

In the Matter of the Compensation of  
**CHERYL A. GRAHAM, Claimant**  
WCB Case No. 16-01633  
ORDER ON REVIEW  
Dale C Johnson, Claimant Attorneys  
SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Ousey.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that: (1) excluded a proposed exhibit (a copy of a prior ALJ's order concerning the previous closure of claimant's accepted claim); (2) admitted physicians' reports presented by the SAIF Corporation to allow it the last opportunity to present evidence concerning a "combined condition" issue; and (3) upheld SAIF's denial of claimant's new/omitted medical condition claim for a right subscapularis tear and right biceps subluxation. On review, the issues are evidence and compensability.

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

Evidentiary Rulings

Claimant sought admission of a prior ALJ's order, which had found that her claim had been prematurely closed concerning her accepted cervical and thoracic strains. (Tr. 3; Proposed Ex. 69). The ALJ excluded the proffered exhibit, reasoning that it was not relevant to the disputed issues.

In addition, claimant contends that the ALJ should have granted her objection to the admission of the rebuttal reports from Drs. Vetter and Button (Exs. 74 and 75) because, in forming their rebuttal opinions (contrary to the parties' colloquy at a prior hearing), those physicians considered more than Dr. Bear's operative report and opinion (Exs. 59 and 72).

Based on the following reasoning, we find no abuse of discretion in the ALJ's rulings.

We review the ALJ's evidentiary rulings for an abuse of discretion. *See SAIF v. Kurcin*, 334 Or 399, 406 (2002); *Michelle D. Johnson*, 69 Van Natta 1607, 1608 (2017). An 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.

ORS 656.283(6). If the record would support a decision by the ALJ to either grant or deny the motion, then the ALJ's ruling is not an abuse of discretion. *Kurcin*, 334 Or at 406; *Michael P. Zapel*, 57 Van Natta 1995, 1996 (2005).

Concerning the ALJ's exclusion of the prior ALJ's order (Ex. 69), we acknowledge claimant's contention that the prior order supports a finding that her accepted cervical and thoracic strains did not resolve within the timeframe for typical strains and, thus, evidenced the "severity" of the May 5, 2015 work injury. Yet, there is no medical opinion establishing the relevance of claimant's accepted back strain conditions to a determination of the cause of disability/need for treatment for the claimed shoulder conditions. See *SAIF Corp. v. Calder*, 157 Or App 224, 227-28 (1998) (Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record). Absent supporting medical evidence for claimant's contention, we find no abuse of discretion in the ALJ's evidentiary ruling.

We next address claimant's challenge to the admission of rebuttal opinions from Drs. Vetter and Button.

At the hearing, the record was left open for "rebuttal evidence from for Dr. Vetter and Dr. Button solely on the issue of whether or not there's a combined condition limited to that[.]" (Tr. 3). For purposes of their rebuttal opinions, Drs. Vetter and Button considered Dr. Bear's operative report (Ex. 59) and concurrence opinion, (Ex. 72), as well as each other's opinions, which were not available at the initial hearing.

SAIF has the burden of establishing that the May 5, 2015 work-related injury combined with claimant's statutory preexisting conditions and that the work injury was not the major contributing cause of the claimed conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Because the disputed reports addressed SAIF's statutory burden, the record supports a conclusion that the reports were within SAIF's right to the last presentation of evidence on its "combined condition" defense. See OAR 438-007-0023; *Kollias*, 233 Or App at 505; *Michael D. Fuller*, 64 Van Natta 627, 629 (2012). Furthermore, the ALJ offered claimant the opportunity to cross-examine Drs. Button and Vetter on their opinions. (Tr. 3). Claimant chose not to exercise that right. Under the circumstances, we find no abuse of discretion in the ALJ's admission of the disputed exhibits.

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## Compensability

The ALJ found that the opinions of Drs. Vetter and Button were more persuasive than Dr. Bear's opinion. Thus, the ALJ concluded that SAIF had met its burden of establishing that claimant's May 5, 2015 work injury was not the major contributing cause of disability/need for treatment of her claimed shoulder conditions. *See* ORS 656.266(2)(a).

On review, claimant contends that Dr. Bear's opinion persuasively established that the work injury was the major contributing cause of the claimed shoulder conditions. For the following reasons, we disagree.

To prevail on her new/omitted medical condition claim, claimant must prove that the claimed conditions exist,<sup>1</sup> and that the May 5, 2015, work injury was a material contributing cause of disability/need for treatment. ORS 656.005(7)(a); ORS 656.266(12); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant meets that burden and the medical evidence establishes that the "otherwise compensable injury" combined at any time with a "preexisting condition" to cause or prolong disability/need for treatment, SAIF has the burden of proving that the "otherwise compensable injury" was not the major contributing cause of the combined right shoulder conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505; *Scoggins*, 56 Van Natta at 2535. Under *Brown v. SAIF*, 361 Or at 282, the 'injury component of the phrase 'otherwise compensable injury,' in ORS 656.005(7)(a)(B) refers to a medical condition, not an accident.

Because of the disagreement between medical experts regarding the cause of claimant's disability/need for treatment of the claimed shoulder conditions, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Mathew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are 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).

There are three causation opinions in this record. The opinion of Dr. Bear, the treating orthopedic surgeon, supports a conclusion that the work injury was a material/major cause of disability/need for treatment for the claimed shoulder

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<sup>1</sup> The parties stipulated that the claimed right shoulder conditions exist. (Tr. 2).

conditions. (Exs. 56, 72 ). In contrast, the opinions of Drs. Vetter and Button, orthopedic surgeons, support a conclusion that claimant's statutory preexisting conditions, which include her previously treated fibromyalgia and arthritic conditions, combined with the May 5, 2015 work injury, but that the injury was never the major contributing cause of disability/need for treatment for the combined shoulder conditions. (Exs. 46-15, 57-2-3, 58-3, 74, 75).

Assuming, without deciding, that claimant has met her burden of proof, based on Dr. Vetter's and Dr. Button's well-reasoned opinions, we are persuaded that the work injury was not the major contributing cause of the disability/need for treatment of the combined conditions. We reason as follows.

On review, citing *Argonaut Ins. Co. v. Mageske*, 93 Or App 689 (1988) and *Weiland v. SAIF*, 63 Or App 810 (1983), claimant contends that Dr. Bear's opinion is entitled to greater probative weight because he treated claimant's claimed shoulder conditions and performed the surgery to repair those conditions. However, because Dr. Bear did not examine claimant until more than eight months after the work injury, his advantage as a treating physician is diminished. See *McIntyre v. Standard Utility Contractors, Inc.*, 135 Or App 298, 302 (1995) (treating physician's opinion found less persuasive when the physician did not examine the claimant immediately following the injury); *Amelia Diaz-Gallardo*, 67 Van Natta 347, 350 (2015) (treating physician's opinion found less persuasive than opinion of physician who had examined claimant closer in time to the injury).

Moreover, Dr. Bear's opinion does not appear to be based on any specific observations during surgery. (Ex. 72). Thus, we are not persuaded that Dr. Bear's causation opinion should be given greater probative weight as the treating surgeon. See *Debrah A. Jolley*, 64 Van Natta 875 (2012) (where treating surgeon's causation opinion was not based on surgical observations, no special deference accorded).

In contrast to Dr. Bear's opinion, Drs. Button's and Vetter's opinions persuasively explained that claimant's MRI findings were attributable to degenerative conditions and that the mechanism of her work injury (which involved "pulling" a 300-pound patient in a wheelchair up a small incline (Tr. 16-17, 51-52)) was inconsistent with causing the claimed right shoulder conditions. (Exs. 57-2, 58-2). Based on those persuasive opinions, the record does not establish that claimant's work injury was the major contributing cause of her disability/need for treatment for her claimed right shoulder conditions.

For the above reasons, as well as those expressed in the ALJ's order, the record persuasively establishes that claimant's May 5, 2015 work injury was not the major contributing cause of disability/need for treatment of the claimed combined shoulder conditions. Accordingly, we affirm the ALJ's decision upholding SAIF's denial of those conditions.

ORDER

The ALJ's order dated August 9, 2017 is affirmed.

Entered at Salem, Oregon on April 27, 2018