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In the Matter of the Compensation of  
**JEFFREY E. PENTECOST, Claimant**  
WCB Case No. 15-03967  
ORDER ON REVIEW  
Unrepresented Claimant  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant, *pro se*,<sup>1</sup> requests review of Administrative Law Judge (ALJ) Jacobson's order that: (1) declined to reopen the record for consideration of additional medical evidence from claimant submitted after the closure of the hearing record; and (2) found that claimant's medical services claim for a C4-5 fusion surgery was not causally related to his compensable injury. On review, the issues are the ALJ's evidentiary ruling and medical services.

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

After the record closed following the hearing, at which claimant was represented by counsel, and after the ALJ's order had issued, claimant submitted additional proposed evidence. The ALJ denied claimant's request to reopen the record and admit evidence that could have been produced at hearing.

On review, claimant challenges the ALJ's evidentiary ruling. Specifically, he requests that the ALJ be directed to admit Dr. Grewe's "post-hearing" responses.<sup>2</sup> Based on the following reasoning, we find no abuse of discretion in the ALJ's ruling.

Under OAR 438-007-0025, the ALJ may reopen the record before a request for review is filed or, if none is filed, before the time for requesting review expires. *See Jeffrey C. Bach*, 61 Van Natta 477, 481 (2009). The ALJ may reopen

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<sup>1</sup> Because claimant is currently unrepresented, he may wish to consult the Ombudsman for Injured Workers. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

DEPT OF CONSUMER & BUSINESS SERVICES  
OMBUDSMAN FOR INJURED WORKERS  
PO BOX 14480  
SALEM OR 97309-0405

<sup>2</sup> The proposed evidence consisted of a concurrence letter drafted by claimant and responded to by Dr. Grewe, as well as Dr. Grewe's notations on a copy of Dr. Rosenbaum's report. (*See* proposed Exhibit 75).

the record for consideration of newly-discovered evidence when the motion to reconsider states the nature of the new evidence and explains why it could not have been reasonably discovered and produced at hearing. OAR 438-007-0025. The ALJ's decision to reopen the record is discretionary. *Bach*, 61 Van Natta at 481. Accordingly, we review that ruling for an abuse of discretion. *Id.*

Here, claimant does not contend that the proposed evidence was unobtainable or that it could not have been produced at hearing.<sup>3</sup> Instead, he raises concerns about his former attorney's representation, arguing that the ALJ should have exercised her discretion to allow him to produce evidence that his former counsel should have obtained for admission at the hearing. However, claimant's concerns do not address whether such evidence was unobtainable or could not have been produced at hearing.<sup>4</sup> *E.g.*, *James E. Gore*, 45 Van Natta 1652 (1993) (“[E]vidence is not newly discovered merely because it was generated after the hearing.”).

Under such circumstances, we conclude that it was not an abuse of discretion for the ALJ to refuse to reopen the record to admit the proposed additional evidence.<sup>5</sup> *See Larry A. Scheel*, 61 Van Natta 2621, 2622 (2009) (no abuse of discretion for the ALJ to refuse to reopen the record for admission of proposed evidence, where there was no showing that the proposed evidence was not obtainable with due diligence before the hearing).

We turn to the medical service dispute. A carrier must generally cause to be provided medical services for conditions “caused in material part” by a compensable injury. ORS 656.245(1)(a). The “compensable injury” is the “work-related injury incident,” not the accepted condition. *See Brown v. SAIF*, 262 Or App 640, 652 (2014); *SAIF v. Carlos-Macias*, 262 Or App 629, 637 (2014). However, for combined or consequential conditions, the carrier is responsible for

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<sup>3</sup> At the conclusion of the hearing, claimant's former counsel did not object to the closure of the evidentiary record and did not request to submit additional evidence.

<sup>4</sup> Any concern about his prior legal representation is a matter between claimant and his former attorney. *See Karen L. Brown*, 65 Van Natta 145, 146 (2013).

<sup>5</sup> To the extent that claimant's references to “post-hearing” evidence could be interpreted as a motion to remand, we find no compelling reasons to take such an action. *See Marlon Bolanos-Guzman*, 59 Van Natta 2690, 2693 (2007) (no compelling reason to remand where proposed evidence was not unobtainable with due diligence at the time of the hearing and there was no abuse of discretion in the ALJ's evidentiary rulings).

only those medical services that are “directed to medical conditions caused in major part by the injury.” ORS 656.245(1)(a); *SAIF v. Sprague*, 346 Or 661, 673 (2009).

Relying on Dr. Rosenbaum’s opinion, the ALJ concluded that the C4-5 fusion surgery was not directed to a medical condition caused in major part by claimant’s 2008 compensable injury. On review, claimant disputes the ALJ’s conclusion. We disagree with claimant’s contention.

Here, it is undisputed that claimant’s 2008 compensable injury resulted in C5-6 and C6-7 fusions, which have now combined with preexisting degenerative spondylosis and a noncompensable C3-4 fusion. It is also undisputed that the C4-5 fusion surgery performed on July 31, 2015 by Dr. Grewe, claimant’s treating physician, was directed to that combined condition. (Exs. 52-5, 59, 68A). Accordingly, the issue is whether the combined condition to which the disputed medical service is directed is “caused in major part by the injury.” *Sprague*, 346 Or at 673; *Daniel B. Slater*, 66 Van Natta 335, 339 (2014).

Because of the conflicting medical opinions regarding the relative contribution of the compensable injury to the combined condition, the compensability issue presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). Where there is a dispute between medical experts, we give more weight to those opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008). The conclusions of a treating physician may be given greater weight if there are not persuasive reasons to do otherwise. *Weiland v. SAIF*, 64 Or App 810, 814 (1983). However, we may give more or less weight to the treating physician’s conclusions, depending on the record in the particular case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Dr. Rosenbaum, a neurosurgeon, explained that, although claimant’s work injury caused the need for a fusion at the C5-6 and C6-7 levels, which contributed to his current C4-5 condition, he also had preexisting degenerative disease (cervical spondylosis) and a nonwork related C3-4 fusion that also contributed. (Ex. 59-9, -11). Ultimately, Dr. Rosenbaum opined that “[i]t is the natural advance of his pre-existing degenerative changes (spondylosis) that is the major contributing cause of his current condition,” for which the C4-5 fusion surgery was directed. (Ex. 74-2).

Dr. Grewe, claimant's treating neurosurgeon, observed that claimant had "rapid acceleration of degenerative change that is now severe at C4-C5, that would be aggravated as a result of [the C5 through C7] fusions," and the C3-4 fusion also would be a contributing factor. (Ex. 52-5). Dr. Grewe also referred to claimant's history of laryngeal cancer radiation therapy and smoking that "could potentially contribute to the acceleration of degenerative changes at C4-C5." (*Id.*) Dr. Grewe did not delineate the relative contribution of the C5-6 fusion, the C6-7 fusion, the C3-4 fusion, or the preexisting degenerative disease (spondylosis). Thus, Dr. Grewe's statements do not persuasively support a conclusion that claimant's 2008 compensable injury was the major contributing cause of the need for the C4-5 fusion surgery.

In sum, based on the aforementioned reasoning, as well as that explained in the ALJ's order, this record does not persuasively establish the requisite causal relationship between the C4-5 fusion surgery and claimant's 2008 compensable injury.<sup>6</sup> Accordingly, we affirm.

#### ORDER

The ALJ's order dated December 30, 2015, as reconsidered on February 16, 2016, is affirmed.

Entered at Salem, Oregon on July 25, 2016

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<sup>6</sup> Claimant also referred to Dr. Silver's 2009 opinion that a C5-6 fusion could result in increased degenerative changes at C4-5, and ultimately cause a need for a C4-5 fusion. (Ex. 24-9). However, we agree with the ALJ's reasoning that Dr. Silver's 2009 opinion is speculative in relation to the current medical service dispute (which concerns a 2015 C4-5 discectomy/fusion) and, therefore, is not persuasive. *See Lyle R. King*, 58 Van Natta 840, 846 (2006) (speculative medical causation opinion found unpersuasive).