
In the Matter of the Compensation of
JULIE E. NAKANDAKARE, Claimant
WCB Case No. 17-02452
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Woodford and Ousey.

Claimant requests review of Administrative Law Judge (ALJ) Somers's order that upheld the self-insured employer's "ceases" denial of her current combined left foot condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

The employer initially accepted an acute left forefoot sprain and first metatarsal phalange joint sprain resulting from claimant's January 24, 2017, work injury. (Ex. 34).

On June 5, 2017, the employer modified its acceptance to include: "[a]cute left forefoot sprain and first metatarsal phalange joint sprain combined with pre-existing, non-compensable degenerative arthritis of the metatarsophalangeal joint of the left great toe and hallux valgus bunion deformity effective January 24, 2017." (Ex. 38). On that same date, the employer issued a denial, stating that the purpose was to "deny compensability of [claimant's] current disability and need for treatment[.]" and that "[m]edical evidence indicates the January 24, 2017 acute left forefoot sprain and first metatarsal phalangeal joint sprain are no longer the major cause of your disability and need for treatment." (Ex. 37). Claimant requested a hearing.

At hearing, claimant challenged the validity of the combined condition acceptance and denial, arguing that there was no legally cognizable preexisting condition. She also contended that the medical evidence was insufficient to sustain the employer's burden of proof. *See* ORS 656.262(6)(c); ORS 656.266(2)(a).

The ALJ found the existence of a “preexisting condition.” *See* ORS 656.005(24)(a)(A). Addressing the merits of the employer’s denial, the ALJ concluded that the medical evidence established the necessary change in claimant’s circumstances or condition such that the accepted sprain component of the combined condition was no longer the major contributing cause of the disability or need for treatment of the combined condition. *Brown v. SAIF*, 361 Or 241, 282 (2017).

On review, claimant argues that the conclusory opinions of Drs. Mozena, Rothstein, Borman, and Cribbs are insufficient to establish a “change” in claimant’s circumstances to support the combined condition denial. For the following reasons, we conclude that the record does not persuasively establish a “change” in claimant’s circumstances.¹

ORS 656.262(6)(c) authorizes a carrier to deny an accepted combined condition if the “otherwise compensable injury” ceases to be the major contributing cause of the combined condition. In *Brown v. SAIF*, 361 Or 241, 282 (2017), the court concluded that the “otherwise compensable injury” is the previously accepted condition, rather than the work-related injury incident. Therefore, a carrier may deny the accepted combined condition if the medical condition that the carrier previously accepted ceases to be the major contributing cause of the combined condition. *Id.*

The word “ceases” presumes a change in the claimant’s condition or circumstances since the acceptance of the combined condition, such that the “otherwise compensable injury” is no longer the major contributing cause of disability or need for treatment of the combined condition. *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). The effective date of the combined condition acceptance provides the baseline for determining whether there has been a “change” in claimant’s condition or circumstances. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006).

Here, on June 5, 2017, the employer modified its acceptance to include claimant’s combined left foot condition effective January 24, 2017. (Ex. 38). Under such circumstances, January 24, 2017, constitutes the effective date for the acceptance of the combined condition. The employer also issued a denial on June 5, 2017, stating that the purpose was to “deny compensability of [claimant’s]

¹ Claimant also asserts that the record does not persuasively establish the presence of a statutory preexisting condition. For the reasons expressed in the ALJ’s order, we conclude that claimant has a statutory preexisting condition.

current disability and need for treatment[,]” and that “[m]edical evidence indicates the January 24, 2017 acute left forefoot sprain and first metatarsal phalangeal joint sprain are no longer the major cause of your disability and need for treatment.” (Ex. 37). Thus, in accordance with the *Brown* rationale, to support its denial under ORS 656.262(6)(c), the employer must prove a change in claimant’s condition or circumstances between January 24, 2017 (the effective date of its combined condition acceptance), and June 5, 2017 (the effective date of its denial), such that the previously accepted conditions (acute left forefoot sprain and first metatarsal phalangeal joint sprain) ceased to be the major contributing cause of the disability or need for treatment for the combined condition. ORS 656.262(6)(c); ORS 656.266(2)(a); *Brown*, 361 Or at 282.

Resolution of this causation issue is a complex medical question that must be resolved by expert medical opinion. *Uris v. Comp. Dep’t*, 247 Or 420, 424-36 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). We rely on medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

The employer relies on the opinions from Drs. Mozena, Rothstein, Borman, and Cribbs to establish a “change” in claimant’s condition to support its combined condition denial. For the following reasons, we find their opinions unpersuasive.

Dr. Rothstein opined that claimant may have sustained a sprain with the initial injury, and that sprains are acute inflammatory reactions to mild trauma. (Ex. 30-7, -8). However, he explained, by definition, they do not linger more than three to four months and should have resolved by the time of his examination. (Ex. 30-8). Dr. Rothstein concluded that, after two months from the initial onset of symptoms secondary to the mechanism of injury (the end of March 2017), the major contributing cause of claimant’s need for treatment/disability was her preexisting hallux valgus deformity. (Exs. 30-8, 51-2).

Subsequently, Dr. Rothstein opined that claimant’s acute sprains were initially the primary cause of claimant’s left foot disability/need for treatment. (Ex 51A-2). However, Dr. Rothstein reasoned that, by June 5, 2017, disability/need for treatment was caused exclusively by the preexisting arthritis of the left metatarsal phalangeal joint of the left great toe, because the acute strains had fully resolved. (*Id.*) In addition, Dr. Rothstein did not attribute claimant’s July 2017 bunionectomy surgery to the January 2017 work injury or sprains, but rather to the preexisting conditions. (Ex. 51A-2, -3).

At Dr. Rothstein's subsequent deposition, he stated that sprains typically heal within two months in a healthy individual treated conservatively, as claimant was. (Ex. 52-33). However, after considering claimant's hallux valgus deformity/bunion condition, he explained that it might take another month. (*Id.*) He reasoned that sprains, and their resulting symptoms, go away over time. (Ex. 52-25, -28). Moreover, he stated that claimant's bunion may have started hurting during the months between the January 2017 work injury and the July 2017 surgery. (Ex. 52-30). He also acknowledged that the findings of sprains and arthritis are the same; *i.e.*, swelling, pain, and limited motion. (Ex. 52-54).

After reviewing Dr. Rothstein's opinion, we consider it to be based on statistical factors and not on factors specific to claimant. Moreover, given his opinion that the physical findings on examination for the sprains and preexisting conditions were the same, we do not consider Dr. Rothstein to have adequately explained the "change" in claimant's circumstances. In other words, we do not find such general and unexplained reasoning persuasive. *See Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (little weight given to comments that were general in nature and not addressed to the claimant's particular situation); *Moe v. Ceiling Sys.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinions).

Dr. Borman diagnosed an aggravation of claimant's preexisting bunion deformity, in addition to preexisting degenerative arthritis. (Ex. 31-6-8). He concluded that, by the time of Dr. Feinblatt's March 27, 2017, exam, claimant's January 2017 work injury was no longer the major contributing cause of the combined left foot condition, but rather he attributed the need for treatment to the preexisting conditions. (Exs. 31-9, 49-2). Furthermore, at the time of his April 2017 evaluation, Dr. Borman reasoned that claimant's physical examination was most consistent with severe hallux valgus bunion deformity with degenerative arthritis, and that Dr. Feinblatt had documented that claimant's left foot pain had improved in March 2017, that a contusion had resolved, and that all manifestations were due to the bunion deformity. (Ex. 31-9).

We consider Dr. Borman's opinion to be insufficient to persuasively establish a "change" in claimant's condition or circumstances to support the combined condition denial. Specifically, Dr. Borman did not weigh the accepted sprain conditions in determining the major contributing cause of the need for treatment/disability for the explicitly accepted combined left foot condition; *i.e.*, "[a]cute left forefoot sprain and first metatarsal phalange joint sprain combined with pre-existing, non-compensable degenerative arthritis of the metatarsophalangeal

joint of the left great toe and hallux valgus bunion deformity[.]” Rather, his opinion focused on the January 2017 work incident. *See Brown*, 361 Or at 282; *Ayres*, 25 Or App at 803. Consequently, his opinion is unpersuasive.

In April 2017, Dr. Mozena reported that claimant experienced continued pain since her January 2017 work incident. (Ex. 26). Dr. Mozena opined that claimant should treat her severe bunion pain, and that she was medically stationary for her work injury. (*Id.*)

Subsequently, Dr. Mozena agreed with the diagnoses of the accepted sprain conditions. (Ex. 41-1). He opined that, by the time of Dr. Rothstein’s April 2017 examination, the work incident had ceased to be the major contributing cause of claimant’s need for treatment/disability. (Ex. 41-2). He reasoned that any ongoing left foot problems were secondary to claimant’s preexisting bunion/hallux valgus deformity because the sprains had resolved. (*Id.*)

We do not find Dr. Mozena’s opinion persuasive. Given Dr. Mozena’s notation of persistent symptoms, it is unclear how he arrived at the conclusion that the accepted sprain conditions had resolved. Moreover, he did not provide any information, based on claimant’s circumstances, that focused on a change in her condition. Without further explanation, we do not consider Dr. Mozena’s opinion to be well reasoned.

There are no other persuasive medical opinions supporting the employer’s burden.² *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007) (where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting the carrier’s denial must be persuasive). Consequently, we conclude that the medical evidence is insufficient to establish that the “otherwise compensable injury” ceased to be the major contributing cause of the need for treatment/disability for claimant’s combined left foot condition. Under such circumstances, the record does not persuasively

² Dr. Cribbs concurred with the opinions of Drs. Borman and Rothstein, as expressed in their April 24, 2017, and April 25, 2017, examinations. (Ex. 35). For the reasons expressed above, we find those opinions to be unpersuasive and, by extension, Dr. Cribbs’s opinion as well.

In addition, Dr. Cribbs offered a separate opinion, concluding that the sprains had resolved within three months of the January 2017 work injury. Yet, in doing so, Dr. Cribbs did not provide any additional explanation or point to claimant’s particular circumstances in support of the “change” in her condition. Thus, we find his opinion unpersuasive. *See Sherman*, 87 Or App at 606 (little probative weight given to comments that were general in nature and not addressed to the claimant’s particular situation); *Moe*, 44 Or App at 433 (rejecting unexplained or conclusory opinions).

establish that claimant's condition or circumstances changed between January 24, 2017, and June 5, 2017. Therefore, we set aside the employer's denial. *Bacon*, 208 Or App at 211; *Peggy S. Shelton*, 70 Van Natta 73 (2018). Accordingly, 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 \$17,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, his counsel's request, and the employer's objection), the complexity of the issue, the value of the interest involved, the risk that 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, if any, incurred in finally prevailing over the denial, to be paid by the employer. 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 April 18, 2018 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing in accordance with law. For services at the hearing level and on review, claimant's attorney is awarded an assessed fee of \$17,000, payable by the employer. 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 employer.

Entered at Salem, Oregon on February 12, 2019