
In the Matter of the Compensation of
ERNESTO LEON-LEMUS, Claimant
WCB Case No. 15-04912
ORDER ON REVIEW
Pancic Law, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that affirmed an Order on Reconsideration's award of 9 percent whole person permanent impairment for right shoulder conditions. On review, the issue is extent of permanent disability (impairment). We modify.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as supplemented below.

In October 1998, claimant sustained a prior compensable injury, which was accepted as a right shoulder strain. (Ex. 3). The medical records identified right shoulder tenderness and a separation. (Ex. 2).

In October 2009, claimant had a right shoulder imaging study, which showed no bone, joint, or soft tissue abnormalities. (Ex. 4).

In June 2013, claimant sustained a second right shoulder work injury. (Exs. 8, 19). The SAIF Corporation initially accepted the claim for right shoulder tendonitis. (Ex. 19).

In January 30, 2014, Dr. DiPaola, orthopedic surgeon, performed right shoulder surgery. (Ex. 24). He diagnosed: (1) superior labral anteroposterior tear; (2) type 1 anteroinferior labral tear; (3) acute supraspinatus rotator cuff full thickness bursal-sided rotator cuff tear, work-related; (4) bony subacromial impingement, preexisting and non-work-related; and (5) absent biceps tendon. (*Id.*)

In February 2014, SAIF modified its Notice of Acceptance to include a right full thickness supraspinatus tendon tear. (Ex. 27).

In December 2014, Dr. DiPaola performed an extensive debridement, a complete synovectomy (capsulotomy), and manipulation under anesthesia of claimant's right shoulder. (Ex. 43). Dr. DiPaola diagnosed adhesive capsulitis secondary to claimant's work-related rotator cuff and labral repairs. (*Id.*)

In May 2015, Dr. DiPaola performed a closing examination. (Ex. 50). He released claimant to perform all pre-injury work activities. (Ex. 50-2). On examination, claimant had limited right shoulder range of motion. (*Id.*) Dr. DiPaola attributed all of claimant's impairment to his June 2013 work injury. (Exs. 50-2-3, 51).

In June 2015, SAIF issued a Notice of Closure that awarded 8 percent whole person impairment. (Ex. 52-3). Thereafter, claimant requested reconsideration and a medical arbiter examination. (Ex. 57).

Subsequently, claimant complained of increasing right shoulder burning and radiating pain. (Exs. 55, 56). Claimant had an MRI, which was negative for any disruption of his surgical repairs. (Ex. 58-1).

In September 2015, Dr. Borman, performed a medical arbiter examination. (Ex. 59). Claimant had decreased range of motion in the right shoulder. (Ex. 59-6-7). He apportioned 50 percent of claimant's impairment to his June 2013 work injury and 50 percent to the preexisting right shoulder problems in 1998 and 2009. (Ex. 59-9).

In October 2015, a reconsideration order modified the Notice of Closure, increasing claimant's impairment to 9 percent whole person impairment. (Ex. 60-4). In doing so, the Appellate Review Unit (ARU) relied on Dr. Borman's impairment findings and the "apportionment" rule in OAR 436-035-0013. (Ex. 60-3). Claimant received a 5 percent impairment award for surgical intervention under OAR 436-035-0011(3). (*Id.*) His total impairment award of 7 percent was reduced to 4 percent after Dr. Borman attributed 50 percent of claimant's impairment to preexisting right shoulder problems. (*Id.*) Claimant requested a hearing.

The ALJ concluded that the ARU properly apportioned claimant's permanent impairment findings. The ALJ reasoned that, because claimant had previously treated for his right shoulder, he had qualified "preexisting conditions" under ORS 656.005(24)(a)(A).

On review, claimant contests the ALJ's application of the "apportionment" rule. For the following reasons, we conclude that apportionment of claimant's impairment is not appropriate.

As the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the reconsideration process. *See Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000). He also has the burden of proving the nature and extent of his disability. ORS 656.266(1).

Evaluation of a worker's permanent disability shall be as of the date of issuance of the reconsideration order. *See* ORS 656.283(6); *SAIF v. Hernandez*, 155 Or App 401, 406 (1998) (Board erred by failing to evaluate the claimant's condition as of the date of reconsideration); *Nisar Ahmed*, 66 Van Natta 1368, 1377 (2014) (evaluation of the claimant's work disability was as of the date of the reconsideration order).

A worker is entitled to a value for those findings of impairment that are permanent and caused by the accepted compensable condition and direct medical sequelae. ORS 656.268(15); OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (2004); *see also Stuart C. Yekel*, 67 Van Natta 1279, 1284 (2015) (finding that "statutory and administrative authority make clear that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions"). Where a worker has a superimposed or unrelated condition, only disability due to the compensable condition is rated under the "apportionment" rule. OAR 436-035-0013. If impairment is entirely due to causes that are not related to the compensable injury, a permanent impairment award is not appropriate. *Paula Magana-Marquez*, 66 Van Natta 1300, 1302 (2014), *aff'd*, *Magana-Marquez v. SAIF*, 276 Or App 32, 37 (2016).

On reconsideration, where a medical arbiter is used, impairment is established by the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings made or ratified by the attending physician 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). Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's findings. *See Hicks v. SAIF*, 194 Or App 655, *recons*, 196 Or App 146, 152 (2004). 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).

To qualify as a “preexisting condition,” a condition must contribute to disability or a need for treatment and, unless the condition is arthritis or an arthritic condition, the worker must have been diagnosed with, or obtained medical services for, the condition before the initial injury. *See* ORS 656.005(24)(a); *Patty A. Stafford*, 62 Van Natta 2493, 2496 (2010).

As noted above, claimant received medical treatment for his right shoulder in 1998 and 2009. (Exs. 2, 4). However, the record does not support a conclusion that claimant had a right shoulder preexisting condition that contributed to his current disability/need for treatment. *See Stafford*, 62 Van Natta at 2496 (2010); *cf. Catherine E. Adler*, 68 Van Natta 264 (2016) (a legally cognizable “preexisting condition” existed where the record supported that the previously treated condition contributed to the claimant’s current disability/need for treatment).

Under such circumstances, the record does not establish that claimant’s previously treated right shoulder conditions were legally cognizable “preexisting conditions.” Accordingly, we do not apportion claimant’s impairment. *See Schleiss v. SAIF*, 354 Or 637, 655 (2013).

The employer contends that, if apportionment is not appropriate, we must utilize the attending physician’s findings in rating permanent impairment. However, based on our review of the medical evidence, Dr. DiPaola’s findings were not more accurate than the medical arbiter’s findings. OAR 436-035-0007(5); *Banderas*, 252 Or App at 144-45. Consequently, we rely on the medical arbiter’s opinion to determine claimant’s permanent impairment.

Dr. Borman’s range of motion impairment findings establishes that claimant is entitled to 12 percent impairment. (Ex. 60-3). Specifically, claimant’s range of motion impairment (without 50 percent apportionment) is rated at 7 percent, in addition to a 5 percent impairment value for surgical intervention. (*Id.*)

In conclusion, based on the aforementioned reasoning, we conclude that the apportionment of claimant’s permanent impairment findings was not appropriate. *See* OAR 436-035-0013; *Joseph Wagner*, 66 Van Natta 485 (2014). Consequently, claimant is entitled to a 12 percent whole person impairment award. Accordingly, we modify claimant’s impairment award.

Because our order results in increased compensation, for services at the hearing level and on Board review, claimant’s counsel is awarded an “out-of-compensation” attorney fee equal to 25 percent of the increased compensation

created by this order (*i.e.*, the 3 percent permanent impairment award) not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(5); OAR 438-015-0055(2).

ORDER

The ALJ's order dated March 11, 2016 is modified. In addition to the ALJ's and the Order on Reconsideration's award of 9 percent whole person impairment, claimant is awarded 3 percent for a total award of 12 percent whole person impairment. Claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$6,000, payable directly to claimant's counsel.

Entered at Salem, Oregon on September 21, 2016