

In the Matter of the Compensation of
TYLER N. BARNES, Claimant

WCB Case No. 18-01141, 18-01131

ORDER ON REVIEW

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Reviewing Panel: Members Woodford, Lanning, and Wold. Member Lanning dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Naugle's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a C5-6 herniated disc and C6 radiculopathy; and (2) found that a proposed surgery was causally related to claimant's compensable injury. On review, the issues are compensability and medical services. We reverse.

FINDINGS OF FACT

On June 12, 2017, claimant was injured at work when a tree limb fell on his head and left shoulder. (Ex. 5-1). On June 13, 2017, he sought emergency room treatment, complaining of head, neck, and left shoulder pain. (*Id.*) The employer accepted left shoulder and head contusions. (Ex. 11-1).

Over the next several months, claimant treated with Dr. Sandefur for left shoulder pain and left arm symptoms. (Exs. 16, 18, 19). Sometime between July and October 2017, claimant began experiencing right-sided symptoms in his neck and arms. (Tr. 13). On October 26, 2017, claimant reported to Dr. Sandefur an increase in pain and loss of motion in his cervical spine. (Ex. 21-1). He also reported experiencing pain radiating down both arms. (*Id.*) A November 16, 2017, MRI revealed a right C5-6 disc herniation. (Ex. 22-1).

On December 12, 2017, Dr. Floyd examined claimant. (Ex. 25). Dr. Floyd diagnosed C5-6 cervical disc herniation with radiculopathy. (Ex. 25-3). He opined that the work injury was the probable cause of those conditions. (*Id.*) In doing so, Dr. Floyd stated that claimant had experienced neck and arm pain, which was mostly right-sided, since the work injury. (Ex. 25-1). He noted that claimant was asymptomatic before the work injury and was a young man¹ with no degenerative neck conditions. (Ex. 25-3). Dr. Floyd requested authorization for a C5-6 cervical disc replacement to treat the C5-6 disc herniation. (Ex. 25-4).

¹ Claimant was 36 years old at hearing.

On January 3, 2018, Dr. Frank examined claimant at the employer's request. (Ex. 28). Dr. Frank diagnosed preexisting cervical spondylosis and a C5-6 disc herniation. (Ex. 28-18). He did not diagnose right C6 radiculopathy, noting that although Dr. Floyd's chart notes contained objective findings consistent with that diagnosis, those findings were not reproduced and claimant was not experiencing symptoms of radiculopathy. (Ex. 28-21).

Dr. Frank opined that the work injury was not a material contributing cause of the disability/need for treatment for the C5-6 disc herniation or any cervical radiculopathy. (Ex. 28-23, -24). He explained that claimant's initial symptoms after the work injury were in his left shoulder and the right-sided symptoms did not occur until several months after the injury. (*Id.*) Dr. Frank concluded that the C5-6 disc surgery requested by Dr. Frank would be for the right-sided symptoms and not related to the initial left-sided symptoms associated with the work injury. (Ex. 28-26, -27).

On January 9, 2018, Dr. Floyd disagreed with Dr. Frank's conclusions. (Exs. 28A, 28B). Specifically, he stated that Dr. Frank's neurological examination was terse and incomplete. (Ex. 28A-1). He also believed that claimant's right-sided symptoms began on the date of the injury. (Ex. 28B-1).

Dr. Sandefur concurred with Dr. Floyd's opinion, agreeing that the C5-6 disc herniation was the result of the work injury. (Ex. 32-2). He opined that the work injury caused the C5-6 disc herniation, and that the resultant physical therapy and claimant's return to modified work "combined with the initial work injury to cause further herniation at the C5-6 dis[c]." (*Id.*) He stated that the disc surgery was necessary to treat the C5-6 disc herniation and would resolve the majority of the head, neck, and arm pain. (*Id.*)

On April 23, 2018, Dr. Swanson examined claimant at the employer's request. (Ex. 34). Dr. Swanson diagnosed preexisting cervical spondylosis and a C5-6 disc herniation. (Ex. 34-16, -23). He did not diagnose C6 radiculopathy, noting a lack of consistent objective findings. (Ex. 34-23). He stated that the mechanism of injury was sufficient to cause a right-sided C5-6 herniated disc. (Ex. 34-26). However, he explained that because claimant had no immediate right upper extremity symptoms and none appeared until over four months after the work injury, it was medically improbable that the work injury was a material contributing cause of the C5-6 disc protrusion or any C6 radiculopathy. (*Id.*) For the same reason, Dr. Swanson stated that the work injury was not the material contributing cause of the need for C5-6 disc replacement surgery. (Ex. 34-29).

Thereafter, Dr. Frank responded to the opinions of Drs. Floyd and Sandefur. (Ex. 38A). Dr. Frank noted that, based on his 30 years of experience in neurosurgery, he had conducted a thorough neurological examination of claimant. (Ex. 38A-5). He disagreed with Dr. Floyd's statement that claimant's right-sided symptoms began at the time of the June 2017 work injury. (*Id.*) Specifically, Dr. Frank noted that the medical record did not mention right-sided symptoms until October 26, 2017, and that claimant reported to him that those symptoms did not begin until he returned to modified work. (*Id.*) Further, he disagreed with Dr. Sandefur's opinion that the work injury caused the C5-6 disc herniation, and that the resultant physical therapy and claimant's modified work caused further herniation of the disc. (*Id.*) In doing so, Dr. Frank reiterated that if claimant had sustained an acute C5-6 disc herniation, he would have contemporaneously had right-sided symptoms in his upper extremities and objective radicular findings on examination. (Ex. 38A-5, -6).

Claimant requested acceptance of a C5-6 herniated disc and C6 radiculopathy. (Ex. 29). The employer denied claimant's new/omitted medical condition claim for those conditions. (Ex. 31). Claimant requested a hearing. In addition, the Workers' Compensation Division issued a "Defer and Transfer Order," referring a causation issue to the Hearing Division regarding claimant's proposed C5-6 disc surgery.

CONCLUSIONS OF LAW AND OPINION

Finding the opinions of Drs. Floyd and Sandefur to be persuasive, the ALJ set aside the employer's denials. On review, the employer contends that the opinions of Drs. Floyd and Sandefur do not persuasively establish the compensability of the claimed C5-6 disc herniation and C6 radiculopathy conditions and the proposed C5-6 disc surgery. Based on the following reasoning, we agree with the employer's contention.

To prevail on his new/omitted medical condition claim, claimant must prove that the claimed conditions exist and that the June 12, 2017, 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 a complex medical questions that must be resolved by expert medical opinion. *Barnett v. SAIF*,

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).

Here, even assuming that the record establishes the existence of the claimed C5-6 disc herniation and C6 radiculopathy conditions, we find that the opinions of Drs. Floyd and Sandefur do not persuasively establish that the work injury was a material contributing cause of claimant's disability/need for treatment for those conditions.² We reason as follows.

Dr. Floyd opined that the work injury was the probable cause of the C5-6 disc herniation and C6 radiculopathy. In reaching that conclusion, Dr. Floyd twice stated that claimant had experienced right-sided neck and arm symptoms since the June 12, 2017, work injury. However, the record establishes that claimant did not experience right-sided neck and arm symptoms at the time of the work injury. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (physician's opinion that was based on an incomplete or inaccurate history was not persuasive). Moreover, because he relied on an inaccurate history, Dr. Floyd did not address the opinions of Drs. Frank and Swanson that the work injury was not a material contributing cause of the C5-6 disc herniation and C6 radiculopathy because claimant did not experience contemporaneous right-sided symptoms. *See Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008) (failure to rebut contrary opinion rendered physician's opinion unpersuasive); *Louise Richards*, 57 Van Natta 80, 81 (2005) (physician's opinion unpersuasive when he did not rebut or respond to contrary opinion in the record).

Dr. Sandefur opined that the work injury was a material cause of the C5-6 disc herniation. He stated that the work injury caused the initial C5-6 disc herniation and resultant physical therapy, and claimant's return to modified work later "combined with the initial work injury to cause further herniation at the C5-6 dis[c]." (Ex. 32-2). However, similar to Dr. Floyd, Dr. Sandefur did not respond to the opinion of Dr. Frank (supported by the opinion of Dr. Swanson) that if claimant had sustained an acute C5-6 disc herniation as a result of the work injury, he would have had contemporaneous right-sided symptoms in his upper extremity. *See Prater*, 60 Van Natta at 1556; *Richards*, 57 Van Natta at 81.

² The employer does not dispute the existence of the C5-6 disc herniation condition.

Under such circumstances, we consider the opinions of Drs. Floyd and Sandefur to be unpersuasive. Thus, the record does not establish that the work injury was a material contributing cause of the disability/need for treatment for the claimed C5-6 disc herniation and C6 radiculopathy conditions. Consequently, we reinstate the employer's denial.

We turn to the issue of medical services. ORS 656.245(1) provides, in part, that "for every compensable injury, the insurer or self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury." The phrase "compensable injury" as used in that provision refers to an "accepted condition." *SAIF v. Carlos-Macias*, 290 Or App 801, 804 (2018); *Garcia-Solis v. Farmers Ins. Co.*, 288 Or App 1, 5 (2017).

Here, Drs. Floyd and Sandefur opined that the proposed C5-6 cervical disc replacement surgery was directed at the C5-6 disc herniation. However, as discussed above, the record does not establish that the C5-6 disc herniation is compensable. Thus, the accepted conditions are claimant's accepted left shoulder and head contusions. Because the record does not establish that the proposed surgery was for, or materially related to, those accepted conditions, the surgery is not compensable.

In sum, the opinions of Drs. Floyd and Sandefur do not persuasively establish the compensability of the claimed C5-6 disc herniation and C6 radiculopathy conditions, or the proposed C5-6 disc replacement surgery. Consequently, we reverse.

ORDER

The ALJ's order dated July 5, 2018 is reversed. The employer's denial is reinstated and upheld. The C5-6 cervical disc surgery is not causally related to claimant's compensable injury. The ALJ's \$10,500 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on April 9, 2019

Member Lanning dissenting.

The majority concludes that the opinion of Dr. Sandefur does not persuasively establish the compensability of the claimed C5-6 disc herniation and C6 radiculopathy conditions or of the proposed C5-6 disc replacement surgery. Because I disagree with those conclusions, I respectfully dissent.

Unless there are persuasive reasons to do otherwise, we tend to give more weight to the opinion of claimant's treating physician. *Weiland v. SAIF*, 64 Or App 810, 814 (1983). However, we may properly give more or less weight to the opinion of the treating physician depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Emma I. Sims*, 63 Van Natta 1198, 1202 (2011) (declining to defer to treating surgeon's opinion in light of well reasoned opinions to the contrary).

Dr. Sandefur, claimant's treating physician, opined that the work injury was a material contributing cause of the disability/need for treatment for the claimed C5-6 disc herniation with radiculopathy. (Ex. 32-2). Dr. Sandefur stated that claimant's head and shoulder were hit by a tree branch causing the C5-6 disc herniation. (*Id.*) He explained the late onset of claimant's right-sided neck and arm symptoms by reasoning that, although the work injury initially caused the disc herniation, claimant's physical therapy and return to modified work caused further herniation of the C5-6 disc. (*Id.*) Accordingly, contrary to the majority's conclusion, I would find that Dr. Sandefur persuasively rebutted the opinions of Drs. Frank and Swanson that the work injury was not a material contributing cause of the claimed conditions because claimant did not experience right-sided symptoms until several months after the work injury. Under such circumstances, I find no reason not to defer to Dr. Sandefur's opinion.

Moreover, I would find the opinions of Drs. Frank and Swanson to be unpersuasive. Drs. Frank and Swanson concluded that the work injury was not a material contributing cause of the C5-6 disc herniation and C6 radiculopathy because claimant's right-sided symptoms developed more than four months after the June 12, 2017, work injury. (Exs. 34-26, 38A-3). However, claimant's un rebutted testimony explains that he began experiencing right-sided symptoms in mid-July, even though he did not report those symptoms to Dr. Sandefur until October 26, 2017. (Tr. 13). Under such circumstances, I would find the opinions of Drs. Frank and Swanson to be based on inaccurate histories. *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive).

Turning to the medical services issue, I would conclude that the proposed C5-6 disc replacement surgery is compensable. As the majority notes, the proposed surgery is compensable under ORS 656.245(1) if it is for a condition caused in material part by the compensable injury.

Here, Dr. Sandefur opined that the proposed C5-6 disc replacement surgery was necessary to treat the C5-6 disc herniation. As noted above, Dr. Sandefur's opinion persuasively establishes that the C5-6 disc condition is compensable. Thus, because I would find that the C5-6 disc herniation is compensable, it follows that the medical service for that condition is likewise compensable.

In sum, based on Dr. Sandefur's persuasive opinion, I would find that the claimed C5-6 herniated disc and C6 radiculopathy conditions, as well as the proposed C5-6 disc replacement surgery, are compensable. Because the majority concludes otherwise, I respectfully dissent.