
In the Matter of the Compensation of
EVERETT L. DAVIS, Claimant
WCB Case No. 15-03374, 15-03373, 15-02054, 14-05165
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Mills's order that: (1) upheld the SAIF Corporation's denial of claimant's September 2013 injury claim for a right shoulder condition; and (2) upheld SAIF's denial of claimant's occupational disease claim for a right shoulder condition. On review, the issue is compensability.

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

In upholding SAIF's denials, the ALJ found claimant's history unreliable. Because the opinion of Dr. Sohn, claimant's treating physician who allegedly supported compensability, was based on that unreliable history, the ALJ concluded that his opinion was unpersuasive.

On review, claimant contends that his history is reliable and that Dr. Sohn's opinion persuasively established the compensability of his alleged September 2013 right shoulder injury and right shoulder occupational disease claims. For the following reasons, we affirm the ALJ's order.

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

Whether claimant established legal causation hinges principally on his credibility/reliability. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991). Here, the ALJ did not make express demeanor-based credibility findings. Where the issue of credibility concerns the

substance of a claimant's testimony, we are equally qualified to make our own credibility determination. *See Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987).

The ALJ reasoned that claimant's credibility was the determining factor in upholding SAIF's denials. The ALJ expressed concern that claimant's September 2013 incident report described the work event as a "near miss" as opposed to an "injury," and that he did not seek treatment for right shoulder symptoms until September 2014. (Ex. F). The ALJ explained that the incident report was consistent with the fact that claimant had not sought treatment or made a claim for compensation at the time of the alleged injury. In addition, the ALJ noted that claimant initially identified a second injury as occurring in April 2014, but then later determined that it actually took place in May 2014. The ALJ reasoned that claimant had treated in the interim with providers for unrelated conditions, but had never mentioned previous right shoulder issues. Finally, the ALJ expressed concern that, on seeking treatment in September 2014, claimant acknowledged the April and May 2014 dates, and not the September 2013 incident.

Claimant contends that, on seeking treatment in September 2014 with Dr. Chang, he referred to the September 2013 incident rather than the April or May 2014 dates. To support his proposition, he refers to his testimony that he reported the September 2013 incident, but not the May 2014 incident. (Tr. 20). He argues that Dr. Chang's September 2014 chart note reference to a "reported" injury supports the proposition that he was relaying the September 2013 incident.¹ (Ex. 4-1).

Yet, Dr. Chang's September 2014 chart note described an "April 2014" incident in which claimant was on the second step of his truck when his foot slipped and that he suffered a pull injury to the right shoulder. (Ex. 4). The 827 form of the same date (signed by claimant) noted that he slipped off truck steps while holding onto the "rail" with his right arm. (Ex. 7; Tr. 14).

Claimant testified that the incident occurring after May 7, 2014 was as noted in the 827 form. (Tr. 14, 16). When claimant treated with Dr. Sohn in January 2015, he similarly described an incident in May 2014 that involved slipping off the steps of his truck while his right hand grasped a "handle." (Ex. 21). However, when claimant completed the September 2013 incident report and testified, he described the event as holding onto the "steering wheel." (Ex. F; Tr. 13).

¹ Claimant conceded that he did not have an April 2014 work injury because he was off work for an unrelated back condition during that month.

Under these circumstances, we agree with the ALJ's finding that claimant referenced the alleged May 2014 incident, rather than the September 2013 incident, through his treatment.

In addition, claimant contends that the ALJ incorrectly found that, when he sought treatment, he had never acknowledged the prior shoulder injuries from February 2013 and September 2013. He renews his argument that the references to the April and May 2014 dates actually refer to the September 2013 mechanism of injury. As stated above, we disagree with that assessment.

Moreover, claimant argues that he did not report the February 2013 injury to his providers, because the symptoms were different. (Tr. 12). To that end, he relies on his testimony denying any prior right shoulder claims. (Tr. 11). Yet, he ultimately acknowledged having right shoulder pain associated with a February 2013 injury, and that he had filed an injury claim for his right shoulder. (Tr. 12-13). Considering these inconsistencies, we agree with the ALJ's assessment of the evidence bearing on claimant's credibility.

Based on our *de novo* review of the record, we find no persuasive reason to reject the ALJ's credibility finding. Consequently, we affirm the ALJ's determination that claimant did not provide a reliable history.

Under an injury theory, claimant has the burden of proving, by a preponderance of the evidence, that his September 2013 work injury was a material contributing cause of his disability or need for treatment of his right shoulder condition. ORS 656.005(7)(a); ORS 656.266(1). If the "otherwise compensable injury" combines with a preexisting condition, SAIF has the burden of establishing that the "otherwise compensable injury" was not the major contributing cause of claimant's disability/need for treatment of the combined condition. ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

In the alternative, under an occupational disease theory, claimant has the burden to establish that his employment conditions were the major contributing cause of his right shoulder condition. ORS 656.802(2)(a); ORS 656.266(1). The major contributing cause is the cause that contributes more than all other causes combined. *See Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995); *McGarrah v. SAIF*, 296 Or 145, 166 (1983).

Because of the disagreement regarding causation, this is a complex medical question that must be resolved on the basis of expert medical opinion. *SAIF v. Barnett*, 122 Or App 279, 283 (1993). We give more weight to medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Sohn is the only physician allegedly supporting compensability of claimant's claim as either an injury or an occupational disease. Claimant initially treated with Dr. Sohn in January 2015, when he reported a May 2014 date of injury when his feet slipped while pulling on a handle. (Ex. 21-1). Dr. Sohn subsequently signed a concurrence letter in which he agreed that claimant's shoulder injury while pulling on a "rail" occurred in September 2013. (Ex. 36-1). He also discussed claimant's difficulty in recalling the exact date of injury. (*Id.*) He did not find the delay in seeking treatment medically significant, because claimant reported the September 2013 incident. (Ex. 36-2). Although he opined that claimant's earlier "March 2013" right shoulder injury, a combination of injuries, and overall work as a truck driver "may have contributed," Dr. Sohn concluded that claimant's September 2013 work incident was the major contributing cause of his right shoulder condition and disability/need for treatment. (Ex. 36-3).

The parties subsequently deposed Dr. Sohn. (Ex. 39). He testified that he did not personally review many of the exhibits even though they had been sent to him. (Ex. 39-15). He was unaware that the September 2013 work event was marked as "near miss" rather than an injury, which he considered to be an unexpected response for someone that had been "truly injured." (Ex. 39-24, -34). He opined that it was equally likely that the September 2013 incident caused claimant's condition as the February 2013 incident. (Ex. 39-29 -30). However, he also stated that he could not tell whether the February 2013 incident, September 2013 incident, or degeneration were the sole cause of claimant's right shoulder condition. (Ex. 39-25-26). He also could not tell if the condition was acute or degenerative, but that claimant's condition was most likely related to the September 2013 incident because it was the most recent injury. (Ex. 39-31, -34).

After reviewing Dr. Sohn's opinion, we find that it is based on an inaccurate and incomplete history. Dr. Sohn's indication that claimant's September 2013 incident was the most recent incident conflicts with claimant's testimony, and the medical reports, which refer to a May 2014 incident. *See Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive). In addition, because the

history that claimant provided is unreliable, we conclude that Dr. Sohn's reliance on such a history renders his opinion unpersuasive. *See Miller*, 28 Or App at 476 (a physician's conclusions are valid as to the matter of causation only to the extent that the underlying basis of those opinions, the reports of the claimant as to the circumstances of the accident and the extent of the resulting injury, are accurate and truthful); *James D. Shirk*, 41 Van Natta 90, 93 (1989) (a physician's opinion based on a patient's history is only as reliable as the history is accurate).

In sum, for the reasons expressed above, and those set forth in the ALJ's order, we conclude that the record does not establish the compensability of the claimed right shoulder condition, under either an injury or occupational disease theory. Accordingly, we affirm.

ORDER

The ALJ's order dated March 11, 2016 is affirmed.

Entered at Salem, Oregon on December 6, 2016