
In the Matter of the Compensation of
JOYCE L. MELTON, Claimant
WCB Case No. 01-06035
ORDER ON REVIEW
Westmoreland & Mundorff, Claimant Attorneys
Hoffman Hart & Wagner, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) granted the self-insured employer's motion to continue the hearing to allow "post-hearing" medical reports from employer-arranged medical examiners; and (2) upheld the employer's denial of claimant's injury/occupational disease claim for a left shoulder/arm/upper back condition. In her appellant's brief, claimant requests that, in the alternative, the case be remanded to the Hearings Division for the taking of additional evidence. On review, the issues are the ALJ's evidentiary ruling, remand, and compensability.

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

Evidentiary Ruling

At the hearing, the employer's counsel requested a continuance to obtain additional medical reports from examining physicians, Dr. Schilperoort, orthopedic surgeon, and Dr. Williams, neurosurgeon. This request was based on claimant's "pre-hearing" submission of Exhibits 52 and 53, which diagnosed an allegedly "new condition" of left shoulder impingement syndrome for which claimant had recently undergone surgery. The employer's counsel also requested the right to cross-examine the authors of Exhibits 52 and 53: Dr. Dickinson, claimant's treating orthopedic surgeon, and Dr. Webb, claimant's family osteopathic physician. (Tr. 1 - 9). Claimant's counsel objected to a continuance, contending that earlier medical records mentioned positive impingement signs, and therefore, the impingement syndrome was not a "new diagnosis" or "new condition." (Tr. 4 - 5).

Following the taking of lay testimony, the ALJ granted the employer's counsel's continuance motion. Specifically, the ALJ allowed the employer to obtain reports from the examining physicians to address the newly diagnosed impingement syndrome and to cross-examine Drs. Webb and Dickinson regarding

Exhibits 52 and 53. Finally, the ALJ granted claimant the right to cross-examine the examining doctors on their new reports.¹ (Tr. 30 - 32).

On review, claimant argues that the ALJ abused her discretion in: (1) allowing the employer to submit “post-hearing” reports from the examining physicians; and (2) refusing to allow claimant an opportunity to submit “rebuttal” evidence. For the following reasons, we find no abuse of discretion.

ORS 656.283(7) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. The statute has been interpreted to give ALJs broad discretion in admitting or excluding evidence. *See Brown v. SAIF*, 51 Or App 389, 394 (1981); *Jesus J. Ferrer*, 53 Van Natta 703 (2001).

Here, we conclude that the ALJ did not abuse her discretion in allowing the continuance motion to allow the employer to obtain “post-hearing” reports to address the new impingement syndrome. *See SAIF v. Kurcin*, 334 Or 399 (2002) (because Board’s continuance rule stated that an ALJ “may” continue a hearing for further proceedings, Board’s standard of review was for abuse of discretion); *Deborah J. Moore*, 54 Van Natta 1944, 1946 (2002). The ALJ also allowed claimant’s counsel the opportunity to cross-examine the examining doctors regarding the new reports. Furthermore, the ALJ did not “refuse” to allow claimant the right to submit rebuttal evidence, but rather, the ALJ suggested that the parties arrange the depositions of Drs. Webb and/or Dickinson to allow them to present rebuttal evidence. Finally, claimant neither ultimately requested the right to obtain rebuttal evidence from either Dr. Webb or Dr. Dickinson nor did she seek to cross-examine the examining doctors regarding their new reports.²

¹ The ALJ allowed the employer to obtain the examining doctors’ reports addressing the impingement syndrome, but specifically stated that she did not want “any new doctors in the claim.” (Tr. 32). The ALJ also suggested that the parties submit the surgical records. Finally, the ALJ suggested that the parties try to arrange the depositions of Drs. Webb and Dickinson after the examining doctors’ reports so claimant could have them offer rebuttal evidence.

² Following the hearing, the employer’s counsel submitted two “post-hearing” reports by Dr. Schilperoord and a “post-hearing” response from Dr. Williams. The employer’s counsel also declined to depose either Dr. Webb or Dr. Dickinson. In her appellant’s brief, claimant contends that in a telephone conference, the ALJ refused claimant’s offer to submit additional evidence from claimant’s treating physicians (Drs. Webb and Dickinson). With the exception of this representation, claimant does not refer to any portion of the record to support this assertion. Furthermore, there were no additional rebuttal reports by Drs. Webb and Dickinson submitted by claimant. Accordingly, the record does not support a conclusion that the ALJ “refused” to allow claimant an opportunity to submit rebuttal evidence.

Under such circumstances, we find no abuse of discretion in the ALJ's evidentiary ruling.

Remand

On review, claimant seeks remand to allow for additional rebuttal evidence from her attending physicians. Based on the following reasoning, we conclude that remand is not warranted.

We may remand to the ALJ if the record has been improperly, incompletely or otherwise insufficiently developed. ORS 656.295(5). Remand is appropriate upon a showing of good cause or other compelling basis. *Kienow's Food Stores v. Lyster*, 79 Or App 416 (1986). To merit remand for consideration of additional evidence, it must clearly be shown that material evidence was not obtainable with due diligence at the time of the hearing and that the evidence is reasonably likely to affect the outcome of the case. *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *Metro Machinery Rigging v. Tallent*, 94 Or App 245, 249 (1988).

Here, we are not persuaded that the rebuttal evidence that claimant seeks to provide could not have been obtained with due diligence prior to closure of the hearing record. Specifically, following the hearing, the record lacks any correspondence from claimant's counsel (either before or after the closure of the record) requesting that the record remain open for additional rebuttal evidence. *See Robert A. Wilson*, 52 Van Natta 2225 (2000); *Tamara J. Fleshman*, 52 Van Natta 1918 (2000). Under such circumstances, we find no compelling reason to remand. Moreover, in light of the existing documentary and testimonial evidence already present in the record, we cannot conclude that the "potential" evidence that claimant proposes would likely affect the outcome regarding the compensability issue. *See Compton v. Weyerhaeuser Co.*, 301 Or at 646.

Accordingly, we conclude that the case has not been improperly, incompletely, or otherwise insufficiently developed. Consequently, it does not merit remand. ORS 656.295(5).

Compensability

The ALJ found claimant's left shoulder/arm/upper back conditions not compensable as either an occupational disease or injury claim. In so finding, the ALJ was not persuaded that claimant's work activities caused her to develop shoulder problems gradually over time. Therefore, the ALJ declined to rely on Dr. Webb's opinion that the major contributing cause of claimant's need for

treatment were her work activities. Analyzing the claim as an injury claim, the ALJ also concluded that the work incident was not the major cause of claimant's need for left shoulder treatment or disability for a "combined condition." We agree with the ALJ's conclusions.

Acknowledging that she has a preexisting condition, claimant agrees that her claim must be analyzed as a "combined condition." ORS 656.005(7)(a)(B); ORS 656.802(2)(b). To establish the compensability of her occupational disease claim, claimant must prove that work activities were the major contributing cause of the disputed conditions. ORS 656.802(2)(a). Because claimant's occupational disease claim is based on the worsening of a preexisting disease or condition pursuant to ORS 656.005(7), claimant must prove that her work activities were the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.802(2)(b).

To establish the compensability of her "combined condition" injury claim, claimant must show that the work incident was the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); *See SAIF v. Nehl*, 147 Or App 101, *on recon* 149 Or App 309 (1997), *rev den* 326 Or 329 (1998) (claim compensable under ORS 656.005(7)(a)(B) if work injury is the major contributing cause of disability and/ or need for treatment for the combined condition); *Verlyn L. Howland*, 54 Van Natta 1737 (2002).

Because of the multiple possible causes of claimant's current left shoulder condition, the causation issue presents a complex medical question that must be resolved on the basis of expert medical evidence. *See Uris v. Compensation Dept.*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 281 (1993). In evaluating the medical evidence concerning causation, we rely on those opinions which are both well-reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259 (1986). In addition, we generally give greater weight to the opinion of a worker's treating physician, absent persuasive reasons to do otherwise. *Weiland v. SAIF*, 64 Or App 810 (1983); *Darwin B. Lederer*, 53 Van Natta 974 n 2 (2001). However, we properly may or may not give greater 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).

On review, claimant contends that the opinions of her treating surgeon, Dr. Dickinson, and her treating physician, Dr. Webb, should be given special deference based on "their continuing treatment," and in Dr. Dickinson's case, the additional advantage of his having performed the surgery on her shoulder.

See Weiland v. SAIF, 64 Or App at 814; *Majeske v. Argonaut Insurance Co.*, 93 Or App 698, 702 (1988). Here, we find persuasive reasons not to give greater weight to the opinions of Drs. Dickinson and Webb. We base our conclusion on the following reasoning.

The ALJ found the opinions of Dr. Dickinson and Dr. Webb unpersuasive because they were based on an inaccurate history that claimant's left shoulder pain began after lifting a dog food bag.³ The ALJ also found Dr. Dickinson's subsequent opinion to be conclusory and not well-reasoned. We agree with the ALJ's evaluation of those opinions and likewise conclude that they are unpersuasive. *See Somers*, 77 Or App at 259 (persuasive medical opinions are based on accurate and complete history); *Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (medical opinion based on inaccurate information is discounted).

Although claimant argues that Dr. Dickinson's opinion is entitled to greater weight because he performed surgery on claimant's left shoulder, Dr. Dickinson's surgery report is not in the record and Dr. Dickinson does not refer to any surgical findings in his October 2001 opinion. (*See Ex. 52*). More importantly, the history he relied on was inaccurate, making his opinion unpersuasive. *See Dolores M. Guillen*, 52 Van Natta 131 (2000) (treating surgeon's causation opinion entitled to little weight where the history relied on was inaccurate).

Given the deficiencies in Dr. Webb's and Dr. Dickinson's opinions, we find that the record does not establish the compensability of claimant's left shoulder/arm/upper back conditions under a "combined condition" analysis. Therefore, whether analyzed as an injury or an occupational disease, the claim is not compensable. Accordingly, we affirm the ALJ's decision upholding the employer's denial.

ORDER

The ALJ's order dated May 31, 2002 is affirmed.

Entered at Salem, Oregon on January 28, 2003

³ Claimant's testimony was that her pain began in her left wrist, progressed gradually to her elbow, and finally to her left shoulder with an inability to lift occurring approximately 3 to 4 days before she sought medical treatment with Dr. Webb. (Tr. 17, 26 through 27).