

In the Matter of the Compensation of
DONALD L. MIDKIFF, Claimant

WCB Case No. 15-04221

ORDER ON REVIEW

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Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) McWilliams's order that affirmed an Order on Reconsideration's award of 9 percent whole person permanent impairment for a lumbar strain and L4-5 disc extrusion. On review, the issue is extent of permanent disability (impairment). We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

On March 14, 2013, claimant, a nurse, injured his low back when he was turning a patient. (Ex. 97). The self-insured employer accepted a lumbar strain and an L4-5 disc extrusion. (Ex. 174).

On July 25, 2014, Dr. Bobeck, claimant's attending surgeon, performed a right L4-5 microdiscectomy. (Ex. 165). On October 9, 2014, Dr. Bobeck declared claimant medically stationary without permanent impairment. (Ex. 169).

On April 22, 2015, a Notice of Closure awarded 9 percent whole person impairment for the accepted conditions based upon the lumbar surgery.¹ (Exs. 172-2, 175, 176). Claimant requested reconsideration.

On July 18, 2015, a medical arbiter panel attributed zero percent of its impairment findings to the accepted lumbar strain and L4-5 disc extrusion. (Ex. 186-5). Instead, the panel attributed 75 percent of its findings to preexisting lumbar degenerative disc disease and spondylosis because of the "relatively

¹ The Division 35 Rules effective March 1, 2015, are applicable to determine permanent disability benefits. (WCD Admin. Order 15-053).

decreased lumbar extension in the setting of normal flexion” and axial mechanical back pain. (*Id.*) The panel also attributed 25 percent of its findings to physical deconditioning. (*Id.*)

Based on the arbiter panel’s report, an Order on Reconsideration awarded no additional permanent impairment beyond the 9 percent whole person impairment awarded for surgery under OAR 436-035-0350(2). (Ex. 187). Claimant requested a hearing.

The ALJ affirmed the Order on Reconsideration’s 9 percent permanent impairment award. The ALJ found no permanent limitations in claimant’s lumbar range of motion due to the compensable injury.

On review, claimant contends that the arbiters’ impairment findings concerning lumbar range of motion were: (1) improperly apportioned (because no legally cognizable preexisting conditions exist); or (2) improperly analyzed. He argues that no legally cognizable preexisting conditions exist because the record does not establish that his degenerative disc disease and/or spondylosis constitute arthritis, or that his prior treatment for these conditions contributed to his impairment.² For the following reasons, we affirm the Order on Reconsideration.

As the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the reconsideration process. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). He also has the burden of proving the nature and extent of his disability. ORS 656.266(1).

Evaluation of a worker’s permanent disability shall be as of the date of issuance of the reconsideration order. *See* ORS 656.283(6); *SAIF v. Hernandez*, 155 Or App 401, 406 (1998) (Board erred by failing to evaluate the claimant’s condition as of the date of reconsideration); *Nisar Ahmed*, 66 Van Natta 1368, 1377 (2014) (evaluation of the claimant’s work disability was as of the date of the reconsideration order).

A worker is entitled to a value for those findings of impairment that are permanent and caused by the accepted compensable condition and direct medical sequelae. ORS 656.268(15); OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (2004); *see also Stuart C. Yekel*, 67 Van Natta 1279, 1284

² While acknowledging *Claudia S. Stryker*, 67 Van Natta 1003, 1007 (2015), claimant also contends that apportionment is inappropriate here because the employer had not accepted or denied a combined condition. We adhere to our decision in *Stryker* that, under *Schleiss v. SAIF*, 354 Or 637 (2013), apportionment is appropriate (even in the absence of an accepted or denied combined condition) where the record supports the existence of a legally cognizable “preexisting condition.”

(2015) (finding that “statutory and administrative authority make clear that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions”). Where a worker has a superimposed or unrelated condition, only disability due to the compensable condition is rated under the “apportionment” rule. OAR 436-035-0013. If impairment is entirely due to causes that are not related to the compensable injury, a permanent impairment award is not appropriate. *Paula Magana-Marquez*, 66 Van Natta 1300, 1302 (2014), *aff’d*, *Magana-Marquez v. SAIF*, 276 Or App 32, 37 (2016) (where the claimant’s impairment was due solely to causes unrelated to the compensable injury, a permanent impairment award was not appropriate).³

On reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter’s findings, except where a preponderance of the medical evidence demonstrates that different findings made or ratified by the attending physician are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter’s findings. *See Hicks v. SAIF*, 194 Or App 655, *recons*, 196 Or App 146, 152 (2004). However, where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician’s impairment findings if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, regarding claimant’s reduced lumbar range of motion findings,⁴ the arbiter panel attributed zero percent of its examination findings to the accepted lumbar strain and L4-5 disc extrusion. Instead, the panel attributed its findings

³ We have previously determined that adhering to our holding in *Yekel* is the most administratively judicious approach, notwithstanding the court’s footnote in *Magana-Marquez*, 276 Or App at 34 n 2. *See William Snyder*, 68 Van Natta 199, 200 n 1 (2016). Moreover, a claimant who contends that the compensable conditions to be rated extend beyond those reflected in the Notice of Acceptance may object to the acceptance notice or initiate claims for new/omitted medical 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/accepted conditions. *See* ORS 656.262(7)(c); *Jonathan E. Ayers*, 56 Van Natta 1470, 1471 (2004).

⁴ We acknowledge claimant’s contention that the medical arbiter panel improperly invalidated the impairment findings related to his lateral bending because of its conclusion that it was inhibited by his “large body habitus.” (Ex. 186-3, -5). However, given our determination that the medical arbiter panel unambiguously attributed zero percent of its reduced range of motion findings to the accepted lumbar strain and L4-5 disc extrusion, it is unnecessary to address the validity of the lateral bending examination findings.

either to the preexisting lumbar degenerative disc disease and spondylosis (75 percent) or to physical deconditioning (25 percent). (Ex. 186-5). Thus, the panel ultimately did not relate any of its reduced lumbar range of motion findings to the compensable injury.⁵ Accordingly, applying OAR 436-035-0007(1)(b)(C),⁶ the Order on Reconsideration did not award any permanent impairment value for the reduced range of motion.

As noted above, claimant seeks an impairment value for the reduced range of lumbar motion that the panel attributed to his degenerative disc disease and spondylosis, as well as physical deconditioning, because those conditions do not qualify as legally cognizable preexisting conditions. We disagree.

To qualify as a “preexisting condition” in an initial injury claim, a condition must contribute to disability or a need for treatment and, unless the condition is arthritis or an arthritic condition, the worker must have been diagnosed with, or obtained medical services for, the condition before the initial injury. *See* ORS 656.005(24)(a); *Patty A. Stafford*, 62 Van Natta 2493, 2496 (2010).

Here, claimant’s degenerative conditions were previously diagnosed/treated, as was claimant’s “body habitus” (obesity). (Exs. 65, 66, 69, 71, 75-4, 84, 85, 90-2). Therefore, the record supports the existence of preexisting conditions. In any event, the medical arbiter panel did not attribute any of claimant’s loss of range of lumbar motion to either the accepted conditions or the compensable injury. (Ex. 186-5). Thus, claimant is not entitled to an additional permanent impairment award. *See Magana-Marquez*, 66 Van Natta at 1302 (where the claimant’s impairment was due solely to causes unrelated to the compensable injury, a permanent impairment award was not appropriate); *see also* OAR 436-035-0007(1)(b)(C). Accordingly, we affirm.

ORDER

The ALJ’s order dated January 27, 2016 is affirmed.

Entered at Salem, Oregon on August 9, 2016

⁵ Claimant relies on the panel’s findings and does not argue that other impairment findings should be used. In any event, a preponderance of the medical evidence does not demonstrate that the attending physician’s findings are more accurate or should be used. *See* OAR 436-035-0007(5); *Hicks*, 194 Or App at 152; *Maria S. Miller*, 60 Van Natta 1313, 1314 (2008).

⁶ OAR 436-035-0007(1)(b)(C) provides: “If loss of use or function of a body part or system is not caused in any part by the compensable injury, the loss is not due to the compensable injury and the worker is not eligible for an award of impairment.”