

In the Matter of the Compensation of
JASON D. NETHERTON, Claimant

WCB Case No. 14-04276

ORDER ON REVIEW

Julene M Quinn LLC, Claimant Attorneys
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Reviewing Panel: Members Weddell, Johnson and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that reduced an Order on Reconsideration's whole person permanent impairment award of 34 percent for a bilateral carpal tunnel syndrome condition to 4 percent. On review, the issue is permanent disability (impairment).

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

In affirming the Order on Reconsideration, the ALJ relied on the medical arbiter panel's impairment findings to rate claimant's permanent impairment. (Ex. 38-1). In doing so, the ALJ concluded that the findings of Dr. Solomon, claimant's attending physician, were not more accurate than those of the medical arbiter panel.

On review, claimant asserts that a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used to rate his permanent impairment. *See* OAR 436-035-0007(5). Specifically, he asserts that Dr. Solomon had the ability to examine the nature of claimant's hands before and after surgery. Moreover, he argues that Dr. Solomon considered not only the effects of the accepted condition, but also the treatment related to his accepted conditions. Finally, assuming we rely on the medical arbiter panel to determine impairment, he contends that apportionment of impairment is inappropriate. For the following reasons, we affirm the ALJ's order.

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, 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). Only findings of impairment that are permanent and caused by the accepted condition, direct medical sequela, or a condition directly resulting from the work injury may be used to rate impairment. OAR 436-035-0006(1), (2); OAR 436-035-0007(1); OAR 436-035-0013(1), (2); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (1994).

When we have expressly rejected other medical evidence concerning impairment and are left with only the medical arbiter's opinion that unambiguously attributes the claimant's permanent impairment to the compensable condition, "the medical arbiter's report provides the default determination of a claimant's impairment." *Hicks v. SAIF*, 194 Or App 655, *adh'd to as modified on recons*, 196 Or App 146,152 (2004); *cf. John C. Fowler*, 61 Van Natta 2218, 2221-22 (2009) (declining to rely on medical arbiter's report that contained ambiguities as to whether the impairment findings were due to the compensable conditions). 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).

Claimant contends that Dr. Solomon's findings were more accurate because he took not only claimant's accepted conditions into consideration, but also his surgical "treatment." (Exs. 33, 34). However, the medical arbiter panel also considered claimant's accepted conditions and related treatment. After reviewing his record and performing an examination, the medical arbiter panel concluded that claimant was not significantly limited in the repetitive use of the bilateral hands, wrists or forearms due to the accepted conditions and subsequent surgical treatment. (Ex. 37-4). Moreover, they determined that the range of motion (ROM) loss in his digits was due to claimant's "body habitus" rather than to the "accepted condition and subsequent surgery," but that his loss of motion in his wrists was related to his "accepted condition and subsequent surgery." (*Id.*)

Claimant further contends that Dr. Solomon's opinion establishes more accurate impairment findings for ROM loss in his digits because he treated him before and after his surgery. However, there is no indication that Dr. Solomon examined the ROM of claimant's digits before his surgery. Therefore, Dr. Solomon is not entitled to deference for these findings based on his examinations before and after surgery.

Based on the aforementioned reasoning, the medical arbiter panel's opinion was based not only on claimant's accepted conditions, but also considered his surgery. Under these circumstances, we do not consider Dr. Solomon's findings more accurate than those of the medical arbiter panel.

Finally, claimant argues that, under *Schleiss v. SAIF*, 354 Or 637 (2013), he is entitled to impairment ratings for the decreased ROM findings documented by the medical arbiter panel, because they did not identify any legally cognizable

“preexisting condition,” or attribute the decreased ROM findings to any such condition. According to claimant, *Schleiss* stands for the proposition that all permanent disability is rated unless a carrier accepts and denies a combined condition. For the following reasons, we disagree with claimant’s arguments.

Unlike in *Schleiss*, where there were permanent impairment findings due to the compensable injury, the medical arbiter panel’s opinion does not support such a causal relationship. See OAR 436-035-0007(1). Therefore, because claimant’s ROM impairment in his digits is due to causes unrelated to the compensable injury, a permanent impairment award for reduced ROM is not appropriate. See *William Snyder*, 68 Van Natta 199, 200 n 1(2016);¹ *Eugene Walters*, 67 Van Natta 1439, 1444 (2015); *Marla S. Scanlon*, 66 Van Natta 2060, 2061 (2014); *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).

Based on the foregoing reasons, we find that claimant has not met his burden of establishing error in the reconsideration process. See ORS 656.266(1); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Consequently, we affirm.

ORDER

The ALJ’s order dated April 20, 2015 is affirmed.

Entered at Salem, Oregon on February 24, 2016

¹ A footnote in *Magana-Marquez v. SAIF*, 276 Or App 32, 34 n 2 (2016), suggests that, based on *Brown v. SAIF*, 262 Or App 640, *rev allowed*, 356 Or 397 (2014), the proper focus for assessing a claimant’s entitlement to a permanent disability award is whether the permanent impairment or work disability is related to the compensable injury/occupational disease, rather than the accepted conditions. However we consider that footnote to be *dicta*. *Snyder*, 68 Van Natta at 200. Further, we have concluded that the most administratively judicious approach to this subject is to continue to adhere to the rationale of *Stuart C. Yekel*, 67 Van Natta 1270, 1282 (2015), unless the court rules to the contrary.