
In the Matter of the Compensation of
KATHLEEN I. BRADY, Claimant
WCB Case No. 17-04914, 17-00869
ORDER ON REVIEW
Moore & Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Woodford.

Claimant requests review of Administrative Law Judge (ALJ) Martha Brown's order that: (1) upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for a right rotator cuff tear; and (2) found that the medical services claim for a right shoulder arthroscopy was not compensable. On review, the issues are compensability and medical services. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ analyzed claimant's new/omitted medical condition claim as a "combined condition." *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a). In upholding SAIF's denial of the claim, the ALJ concluded that the opinions of Drs. Kovacevic, Teed, and Vetter persuasively established that claimant's work injury was not the "major contributing cause" of her disability/need for treatment for the combined condition. *Id.* Based on this finding, the ALJ also determined that SAIF was not responsible for the medical services claim.

On review, claimant contends that her right rotator cuff tear and her medical service claim are compensable. For the reasons explained below, we agree.¹

To establish the compensability of a new/omitted medical condition, claimant must prove that the claimed condition exists and that the work injury was a material contributing cause of the disability or need for treatment of the condition. ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977

¹ In light of our conclusion that the evidence establishes compensability of the claimed right shoulder rotator cuff tear, we need not address claimant's alternative argument that SAIF's denial should be set aside on procedural grounds.

(2006); *Maureen Y. Graves*, 57 Van Natta 2380 (2005).² If claimant makes such a showing, and the record establishes that the otherwise compensable injury combined with a “preexisting condition” to cause or prolong disability or a need for treatment, SAIF must prove that the combined condition is not compensable by showing that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Because SAIF has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *See Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007).

The assessment of the major contributing cause of the disability/need for treatment of a combined condition requires a comparison of the relative contribution of the preexisting condition and the work-related condition. *See Cummings v. SAIF*, 197 Or App 312, 318 (2005) (quoting *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995)). That determination is a complex medical question that must be resolved on the basis of expert medical opinion. *See Jackson County v. Wehren*, 186 Or App 555, 559 (2003). When presented with disagreement between medical experts, we give more weight to those opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

On review, there is no dispute regarding the existence of claimant’s right shoulder condition, or that the work injury was at least a material contributing cause of her disability/need for treatment of the right shoulder condition. Furthermore, there is no dispute that a combined right shoulder condition exists. Accordingly, the issue for determining compensability of the disputed claim is whether SAIF has persuasively established that claimant’s work injury was not the major contributing cause of her disability/need for treatment for the combined condition.

SAIF contends that the opinions of Drs. Kovacevic, Teed, and Vetter persuasively establish that the work injury was not the major contributing cause of claimant’s disability/need for treatment for the combined right shoulder rotator cuff tear condition. For the following reasons, we do not find those opinions sufficiently persuasive.

² SAIF invites us to modify the current legal standard for determining the compensability of a new/omitted medical condition claim to require proof that the work injury was a material contributing cause of the claimed condition itself, and not merely a material cause of disability/need for treatment for the claimed condition. *See Graves*, 57 Van Natta at 2381. After considering SAIF’s analysis, we adhere to the *Graves* rationale.

Dr. Teed, an orthopedic surgeon who examined claimant at SAIF's request, acknowledged that after claimant's 1995 right rotator cuff repair surgery, she was asymptomatic and continued to perform her normal work duties. (Ex. 41-6). He nonetheless concluded that claimant's right shoulder condition was unrelated to her November 2015 work injury,³ and, rather, "was secondary to [her] previous right rotator cuff injury and repair, as well as aging." (Exs. 41-6, -9, 50-2). He did not address claimant's absence of right shoulder symptoms from her 1995 surgery until her November 2015 work injury, nor did he explain why she suddenly developed symptoms after the work injury. (Ex. 41). Dr. Kovacevic, claimant's former treating physician, concurred with Dr. Teed's opinion and also did not address claimant's absence of right shoulder symptoms before her November 2015 work injury. (Ex. 49).

Contrary to Drs. Teed and Kovacevic, claimant's attending physician, Dr. Walton, opined that the absence of problems following claimant's 1995 surgery indicated a successful rotator cuff repair and that her prior surgery was not the cause of her current rotator cuff problems. (Ex. 51-1). Given Drs. Teed's and Kovacevic's lack of explanation for why claimant was asymptomatic from her 1995 surgery until her 2015 work injury, their opinions do not persuasively establish that the work injury was not the major contributing cause of claimant's disability/need for treatment for her combined right shoulder condition. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained and conclusory opinion as unpersuasive); *Tracy A. Jones*, 69 Van Natta 998, 999 (2017) (same).

Dr. Vetter, an orthopedic surgeon who examined claimant at SAIF's request, opined that claimant's 1995 surgery provided symptomatic relief but did not repair her right rotator cuff tear, which continued to exist since the surgery and, coupled with her degenerative changes, was the major contributing cause of her need for treatment after the November 2015 work injury. (Exs. 52-19, -20, 56-2). We do not find Dr. Vetter's opinion to be well reasoned for the following reasons.

Dr. Vetter understood that claimant's November 2015 work injury occurred after a patient stepped off a scale, lost her balance, and stumbled backward a few feet, sandwiching claimant between the patient and a door. (Exs. 52-15, 56-2). However, in addressing the plausibility of the mechanism of injury causing a rotator cuff tear, Dr. Vetter noted it was "well established" that "work-related rotator cuff

³ On December 8, 2015, SAIF accepted a nondisabling right shoulder contusion, right shoulder strain, and neck strain. (Ex. 25).

tears typically involve ‘awkward positions,’ meaning abduction beyond 60-degrees * * *. And, almost always the awkward positions combined with repetition and load.” (Ex. 56-2). Because claimant’s elbows were tucked in at her sides and there was “no lifting or pushing by [claimant],” Dr. Vetter concluded that claimant did not exert significant enough force with her arms to cause injury to the rotator cuff. (*Id.*) Because we find Dr. Vetter’s opinion to be based more on generalities than claimant’s specific circumstances, we discount his opinion. *See Sherman v. Western Employers Ins.*, 87 Or App 602 (1987) (physician’s comments that were general in nature and not addressed to the claimant’s situation in particular were found not persuasive); *Shelby N. Zoon*, 70 Van Natta 701, 706 (2018) (same).

In sum, for the reasons stated above, we are not persuaded that claimant’s work injury was not the major contributing cause of her disability/need for treatment for the combined condition.⁴ Accordingly, we set aside SAIF’s denial of the claimed right rotator cuff tear.

We turn to claimant’s medical services claim for a right shoulder arthroscopy. Claimant’s attending physician, Dr. Walton, recommended a right shoulder arthroscopic surgery with rotator cuff repair. (Exs. 35-6, 37). There is no dispute that the proposed surgery is directed to the right rotator cuff tear. Because we have determined that the right rotator cuff tear is compensable, it follows that the proposed surgery for that condition is likewise compensable. *See* ORS 656.245(1)(a); *Leobardo Gomez*, 65 Van Natta 2459, 2467 (2013). Consequently, we find that claimant’s right shoulder arthroscopy is related to the compensable injury.

In sum, for the reasons stated above, we conclude that claimant’s right shoulder condition is compensable and her right shoulder arthroscopy is related to the compensable injury. Consequently, we reverse.

Claimant’s attorney is entitled to an assessed fee for services at the hearing level and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services at the hearing level and on review is \$14,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant’s appellate

⁴ Because the evidence supporting SAIF’s burden of proof is unpersuasive, we need not address the persuasiveness of claimant’s treating physician, Dr. Walton. *See Johnnie E. Jones*, 67 Van Natta 731, 733 n 2 (2015); *Skirving*, 58 Van Natta at 324.

briefs), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of worker's compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated July 11, 2018 is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for processing according to law. Claimant's right shoulder arthroscopy is related to his compensable injury. For services at the hearing level and on review, claimant's attorney is awarded an assessed fee of \$14,500, to be paid by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on April 11, 2019