
In the Matter of the Compensation of
ROBIN B. WRIGHT, Claimant
WCB Case No. 15-01167
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) declined to admit claimant's affidavit (which was not submitted during the reconsideration proceeding); and (2) affirmed an Order on Reconsideration that awarded 15 percent whole person impairment and no work disability for his bilateral sensorineural hearing loss condition. On review, the issues are evidence and extent of permanent disability (impairment and work disability).

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

At the hearing level, claimant requested admission of his "post-reconsideration order" affidavit. (Ex. 14-5). The ALJ declined to admit claimant's affidavit, reasoning that it was evidence on an issue regarding a Notice of Closure that was not submitted at the reconsideration proceeding and did not arise out of the reconsideration order.

We review the ALJ's evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Charlotte A. Landers*, 60 Van Natta 1432, 1434 (2008). ORS 656.283(6) provides, in pertinent part:

"Evidence on an issue regarding a notice of closure that was not submitted at the reconsideration required by ORS 656.268 is not admissible at hearing, and issues that were not raised by a party to the reconsideration may not be raised at hearing unless the issue arises out of the reconsideration order itself. However, nothing in this section shall be construed to prevent or limit the right of a worker, insurer or self-insured employer to present the reconsideration record at hearing to establish by a preponderance of that evidence that the standards

adopted pursuant to ORS 656.726 for evaluation of the worker's permanent disability were incorrectly applied in the reconsideration order pursuant to ORS 656.268.”

Here, claimant concedes that his “post-reconsideration” affidavit was not a part of the reconsideration record. *See* OAR 436-030-0155(1). Nevertheless, citing *Nisar Ahmed*, 66 Van Natta 1368 (2014), he argues that the affidavit should be admitted because it is related to the ARU’s “factual finding,” which he asserts is an “issue” that arose out of the Order on Reconsideration. However, in *Ahmed*, the disputed exhibits *were* included in the reconsideration record. 66 Van Natta at 1376. We further noted that, because the disputed exhibits were included in the reconsideration record, it was unnecessary to determine whether “work disability” was an issue “arising out of the reconsideration order.” *Id.* at 1375 n 3.

In any event, even if the evidence offered by claimant addresses an *issue* that “[arose] out of the reconsideration order,” as he alleges, the statutes do not allow for the introduction of *evidence* that was not a part of the reconsideration record. ORS 656.268(8); ORS 656.283(6); *Aleksandr N. Makarenko*, 60 Van Natta 1776 (2008) (citing *Cathy M. Montgomery*, 48 Van Natta 1170 (1986)). Consequently, because the affidavit was not a part of the reconsideration record, the ALJ properly excluded it from the hearing record. ORS 656.283(6); *Kathryn A. Sanders*, 60 Van Natta 3275, 3277-78 (2008).

Accordingly, we find no abuse of discretion in the ALJ’s evidentiary ruling.

ORDER

The ALJ’s order dated August 31, 2015 is affirmed.

Entered at Salem, Oregon on March 24, 2016