
In the Matter of the Compensation of
DANIEL LICKTEIG, Claimant
WCB Case No. 14-04695
ORDER ON REVIEW
Bailey & Yarmo LLP, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Johnson, Lanning, and Somers. Member Lanning dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) excluded a physician's "post-hearing" report; and (2) set aside the employer's denial of claimant's injury claim for a chest condition and lightheadedness. On review, the issues are the ALJ's evidentiary ruling and compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

By the time of hearing, claimant (43 years of age) had worked as a firefighter for almost 16 years. (Tr. 5). He responded to approximately 100 emergency calls per month. (*Id.*)

On June 29, 2014, Dr. Bryan, emergency room physician, noted that claimant reported feeling "chest heaviness" symptoms for three days. (Ex. 1-2). In addition, claimant felt chest "squeezing," dizziness, nausea, shortness of breath, feelings of impending doom, and near syncope on that particular day, but he also had worsening symptoms for the past "month or two." (*Id.*) He also reported that he had nausea and shortness of breath "when it is really bad," and that "some episodes" had radiating numbness into his arm and hand. (*Id.*) Dr. Bryan indicated that claimant had drunk 12 cups of coffee on his way to work that morning, and that the onset of his "shortness of breath" was gradual. (*Id.*)

Claimant had a negative electrocardiogram (EKG), and lab results indicated that his "Troponin I" level was negative for cardiac injury. (Ex. 1-4-5, -11, -16). Noting that claimant had no prior symptoms with exertion, Dr. Bryan released him to return to full duty. (Ex. 1-17). Dr. Bryan diagnosed "chest pain, uncertain cause," recommended that claimant decrease his coffee intake, and prescribed medication for gastrointestinal issues. (Exs. 3-1, 3A-1).

Subsequently, claimant filed a claim, describing his “injury” as responding from the station to a motor vehicle accident and feeling chest pressure and weakness when he climbed into the seat of his emergency vehicle. (Exs. 4, 5-2). He also filed an 801 Form, indicating that he felt chest tightness and lightheadedness when responding to a call. (Ex. 6).

In August 2014, the employer denied the claim. (Ex. 7).

In January 2015, Dr. Berney, occupational and internal medicine specialist, evaluated claimant at the employer’s request. (Ex. 9). He recorded that claimant was feeling poorly on the date of injury, and that he had considered checking himself with a 12-lead EKG at the fire station because of chest tightness, lightheadedness, and feeling unwell. (Ex. 9-2). Claimant admitted feeling similar symptoms at times for several weeks before the incident, but this was the worst he had ever felt. (Ex. 9-2-3). Before claimant could perform the EKG, his unit got a call and, in the course of responding, he developed increased tightness in his chest, radiating to the left arm. (Ex. 9-3).

Dr. Berney noted that claimant reported an “epinephrine outflow” from the alarm and putting on his uniform, which led to the worsening of his chest pain. (Ex. 9-6). Claimant reported regularly drinking eight to 12 cups of coffee on his morning work commute, which took three to four hours. (Ex. 9-4, -7). Claimant also reported that he had not had any symptoms since Fall 2014. (Ex. 9-3, -5).

Dr. Berney diagnosed “atypical chest pain, resolved,” and did not believe that claimant had a cardiac episode. (Ex. 9-5). Ultimately, Dr. Berney opined that claimant’s work activities were a “minor” contributing cause to his symptoms and need for treatment. (Ex. 9-7).

In February 2015, Dr. Berney reiterated that claimant’s work exposure was minimal and not a material contributing cause of his need for treatment on June 29, 2014. (Ex. 10-2). Dr. Berney’s opinion was based on claimant’s reported symptoms before and on June 29, 2014, which had prompted him to consider an EKG at the firehouse before the emergency call. (*Id.*)

Subsequently, Dr. Bryan indicated that, when claimant presented to the emergency room, the cause of his chest pain was unclear. (Ex. 11). He reiterated that claimant’s condition was unlikely cardiac in nature, but believed it was “prudent” for claimant to seek medical treatment. (*Id.*)

Claimant testified that, on June 29, 2014, his department received an emergency call after he had been on shift for approximately three to four hours. (Tr. 10). Emergency calls are accompanied by bells on a loudspeaker that are meant to “just kind of get your attention” and a quick assessment of the emergency. (Tr. 6). Before the call and after breakfast, he felt a “little bit funny” and considered performing an EKG on himself to check for a heart attack. (Tr. 13-14). He felt squeezing in his chest during the call. (Tr. 14). The emergency call issue was resolved before claimant’s unit arrived at the scene. (Tr. 35). Claimant was then transported to a hospital for evaluation. (*Id.*; Ex. 1).

Claimant denied having ongoing similar symptoms before June 29, 2014, but acknowledged having similar symptoms to a lesser degree during a previous shift (approximately one to two weeks earlier). (Tr. 11, 17, 26). He could not remember why he called in sick for his June 26, 2014 shift, which was three days before his June 29 event. (Tr. 28).

Following the hearing, Dr. Berney was deposed after reviewing the June 2014 emergency room report, his January 2015 report and notes, his February 2015 concurrence letter, and the hearing transcript. (Ex. 12-4, -16-17). He noted that the history claimant had provided to him in January 2015 was different from his testimony. (Ex. 12-10). He testified that: (1) he directly asked claimant questions to obtain a history; (2) he did not believe there was any confusion; and (3) the history was “pretty much consistent” with that provided to Dr. Bryan. (Ex. 12-20-21).

Dr. Berney opined that, based only on the increase in symptoms at the time of the emergency call, without looking to any preexisting symptoms or “post-June 29, 2014” symptoms, the stimulus would be responsible for claimant’s symptomatic response. (Ex. 12-15). However, he considered claimant’s “pre-June 29, 2014” call symptoms “absolutely” important to understand the nature of his symptoms. (Ex. 12-24). He determined that claimant’s testimony would not change his conclusion that claimant’s work activities were a “minimal,” but not a material/substantial, cause of his need for treatment/disability. (Ex. 12-27-28).

Dr. Bryan was also deposed. (Ex. 13). He testified that claimant’s symptoms could have been cardiac and that, only after a thorough evaluation, could it be determined that his symptoms were not indicative of a cardiac event. (Ex. 13-6). Ultimately, he opined that it was medically probable that claimant suffered an episode of acid reflux caused by his consumption of coffee that necessitated his need for medical care. (Ex. 13-17).

CONCLUSIONS OF LAW AND OPINION

The ALJ continued the hearing for depositions of Drs. Bryan and Berney. Subsequently, the employer submitted Dr. Bryan's deposition, attaching a concurrence letter signed by him. Claimant objected to the attached letter. The ALJ concluded that the letter was outside the scope of the continuance and excluded it. (Ex. 13-20-21).

Turning to the compensability issue, the ALJ concluded that Dr. Bryan's opinion that the cause of claimant's chest pain was unclear, but that it was prudent for him to seek care for his symptoms, established compensability. (Ex. 11). In doing so, the ALJ relied on *Horizon Air Industries, Inc. v. Davis-Warren*, 266 Or App 388 (2014).

On review, the employer contests the ALJ's evidentiary ruling, contends that the ALJ should have rendered credibility findings concerning claimant's testimony, and asserts that the claim is not compensable under an injury or occupational disease standard.

Evidence

Noting that Dr. Bryan's concurrence letter was attached to his deposition, the employer challenges the ALJ's exclusion of the letter. In doing so, the employer asserts that Dr. Bryan's letter provided the context of, and was discussed within, his "post-hearing" deposition.

An ALJ may conduct a hearing in any manner that will achieve substantial justice and has broad discretion regarding the admissibility of evidence. *See* ORS 656.283(6); *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ's evidentiary rulings for an abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002).

Here, the ALJ continued the hearing for the limited purpose of allowing depositions of Drs. Berney and Bryan. (Tr. 1-2). When granting a request for a continuance of a hearing, an ALJ has discretion to limit the purpose for which a record remains open. *See Michael A. Sell*, 55 Van Natta 767 (2003).

Dr. Bryan's August 1, 2015 letter did not fall within the ALJ's continuance ruling. Under these circumstances, the ALJ did not abuse his discretion in excluding the letter. *See Sell*, 55 Van Natta at 770 (No abuse of discretion for ALJ's exclusion of proposed evidence outside the limited purpose of a continuance ruling).

Credibility

The employer contends that the ALJ should have made credibility findings concerning claimant's testimony.¹ We provide the following credibility assessment and rely on the history contained in the contemporaneous medical records.

In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (it is good practice to give weight to a fact finder's credibility assessments). Here, the ALJ did not make an express demeanor-based credibility finding. Therefore, because the issue of credibility concerns the substance of claimant's testimony, we are equally qualified to make our own credibility determination. *Hultberg*, 84 Or App at 285; *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008).

RN Housley and Dr. Bryan documented claimant's history immediately following the episode on June 29, 2014. (Ex. 1). That history indicated that claimant had similar symptoms in the past. Likewise, Dr. Berney documented a history in January 2015 indicating that claimant had comparable symptoms before the June 2014 episode. (Ex. 9). Claimant testified that these similar histories were incorrect in that they exaggerated his previous symptoms. (Tr. 11-12, 16-17, 21, 29-31).

After reviewing the medical records and claimant's testimony, we conclude that the contemporaneous medical record provides a more reliable history than claimant's later testimony (March 2015), which minimized his pre-June 29, 2014 chest/lightheadedness symptoms.² *See Pamela R. Blake*, 62 Van Natta 216, 225

¹ We acknowledge the employer's "remand" request. However, we find the record sufficiently developed to render a decision on the merits of the compensability dispute. *See* ORS 656.295(5). Consequently, there is no compelling reason to remand. *See SAIF v. Avery*, 167 Or App 327, 333 (2000). In reaching this conclusion, we note that an ALJ is authorized to make "demeanor-based" credibility findings, but is not required to do so. Moreover, as discussed above, we can make credibility/reliability findings based on the written record (even without an ALJ's "demeanor-based" findings). *See Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987).

² For example, on June 29, 2014, Dr. Bryan initially reported that claimant had experienced three days of chest heaviness/squeezing, which lasted two to three hours. (Ex. 1). He noted that claimant's symptoms had worsened over the last one to two months, and that he had nausea and shortness of breath "when it was really bad." (*Id.*) Finally, Dr. Bryan recorded that some of claimant's episodes had radiating numbness in his arm and hand. (*Id.*) This history supports the presence of ongoing symptomatology, which claimant acknowledged to a lesser degree at hearing.

(2010) (contemporaneous records found more reliable than testimony given long after the pertinent event); *Paul M. Toufar*, 60 Van Natta 2789, 2793 (2008) (history described in a chart note provided the most accurate description of the history of the claimant's initial low back complaints).

Compensability

The employer contends that claimant did not prove the compensability of an injury or an occupational disease.³ In response, claimant contends that his claim is compensable under *Davis-Warren*. For the following reasons, we find *Davis-Warren* distinguishable.

In *Davis-Warren*, the claimant, a flight attendant, became ill after the airplane cabin she was working in failed to fully pressurize. The claimant did not have similar previous symptoms consistent with those she experienced after her "cabin pressure" incident. The court evaluated whether the claimant sustained an "injury" and whether her "diagnostic" medical service, a test of pressure with hyperbaric oxygen, was "required." The court concluded that, based on the claimant's exposure to a change in pressure, her symptoms, the results of her physician's examination, and the relative difficulty in diagnosing decompression sickness, the services were required, even though the ultimate condition was unclear.

Here, as in *Davis-Warren*, the record establishes that claimant's testing on June 29, 2014 was required to determine whether he had a cardiac event/condition. However, while it is true that claimant experienced some of his symptoms at work on June 29, 2014, the record establishes that he had previously experienced similar symptoms (unlike *Davis-Warren*). Consequently, in contrast to *Davis-Warren*, the causal connection to claimant's work exposure is at issue in this case.

Furthermore, on January 19, 2015, Dr. Berney reported a similar history that claimant had felt chest tightness, lightheadedness, and was generally unwell for the last several weeks. (Ex. 9). Dr. Berney noted that, on the date of injury even before the emergency call, claimant considered giving himself a 12-lead EKG at the fire station due to his symptoms. (*Id.*)

³ The employer argues that, because claimant maintains that his symptoms were caused by a sudden, stressful situation at work, compensability should be analyzed under an occupational disease standard for mental disorders, which requires a "major contributing cause" standard of proof. ORS 656.802(1)(b) (a "mental disorder" includes any physical disorder caused or worsened by mental stress); ORS 656.802(2)(a); *SAIF v. Falconer*, 154 Or App 511 (1998), *rev den*, 328 Or 330 (1999). We need not resolve this dispute because we find that claimant's chest/lightheadedness claim is not compensable under a lesser burden of proof.

When analyzed under an “injury” standard, claimant must prove that the June 2014 work exposure was at least a material contributing cause of the disability or need for treatment for his chest/lightheadedness condition. ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). The standard for “material contributing cause” is a “substantial cause, but not necessarily the sole cause or even the most significant cause.” *See Knaggs v. Allegheny Techs.*, 223 Or App 91, 93-94 (2008); *see also Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976) (“material contributing cause” means something more than a minimal cause; it need not be the sole or primary cause, but only the precipitating factor); *John P. Monroe*, 60 Van Natta 317, 320 (2008) (same).

Because the causation inquiry presents a complex medical question, it must be established by expert medical opinion. *Uris v. Comp. Dep’t*, 247 Or 420, 427 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

After considering the histories provided by claimant during his January 2015 examination and testimony, Dr. Berney opined that his need for treatment/disability “would have only been minimally caused –not caused in material part or substantial part” by his June 29, 2014 work activities. (Ex. 12-28). We acknowledge Dr. Berney’s testimony that, based only on the increase in symptoms at the time of the emergency call, without looking to any preexisting symptoms or “post-June 29, 2014” symptoms, the “emergency call” stimulus would be responsible for his symptomatic response. (Ex. 12-15). However, Dr. Berney also considered claimant’s “pre-June 29, 2014” call symptoms “absolutely” important to know the nature of the symptoms. (Ex. 12-24). He ultimately concluded that claimant’s testimony (that he had symptoms before June 29, 2014) would imply problems prior to the emergency call and would not change his conclusion that claimant’s work activities were not a material/substantial cause of his symptoms. (Ex. 12-27-28). Thus, in light of Dr. Berney’s description of a “minor” or “minimal” cause, in addition to explaining that the “minor” cause was not a material or substantial cause, we are not persuaded that Dr. Berney’s opinion satisfies the statutorily required “material contributing cause” standard. *See Summit*, 25 Or App at 856.

Dr. Bryan also offered a compensability opinion. We acknowledge that he initially stated that, based on claimant’s testimony, the emergency call at the fire station had a significant influence on claimant’s worsened symptoms. (Ex. 13-13). However, he subsequently clarified that it would be just as likely that his acid

reflux episode “caused his symptoms contemporaneous with the emergency call[.]” (Ex. 13-16). Ultimately, he opined that claimant’s consumption of a significant amount of coffee on his June 29, 2014 commute to work likely caused his acid reflux, and that the probable cause of claimant’s need for treatment was due to acid reflux.⁴ (Ex. 13-17). Accordingly, Dr. Bryan’s ultimate opinion, which relates claimant’s need for treatment to the non-work cause of acid reflux, does not meet claimant’s statutory burden of proof.

In sum, for the reasons expressed above, we find the opinions of Drs. Berney and Bryan insufficient to establish that claimant’s work activities on June 29, 2014 were a material contributing material contributing cause of his disability/need for treatment for his chest/lightheadedness condition. ORS 656.005(7)(a); ORS 656.266(1). Consequently, we conclude that claimant’s injury claim is not compensable. Accordingly, we reverse.

ORDER

The ALJ’s order dated December 17, 2015 is reversed. The employer’s denial is reinstated and upheld. The ALJ’s \$8,500 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on August 4, 2016

Member Lanning dissenting.

The majority finds that claimant did not meet his burden to prove that his work injury was a material contributing cause of his need for treatment/disability. Because I disagree with the majority’s reasoning, I respectfully dissent.

There are two causation opinions, and I find them both sufficient to establish compensability of the claim. I reason as follows.

Dr. Berney originally opined that claimant’s work exposure was a “minor” cause of his need for treatment. (Ex. 9-7). After considering the histories provided by claimant during his January 2015 examination and claimant’s testimony,

⁴ This is consistent with his June 29, 2014 treatment record, which noted that claimant drank 12 cups of coffee on his way to work and discharged him with a diagnosis of chest pain of an uncertain cause, possibly gastrointestinal, prescribed medication for gastrointestinal issues, and recommended a decrease in coffee. (Exs. 1-9, -17, 3-1).

Dr. Berney opined that his June 29, 2014 work exposure would have been a “minimal” cause of his need for treatment/disability. (Ex. 12-28). Dr. Berney further clarified that, based only on claimant’s increased symptoms without looking to any preexisting symptoms or “post-June 29, 2014” symptoms, the “emergency call” stimulus was responsible for his symptomatic response. (Ex. 12-15).

Moreover, based on claimant’s testimony, Dr. Bryan testified that the emergency call at the fire station had a significant influence on his worsened symptoms. (Ex. 13-13). In addition, Dr. Bryan indicated that, when claimant presented to the emergency room, it was “prudent” for him to seek medical treatment. (Ex. 11).

After considering this record, I am persuaded that Dr. Berney’s opinion (as clarified at deposition), as well as Dr. Bryan’s opinion, support a conclusion that claimant’s June 2014 work exposure was a material contributing cause of his need for treatment/disability for his chest/lightheadedness condition, if for no other reason than to ultimately diagnose claimant’s condition and its relationship to his work. See ORS 656.005(7)(a); ORS 656.266(1); *Horizon Air Industries, Inc. v. Davis-Warren*, 266 Or App 388 (2014). Because the majority concludes otherwise, I respectfully dissent.