

In the Matter of the Compensation of
ROBERT BOYCE, Claimant
WCB Case No. 14-00805
ORDER ON REVIEW

Brian R Whitehead, Claimant Attorneys
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Reviewing Panel: Members Curey, Weddell, and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that awarded no work disability for his sternum, ribs, thoracic, and low back conditions, whereas an Order on Reconsideration awarded 52 percent work disability. On review, the issue is extent of permanent disability (work disability).

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

Claimant, a truck driver, was compensably injured in a June 22, 2012 motor vehicle accident. The employer accepted a sternum fracture, right fourth and fifth rib fractures, thoracic transverse process fracture, and L1 compression fracture, left wrist sprain, and right ankle sprain. (Exs. 19, 52).

In July 2012, claimant began treating with Dr. Brumbaugh. He was provided with physical therapy and chiropractic treatment.

On June 19, 2013, Dr. Teal, orthopedic surgeon, examined claimant on behalf of the employer. Claimant denied problems with his lower back and was a little tender in his mid-back. (Ex. 42-1). Dr. Teal concluded that the accepted conditions, including the L1 compression fracture, had resolved and were medically stationary. (Ex. 42-11, -12, -13). He explained that claimant could return to full, unrestricted work on July 8, 2013, when his work hardening would be completed. He stated that the only restrictions were that claimant should have adequate padding in the truck seat that he used. (Ex. 42-12). Dr. Teal concluded that the only permanent impairment attributable to the work injury was prolonged sitting and lifting more than 75 pounds. (Ex. 42-13).

On July 15, 2013, Dr. Brumbaugh agreed with Dr. Teal's report, except for the medically stationary date and work restrictions. He noted that therapy was working toward a goal of lifting/carrying 100 pounds and that claimant had lifted 90 pounds and carried 85 pounds. (Ex. 43).

Claimant returned to Dr. Brumbaugh on July 17, 2013. Dr. Brumbaugh recommended more work conditioning and noted that once claimant completed work conditioning, his condition would be medically stationary. (Ex. 44).

On August 14, 2013, Dr. Brumbaugh reported that claimant was moving up to a 95-pound lifting limit. He noted that claimant was concerned about returning to driving because of sleep issues, as well as the repetitive activity and prolonged sitting. (Ex. 45).

In August 2013, the employer sent claimant's job description to Dr. Brumbaugh and asked whether he was released to the job at injury and, if not, the employer inquired about his current restrictions. The job description explained that 80 percent of the job involved sitting. (Ex. 47). The job also involved lifting a maximum weight of 50 pounds and a minimum weight of one pound. (*Id.*)

On August 15, 2013, Dr. Brumbaugh responded that claimant should be able to perform the physical duties as described, but was not sure how he would tolerate prolonged sitting. He also noted that claimant was concerned about sleep issues. (*Id.*)

On August 21, 2013, claimant was discharged from physical therapy because the goals were met. The discharge summary explained that claimant demonstrated the ability to lift and carry 100 pounds. (Ex. 48-5).

Dr. Brumbaugh determined that claimant's conditions were medically stationary on September 3, 2013. He explained that claimant had completed work conditioning and met his goal of lifting 100 pounds. (Ex. 49-1). Dr. Brumbaugh concluded that claimant "may work regular duties, full time, without restrictions." (Ex. 49-2).

A September 18, 2013 Notice of Closure awarded 19 percent whole person impairment, but no work disability. (Ex. 53). Claimant requested reconsideration, raising issues of impairment and work disability. (Ex. 53a).

On November 7, 2013, Dr. Brumbaugh explained that claimant had returned to him unexpectedly. Claimant reported that he had contacted his employer to see about coming back to work and was informed that he no longer had a job with the employer. Claimant did not believe he would be able to tolerate working in that position again. Dr. Brumbaugh planned to contact the adjuster to see if a formal work capacity evaluation could be considered. (Ex. 54).

On December 13, 2013, Drs. Harris, Grossenbacher, and Rischitelli performed a medical arbiter examination. (Ex. 55). They reported that Dr. Brumbaugh had released claimant to regular duty. (Ex. 55-4).

Relying on the medical arbiter panel's findings, a January 28, 2014 Order on Reconsideration increased claimant's whole person impairment to 36 percent. (Ex. 59). The reconsideration order also found that claimant was not released to regular work and was entitled to a 52 percent work disability award. (Ex. 59-4, -5). The employer requested a hearing.

The ALJ found that Dr. Brumbaugh had released claimant to regular work on September 3, 2013, and that Dr. French, a consulting physician, also indicated that he was released to full duty without limitations. (Exs. 49, 50). Because claimant was released to regular work by his attending physician, the ALJ concluded that he was not entitled to work disability.

On review, claimant argues that the employer did not sustain its burden of proving that he was released to regular work. Claimant contends that he was not released to regular work by Dr. Brumbaugh and that his work release status, as of his last visit, was "up in the air" pending a work capacity evaluation. Consequently, he seeks a work disability award because he did not return to, and was not released to, regular work.

As the party challenging the Order on Reconsideration, it is the employer's burden to establish error in the reconsideration process. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

Claimant is entitled only to impairment, but not to work disability, if he "has been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has returned to regular work at the job held at the time of injury." ORS 656.214(2)(a) (Or Laws 2007, ch 274, §§ 1, 8); ORS 656.726(4)(f)(E) (Or Laws 2007, ch 274, §§ 2, 8); OAR 436-035-0009(4) (WCD Admin Order 12-061; eff. January 1, 2013). Absent such a release or return to regular work, he is entitled to work disability as well as impairment. ORS 656.214(2)(b); OAR 436-035-0009(6). "Regular work" means the job the worker held at the time of injury. ORS 656.214(1)(e); OAR 436-035-0005(15); *James P. Hollis*, 60 Van Natta 826, 827 (2008).

On review, the dispositive issue is whether claimant was released to regular work. Based on the following reasoning, we find that he was.

Dr. Brumbaugh was claimant's attending physician and was familiar with his job duties based on the job description. (Ex. 47). His reports documented concerns about claimant's tolerance for prolonged sitting. (Exs. 45, 47). However, on September 3, 2013, Dr. Brumbaugh determined that claimant's conditions were medically stationary, explaining that he had completed work conditioning and met his goal of lifting 100 pounds. (Ex. 49-1). He further opined that claimant "may work regular duties, full time, without restrictions." (Ex. 49-2).

Claimant acknowledges that Dr. Brumbaugh released him to regular work, full time without restrictions, on September 3, 2013. However, referring to Dr. Brumbaugh's earlier July 15, 2013 note, claimant asserts that Dr. Brumbaugh "was mistaken or the work release only was relevant to [his] lifting abilities." (Claimant's closing argument at 2). Claimant also relies on Dr. Brumbaugh's August 15, 2013 note, which expressed concern about claimant's tolerance for prolonged sitting. (Ex. 47-1). Claimant argues that, based on those two records, Dr. Brumbaugh either agreed with Dr. Teal that claimant had a permanent restriction against prolonged sitting or the record is unclear as to Dr. Brumbaugh's opinion regarding his prolonged sitting restriction. We disagree with claimant's interpretation.

On July 15, 2013, Dr. Brumbaugh agreed with Dr. Teal's report, except for the medically stationary date and work restrictions. Dr. Brumbaugh noted that therapy was working toward a goal of lifting/carrying 100 pounds and that claimant had lifted 90 pounds and carried 85 pounds. (Ex. 43). On August 15, 2013, Dr. Brumbaugh explained that claimant should be able to perform the physical duties described in the job description, but was not sure how he would tolerate prolonged sitting. He also noted that claimant was concerned about sleep issues. (Ex. 47).

We find that Dr. Brumbaugh's comments on July 15, 2013 and August 15, 2013 pertained to claimant's condition at that time, before he had successfully completed the work hardening program and before Dr. Brumbaugh had determined that his condition was medically stationary. (See Ex. 48-5). On September 3, 2013, Dr. Brumbaugh unambiguously released claimant to regular duty without restrictions. He was familiar with claimant's job description and, although he had previously expressed concerns about his tolerance for prolonged sitting,

Dr. Brumbaugh did not provide any work restrictions. Under such circumstances, we conclude that the record establishes that Dr. Brumbaugh released claimant to regular work without restrictions.

Claimant also relies on Dr. Brumbaugh's November 7, 2013 chart note. He contends that, even if the "regular work" release is construed as releasing him to prolonged sitting, as of November 7, 2013, he was no longer released to regular work and his ability to do so was "up in the air" pending a formal work capacity evaluation. For the following reasons, we disagree with claimant's interpretation of Dr. Brumbaugh's November 7, 2013 chart note.

On November 7, 2013, Dr. Brumbaugh reported that claimant had returned unexpectedly. Claimant indicated that he had contacted his employer about coming back to work and was informed that he no longer had a job there. He told Dr. Brumbaugh that he did not believe he would be able to tolerate working in that position again. He raised an issue about putting heavy chains on the truck tires and did not believe his back could handle it and also reported that his ankle could not tolerate prolonged walking. (Ex. 54-1). After examining claimant, Dr. Brumbaugh explained:

"Unfortunately [claimant] was not able to return to his job at time of injury. He now questions whether he can perform [his] job at the time of injury. I am not sure what options would be available to him. He does he is not working [sic] he would not qualify for palliative care. He has not had a pathologic aggravation of his condition. His IME opined that he would have a lifting restriction of 75 pounds. He did exceed this with work conditioning albeit with some difficulty. I will contact the adjuster to see if a formal work capacity evaluation could be considered." (Ex. 54-2).

Dr. Brumbaugh's November 7, 2013 chart note referred to *claimant's* concern about whether he could perform his job at injury. He considered the possibility of a formal work capacity evaluation. Nevertheless, Dr. Brumbaugh notably did not rescind his prior work release or indicate that claimant's condition had changed. Instead, he advised claimant to consider appealing his closure or permanent restrictions. Dr. Brumbaugh's "post-closure" report does not support the conclusion that he rescinded the release to regular work without restrictions.

In summary, after evaluating Dr. Brumbaugh's opinion in context and based on the record as a whole, we conclude that he released claimant to regular work without restrictions. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency). Based on the foregoing reasons, we agree with the ALJ's conclusion that the employer sustained its burden of proving error in the reconsideration process. *Callow*, 171 Or App at 183. Consequently, we affirm.

ORDER

The ALJ's order dated June 13, 2014 is affirmed.

Entered at Salem, Oregon on November 7, 2014

Member Weddell dissenting.

Based on the medical evidence, the majority concludes that claimant is not entitled to a work disability award. Because I disagree with the majority's evaluation of the evidence, I respectfully dissent.

The reconsideration order explained that claimant was not released to regular work and awarded 52 percent work disability. (Ex. 59-4, -5). Because the employer challenged the reconsideration order, it has the burden to establish error in the reconsideration process. *Marvin Wood Prods, v. Callow*, 171 Or App 175, 183 (2000). For the following reasons, the employer did not sustain that burden.

The record does not establish that claimant returned to regular work. Therefore, the issue is whether Dr. Brumbaugh released him to regular work. Despite Dr. Brumbaugh's September 3, 2013 comment that claimant could perform his regular duties without restrictions (Ex. 49-2), the record, read as a whole, does not support that conclusion.

Claimant's job description explained that 80 percent of his job involved sitting. (Ex. 47). Dr. Brumbaugh was concerned about how he would tolerate prolonged sitting. (*Id.*)

Dr. Teal concluded that claimant had permanent impairment attributable to the work injury that included prolonged sitting and lifting more than 75 pounds. (Ex. 42-13). He explained that claimant should have adequate padding in the

truck seat that he used. (Ex. 42-12). Dr. Brumbaugh agreed with Dr. Teal's report, except for the medically stationary date and work restrictions. However, the work restrictions Dr. Brumbaugh referred to pertained to claimant's lifting requirements, not the restrictions from prolonged sitting. (Ex. 43). Thus, Dr. Brumbaugh's response indicated that he agreed with Dr. Teal that claimant should be restricted from prolonged sitting. In the context of this record, Dr. Brumbaugh did not release claimant to return to the full range of duties required in his regular work. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency).

Moreover, even if the "regular work" release can be construed as releasing claimant to prolonged sitting, he was no longer released for regular work, as of Dr. Brumbaugh's November 7, 2013 chart note. On that date, Dr. Brumbaugh reported that claimant raised an issue of putting chains on the truck tires. He explained that the chains could weigh up to 100 pounds and had to be lifted while he was bending over. Claimant did not believe his back could handle that activity. Dr. Brumbaugh expressed no disagreement with claimant's observation. Claimant also reported that his ankle could not tolerate prolonged walking. (Ex. 54-1). Dr. Brumbaugh examined claimant and found tenderness in his back and ankle. (Ex. 54-2). He planned to contact the employer's adjuster to see if a formal work capacity evaluation could be considered. (Ex. 54-2).

Thus, even assuming that claimant previously had been released to regular work, Dr. Brumbaugh's request for a work capacity evaluation after claimant reported that he could not perform his regular work duties establishes that Dr. Brumbaugh had reconsidered and withdrawn the release. At a minimum, Dr. Brumbaugh's statements are confusing or contradictory and insufficient to meet SAIF's burden of proof.

Based on this record, the employer did not sustain its burden of burden of proving error in the reconsideration process. I would reinstate the work disability award in the reconsideration order. Because the majority concludes otherwise, I dissent.