
In the Matter of the Compensation of
JULIA L. JOHNSON, Claimant
WCB Case No. 13-00665
ORDER ON REVIEW
Cary et al, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Crumme's order that awarded 16 percent work disability, whereas an Order on Reconsideration awarded no work disability. Claimant cross-requests review of that portion of the ALJ's order that declined to include a "chronic condition" impairment value for her left shoulder condition. On review, the issue is extent of permanent disability (impairment and work disability). We modify.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

On November 8, 2011, claimant fell at work, fracturing her left upper arm. (Exs. 1). The employer accepted a "left proximal humerus fracture with valgus impaction of the humeral neck and displacement of the greater tuberosity." (Ex. 7).

In July 2012, Dr. Sheerin, claimant's attending physician, reported that the fracture had healed. (Ex. 12). He noted that claimant was back at work with no restrictions, and that there were no "specific" restrictions from his "standpoint." Because claimant was stiff and occasionally painful, he recommended a functional capacity evaluation for claim closure. (*Id.*)

In August 2012, Ms. Veloon, an occupational therapist, performed a physical capacity evaluation (PCE). Finding that claimant was performing at the "light" physical demand level, Ms. Veloon recommended that claimant: (1) limit loads and forces to "light" physical demand; with lifting at "20 pounds at occasional frequency;" (2) limit overhead reaching and crawling to "occasional frequency;" and (3) avoid ladders. (Ex. 14).

Dr. Sheerin agreed with Ms. Veloon's findings/conclusions for claim closure. (Ex. 15). When he was asked if claimant "remain[ed] released to her regular job," Dr. Sheerin did not answer "yes" or "no." (Ex. 16). When asked to "explain and outline all permanent modified work restrictions including her lifting and carrying limitations in pounds," he responded "per PCE." (Ex. 16).

An October 10, 2012 Notice of Closure awarded claimant 6 percent whole person impairment and no work disability. (Ex. 18). Claimant requested reconsideration and the appointment of a medical arbiter. (Ex. 19).

In January 2013, Dr. Weller performed a medical arbiter examination. (Ex. 20). When asked if claimant was significantly limited in the repetitive use of the left shoulder, Dr. Weller responded that claimant "is limited in the repetitive use of the left shoulder and any reaching activity at or above shoulder level due to the accepted injury with residual pain and reduced strength at the left shoulder." (Ex. 20-4).

A January 25, 2013 Order on Reconsideration reduced the whole person impairment award to 4 percent for loss of both motion and strength in the left shoulder. (Ex. 21-3). Reasoning that, pursuant to OAR 436-035-0019(1), the repetitive use limitation did not meet the threshold of a "significant" limitation, the appellate reviewer determined that claimant was not entitled to a value for "chronic condition" impairment. (*Id.*) Finding that claimant had returned to her regular job at the time of injury, the appellate reviewer did not award work disability. Claimant requested a hearing.

The ALJ declined to award an impairment value for a left shoulder "chronic condition," finding that Drs. Sheerin and Weller limited repetitive use of the left shoulder to only activities performed above the shoulder level. *See Johnathan M. Myers*, 65 Van Natta 1174, 1178 (2013) (qualified limitation on repetitive use of shoulder to only activities performed above shoulder level insufficient to establish entitlement to a "chronic condition" award). Determining that claimant did not return to her regular work and that, ultimately, Dr. Sheerin did not release her to regular work, the ALJ awarded work disability.

On review, contending that Dr. Weller's opinion was sufficient to establish entitlement to a "chronic condition" impairment value, claimant seeks a "chronic condition" impairment rating. The employer asserts that, because claimant was released or returned to her regular work, the ALJ should not have awarded work disability. We conclude that claimant is entitled to a chronic condition award and is entitled to work disability. We reason as follows.

In considering whether claimant is entitled to a “chronic condition” award under OAR 436-035-0019(1), we must determine “whether the loss of function to a body part created a significant limitation to [her] ability to use the affected body part repetitively.” *Gonzalez v. SAIF*, 183 Or App 183, 190 (2002). A medical opinion that qualifies a repetitive use limitation to specific activities may be insufficient to establish entitlement to a “chronic condition” award. *See Edwardo Gonzales*, 66 Van Natta 409, 411 (2014) (a qualified limitation on repetitive right shoulder use to only activities performed at or above shoulder level was insufficient to establish entitlement to a “chronic condition” impairment value of the right shoulder as a whole). “Magic words” are not required, provided the record contains the opinion of a medical arbiter, attending physician, or physician with whom the attending physician concurred, from which it can be found that claimant is significantly limited in the repetitive use of the relevant body part due to a chronic and permanent medical condition. *See Buss v. SAIF*, 182 Or App 590, 594-95 (2002); *Weckesser v. Jet Delivery Sys.*, 132 Or App 325, 328-29 (1995).

Here, Dr. Weller was asked to “specify whether due to the accepted condition or direct medical sequelae, this worker is significantly limited in the repetitive use of the left shoulder due to a chronic and permanent medical condition.” (Ex. 20-4). Dr. Weller responded that “this worker is limited in the repetitive use of the left shoulder *and* any reaching activity at or above shoulder level due to the accepted injury of the left proximal humeral fracture with residual pain and reduced strength at the left shoulder.” (*Id.*) (emphasis added).

We consider Dr. Weller’s response sufficient to establish a chronic condition, and that the additional information she provided included an example of the limited activities. *See Lynette M. Miller*, 58 Van Natta 2881, 2884 (2006) (because the arbiter’s response that the claimant was significantly limited in her ability to use her left shoulder to lift and transfer patients/weight was made in specific reference to the question posed, which asked him to explain whether or not the claimant was significantly limited in the repetitive use of her left shoulder, his opinion was sufficient to establish a “chronic condition,” and the additional information he provided included an example of such activities); *cf. Juan L. Godinez*, 64 Van Natta 1990, 1991 (2012) (where the arbiter was specifically asked whether the claimant had a significant limitation in repetitive use of his left shoulder above chest level and responded that the claimant “should not lift materials exceeding 20 pounds above shoulder level with his left arm,” the limitation was qualified and insufficient to establish entitlement to a “chronic condition” impairment value).

In reaching this conclusion, we distinguish *Myers*, 65 Van Natta at 1178, in which we considered a “qualified” limitation on repetitive use of the claimant’s shoulder insufficient to establish entitlement to a “chronic condition” award. In that case, the arbiter opined that the claimant was significantly limited in the repetitive use of his left shoulder while performing activities at shoulder height or above, but was not limited in the repetitive use of his shoulder when performing activities at shoulder height or below. Because the arbiter specifically “qualified” the limitation on repetitive use in that manner, we found the opinion insufficient to establish entitlement to a “chronic condition” impairment value.

Here, when asked if claimant was significantly limited in the repetitive use of the left shoulder, Dr. Weller responded that claimant was limited in the repetitive use of the left shoulder, and, as in *Miller*, she provided an example of the limitation. The fact that her response did not include the term “significant” does not alter our conclusion. See *Rafael Corona*, 66 Van Natta 788, 792 (2014) (“magic words” not required where the medical arbiter’s opinion in response to the question posed supported a finding that the claimant was significantly limited in the repetitive use of the relevant body part due to a chronic and permanent medical condition).

Accordingly, based on Dr. Weller’s opinion, we conclude that claimant is significantly limited in the repetitive use of her left shoulder. Therefore, she is entitled to a 5 percent “chronic condition” impairment value. OAR 436-035-0019(1). This value is combined with 2 percent range of motion loss and 2 percent strength loss for a total whole person impairment value of 9 percent. OAR 436-035-0011.

We turn to the issue of work disability. Asserting that claimant returned to regular work, the employer contends that claimant is not entitled to a work disability benefit. For the reasons explained in the ALJ’s order, we find that claimant was not released to and did not return to “regular work.” Therefore, claimant is entitled to a work disability value, in addition to the previously awarded impairment value. OAR 436-035-0009(6).

The employer alternatively argues that claimant’s base functional capacity (BFC) is “light.” We do not agree. For the reasons provided by the ALJ, claimant’s BFC is “medium.” Therefore, claimant is entitled to an adaptability value of 3. OAR 436-035-0012(11).

Compiling the factors articulated in the ALJ's order, we find that claimant's age/education value (4) multiplied by the adaptability factor (3) equals 12. Claimant's social-vocational value (12) is added to her impairment value (9) for a total "work disability" value of 21 percent.¹ OAR 436-035-0009(6)(b).

Because our decision results in increased permanent disability compensation from that awarded by the ALJ's order, claimant's attorney is awarded an "out of compensation" attorney fee equal to 25 percent of the increased compensation created by our order, not to exceed \$6,000. ORS 656.386(4); OAR 438-015-0055(2).

Additionally, because claimant's work disability award was not disallowed or reduced as a result of the employer's request for review, claimant's attorney is entitled to an assessed fee for services on review concerning that issue. *See* ORS 656.382(2); OAR 438-015-0070(1). After considering the factors set forth 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 is \$3,000, 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), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

ORDER

The ALJ's order dated February 6, 2014 is modified. In addition to the 4 percent whole person impairment granted by the Order on Reconsideration, claimant is awarded an additional 5 percent whole person impairment and 21 percent work disability, for total awards of 9 percent whole person impairment and 21 percent work disability. Claimant's counsel is awarded 25 percent of the increased compensation created by this order, not to exceed \$6,000, payable directly to claimant's attorney. For services on review regarding the work disability issue, claimant's attorney is awarded an assessed fee of \$3,000, to be paid by the employer.

Entered at Salem, Oregon on July 28, 2014

¹ Given his finding that claimant was entitled to a work disability award, the ALJ was obligated to quantify (by means of a percentage) claimant's work disability award. *See Chantal M. Thomas*, 65 Van Natta 1306, 1307 n 1 (2013). It is unnecessary to calculate the specific monetary value of the work disability award, which is a matter of claim processing. *See Joseph Wagner*, 66 Van Natta 485, 491 n 5 (2014) (declining the claimant's request to award a specific dollar amount of permanent disability as this was a matter of claim processing).