
In the Matter of the Compensation of
JESUS PENA, Claimant
WCB Case No. 16-01027
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that affirmed an Order on Reconsideration that awarded no permanent disability for his cervical, thoracic, and lumbar spine conditions. On review, the issue is extent of permanent disability (impairment and work disability).

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

In affirming the February 18, 2016 Order on Reconsideration, the ALJ found that the record did not establish that a surveillance video provided by the Workers' Compensation Division (WCD) for the medical arbiter panel review was fully reviewed by Dr. Heitsch (claimant's attending physician) in compliance with OAR 436-030-0155(4)(a).¹ Reasoning that the medical arbiter panel did not rely solely on the surveillance video in determining claimant's impairment findings to be invalid, and that the record did not demonstrate that Dr. Heitsch's findings were more accurate, the ALJ nonetheless concluded that claimant did not establish error in the Appellate Review Unit's (ARU's) reliance on the medical arbiter panel's opinion in rating his permanent disability.

On review, claimant argues that the medical arbiter panel's opinion should have been excluded from consideration because it was based on the surveillance video that had not been reviewed by a physician involved in his evaluation or treatment, as OAR 436-030-0155(4)(a) requires. Alternatively, he contends that Dr. Heitsch's impairment findings were more accurate and should be used to rate his permanent impairment. For the following reasons, we disagree with claimant's arguments.

¹ Pursuant to OAR 436-030-0155(4)(a) (WCD Admin Order 15-061, eff. November 17, 2015), "Surveillance video provided for arbiter review must have been viewed prior to claim closure by a physician involved in the evaluation or treatment of the worker."

Claimant has the burden to establish the extent of his permanent disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, he also has the burden to establish error in the reconsideration process. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000). The burden of establishing error in the reconsideration proceeding means identifying the ways that the standards for rating permanent disability were misapplied, and persuasively demonstrating that there was an error in the determination of the disability award. *Id.* at 183-84.

For the purpose of rating claimant's permanent impairment, only the opinions of his attending physician at the time of claim closure, any findings with which he or she concurred, and a medical arbiter's findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(8); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994). 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).

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). 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).

At the outset, the record establishes that the surveillance video DVD provided by the WCD for the medical arbiter panel review was not fully reviewed before claim closure by a physician involved in claimant's evaluation or treatment pursuant to OAR 436-030-0155(4)(a).² (Ex. 111).³ Nevertheless, for the following reasons, the medical arbiter panel's report is not excluded from consideration "as a matter of law" on this basis.

² Specifically, the surveillance video provided for arbiter review contained footage of claimant taken on June 13, 2013, June 17, 2013, May 20, 2014, August 5, 2014, August 17, 2014, and December 16, 2014. (Ex. 111). Drs. Duncan and Toal (who evaluated claimant at the self-insured

All parties have an opportunity to submit evidence regarding a worker's status at the time of claim closure into the record under ORS 656.268(6) within the timeframes allowed for processing the reconsideration request. *See* OAR 436-030-0115(4), (5), (7). The insurer must provide all documents pertaining to claim closure to WCD and the other parties. OAR 436-030-0135(1), (2); OAR 436-030-0155(5).

Here, claimant does not cite, and we do not find, any statutory authority, administrative rule, or case precedent to support the proposition that the medical arbiter panel's report should be "excluded from consideration" because the panel reviewed a surveillance video that did not comply with OAR 436-030-0155(4)(a). Instead, an insurer that does not provide information complying with the requirements set forth in OAR 436-030-0135, 436-030-0145, 436-030-0155, and 436-030-0165 may be assessed civil penalties, and such a failure may also be grounds for extending the reconsideration proceeding. OAR 436-030-0175(1). Thus, the rules do not outright preclude the consideration of the medical arbiter panel's report in rating claimant's permanent disability under these particular circumstances.

In addition, claimant has not established error in the reconsideration process by virtue of the ARU's reliance on the medical arbiter panel's report. We reason as follows.

The medical arbiter panel found decreased ranges of motion (ROM) in claimant's cervical, thoracic, and lumbar spine, but no loss of strength. (Ex. 145-3, -6-8). The panel stated that claimant was not significantly limited in the repetitive use of his spine due the accepted cervical, thoracic, and lumbar strain/sprain conditions. (Ex. 145-3).⁴ The arbiter panel noted that the surveillance

employer's request on December 16, 2014) viewed a surveillance video containing approximately three hours of footage of claimant taken on August 5 and 17, 2014, and stated that it did not indicate that claimant was having any back pain or restrictions. (Ex. 110-9). On January 26, 2015, Dr. Heitsch noted that he had "viewed the same video[.]" and explained that the three-hour video was not determinative of whether claimant had back pain or related limitations/restrictions. (Ex. 115-1-2). Because Drs. Duncan, Toal, and Heitsch referred only to the August 2014 dates, the record does not persuasively establish that they reviewed the entire surveillance video provided for the medical arbiter panel review.

³ The parties do not dispute that the surveillance video was submitted by WCD to the medical arbiter panel for review and, therefore, was a part of the reconsideration record. (*See* Ex. 145-3). OAR 436-030-0155(1), (3).

⁴ The employer accepted claimant's April 4, 2013 injury claim for "cervical, thoracic and lumbar strains/sprains." (Ex. 27-1).

video DVD provided by WCD “has had an impact” on their opinion regarding claimant’s functional capacity and validity. (Ex. 145-3). In concluding that the ROM findings were not valid for the purpose of measuring claimant’s permanent impairment, the arbiter panel explained:

“All motions performed today appear to be self-limited. [Claimant] demonstrated spontaneous range of motion greater than the measured values during portions of our encounter today including getting on and off the exam table and getting his tennis shoes back on his feet. Furthermore, the DVD provided by the Workers’ Compensation Division has been reviewed by all panel physicians. This again demonstrates greater cervical, thoracic, and lumbar motion than what was seen in today’s clinic. For these reasons, it is the impression of this panel that today’s examination of motion is not valid for the purpose of measuring permanent impairment.” (Ex. 145-4).

Pursuant to OAR 436-035-0007(11), findings of impairment that are determined to be ratable under the Director’s rules are rated unless the physician determines that the findings are invalid. When findings are determined to be invalid, the findings receive a value of zero. *Id.*

Here, the medical arbiter panel’s “invalidity” determination was not based solely on the surveillance video, but also on the panel’s own independent observations and findings during its examination. Specifically, the panel expressly stated that claimant’s motions appeared “self-limited,” and that he demonstrated greater ROM “getting on and off the exam table and getting his tennis shoes back on his feet” than the measured values during examination. (Ex. 145-4). The surveillance video *further* supported the panel’s impression that claimant’s ROM findings were invalid. (*Id.*) Because the medical arbiter panel determined claimant’s ROM findings to be invalid, those findings receive a value of zero. OAR 436-035-0007(11). We find no ambiguity in the medical arbiter panel’s opinion.

Moreover, we do not find that a preponderance of the medical evidence demonstrates that different findings by Dr. Heitsch (the attending physician) are more accurate and should be used to rate claimant’s permanent impairment. We reason as follows.

Dr. Heitsch noted that claimant's work injury (which resulted in intervertebral disc damage in addition to the accepted cervical, thoracic, and lumbar strains/sprains), preexisting degenerative arthritis and arthritic changes in the thoracic and lumbar spine, and history of "at least three prior back injuries" contributed to his residual impairment.⁵ (Ex. 127-2-5). Dr. Heitsch initially apportioned claimant's impairment findings as "60% from the current injury, 20% from degenerative arthritis, and 20% related to prior back injuries." (Ex. 127-5).⁶ He subsequently apportioned claimant's thoracic and lumbar spine findings as "80% related to the work injury and 20% to preexisting arthritic conditions" in those areas. (Ex. 133-1). In doing so, he stated that claimant's impairment was the result of the intervertebral disc injury, rather than the accepted sprain-strain injury. (Ex. 133-1-2). However, Dr. Heitsch did not explain why he no longer attributed any of the impairment findings to claimant's history of "at least three prior back injuries." (Ex. 127-5). Absent further explanation for this apparent inconsistency, we are not persuaded that Dr. Heitsch's impairment findings are more accurate than those of the medical arbiter panel. *Banderas*, 252 Or App at 144-45.

Based on the foregoing reasons, we rely on the medical arbiter panel's unambiguous impairment findings to rate claimant's permanent impairment. OAR 436-035-0007(5); *Hicks*, 196 Or App at 152. Because the arbiter panel determined claimant's impairment findings to be invalid, those findings receive a value of zero. OAR 436-035-0007(11). Therefore, claimant has not established an error in the reconsideration order's disability award. *Callow*, 171 Or App at 183-84. Consequently, we affirm.

ORDER

The ALJ's order dated October 24, 2016 is affirmed.

Entered at Salem, Oregon on April 18, 2017

⁵ Claimant reported a history of prior low back injury and treatment. (See Exs. 2, 4, 6-2).

⁶ Dr. Heitsch stated that claimant had no residual permanent impairment or restrictions in his cervical spine related to the work injury. (Exs. 127-3, 133).