In the Matter of the Compensation of
JASON BYBEE, Claimant
WCB Case No. 21-05245
ORDER ON REVIEW
Bennett Hartman Morris & Kaplan, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that affirmed an Order on Reconsideration that: (1) found that his injury claim for a COVID-19 condition was not prematurely closed; and (2) did not award permanent disability benefits for his COVID-19 condition. In the alternative, claimant requests remand to the ALJ for additional evidence taking. On review, the issues are premature closure, permanent disability (permanent impairment), and remand.

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

The ALJ found that there was sufficient information to close the claim and that the record did not persuasively establish that claimant was entitled to a permanent impairment award.[1] Accordingly, the ALJ affirmed the Order on Reconsideration.

On review, claimant contends that his injury claim was prematurely closed. Alternatively, he seeks a permanent impairment award.[2] Based on the following reasoning, we affirm the ALJ's order.

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[1] Claimant objects to the ALJ's admission of Exhibits 50A and 65A. However, claimant did not object to the admission of these exhibits at the hearing level. (Hearing Record). In fact, at the hearing level, the SAIF Corporation stipulated that Exhibits 50A and 65A were part of the reconsideration record and claimant did not challenge that statement. (*Id.*) Under such circumstances, we decline to address claimant's objection, which he raises for the first time on review. *See Fister v. South Hills Health Care*, 149 Or App 214, 218-19 (1997) (because the carrier had not objected to post-reconsideration evidence at the hearing, the Board should not have considered the carrier's argument that the evidence was inadmissible); *Stephanie A. Sherman*, 73 Van Natta 210, 211 n 2 (2021) (post-reconsideration evidence was considered on review because no party objected to its admission at the hearing level).

[2] We adopt the ALJ's reasoning and conclusions regarding the permanent impairment issue. On review, claimant references statements from Dr. Shih (a physician who evaluated claimant by video) and Mr. Thornton (a treating nurse practitioner) pertaining to his ongoing symptoms. (Exs. 63, 65, 68). However, only the medical arbiter's findings can be used to establish impairment, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or

Claimant has the burden of establishing the nature and extent of his disability. *See* ORS 656.266(1). As the party challenging the Order on Reconsideration, claimant must establish error in the reconsideration process. *See* ORS 656.283(6); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

ORS 656.268(1)(a) authorizes claim closure when "[t]he worker has become medically stationary and there is sufficient information to determine permanent disability[.]" *See also* OAR 436-030-0020(1)(a). For purposes of evaluating the validity of claim closure, only the accepted conditions (and any direct medical sequelae) can be considered. *See Kevin B. Vanboeckel*, 69 Van Natta 1390, 1392 (2017).

A condition is "medically stationary" if no further material improvement would reasonably be expected from medical treatment or the passage of time. *See* ORS 656.005(17). In addition, the medically stationary status of the claimant's condition is considered at the time of the Notice of Closure, without considering subsequent developments. *See Sullivan v. Argonaut Ins. Co.*, 73 Or App 694, 697 (1985); *Humzah Al-Rawas*, 71 Van Natta 1133, 1136 (2019). Whether a condition is medically stationary is primarily a medical question to be decided based on competent medical evidence, not limited to the opinion of the attending physician. *See Harmon v. SAIF*, 54 Or App 121, 125 (1981).

Here, on July 15, 2021 (before the SAIF Corporation's August 4, 2021, Notice of Closure), Dr. Sethi, an occupational medicine physician who examined claimant at SAIF's request, opined that claimant's COVID-19 condition was medically stationary and that no impairment was due to that condition. (Ex. 58-11). He explained that no further treatment was necessary and that claimant did not have medical sequelae related to the COVID-19 condition. (Ex. 58-11-12). In addition, Dr. Sethi stated that he did not anticipate that claimant would improve with further treatment. (Ex. 58-12). Moreover, on July 25, 2021, Ms. Crowder,

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impairment findings with which the attending physician has concurred, are more accurate and should be used. *See* OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Here, as stated in the ALJ's order, neither Dr. Harris (the medical arbiter) nor Ms. Crowder (the attending physician) attributed any impairment to the accepted COVID-19 condition. (Exs. 62, 71-9, 72-1). Therefore, the record does not persuasively establish that any impairment was caused in material part by the compensable injury. *See* ORS 656.214(1)(a); OAR 436-035-0007(1)(a); OAR 436-035-0013(1); *Robinette v. SAIF*, 360 Or 767, 782-83 (2022) (the claimant was not entitled to a permanent impairment award where the record did not persuasively establish that the medical arbiter's findings were caused in material part by the compensable injury).

claimant's attending physician, concurred with Dr. Sethi's opinions. (Ex. 62-1). She also stated that claimant's condition was medically stationary and that he did not have any impairment or medical sequelae related to the work injury. (*Id*.)

Under such circumstances, we find that the record persuasively establishes that the accepted COVID-19 condition was medically stationary at the time of closure and that SAIF had sufficient information to close the claim.[3] *See Danny T. Houser*, 70 Van Natta 848, 853-54 (2018) (a carrier had sufficient information to close a claim based on an attending physician's concurrence with an examining physician's "medically stationary" opinion and finding of no impairment). Consequently, SAIF's August 4, 2021, Notice of Closure was not premature. *Id*.

In the alternative, claimant requests remand to the ALJ for additional evidence taking. However, because the ALJ would be unable to consider additional evidence outside of the reconsideration record, such evidence is not reasonably likely to affect the outcome of the case. *See SAIF v. Avery*, 167 Or App 327, 333 (2000) (a compelling reason justifying remand to the ALJ exists only when the new evidence (among other things) is likely to affect the outcome of the case); *see also Joseph Wagner*, 66 Van Natta 485, 486 n 2 (2014) (remand to the ALJ for additional evidence taking was inappropriate because the ALJ would not be able to consider evidence outside of the reconsideration record). Therefore, remand is not appropriate. *See Avery*, 167 Or App at 333; *Wagner*, 66 Van Natta at 486 n 2.

In sum, for the aforementioned reasons and those articulated in the ALJ's order, we find that the record does not establish error in the reconsideration process.[4] *See Callow*, 171 Or App at 183; *Harris*, 70 Van Natta at 1105-06. Accordingly, we affirm the ALJ's order that affirmed the Order on Reconsideration.

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[3] Claimant contends that Dr. Shih's and Mr. Thornton's statements regarding claimant's ongoing symptoms establish that he was not medically stationary. (Exs. 63, 65, 68). However, neither Dr. Shih nor Mr. Thornton addressed whether claimant's condition was medically stationary. (*Id*.) Under such circumstances, these statements do not contravene Dr. Sethi's and Ms. Crowder's opinions that the accepted COVID-19 condition was medically stationary at the time of closure. *See Sherman*, 73 Van Natta at 128 (although the record included references to ongoing symptoms, closure was not premature where there was no contrary physician's opinion supporting a conclusion that the claimant's condition was not medically stationary); *Pennie Rickerd-Puckett*, 61 Van Natta 336, 340 (2009) ("medically stationary" does not mean that there is no longer a need for continuing medical care, but, rather, that no further material improvement would reasonably be expected from medical treatment or the passage of time).

[4] In reaching this conclusion, we acknowledge that the record includes references to claimant's cognitive difficulties and that Dr. Harris recommended a neuropsychologist examination to assess his cognitive function. (Exs. 68-1, 71-9). We also note that the Director's impairment rules do not

ORDER

The ALJ's order dated June 14, 2022, is affirmed.

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specifically mention COVID-19. *See* OAR 436-035-0001 – 436-035-0500. However, for the reasons stated above and those articulated in the ALJ's order, the record does not support a conclusion that any impairment was caused in material part by the COVID-19 condition. *See* ORS 656.214(1)(a); OAR 436-035-0007(1)(a); OAR 436-035-0013(1); *Robinette*, 360 Or at 782-83. Nevertheless, we emphasize that claimant may file a new or omitted medical condition claim for a consequential condition at any time. *See* ORS 656.262(6)(d); ORS 656.267; ORS 656.005(7)(a)(A).