interest involved.

Work Disability

Under ORS 656.726(4)(f)(E) (Or Laws 2005, ch 653, §§ 1, 5), impairment is the only factor to be considered in evaluating a worker's disability under ORS 656.214 (Or Laws 2005, ch 653, §§ 3, 5) if "the worker has been released to regular work by the attending physician[.]"³ "Regular work" means "the job the worker held at injury," and includes tasks that are performed on a steady or customary basis. ORS 656.214(1)(d); OAR 436-035-0005(15); *Thrifty Payless, Inc. v. Cole*, 247 Or App 232, 239 (2011). As the party challenging the portion of the Order on Reconsideration that awarded no work disability, claimant has the burden of establishing error in the reconsideration process. *See Callow*, 171 Or App at 183.

The attending physician's release to work, not the medical arbiter's opinion, determines whether a claimant is entitled to work disability. ORS 656.214(2); ORS 656.726(4)(f)(E); OAR 436-035-009(4); *Jon M. Schleiss*, 62 Van Natta 2567 (2010), *aff'd*, *Schleiss v. SAIF*, 240 Or App 458 (2012); *Julia Escobedo*, 60 Van Natta 3289, 3291 (2006). Because we evaluate claimant's disability as of the date of the Order on Reconsideration, claimant's entitlement to work disability depends on whether Dr. Black released claimant to regular work as of the June 28, 2012 Order on Reconsideration. ORS 656.283(7); *Joshua A. Dorr*, 64 Van Natta 1934, 1937 (2012).

On May 7, 2012, in response to an inquiry from the ARU, Dr. Black opined, "Regarding the newly accepted condition of rotator cuff tear, left shoulder and recurrent rotator cuff tear, left shoulder, [claimant is] released to his regular work

³ The employer does not assert that claimant has returned to regular work at the job held at the time of injury.

at the time of injury as a Journeyman Wireman.” (Ex. 103-1). Dr. Black was invited to indicate whether claimant was restricted in various respects, including reaching and weight limits on his lifting/carrying. (*Id.*) He did not indicate that claimant was subject to any such restrictions. (*Id.*)

On June 27, 2012, Dr. Black responded to another inquiry from the ARU, which asked him to review the Job Analysis of claimant’s job at injury as a Journeyman Wireman and state whether claimant was released to his regular work. (Ex. 106-1). Dr. Black answered, “Yes, regarding the newly accepted condition, [claimant] is released to his regular work.” (Ex. 106-1). He was again invited to indicate whether claimant was restricted in various respects, including reaching and weight limits on his lifting/carrying. (Ex. 106-1-2). Again, he did not identify any such limitations. (*Id.*)

Claimant contends that Dr. Black did not release him to regular work because Dr. Black had previously imposed work restrictions. We evaluate medical opinions in context and based on the record as a whole to determine their sufficiency. *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999). Thus, a worker may be entitled to work disability if the record as a whole establishes that the attending physician did not release the claimant to regular work, even if the attending physician’s release includes “magic words.” *E.g.*, *Luther Rolle*, 65 Van Natta 416 (2013) (statement that the claimant had “no restrictions” was inconsistent with the remainder of the attending physician’s report, which included work restrictions); *Joseph A. Whitcomb*, 65 Van Natta 913 (2013) (“regular duty” release incorporated previous “permanent restrictions”); *Brian E. Pier*, 63 Van Natta 1902 (2011) (the claimant was awarded work disability where the release to regular work did not consider the full range of his regular work’s tasks). Nevertheless, for the following reasons, we conclude that Dr. Black released claimant to regular work.

As claimant notes, Dr. Black had earlier restricted him from lifting more than 25 pounds or performing any overhead work. (Exs. 87, 88, 95-2). However, Dr. Black’s ultimate opinions releasing claimant to regular work were unequivocal. Dr. Black released claimant to regular work after considering his specific job at injury, including a job analysis. Additionally, he was invited to describe specific restrictions, such as limits on claimant’s reaching or lifting/carrying abilities, but declined to do so. Thus, although Dr. Black had earlier restricted claimant from regular work, he ultimately released claimant to regular work. Under such circumstances, we find no error in the reconsideration record regarding the ARU’s decision that claimant was not entitled to work disability.

Accordingly, we reverse that portion of the ALJ's order that awarded 27 percent work disability. Likewise, we reverse the ALJ's "out-of-compensation" attorney fee award.

ORDER

The ALJ's order dated January 23, 2013 is reversed in part and affirmed in part. That portion of the ALJ's order that awarded 27 percent work disability is reversed. The Order on Reconsideration's award of 19 percent whole person impairment and no work disability is reinstated and affirmed. The ALJ's "out-of-compensation" attorney fee is reversed. The remainder of the ALJ's order is affirmed. For services on review regarding the impairment issue, claimant's attorney is awarded an assessed fee of \$2,000, payable by the employer.

Entered at Salem, Oregon on July 30, 2013