
In the Matter of the Compensation of
JIMMY D. FOLKENS, Claimant
WCB Case No. 15-02251
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Mark P Bronstein, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that upheld the self-insured employer's denial of claimant's new/omitted condition claims for L4-5 and L5-S1 disc bulges and lumbar radiculopathy. On review, the issue is compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer's denial of claimant's new/omitted medical condition claims for lumbar radiculopathy, L4-5 disc bulge, and L5-S1 disc bulge. In doing so, the ALJ found that the existence of lumbar radiculopathy had not been established. Consequently, the ALJ concluded that claimant had not established a need for treatment or disability due to the claimed L4-5 and L5-S1 disc bulges. In the alternative, the ALJ determined that the September 2014 work injury was not the major contributing cause of claimant's disability/need for treatment of any of the claimed conditions.

On review, claimant contends that the medical evidence persuasively establishes that the September 2014 work injury was at least a material contributing cause of his disability/need for treatment of his lumbar radiculopathy, L4-5, and L5-S1 disc bulge conditions. In response, the employer argues that, even if claimant establishes that the conditions exist and that the work injury was a material contributing cause of his disability/need for treatment, the work injury was not the major contributing cause of claimant's disability/need for treatment of the combined low back conditions. Based on the following reasoning, we find claimant's radiculopathy and L5-S1 disc bulge conditions compensable.

To prevail on his new/omitted medical condition claims, claimant must prove that the conditions exist and that the September 2014 work injury was a material contributing cause of his disability or need for treatment for those conditions.¹ ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant meets that burden and the medical evidence establishes that the “otherwise compensable injury” combined with a “preexisting condition” to cause or prolong disability or a need for treatment, the employer has the burden to prove that the “otherwise compensable injury” (*i.e.*, the “work-related injury incident”) was not the major contributing cause of the disability or need for treatment of the combined low back conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff’d without opinion*, 278 Or App 447 (2016).

Because of the disagreement between medical experts regarding the existence of claimant’s lumbar radiculopathy, the cause of claimant’s conditions, need for treatment, and disability, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

After considering this record, we consider the opinions of Drs. Flattery, Nelson, and Tien, who treated claimant, to be more persuasive regarding the existence of claimant’s lumbar radiculopathy and causation concerning the need for treatment/disability of claimant’s lumbar radiculopathy and L5-S1 disc bulge. We reason as follows.

Dr. Nelson, who examined claimant the day after his September 23, 2014 work injury, noted claimant’s complaints of radicular pain in his left leg and considered him to have symptoms consistent with radiculopathy. (Ex. 6). Dr. Flattery diagnosed lumbar radiculopathy in an “S1 dermatomal pattern” based on his physical examination on September 29, 2014. (Ex. 8-2). He commented that the lumbar radiculopathy was confirmed by findings on clinical examination, as well as MRI and EMG findings. (Ex. 112-2, -3).

¹ The employer contests the existence of the claimed lumbar radiculopathy, but not the L4-5 and L5-S1 disc bulges.

Additionally, Dr. Tien considered the diagnosis of lumbar radiculopathy to be consistent with his own clinical examination, as well as with MRI and EMG findings. (Ex. 102, 105-2).

Dr. Nelson acknowledged that the NCS graphic results did not accurately represent the testing done. Nonetheless, he considered the EMG portion to show evidence of radiculopathy in an L5-S1 distribution. (Ex. 104).

Drs. Kitchel, Green, Carr, and Ochoa did not consider claimant's physical examinations to be consistent with a diagnosis of lumbar radiculopathy. (Exs. 76-7, 100-17, 108-3).² Dr. Kitchel, who examined claimant some six months after the work injury, was asked whether he "believe[d] that [claimant] has a true lumbar radiculopathy." (Ex. 76-7). He responded that claimant had no findings of radiculopathy "today," *i.e.* the day of his examination. (*Id.*) Dr. Green, who examined claimant some ten months after the work injury, responded to the same question stating that claimant "does not have a lumbar radiculopathy" and he explained that the requisite diagnostic findings were not present in the medical record. (Ex. 100-17). However, Dr. Flattery, who examined claimant six days after the work injury and performed many examinations over the course of several months of chiropractic treatment, explained that claimant's radicular symptoms would wax and wane over time. (Ex. 112-3).

We consider the opinions of Drs. Flattery, Nelson, and Tien to persuasively establish the existence of the claimed lumbar radiculopathy. Drs. Flattery and Nelson both performed examinations immediately following the injury, while Dr. Kitchel did not examine claimant until some six months after the injury, and Drs. Carr and Green did not examine claimant until almost ten months after the injury. (Exs. 76, 100). *See Sherri L. Aldinger*, 63 Van Natta 2004, 2008 (2011) (physician who examined claimant closest in time to claim filing in advantageous position). Moreover, Drs. Nelson, Tien, and Flattery relied on objective findings from claimant's MRI and EMG testing, in addition to their clinical examinations. *See, e.g., Cornelio Garcia*, 67 Van Natta 893, 895 (2015) (finding opinion of treating physicians persuasive where subjective complaints correlated with objective findings).

² Drs. Kitchel, Carr, and Green performed physical examinations at the employer's request, while Dr. Ochoa performed a record review. While these physicians disputed the existence of the claimed lumbar radiculopathy, they did not dispute the existence of the claimed L4-5 and L5-S1 disc bulges.

While Drs. Carr and Green opined that physical examination was the most important test for the presence of radiculopathy in claimant's circumstances, their examination did not occur until ten months after the work injury. (Ex. 100). For the previously discussed reasons, we do not consider their opinions sufficiently persuasive to discount the physical examination findings of Drs. Tien and Flattery, who also performed such examinations and considered them to be consistent with lumbar radiculopathy. Accordingly, we conclude that claimant has established that his lumbar radiculopathy exists.

We turn to the question of whether claimant's work injury was at least a material contributing cause of his disability/need for treatment for the claimed low back conditions.

As an initial matter, the physicians on whom the employer relies do not dispute that the work injury was a material contributing cause of claimant's disability/need for treatment for his L5-S1 disc bulge, although they opined that, due to claimant's preexisting condition and other factors, the work incident was not the major contributing cause. (Exs. 76-9, 100-20, 101). However, the medical evidence did not attribute a need for medical treatment or disability to the claimed L4-5 disc bulge. Instead, the physicians on whom claimant relies specifically attribute his lumbar radiculopathy, disability, and need for treatment to the L5-S1 disc bulge condition. (Exs. 81, 97, 101, 105, 112). Accordingly, we find that claimant has established that the work injury/incident was a material cause of the need for medical treatment/disability of the claimed lumbar radiculopathy and L5-S1 disc bulge, but not the L4-5 disc bulge.

Additionally, claimant agrees that his low back conditions are accurately characterized as "combined conditions." (App. Br. at 9). Therefore, we proceed to consider whether the employer has established that the work injury incident was not the major contributing cause of claimant's need for treatment/disability for the claimed lumbar radiculopathy and L5-S1 disc bulge. ORS 656.005(7)(a)(B); ORS 656.266(2)(a);³ *Brown*, 262 Or App at 652; *Janvier*, 66 Van Natta at 1832-33.

Dr. Kitchel considered claimant's work injury to have combined with his preexisting degenerative disc disease, and attributed his ongoing radicular and low-back symptoms, "post-February 10, 2015" need for treatment/disability to

³ Because Drs. Carr, Green, Ochoa, and Ha did not consider the lumbar radiculopathy to exist, we discount their opinions regarding causation of the claimed lumbar radiculopathy. See *Jessica M. Taylor*, 62 Van Natta 3034 (2010) (opinion of physician who did not believe that the disputed condition existed was unpersuasive when the medical evidence established the existence of that condition).

his preexisting degenerative disc disease. (Exs. 76-9). Drs. Carr and Green agreed with Dr. Kitchel's opinion that the work injury was no longer the major contributing cause of claimant's disability/need for treatment after February 10, 2015, and attributed his ongoing symptoms to degenerative disc disease. (Ex. 100-20).

Yet, the aforementioned opinions did not specifically address the role of claimant's work injury in the combined condition before February 10, 2015. Under such circumstances, the opinions of Drs. Kitchel, Carr, and Green do not persuasively establish that the work-related injury incident was, at no time, the major contributing cause of claimant's need for treatment/disability for the claimed lumbar radiculopathy and L5-S1 disc bulge.

Further, even if Dr. Kitchel, Carr and Green addressed the initial major contributing cause of the disability/need for treatment of the combined condition, we would not find their opinions persuasive. We reason as follows.

Drs. Carr and Green based their opinion (*i.e.*, that claimant's work injury was not the major contributing cause of his need for treatment/disability for the claimed low back conditions) on the findings of their own physical examination and the mechanism of injury. (Ex. 100-15). However, we are not persuaded that they adequately explained how the work injury initially combined with claimant's preexisting condition to result in his need for treatment, but did not constitute the major contributing cause of the need for treatment. While they explained that they would consider claimant's lumbar strain to have resolved several months after the injury, they stated that they questioned the validity of his ongoing pain complaints. (Ex. 100-20). Given our finding that claimant has established the existence of his lumbar radiculopathy, we do not find the remainder of their opinions persuasive. Accordingly, their opinions do not satisfy the employer's burden of proof.⁴

Finally, we note that Dr. Kitchel's analysis was essentially the same as that of Drs. Carr and Green, but with less explanation. (Exs. 76, 88). Accordingly, based on the abovementioned reasoning, Dr. Kitchel's opinion is also not sufficient to satisfy the employer's burden of proof.

⁴ To the extent that Dr. Ha concurred with the findings of Drs. Carr and Green, we discount his opinion based on the same reasoning. (Ex. 103).

Dr. Ochoa considered the surveillance footage to establish “malingering by every definition.” (Ex. 108-6). Dr. Ochoa stated that the portion of the video of claimant on his property showed him walking “almost athletically.” (*Id.*) He described claimant’s subsequent limp as “theatrical.” (*Id.*) Such statements are significantly at odds with the interpretations of other examiners, as well as our own review.

We consider the surveillance footage submitted by the employer to present an ambiguous and inconclusive depiction of claimant’s physical capabilities. Moreover, the video was obtained some nine months after claimant’s work-related injury/incident. (Ex. 99A). The video was of very limited duration and showed claimant walking about his property, moving some items that did not appear to be overly heavy, and operating a crank on a trailer. (*Id.*) In this portion of the video, claimant did not walk with a pronounced limp. However, we agree with the description of Drs. Carr and Green, that in certain portions they could not “truly say that he is walking without a limp.” (Ex. 100-14). In a later scene, recorded as claimant completed errands in a public place, he walked with a more pronounced limp.

Considering Dr. Ochoa’s adamant interpretation of such ambiguous evidence, we do not consider his medical opinion to be persuasive.⁵

Under such circumstances, we conclude that the employer has not established that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined lumbar radiculopathy and L5-S1 disc bulge conditions. Accordingly, we find those conditions compensable.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review regarding the lumbar radiculopathy and L5-S1 disc bulge conditions. 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 at hearing and on review is \$15,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as demonstrated by the hearing record, claimant’s appellate briefs, and his counsel’s uncontested submission), the complexity of the issues, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

⁵ Drs. Carr and Green also considered the surveillance footage to show that claimant had exaggerated the extent of his disability, although their interpretation was more consistent with the ambiguity of the video evidence. (Ex. 100-14, -16).

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the lumbar radiculopathy and L5-S1 disc bulge, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *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 December 14, 2015 is reversed in part and affirmed in part. The employer's denial is set aside insofar as it pertains to claimant's new/omitted medical condition claims for L5-S1 disc bulge and lumbar radiculopathy and the claim is remanded to the employer for processing in accordance with law. For services at hearing and on review regarding the L5-S1 disc bulge and radiculopathy issues, claimant's attorney is awarded an assessed fee of \$15,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the L5-S1 disc bulge and lumbar radiculopathy denial, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 4, 2016