

In the Matter of the Compensation of
STEPHEN L. SUTTON, Claimant
WCB Case No. 12-04452, 12-04113
ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
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Reviewing Panel: Members Lanning and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that found that claimant's proposed right shoulder surgery was not caused in material part by his accepted right shoulder impingement condition. On review, the issue is medical services.

We adopt and affirm the ALJ's order with the following supplementation.

In March 2011, claimant, a construction worker for more than 14 years, sustained a compensable right shoulder injury. (Exs. 1, 2, 4). Initially, a right shoulder strain was diagnosed. (Exs. 1, 2, 4, 5). Subsequently, Dr. Jacobs diagnosed right shoulder impingement syndrome. (Ex. 7). In May 2011, the employer accepted a right shoulder impingement syndrome. (Ex. 9).

In June 2012, Dr. Dawson, an orthopedic surgeon, requested authorization to perform surgery (arthroscopy, subacromial decompression, and distal clavicle excision with inspection of the rotator cuff and labrum (and possible repair)). (Exs. 46, 47). Dr. Dawson diagnosed right shoulder impingement and AC arthrosis. (Ex. 52-1).

When the self-insured employer declined to authorize the surgery, the dispute was initially presented to the Workers' Compensation Division (WCD). Thereafter, WCD transferred the dispute to the Hearings Division for resolution of the medical services causation issue.

The ALJ concluded that the proposed surgery was not "directed to" claimant's accepted right shoulder impingement condition. Instead, the ALJ reasoned that the persuasive medical evidence established that the proposed surgery was "directed to" a preexisting and unaccepted condition (AC arthritis). Consequently, the ALJ determined that the medical services claim was not compensable. *See* ORS 656.245(1)(a); *Dianne R. Weiker*, 64 Van Natta 2086, 2087 (2012).

On review, claimant initially contends that the employer's acceptance of the right shoulder impingement syndrome constituted an acceptance of a "combined condition" comprised of the impingement syndrome and "the preexisting AC joint arthritis condition." Asserting that the surgery was for the undenied "combined condition," claimant argues that the medical service claim is compensable. In response, the employer asserts that claimant did not raise this procedural argument at the hearing level.

We need not resolve this procedural issue because the employer's unequivocal acceptance, as confirmed by the contemporaneous record, establishes that its acceptance was confined to a right shoulder impingement syndrome. We reason as follows.

The scope of an acceptance is a question of fact. *Columbia Forest Prods. v. Woolner*, 177 Or App 639, 643 (2001). No magic words are required. Rather, "we consider whether the notice apprises the claimant of the nature of the compensable conditions covered by the acceptance." *Roseburg Forest Prods. v. Lund*, 245 Or App 65, 71-72 (2011). The carrier's own words used to describe the accepted condition constitute significant evidence bearing on the factual issue of whether a "combined condition" was accepted. *Bonnie J. Woolner*, 54 Van Natta 828, 832 (2002) (on remand). The contemporaneous medical evidence is also evaluated in factually determining whether a carrier has accepted a "combined" condition. See *Gary E. Lombardo*, 53 Van Natta 1634, 1635 (2001); *Pamela J. Sartin*, 53 Van Natta 1560, 1562 (2001).

Here, the employer accepted claimant's injury claim for a "right shoulder impingement syndrome" on May 6, 2011. (Ex. 9). At that time, claimant had not been diagnosed with any arthritic or other preexisting condition. (Exs. 1-8). Rather, Dr. Jacobs had diagnosed a "right shoulder impingement syndrome." (Exs. 7, 8).

Shortly after the employer's acceptance, when claimant had made little progress with conservative therapy, Dr. Jacobs ordered an MRI for the right shoulder. (Ex. 10). Based on the results, AC arthritis was diagnosed. (Exs. 21-7, 24, 25, 43, 48-18, 51-1,-2).

Claimant contends that the employer's acceptance of "right shoulder impingement syndrome" necessarily encompasses the AC arthritis condition to constitute acceptance of a "combined condition." Yet, as previously explained, the aforementioned diagnosis did not arise until after the employer's acceptance.

Moreover, the medical evidence does not persuasively establish that claimant's accepted right shoulder impingement condition combined with his degenerative AC arthritis. (Exs. 21, 38, 48-18, 51-1, -2). Finally, the employer's acceptance notice did not state a "combined condition" was being accepted. (Ex. 9).

Under these circumstances, the medical and documentary record supports a conclusion that the employer's acceptance was limited to a right shoulder impingement syndrome. Consequently, we disagree with claimant's assertion that the employer's acceptance extended to his degenerative AC arthritis.

Our next inquiry is whether the proposed medical service is causally related to the compensable injury. Based on the following reasoning, we affirm the ALJ's decision.

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."

Because we have concluded that the employer did not accept a combined condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *aff'd*, 248 Or App 120 (2012). Thus, we must determine whether the proposed surgery was for a condition "caused in material part by the injury." *SAIF v. Swartz*, 247 Or App 515, 525 (2011). As explained by the court, "the 'conditions' are the current conditions for which treatment is sought[.]" and "[t]he 'injury' or 'compensable injury' is the previously accepted condition[.]" *Id.* at 522-23, 525.

A “material cause” under ORS 656.245(1)(a) is a fact of consequence. *Id.* at 525 (citing *Mize v. Comcast Corp-AT & T Broadband*, 208 Or App 563, 569-71 (2006)). “Thus, the compensable injury could constitute a material cause if it makes ‘any contribution’ to [a] claimant’s current condition.” *Id.* at 525-26 (emphasis in original). Finally, although the condition for which treatment is sought need not be the accepted condition, the treatment must be necessitated in material part by the “compensable injury,” which is the condition previously accepted. *SAIF v. Martinez*, 219 Or App 182, 190-91 (2008).

In *Swartz*, the court upheld the carrier’s denial of the claimant’s medical service claim for back injections. Applying the standards set forth in *Sprague v. United States Bakery*, 199 Or App 435, *adh’d to as modified on recons*, 200 Or App 569 (2005), *rev den*, 340 Or 157 (2006), and *Martinez*, 219 Or App at 188, the court identified the issues as: (1) whether the accepted low back contusion was a material cause of the claimant’s ongoing low back pain; and (2) whether the claimed injections were “for” that ongoing low back pain. 247 Or App at 525. Because the medical evidence established that the accepted condition had completely resolved (and it was no longer a material cause of the claimant’s ongoing pain or any of his ongoing conditions), the court concluded that the proposed injections were not necessary to determine the extent of the accepted injury. Therefore, the *Swartz* court held that the medical service claim was not compensable. *Id.* at 526-27.

Here, claimant relies on Dr. Dawson’s opinion to establish that the accepted shoulder impingement condition is a material cause of his need for the proposed shoulder surgery. Dr. Dawson’s opinion, however, is unpersuasive.

In a concurrence letter summarizing his opinion, Dr. Dawson agreed that claimant’s impingement syndrome had caused the need for the surgery. (Ex. 52-1). Nevertheless, Dr. Dawson added a handwritten comment stating that claimant’s symptoms were predominantly for AC arthrosis, which was the primary diagnosis that required treatment. (*Id.*) In the absence of a clarification of these apparently inconsistent observations, we agree with the ALJ’s determination that Dr. Dawson’s opinion is ultimately unpersuasive. *See, e.g., Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without sufficient explanation, found unpersuasive).

Moreover, following examinations of claimant and a review of his medical records, Drs. Weeks, Hutchins, and Kaesche each opined that claimant’s right shoulder impingement syndrome had completely resolved by at least July 13, 2011,

and did not contribute to his need for treatment related to his ongoing symptoms from AC arthritis.¹ (Exs. 25-2, 29, 48-19, 51-2). Dr. Dawson did not offer any rebuttal to those opinions. *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, based on the aforementioned reasoning, the preponderance of the persuasive medical evidence is insufficient to establish the compensability of the proposed right shoulder surgery under ORS 656.245(1)(a). Therefore, we affirm.

ORDER

The ALJ's order dated November 29, 2012 is affirmed.

Entered at Salem, Oregon on July 18, 2013

¹ In particular, relating claimant's current symptoms to his "pre-existing degenerative tendinopathy of the supraspinatus, infraspinatus, and acromioclavicular joint," Dr. Kaesche opined that "the proposed right shoulder arthroscopy is directed toward claimant's preexisting AC arthritis." (Exs. 48-19, 51-2).