
In the Matter of the Compensation of
RICKY J. MORIN, Claimant
WCB Case No. 14-04533
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning. Member Lanning specially concurs.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) admitted an addendum report from a carrier-arranged examining physician that was part of the "reconsideration record" (Exhibit 19A); and (2) increased an Order on Reconsideration's award of 18 percent whole person permanent impairment for a cervical condition to 21 percent. On review, the issues are the ALJ's evidentiary ruling and extent of permanent disability (impairment).

We adopt and affirm the ALJ's order with the following supplementation regarding the evidentiary issue.¹

Claimant argues that it was an abuse of discretion for the ALJ to admit Exhibit 19A into the hearing record after it was submitted by the SAIF Corporation on reconsideration of the ALJ's order. After conducting our review, we find no abuse of discretion.

ORS 656.283(6) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. That statute gives an ALJ broad discretion on determinations concerning the admissibility of evidence. *See, e.g., Brown v. SAIF*, 51 Or App 389, 394 (1981); *Stephen H. Johnson*, 55 Van Natta 3074, 3077 (2003). The ALJ's evidentiary discretion continues after the hearing and closure of the record, and we review "post-closure" evidentiary decisions for an abuse of discretion. *See OAR 438-007-0025(1)* (an ALJ may reopen the record and reconsider a decision before a request for review is filed or, if none is filed,

¹ We conclude that the ALJ properly apportioned claimant's permanent impairment based on existing case precedent. *See Steven R. Joll*, 68 Van Natta 524, 526 (2016); *Donald V. Burch*, 67 Van Natta 1866, 1870-71 (2015); *Susan Caren*, 67 Van Natta 1636, 1638 (2015); *Claudia S. Stryker*, 67 Van Natta 1003, 1007 (2015).

before the time for requesting review expires); *Rodney C. Walters*, 63 Van Natta 114 (2011) (it was within the ALJ's discretion to admit evidence that was submitted after the initial written argument); *Howard D. Smith*, 57 Van Natta 1796 (2005) (admission of "post-hearing" evidence was within the ALJ's discretion).

When an evidentiary ruling concerns a hearing request regarding an Order on Reconsideration, a factual finding concerning a document's presence in the reconsideration record is determinative regarding an ALJ's evidentiary ruling on its admissibility. *David S. Lund*, 61 Van Natta 1254, 1254 (2009), *aff'd on other grounds*, *Roseburg Forest Prods. v. Lund*, 245 Or App 65 (2011). Thus, considering the evidentiary limitations/rights regarding "reconsideration records" (as prescribed in ORS 656.283(6)), as a practical matter, an ALJ's "discretion" in admitting/excluding proposed evidence concerning reconsideration records is extremely narrow. *Id.* In other words, if an ALJ admits a document that was not contained in the reconsideration record, or, conversely, excludes a document that was contained in the reconsideration record, the ALJ's evidentiary ruling will likely be overruled on Board review as legal error. *Id.* at 1255. Nonetheless, because an ALJ's decision concerns an evidentiary matter, the appropriate review standard for any such ruling remains an examination of whether the ruling constitutes an abuse of discretion, even though in these "reconsideration record" situations, an ALJ's "discretion" is statutorily limited. *Id.*

Here, in admitting the disputed exhibit into the hearing record, the ALJ reasoned that, based on the specific issues initially raised by the parties, SAIF could not have reasonably expected that the exhibit would be relevant and material to the matters in dispute.² Moreover, the ALJ concluded that claimant was not unduly prejudiced by the timing of the report's submission because it was part of the reconsideration record and he was presumably aware of its existence before the hearing.

² SAIF filed the hearing request, challenging the "medically stationary" finding and temporary disability award granted by the Order on Reconsideration. Claimant did not file a cross-request for hearing, but rather subsequently challenged the reconsideration order's application of the "apportionment" rule (OAR 436-035-0013 (WCD Admin. Order 12-061; eff. January 1, 2013)) in evaluating his permanent impairment.

Our review of the record confirms the basis for the ALJ's conclusion. It is undisputed that the challenged exhibit was part of the reconsideration record.³ It is likewise uncontested that claimant was aware of the existence of the exhibit in question. Finally, the record does not support a finding that claimant was materially prejudiced by the admission of the exhibit, not only because it was part of the reconsideration record, but also because he had an opportunity to address the substantive matters expressed in that exhibit in his response to SAIF's submission.

Under these particular circumstances, we find no abuse of discretion in the ALJ's admission of the disputed exhibit. *See Nisar Ahmed*, 66 Van Natta 1368, 1376 (2014) (no abuse of discretion in ALJ's admission of the disputed exhibits where it was undisputed that the exhibits were part of the reconsideration record); *Kenneth P. Anderson*, 63 Van Natta 1496 (2011) (no abuse of discretion in ALJ's admission of disputed exhibits that were part of the reconsideration record because the carrier was aware of the existence of the exhibits and was not materially prejudiced by their admission); *Lund*, 61 Van Natta at 981.

Consequently, based on the aforementioned reasoning, the ALJ's order is affirmed.

ORDER

The ALJ's order dated February 13, 2015, as reconsidered March 9, 2015 and May 18, 2015, is affirmed.

Entered at Salem, Oregon on May 11, 2016

Member Lanning specially concurring.

For the reasons expressed in my dissent in *Claudia S. Stryker*, 67 Van Natta 1003, 1008-1011 (2015) (Members Lanning and Weddell dissenting), I do not agree that permanent impairment can be apportioned unless a combined condition has been accepted and denied. However, under the principles of *stare decisis*, I follow the holding in *Stryker* and concur with the outcome in this case.

³ The record for the reconsideration proceeding includes all documents and other material relied upon in issuing the Order on Reconsideration as well as any additional material submitted by the parties, but not considered in the reconsideration proceeding. OAR 436-030-0155(1). The record consists of all documents and material received and date stamped by the Director before issuance of the Order on Reconsideration. OAR 436-030-0155(1)(a).