

In the Matter of the Compensation of
EDGAR R. HIDALGO-REYES, Claimant

WCB Case No. 14-00622

ORDER ON REVIEW

Dunn & Roy PC, Claimant Attorneys
Law Offices of Kathryn R. Morton, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) set aside its denial of claimant's new/omitted condition claim for an L4-5 disc protrusion; and (2) awarded temporary disability benefits. On review, the issues are compensability and temporary disability.

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

In setting aside the insurer's denial, the ALJ found that claimant's consistent history of symptoms, the MRI findings, and the opinions of Dr. Duff and Dr. Brett persuasively established the existence of an L4-5 disc protrusion. The ALJ also reasoned that Dr. Mohabeer's testimony about his experience with patients who have a language barrier provided a reasonable explanation for claimant's exaggerated complaints.

The insurer contends that the record does not support the existence of the claimed L4-5 disc protrusion.¹ In doing so, the insurer refers to several physicians' comments about claimant's psychosocial issues, exaggerated complaints, inconsistent exam findings, and nonanatomic responses.

We acknowledge that claimant's first MRI was considered of "rather poor" quality by Dr. Lorber, a physiatrist. (Ex. 22-4). Nonetheless, an L4-5 disc protrusion was detected by the reading radiologist, Dr. Stoehr, and Dr. Duff, an orthopedic surgeon, who examined claimant at the insurer's request. (Exs. 8-1, 11-4-5).

¹ To prevail on his new/omitted medical condition claim, claimant must prove that the condition exists and that the work injury was a material contributing cause of his disability/need for treatment of the condition. See ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). On review, the insurer does not challenge the causal relationship between claimant's disc protrusion (should it be determined to exist) and his need for treatment/disability.

Moreover, the second MRI further confirmed an L4-5 disc protrusion. (Ex. 24). Based on this imaging finding, Dr. Rosenbaum, a neurosurgeon who conducted an examination for the insurer, acknowledged the L4-5 disc protrusion, although he considered it “insignificant” based on claimant’s exaggerated complaints. (Ex. 15-2). Similarly, Dr. Lohman, an orthopedist who also examined claimant at the insurer’s request, questioned claimant’s complaints, but did not dispute the existence of the L4-5 disc protrusion as documented in the MRI report. (Ex. 31-16).

Other physicians’ opinions support the existence of the claimed L4-5 disc protrusion. Dr. Duff, an orthopedic surgeon who examined claimant at the insurer’s request, explained that his “[d]iagnosis relative to the present injury is a lumbar strain with an L4-5 disc protrusion, most likely attributable to the same injury.” (Ex. 11-5).

Dr. Mohabeer, an occupational medicine physician who performed an examination at claimant’s request, also diagnosed an L4-5 disc protrusion, confirmed by MRI findings, and consistent with objective findings on examination. (Ex. 47-3). He attributed the L4-5 disc protrusion to claimant’s reported mechanism of injury. (Ex. 47-2).

We acknowledge that, in his deposition, Dr. Mohabeer recommended more “neurodiagnostic” testing for claimant and agreed that Dr. Rosenbaum had more expertise analyzing MRIs. (Ex. 49-14-15, -18). Dr. Mohabeer, however, also agreed, on a probable basis, that claimant’s work injury caused the L4-5 disc injury. (Ex. 49-42).²

Finally, Dr. Brett, a neurosurgeon, examined claimant and diagnosed an L4-5 disc protrusion. (Ex. 42-3). He attributed the L4-5 disc protrusion as “a direct result” of claimant’s work injury. (*Id.*) In doing so, he did not report any functional features that interfered with his examination.

² In offering his opinion, Dr. Mohabeer further observed that claimant’s language barrier provided a reasonable explanation for the exaggeration of some of his complaints. (Ex. 49-10-12). Based on Dr. Mohabeer’s un rebutted explanation, we consider this particular record to provide a reasonable explanation for claimant’s “embellished” complaints. (Ex. 49-10-11)

Thus, as demonstrated by the aforementioned summaries of the physicians' opinions, this record supports a conclusion that, while there may be reasons to question the extent of claimant's complaints, the claimed L4-5 disc protrusion exists.³ Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award is \$5,000, to be paid by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, the values of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fee, if any, incurred in finally prevailing over the denial, to be paid by the insurer. See ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

ORDER

The ALJ's order dated June 15, 2015 is affirmed. For services on review, claimant's attorney is awarded a reasonable attorney fee of \$5,000, payable by the insurer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer.

Entered at Salem, Oregon on February 2, 2016

³ As previously noted, the insurer has limited its argument to whether the evidence establishes the existence of the claimed condition. Thus, we have confined our analysis to that disputed component of the claim.