

In the Matter of the Compensation of
MARY M. HARVEY, Claimant

WCB Case No. 13-00339

ORDER ON REVIEW

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Reviewing Panel: Members Curey, Weddell, and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that affirmed an Order on Reconsideration that awarded 10 percent whole person impairment for a concussion condition. On review, the issue is extent of permanent disability (impairment).

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

The primary issue with respect to permanent impairment concerns whether claimant's cognitive impairment falls within Class 1 or Class 2.¹ Relying on the opinions of the medical arbiters that Class 1, rather than Class 2, applied, the ALJ concluded that claimant had not met her burden of proving that the Order on Reconsideration should be modified.

¹ A finding of "Class 1" brain impairment, in reference to cognition, means that: "The worker is independent in ADL (activities of daily living). If there are cognitive or memory deficits, they are no more than minimal or 'nuisance' level, and do not materially impair ADL, or the type of work the worker may perform." OAR 436-035-0390(10). In reference to sleep/alertness: "If there are episodic sleep disturbances, fatigue, or lethargy, they are minimal (e.g. any sleeping irregularity, fatigue, or lethargy does not interfere with daily living)." *Id.* The fundamental intent of this Class in reference to work capacity is: "The 'nuisance' level residuals may impact the manner in which the worker performs work tasks, and/or the subjective ease of performance, but the worker is not materially limited in the types of work which can be performed, as compared with pre-injury abilities." *Id.*

A finding of "Class 2" brain impairment, in reference to cognition, means that: "The worker can perform all ADL independently, but due to mild cognitive or memory deficits, may need to use compensatory strategies or devices such as multiple written reminders, alarms, or digital devices; or may sometimes require more time than normal to complete ADL; or may use occasional reminders, prompts, or minor assistance by others as compensatory strategy, but is not dependent on others." *Id.* In reference to sleep/alertness: "Episodic sleep disturbances, fatigue, or lethargy are mild (e.g. any sleeping irregularity, fatigue, or lethargy only occasionally interferes with daily living). Sleep disturbance, or mild or episodic fatigue or lethargy, may limit the worker's ability to perform some types of jobs, for example, shift work or commercial driving; but the worker is still employable." *Id.* The fundamental intent of this Class in reference to work capacity is: "The residuals result in some type of limitation on the worker's employment capacity, restricting the range of employment options that were previously available to the worker, but the worker remains employable in most jobs for which s/he was qualified prior to injury." *Id.*

On review, claimant contends that the medical arbiters did not analyze her cognitive fatigue in the context of her job at injury. She argues that the permanent impairment rating, made by her attending physician, Dr. Wilson, did consider her fatigue, and so his rating should be used to restore the Class 2 award granted by the Notice of Closure. Based on the following reasoning, we disagree with claimant's assertions.

Claimant has the burden of establishing the nature and extent of her disability. ORS 656.266(1). In addition, because she is challenging the Order on Reconsideration, it is her burden to prove error in the reconsideration process. ORS 656.283(7); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

Only the opinion of claimant's attending physician at the time of claim closure, other medical findings with which the attending physician concurred, and the findings of the medical arbiter may be considered for the purpose of rating permanent disability. ORS 656.245(2)(b)(C); ORS 656.268(8)(a); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). Where, as here, a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's impairment." See *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, the attending physician's opinion has not been expressly rejected. Thus, the issue is whether the attending physician's findings are more accurate than those of the medical arbiters.

Claimant contends that the medical arbiters, Drs. Leland and Lorber, did not analyze her cognitive impairment in the context of her regular work, which required a high level of cognitive functioning 40 to 50 hours a week.² She asserts that, in contrast, Dr. Wilson did so and, therefore, provided more accurate impairment findings. We disagree.

In opining that claimant's permanent impairment met the criteria for Class 1, Drs. Leland, a clinical psychologist, and Lorber, a psychiatrist, expressly referenced claimant's fatigue and work hour limitations. Specifically, Dr. Leland noted that claimant was experiencing "extreme fatigue," resulting in a reduced work week. (Ex. 27-2, -3). Dr. Leland also reviewed the closing examination of Dr. Wilson (the attending physician), which noted that claimant continued to report exhaustion and fatigue. (Ex. 27-9). Dr. Lorber, too, noted that claimant was working part-time due to fatigue. (Ex. 28-8).

Based on his review of the medical records, neuropsychological and psychological testing, and his interview with claimant, Dr. Leland concluded that claimant met the criteria for Class 1 impairment. (Ex. 27-20). Dr. Lorber concurred with Dr. Leland's neuropsychological evaluation. (Ex. 28-10). In applying Class 1 to claimant's impairment, Dr. Lorber noted his concurrence with the opinion of Dr. Tilson,³ a consulting psychologist, who performed his own tests and found minimal deficits, and did not agree with Dr. Wilson's application of Class 2 impairment based on the neuropsychological results. (Ex. 28-11).

Contrary to claimant's contention, the record persuasively establishes that the medical arbiters considered claimant's fatigue and reduced hours in analyzing her impairment. Therefore, we are not persuaded that the arbiters neglected to apply the required elements of the Director's permanent disability standards in rating claimant's impairment attributable to her accepted concussion condition. Under these circumstances, we are unable to conclude that Dr. Wilson's findings

² At the time of injury, claimant was employed as a "quality specialist." She was required to frequently attend meetings before or after work, making her average work day 10 hours, five days a week. (Ex. 4Ja-2). Her job required advanced degrees in healthcare, "expert experience" with medical programs, a "proven record of accomplishments" and knowledge of quality improvement processes, an understanding of statistical analysis and reporting, "excellent" leadership and facilitation in presenting technical information, and proficiency with advanced computer programs. (Ex. 4Ja-3). Her job duties were described as "extremely demanding," requiring a high level of attention, concentration, and a "superior" skill level. (Ex. 4Ja-6).

³ In applying Class 1 to claimant's impairment, Dr. Tilson specifically acknowledged that claimant was performing her regular work, but had decreased endurance. (Ex. 17-2).

are more accurate than those of the medical arbiters. *See Thomas L. Bair*, 64 Van Natta 1083, 1086 (2012) (adopting the medical arbiter's finding where the medical evidence did not demonstrate that the attending physician's Class 2 finding was more accurate than the arbiter's Class 1 finding).

Moreover, we find *Donald E. Adams*, 58 Van Natta 2815 (2006), distinguishable. In *Adams*, the medical arbiter had an inaccurate understanding of the appropriate standards for rating brain impairment. Reasoning that the arbiter did not apply accurate rating standards, we concluded that his opinion was ambiguous and unpersuasive. Here, there is no indication that the arbiters misunderstood the appropriate standards for rating brain impairment.

Accordingly, for the reasons expressed above, claimant has not established error in the reconsideration process. Consequently, we affirm the ALJ's order.

ORDER

The ALJ's order dated August 28, 2013 is affirmed.

Entered at Salem, Oregon on July 16, 2014

Member Weddell dissenting.

The majority affirms the ALJ's order because it finds that the medical arbiters considered all the relevant factors, in particular claimant's cognitive fatigue, in rating her permanent impairment attributable to her accepted concussion condition. Because I would find otherwise, I respectfully dissent.

Under OAR 436-035-0007(5), the medical arbiters' findings are used unless "a preponderance of the medical evidence demonstrates that different findings are more accurate and should be used." Where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012). In other words, considering the evidence on review, we do not automatically rely on the opinion of the medical arbiter, but rather give greatest weight to the most thorough, complete, and well-reasoned assessment of the worker's injury-related impairment. *See Gayl L. George-Buffington*, 55 Van Natta 2989 (2003); *Kenneth W. Matlack*, 46 Van Natta 1631 (1994).

Here, although Drs. Leland and Lorber noted claimant's "extreme" fatigue and work hour limitations, they applied Class 1 impairment.⁴ (Exs. 27). In contrast, Dr. Wilson, claimant's attending physician, applied Class 2 impairment, mainly due to claimant's fatigue and inability to work her regular hours.⁵ (Ex. 25-1). For the following reasons, I would adopt Dr. Wilson's findings as more accurate than those of the medical arbiters.

At the time of injury, claimant was employed as a "quality specialist." Her job required advanced degrees in healthcare, "expert experience" with medical programs, a "proven record of accomplishments" and knowledge of quality improvement processes, an understanding of statistical analysis and reporting, "excellent" leadership and facilitation in presenting technical information, and proficiency with advanced computer programs. (Ex. 4Ja-3). Her job duties were described as "extremely demanding," requiring a high level of attention and concentration, and a "superior" skill level. (Ex. 4Ja-6). She was also required to frequently attend meetings before or after work, making her average work day 10 hours, five days a week. (Ex. 4Ja-2).

After the injury, claimant experienced fatigue and was unable to work more than 32 hours a week. (Ex. 12-1). She struggled with multitasking and attention. (*Id.*) Her work pace was slow, and she was unable to increase it without also increasing errors. (*Id.*) Consequently, Dr. Wilson limited her work week to 32 hours and her computer time to 50 minutes/hour with breaks. (Ex. 12-4).

In the medical arbiter examination, claimant reported "extreme fatigue" resulting in a reduced work week. (Ex. 27-2, -11). Dr. Leland, the psychologist arbiter, also noted claimant's complaints of fatigue in reviewing her medical records. (Ex. 27-5, -9). During his evaluation, Dr. Leland observed that claimant's performance reflected cognitive inefficiency, which likely required a great deal of

⁴ Class 1 impairment applies where fatigue is minimal and does not interfere with daily living. OAR 436-035-0390(10); (Ex. 26-2). Concerning work capacity, the fundamental intent of Class 1 impairment is described as a "nuisance" level of residual effects that may impact the manner in which the worker performs work tasks, and/or the subjective ease of performance, but does not materially limit the worker in the types of work that can be performed compared with pre-injury abilities. *Id.*

⁵ Class 2 impairment applies when fatigue is mild, occasionally interferes with daily living, and may limit the worker's ability to perform some types of jobs, although the worker is still employable. (Ex. 26-3). Concerning work capacity, the fundamental intent of Class 2 impairment is described as residual effects that result in some type of limitation on the worker's employment capacity, restricting the range of employment options that were previously available to the worker, although the worker remains employable in most jobs for which s/he qualified prior to the injury. (*Id.*)

cognitive effort, and may have created significant cognitive fatigue. (Ex. 27-14). In reviewing two prior neuropsychological evaluations, Dr. Leland also noted evidence of cognitive inefficiency, proactive interference, and mildly impaired executive functioning. (Ex. 27-15). Yet, in concluding that claimant met the criteria for Class 1 impairment, Dr. Leland did not specifically address claimant's fatigue/diminished work capacity or explain his reasoning. (Ex. 27-20). Without some explanation, I am unable to conclude that Dr. Leland considered all of the factors necessary to assess claimant's work-related impairment.

Similarly, Dr. Lorber, the psychiatrist arbiter, noted that claimant was working part-time due to fatigue. (Ex. 28-8). Based on "some minor abnormalities" on the neuropsychological testing combined with claimant's "general" complaints, Dr. Lorber concluded that claimant qualified for Class 1 impairment. (Ex. 28-11). While Dr. Lorber noted that claimant was only working part-time due to fatigue and agreed with Dr. Tilson that 32 hours/week was reasonable, Dr. Lorber did not specifically address the required elements of OAR 436-035-0390(10). Thus, I am unable to conclude that Dr. Lorber considered all of the factors necessary to assess claimant's work-related impairment.

In contrast, Dr. Wilson, claimant's attending physician, explained that claimant's fatigue/inability to work regular hours was the main reason that she qualified for Class 2 brain impairment. (Ex. 25-1). Noting that two separately administered neuropsychological evaluations documented deficits consistent with claimant's subjective report of difficulty with attention and multitasking, Dr. Wilson opined that her persistent fatigue was related to the increased energy she was expending in attempting to overcome these deficits at work. (Ex. 12-3).

Because claimant's cognitive impairment/fatigue limited her ability to perform the work that was available to her before her injury, I would find Dr. Wilson's findings more accurate and award claimant Class 2 impairment. Because the majority reaches a different conclusion, I respectfully dissent.