
In the Matter of the Compensation of
DELMY E. DIAZ-GALDAMEZ, Claimant
WCB Case No. 14-02852
ORDER ON REVIEW
Bottini Bottini & Oswald, Claimant Attorneys
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests Board review of Administrative Law Judge (ALJ) Jacobson's order that upheld the Sedgwick Claims Management Services's (Sedgwick's)¹ denial of claimant's new/omitted condition claim for a L5-S1 disc herniation. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

In May 2013, claimant, a 25-year-old employee of a house-cleaning business, sustained a work-related low back injury. She was pushing the bottom of a trash can as her coworker lifted the bag from above in order to deposit the trash in a dumpster. As claimant was pushing the trash can, she had a light sensation of pain in her low back. (Tr. 8). Her symptoms significantly worsened and the next day she was not able to return to work because of significant back pain. (Tr. 9).

In June 2013, claimant was evaluated by Dr. Halko, chiropractor. He diagnosed an acute lumbar strain and provided treatment for two weeks before referring claimant for an MRI due to persistent symptoms. (Ex. 3). Claimant then obtained the MRI and established treatment with Dr. Smith. (Exs. 4, 7). Based on the MRI and his clinical examination, Dr. Smith diagnosed an extruded disc at L5-S1 and right and left radiculopathies. (Ex. 8). He referred claimant for evaluation by neurosurgeon, Dr. Brett, who diagnosed a left-sided disc herniation at L5-S1, and recommended surgery. (Exs. 11, 12).

In December 2013, Sedgwick accepted claimant's work injury as a disabling lumbar strain. (Ex. 15). Claimant then requested acceptance of an L5-S1 disc herniation. (Ex. 18). Sedgwick denied the claim (Ex. 20), prompting claimant to request a hearing.

¹ Sedgwick is the assigned claims agent under ORS 656.054(1).

Claimant was evaluated by Dr. Strum at Sedgwick's request. (Ex. 16). He diagnosed a resolved lumber strain, degenerative joint disease at L4-5 and L5-S1, nonanatomic/nonphysiologic findings on examination and a "serious psychological condition" by history. (Ex. 16-13). Dr. Strum attributed claimant's presentation to a combination of the preexisting arthritic condition, "internal and external psychosocial factors" and "preexisting inherent psychological disturbances." (Ex. 16-18). Dr. Strum further opined that the "theory of 'traumatic disc rupture'" had recently been disproven in the medical literature and that "minor trauma" does not result in disc herniations or changes in preexisting disc pathology. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

In upholding Sedgwick's denial, the ALJ determined that Dr. Brett had an inaccurate history regarding the onset of claimant's radicular complaints. The ALJ also reasoned that Dr. Brett did not adequately explain the presence of his clinical findings of radiculopathy in light of his admission that claimant did not have an objective neurological deficit. (Ex. 22-2). The ALJ, therefore, concluded that Dr. Brett's opinion was insufficient to establish that claimant's work injury was a material cause of the disability/need for treatment of the denied L5-S1 disc herniation.

On review, claimant argues that, despite Dr. Brett's mistaken history regarding the onset of her radicular complaints, his opinion is persuasive and more consistent with the medical record than the contrary opinion of Dr. Strum. Based on the following reasoning, we agree.

To prevail on her new/omitted medical condition claim for an L5-S1 disc herniation, claimant must prove that her work injury was a material contributing cause of her disability or need for treatment for that condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).² If she satisfies that burden, we address whether the evidence establishes that the "otherwise compensable injury" combined with a preexisting condition and was not the major contributing cause of claimant's disability/need for treatment of the

² While Dr. Strum characterizes claimant's L5-S1 disc pathology as a protrusion, rather than a herniation, the parties do not dispute the existence of disc pathology at L5-S1. (Ex. 16-13). Because we find the opinion of Dr. Brett to be persuasive, we rely on his opinion to establish the existence of the claimed new/omitted L5-S1 disc herniation. *See Graves*, 57 Van Natta at 2381.

combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Considering the disagreement between experts regarding the compensability of the claimed new/omitted medical condition, this claim presents complex medical questions that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are both well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Brett initially took a history of an immediate onset of radicular symptoms. (Ex. 12). After reviewing Dr. Strum's report, Dr. Brett characterized the onset of radicular symptoms as occurring several weeks after the injury. (Ex. 17). Subsequently, Dr. Brett again characterized the onset of radicular symptoms as several weeks, but he also stated that "whether this was more than three months later has no relevance" and that he had seen patients that develop radicular complaints more than a year after an injury. (Ex. 22).

Claimant testified that it was about two months before she appreciated numbness and tingling in her feet. (Tr. 11). She had previously reported to Dr. Strum that she did not remember the exact onset of her radicular symptoms but that it was somewhere between several weeks and three months. (Ex. 16-14).

After considering claimant's testimony and Dr. Brett's reports, we conclude that Dr. Brett had a sufficiently accurate medical history on which to base his opinion. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible). Dr. Brett explained that the important factor in his analysis was that claimant developed her radicular complaints during the time that she continued to have persistent low back pain from her May 2013 work injury. (Ex. 22). He stated that whether claimant's radicular symptoms were immediate, or within a few months, would not change his causation assessment. Notably, Dr. Strum did not contradict Dr. Brett in this regard. Instead, Dr. Strum noted that Dr. Brett's initial history of the onset of radicular symptoms was incorrect. Yet, in doing so, Dr. Strum offered no explanation why a later onset as described by claimant would weigh against acute causation. (Ex. 21). Further, Dr. Strum's opinion that the L5-S1 disc herniation was not caused by the work injury was not based on the timing of the onset of radicular complaints. (Ex. 21-4)

Having determined that Dr. Brett's opinion was based on a sufficiently accurate history, we next address whether Dr. Brett's causation opinion is more persuasive than Dr. Strum's. For the following reasons, we conclude that it is.

Dr. Brett's opinion more comprehensively explains the medical record. For example, Dr. Brett's opinion that claimant had an acutely caused L5-S1 disc herniation explained why a person as young as claimant would have persistent back pain followed by radicular symptoms after an acute overhead lifting incident. In contrast, Dr. Strum did not explain why claimant's preexisting condition would become persistently symptomatic after she suffered a work injury. Moreover, Dr. Strum attributed claimant's presentation to a combination of preexisting degenerative arthritis and psychological factors,³ but he did not explain the relative contributions of these factors or how they would, in fact, combine in the context of claimant's work injury to result in her low back condition. *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Additionally, Dr. Strum relied on premises that are not well explained and are general in nature and not specific to claimant. *See Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (little weight given to comments that were general in nature and not addressed to the claimant's particular situation). For example, Dr. Strum stated that the "theory of 'traumatic disc rupture'" has been disproven and that "minor trauma" does not result in disc herniations. He defined "minor trauma" as "any trauma which is of a lesser degree than major trauma." (Ex. 16-18). In the absence of an explanation or meaningful definition of the terms "minor" and "major," we consider the persuasiveness of Dr. Strum's opinion to be diminished.

Sedgwick argues that the absence of radicular symptoms reported in the examinations of Dr. Halko and Dr. Smith before August 2013 shows that the work injury was not a material cause of claimant's L5-S1 disc herniation. However, as noted above, Dr. Brett concluded that claimant's history of persistent back pain with the eventual onset of radicular symptoms is consistent with injury of the L5-S1 disc. Dr. Halko did not comment on the MRI showing L5-S1 disc pathology and Dr. Smith continued to express concern about an injury to the

³ Dr. Strum discussed certain psychological symptoms experienced by claimant and asserted that they combined with her preexisting degenerative condition to result in her current condition. However, claimant stated that she was in a depressed state because she was unable to work. (Ex. 16-5). Under such circumstances, we do not consider Dr. Strum's opinion concerning psychological symptoms occurring well after the onset of protracted back pain and a lengthy period of disability to be well-explained. *Moe*, 44 Or App at 433 (rejecting unexplained or conclusory opinion).

L5-S1 disc though he concurred with Dr. Strum's report. (Ex. 19). Under such circumstances, we conclude that Dr. Brett's opinion persuasively explained the late manifestation of claimant's radicular symptoms.

Because Dr. Brett persuasively concluded that the May 2013 work injury was the major contributing cause of claimant's need for treatment/disability of the L5-S1 disc herniation, we find that claimant has met her burden to establish that the injury was at least a material cause of the need for treatment/disability. The burden of proof then shifts to Sedgwick to establish that the work injury combined with a "preexisting condition" and was not the major contributing cause of the need for treatment/disability for a combined condition. ORS 656.266(2)(a). However, Dr. Strum never commented on a combination of a preexisting condition with the work injury. Accordingly, for the reasons stated above, Dr. Strum's opinion does not persuasively satisfy Sedgwick's burden of proof.

Therefore, based on the above reasoning, we find claimant's new/omitted condition claim for an L5-S1 disc herniation to be compensable. Thus, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review for finally prevailing over Sedgwick's denial. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award is \$12,000, to be paid by Sedgwick, on behalf of the noncomplying employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, claimant's appellate briefs, and his counsel's uncontested attorney fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the injury denial, to be paid by Sedgwick, on behalf of the noncomplying employer. See ORS 656.386(2); OAR 438-015-00129; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated November 14, 2014 is reversed. Sedgwick's denial is set aside and the claim is remanded to Sedgwick for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$12,000, payable by Sedgwick, on behalf of the noncomplying employer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by Sedgwick, on behalf of the noncomplying employer.

Entered at Salem, Oregon on May 19, 2015