
In the Matter of the Compensation of
SUSAN CAREN, Claimant
WCB Case No. 14-05147
ORDER ON REVIEW
DiBartolomeo Law Office PC, Claimant Attorneys
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that affirmed an Order on Reconsideration that awarded 5 percent permanent impairment for a low back condition. On review, the issue is extent of permanent disability (permanent impairment).

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

In April 2012, claimant sustained a compensable back injury. (Ex. 23). The self-insured employer accepted a lumbar strain. (Ex. 34).

On July 31, 2012, Dr. Tatsumi performed a left-sided hemilaminotomy to address claimant's L4-5 disc herniation. (Ex. 32). After the surgery, claimant experienced ongoing severe pain involving her right lower extremity. (Ex. 62).

Claimant's June 21, 2013 lumbar MRI showed bilateral L2-S1 facet arthropathy, foraminal stenosis due to L2-3, L3-4, and L4-5 disc bulges, and scar tissue formation encircling the left L5 nerve root, with no evidence of a recurrent herniated disc. (Ex. 67-2, -3).

On August 12, 2013, Dr. Vander Waal became claimant's attending physician. (Ex. 72).

On February 3, 2014, claimant enrolled in a comprehensive pain management program, which she completed on February 28, 2014. (Ex. 86-2, -10). Dr. Hamby, a staff physician with the program, performed a discharge examination. He reported decreased lumbar range of motion, apportioning 50 percent to preexisting degenerative changes and 50 percent to the work injury. (Ex. 86-3, -4, -7). Dr. Hamby opined that the preexisting degenerative disc disease was "arthritis."¹ (Ex. 90).

¹ Drs. Hamby opined that claimant's preexisting degenerative disc disease was "arthritis" as defined by the Oregon Supreme Court (*i.e.*, "the inflammation of one or more joint due to infectious, metabolic or constitutional causes, and resulting in break down, degeneration or structural change"). (Ex. 90-1). *See Schleiss v. SAIF*, 354 Or 637, 652-53 (2013); *Hopkins v. SAIF*, 349 Or 348, 364 (2010).

On April 11, 2014, Dr. Vander Waal released claimant to return to her job at injury. (Exs. 88, 93). He also concurred with Dr. Hamby's findings. (Ex. 93).

A May 30, 2014 Notice of Closure apportioned claimant's impairment findings and awarded 8 percent for the accepted lumbar strain. (Exs. 94, 95). Claimant requested reconsideration.

On September 9, 2014, a medical arbiter panel performed an examination and apportioned 30 percent of claimant's reduced lumbar motion to the accepted lumbar strain and 70 percent to preexisting "arthritis or arthritic conditions." (Ex. 98-4).

Based on the medical arbiter panel's findings, the October 15, 2014 reconsideration order apportioned claimant's permanent impairment findings and awarded 5 percent, rather than the 8 percent granted by the Notice of Closure. (Ex. 99-2, -3). Claimant requested a hearing.

The ALJ affirmed the Order on Reconsideration. In doing so, the ALJ determined that claimant had a legally cognizable preexisting condition and that apportionment was appropriate.

On review, claimant contends that, under *Brown v. SAIF*, 262 Or App 640 (2014), she is entitled to impairment based on her "compensable injury," which is not limited to her accepted condition. She also argues that, under *Schleiss v. SAIF*, 354 Or 637 (2013), apportionment is not permitted because the employer did not accept or deny a combined condition. For the following reasons, we disagree.

We recently declined to apply the *Brown* holding to a permanent impairment valuation. See *Stuart C. Yekel*, 67 Van Natta 1279, 1284 (2015). We reasoned that the relevant statutory and administrative authority make it clear that impairment is awarded based on the accepted conditions and their direct medical sequelae. See ORS 656.268(15); OAR 436-035-0007(1). We also noted that a claimant who contends that the compensable conditions to be rated extend beyond those listed in the Notice of Acceptance may object to the acceptance notice or initiate claims for new/omitted conditions at any time. See ORS 656.262(6)(d); ORS 656.267(1). If new/omitted conditions are found compensable, the claim must be reopened and processed to closure, at which time the record will be further developed for the rating of impairment for those subsequently claimed and accepted conditions. See ORS 656.262(7)(c). *Id.* at 1288.

This case is analogous to the situation presented in *Yekel*. Accordingly, claimant's impairment was appropriately based on her accepted lumbar strain.

Regarding apportionment, in *Claudia S. Stryker*, 67 Van Natta 1003, 1007 (2015), we concluded that, under *Schleiss*, apportionment is appropriate where the record supports the existence of a legally cognizable "preexisting condition." There, we apportioned the claimant's permanent impairment between her accepted conditions and her unclaimed/unaccepted legally cognizable "preexisting conditions." *Id.* at 1008. We also noted that the claimant could object to the acceptance notice or initiate a "new/omitted" medical condition at any time and, if a combined condition were subsequently accepted, the carrier would have to reopen and process that claim to closure.

Here, it is undisputed that claimant's permanent impairment is due in part to "arthritis" (*i.e.*, a legally cognizable "preexisting condition") and in part to her accepted lumbar strain. Accordingly, claimant's impairment was appropriately apportioned.

In conclusion, for the reasons expressed above, claimant has not established error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Consequently, we affirm the ALJ's order that affirmed the Order on Reconsideration.²

ORDER

The ALJ's order dated April 13, 2015 is affirmed.

Entered at Salem, Oregon on September 4, 2015

² As previously noted, claimant may object to the Notice of Acceptance or initiate a new/omitted medical condition claim at any time. ORS 656.262(6)(d); ORS 656.267(1). If a new/omitted or combined condition is subsequently accepted or found compensable, the carrier must reopen the claim under ORS 656.267(7)(c), process the claim to closure, and evaluate the accepted condition for permanent disability purposes at that time.