
In the Matter of the Compensation of
TABATHA A. YARBOROUGH, Claimant
WCB Case No. 17-05713
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
Goehler & Associates, Defense Attorneys

Reviewing Panel: Members Ousey and Woodford.

The insurer requests review of Administrative Law Judge (ALJ) Otto's order that set aside its denial of claimant's new/omitted medical condition claim for a low back condition. On review, the issue is compensability.¹

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

The ALJ set aside the insurer's denial of claimant's new/omitted condition claim for an L4-5 disc bulge, reasoning that claimant's treating physicians, Dr. Hassan and Dr. Puziss, persuasively established the compensability of the claimed condition.

On review, the insurer contends that Dr. Puziss's diagnoses of disc herniation and L4-5 disc protrusion are not consistent with the claimed L4-5 disc bulge. Further, the insurer argues that Dr. Puziss's opinion establishes that there was no need for treatment for the L4-5 disc condition (however it is described), and that the new/omitted medical condition claim is, thus, not compensable. Based on the following reasoning, we disagree with the insurer's contentions.

To prevail on her new/omitted medical condition claim, claimant must prove that the claimed conditions exist and that the September 2015 work injury was a material contributing cause of the disability/need for treatment for the claimed conditions. ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2381 (2005).

Because of the disagreement between medical experts regarding the compensability of the claimed conditions, the claim presents complex medical questions that must be resolved by expert medical opinion. *Barnett v. SAIF*,

¹ The insurer moves to strike claimant's respondent's brief as untimely filed. See OAR 438-011-0020(2). While claimant's brief was initially due on January 8, 2019, the due date was subsequently extended to January 15, 2019. Under such circumstances, claimant's brief, which was filed on January 15, 2019, was timely filed. Therefore, the insurer's motion to strike is denied.

122 Or App 279 (1993); *Matthew 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. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

Claimant must establish that the claimed “disc bulge” exists as a new/omitted medical condition, not that it is the best diagnosis to describe her condition. *See Tiffany Goosing*, 68 Van Natta 479, 485 (2016); *Elizabeth Wood*, 66 Van Natta 402, 404-05 (2014); *April L. Shabazz*, 60 Van Natta 2475, 2476-77 (2008).

Here, Dr. Wadley, the interpreting radiologist for claimant’s October 2017 MRI, read the diagnostic image as showing a “broad-based diffuse disc bulge” at L4-5. (Ex. 19-1). Later, Dr. Hasan, claimant’s then-attending physician, agreed with that diagnosis, noting that he did not agree with the conclusions of Dr. Deafenbaugh (that claimant’s symptoms were due to “non-physiologic signs” and symptom magnification), because claimant’s MRI showed a disc bulge at L4-5 and L5-S1. (Exs. 17-7, 22-1).

Subsequently, Dr. Hasan referred claimant to Dr. Puziss, an orthopedic surgeon, for further evaluation of her low back pain. (Ex. 25-2). Dr. Puziss diagnosed L4-5 and L5-S1 disc herniations (which were considered to be symptomatic) and described an L4 disc protrusion. (Ex. 25-4).

Further, Dr. Bell, an orthopedic surgeon who examined claimant at the insurer’s request, commented that the MRI showed disc bulges at L4-5 and L5-S1. (Ex. 36-6). Dr. Deafenbaugh also agreed with the MRI finding of an L4-5 disc bulge. (Ex. 52-4).

After reviewing these physician’s opinions, we reach the following conclusions.

We acknowledge that Dr. Puziss did not employ the term “disc bulge” in describing claimant’s L4-5 disc pathology. Nonetheless, we do not interpret his opinion as disputing the existence of an L4-5 disc bulge. In doing so, we note that no physician discussed any differentiation between the terms “bulge,” “protrusion,” and “herniation.” Thus, based on our review of the record, we consider Dr. Puziss to have employed the terms “herniation” and “protrusion” to designate the “best diagnos[es]” according to his opinion. *See Goosing*, 68 Van Natta at 485.

Accordingly, under these particular circumstances, we conclude that the terms “bulge,” “protrusion” and “herniation” represent diagnostic terms that were used interchangeably to designate the same L4-5 disc pathology that was the subject of claimant’s October 2017 new/omitted medical condition claim. (Ex. 24). Thus, we reject the insurer’s argument that Dr. Puziss’s opinion does not support the compensability of the claimed L4-5 disc “bulge.”

Finally, we address the insurer’s assertion that Dr. Puziss “directed that” no medical treatment was required for the L4-5 disc bulge. In support of its position, the insurer cites Dr. Puziss’s December 2017 chart note, which stated that “[i]t is more likely that an L5-S1 disc is symptomatic than that of L4-5 disc,” and his recommendation of an L5-S1 injection. (Exs. 40, 44, 46, 47). However, based on the following reasoning, we do not consider such statements supportive of a conclusion that there was no need for medical treatment for the claimed L4-5 condition.

While the abovementioned statement appears to discount symptoms from the L4-5 disc during Dr. Puziss’s December 2017 examination, earlier treatment records document such symptoms. For example, in November 2017, Dr. Puziss documented diminished left knee reflex, correlating them with claimant’s L4-5 disc condition. (Exs. 25, 29). Further, following his November 2017 evaluations, Dr. Puziss prescribed chiropractic therapy, medications, and work restrictions. (*Id.*) Based on our review of those records, we conclude that such treatment recommendations were due, at least in part, to the claimed L4-5 disc condition.

In any event, even assuming that Dr. Puziss did not recommend any medical treatment for the L4-5 disc in December 2017, the earlier treatment recommendations are sufficient to establish the compensability of the claimed condition. *See Braden v. SAIF*, 187 Or App 494, 500 (2003); *Kristie L. Haas*, 59 Van Natta 2761, 2764 (2007) (the initial compensability of a new/omitted medical condition claim is addressed, rather than later periods of compensability) for the claimed condition. Accordingly, the record persuasively establishes the compensability of the claimed L4-5 disc bulge condition. Therefore, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$4,250, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as

represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, incurred in finally prevailing over the denial, to be paid by the insurer. *See* ORS 656.386(2); OAR 436-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated October 18, 2018 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,250, to be paid by the insurer. 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 the insurer.

Entered at Salem, Oregon on April 23, 2019