
In the Matter of the Compensation of
TERRY D. STEWART, Claimant
WCB Case No. 02-06606
ORDER ON REVIEW
Rex Q Smith, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that: (1) declined to admit a "post-hearing" letter from Dr. Kimberley; and (2) upheld the SAIF Corporation's denial of claimant's groin injury claim. With his brief, claimant submits a copy of Dr. Kimberley's letter. We treat claimant's submission as a motion to remand. *See Judy A. Britton* 37 Van Natta 1262 (1985). On review, the issues are evidence/continuance, remand, and compensability. We deny the motion to remand and affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact and Procedural History."

CONCLUSIONS OF LAW AND OPINION

Evidence/Continuance

At the November 26, 2002 hearing, claimant asked the ALJ to leave the record open "for one or more appropriate medical visits," in hopes of obtaining a medical opinion regarding the cause of claimant's condition. (Tr. 1-7, 11, 35).

Over SAIF's objection, the ALJ ruled that the record would remain open for submission of medical evidence generated after a "follow-up" appointment with Dr. Ackerman, claimant's treating urologist, in about 3 months (with the understanding that the appointment with Dr. Ackerman first had to be approved by claimant's primary treating physician, Dr. Adelman). (Tr. 42, 47; *see* Tr. 40-41). Explaining that the record could not be left open indefinitely, the ALJ asked whether the appointment was scheduled. Claimant's counsel responded that he would let the ALJ know "if claimant is able to schedule the urology follow-up for as soon after January 1 as an appointment is available. If that is doable to have that scheduled, I will immediately obtain the chart note from that exam and I will forthwith submit a copy of the chart note* * * *." (Tr. 48; *see* Tr. 77, 80).

On December 21, 2002, claimant's attorney wrote to the ALJ and explained that claimant had been unable to schedule a follow-up appointment with his urologist, but that he had "every intention to follow up with medical visits to try to develop the evidence [on the causation issue]."

On January 16, 2002, SAIF responded, continuing its objection to the continuance and asked the ALJ to close the record and exclude further evidence. SAIF contended that claimant had not shown that the post-hearing evidence was unobtainable at hearing. Alternatively, SAIF asked the ALJ to provide a specific time line within which claimant must seek treatment and submit a related report.

On January 17, 2003, claimant's attorney informed the ALJ that claimant had a follow-up appointment with his urologist scheduled for February 11, 2003. Counsel did not know whether additional medical visits would be necessary, but he thought that Dr. Thiessen (a Kaiser physician who had not seen claimant) would be in a good position to formulate a considered causation opinion.

On January 18, 2003, claimant's attorney wrote to the ALJ, in part contending that claimant had been diligent in attempting to schedule his follow-up urology appointment. Then, on February 3, 2003, claimant's attorney informed the ALJ that Kaiser "wanted to" to postpone claimant's February 11, 2003 appointment.

On March 24, 2003, SAIF requested that the ALJ close the record and schedule closing arguments. SAIF acknowledged that claimant sought treatment on February 11, 2003, but it asserted that he did not request a causation opinion until March 18, 2003—almost four months after the hearing.

On March 25, 2003, claimant's attorney wrote to the ALJ, contending that he had exercised due diligence in seeking additional medical evidence and he had chosen Dr. Thiessen, "because he would not have to appear to disagree with any other doctor in order to opine that causation was probably the incident in question." Counsel indicated that he would submit Dr. Thiessen's letter when he received it and commented, "If it does not support compensability, the case is over."

On April 22, 2003, claimant's attorney submitted Proposed Exhibit 21, a March 31, 2003 letter from Dr. Thiessen (wherein the doctor declined to address causation); Proposed Exhibit 22, an April 17, 2003 record review letter from Dr. Kimberley; and two April 22, 2003 affidavits from claimant's attorney. Claimant's attorney also suggested written closing arguments.

SAIF objected to the proposed medical evidence, again contending that claimant had failed to establish that its substance was unobtainable at hearing. The employer also argued that Dr. Kimberley's April 17, 2003 record review was beyond the limited purpose for which the record had remained open; *i.e.*, to allow claimant to obtain additional evidence from the doctors who had examined and treated claimant for his condition. Moreover, SAIF contended that Dr. Kimberley's report was beyond the scope of the continuance, because claimant had conceded that the case was "over" if Dr. Thiessen did not support compensability. Thus, because Dr. Thiessen did not support compensability and Dr. Kimberley had not examined or treated claimant, SAIF urged the ALJ to exclude Kimberley's record review on these bases.

Claimant responded that Dr. Thiessen neither supported nor failed to support compensability—he simply refused to address causation. Claimant also disagreed that the record had remained open only for "input from Kaiser" and reasserted that he had exercised due diligence in waiting to solicit an opinion from a "non-Kaiser" physician, because it was reasonable to expect that claimant's Kaiser physicians would eventually address causation.

The ALJ admitted Dr. Ackerman's February 11, 2003 chart notes, a March 18, 2003 letter from claimant's counsel to Dr. Thiessen, and a March 31, 2003 letter from Dr. Thiessen to claimant's counsel. (Exs. 19-21). The ALJ explained. "The record was expressly left open for this type of diagnostic and causation analysis from the treating physicians." (Opinion and Order, p. 6).¹

However, the ALJ sustained SAIF's objection to Dr. Kimberley's April 17, 2003 file review letter, because it was not prepared in the normal course of claimant's treatment.² Moreover, the ALJ found that claimant had not demonstrated that Dr. Kimberley's opinion could not have been obtained with due diligence at the time of hearing (noting that it was not based on new diagnostic information generated after the hearing). *Id.*

On review, claimant contends that the ALJ erred in ruling that he lacked diligence in obtaining Dr. Kimberley's "post-hearing" file review letter.

¹ On review, SAIF does not object to the ALJ's admission of this evidence.

² The ALJ also sustained SAIF's objection to claimant's affidavit regarding the authenticity of Proposed Exhibit 22 (Dr. Kimberley's April 17, 2003 opinion letter). Claimant does not challenge this ruling on review.

Specifically, claimant contends that he established due diligence, because a reasonable person³ in his shoes would have expected his Kaiser treating physicians (Drs. Adelman and Ackerman) or Dr. Thiessen to provide the requested causation opinion. Consequently, claimant contends that due diligence did not require him to seek a causation opinion from a “non-treating” physician outside the Kaiser system until after the Kaiser doctors all refused to comment on causation. Claimant also argues that his groin injury claim is compensable, based on Proposed Exhibit 22, Dr. Kimberley’s “post-hearing” file review letter.

SAIF responds that the ALJ properly excluded Dr. Kimberley’s “post-hearing” file review letter, because the record remained open after the hearing only to allow claimant to obtain follow up medical evidence from his treating physicians. Because Dr. Kimberley’s letter exceeded the scope of that limited purpose, SAIF contends that the ALJ did not abuse her discretion by refusing to admit it. We agree with SAIF’s contentions.

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 ALJ has broad discretion with regard to the admissibility of evidence at hearing. *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ’s rulings on motions for continuance and his evidentiary rulings for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Jesus M. Delatorre*, 51 Van Natta 728 (1999); *James D. Brusseau II*, 43 Van Natta 541 (1991).

OAR 438-006-0091 provides:

“The parties shall be prepared to present all of their evidence at the scheduled hearing. Continuances are disfavored. The Administrative Law Judge may continue a hearing for further proceedings. The Administrative Law Judge shall state the specific reason for the continuance:

“(1) If the time allocated for the scheduled hearing is insufficient to allow all parties to present their evidence

³ Under OAR 438-005-0040(8), “[d]ue diligence’ means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.”

and argument;

“(2) Upon a showing of due diligence if necessary to afford reasonable opportunity to cross-examine on documentary medical or vocational evidence;

“(3) Upon a showing of due diligence if necessary to afford reasonable opportunity for the party bearing the burden of proof to obtain and present final rebuttal evidence or for any party to respond to an issue raised for the first time at a hearing; or

“(4) For any reason that would justify postponement of a scheduled hearing under OAR 438-006-0081.”

In *Kurcin*, 334 Or at 406, the Supreme Court explained that OAR 438-006-0091 grants discretion to the ALJ to decide whether a hearing should be continued for further proceedings, subject to review by the Board to determine whether the ALJ abused his or her discretion. The Court said that “if the record would support a decision by the ALJ either to grant or to deny a continuance, then the Board on review must conclude that the ALJ’s choice is not an abuse of discretion.” *Id.*

Here, after granting a continuance to allow claimant to attend a follow-up urology examination and obtain a related report, (Tr. 47-48), the ALJ closed the record without admitting additional (subsequent) post-hearing evidence.

Considering the ALJ’s ruling and its context, we conclude that the record remained open for a limited purpose and that purpose was to allow for a follow-up examination by claimant’s treating urologist and for submission of medical evidence arising out of that follow-up examination. (*See id.*). In other words, Dr. Kimberley’s April 17, 2003 file review letter fell outside that purpose, in part because Dr. Kimberley never examined or treated claimant. Under these circumstances, we conclude that it was within the ALJ’s discretion to exclude the evidence that did not fall within the limited purpose of the continuance. *See Michael A. Sell*, 55 Van Natta 767, 770 (2003); *Michael C. Spady*, 55 Van Natta 841 844 (2003) (considering the 3 month “pre-record closure” time allowed for obtaining additional medical report, ALJ’s closure of the record without that report not an abuse of discretion); *Clifford L. Conradi*, 46 Van Natta 854 (1994)

(when an ALJ leaves the record open for a limited purpose, it is within the ALJ's discretion to exclude evidence that does not comport with that purpose).

Remand/Compensability

With his appellant's brief, claimant has submitted Proposed Exhibit 22, Dr. Kimberley's April 17, 2003 file review report. We treat claimant's submission as a request for remand. *Judy A. Britton*, 37 Van Natta at 1262.

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 be clearly shown that material evidence was not obtainable with due diligence at the time of hearing. *Compton v. Weyerhaeuser Co.*, 301 Or 641 (1986); *see SAIF v. Avery*, 167 Or App 327, 333-34 (2000).

Dr. Kimberley's April 17, 2003 file review letter was clearly not "available" by the time of the November 26, 2002 hearing. Nevertheless, although evidence that is not generated until after the hearing is "unavailable," it may still have been "obtainable" at the time of hearing. *Compton*, 301 Or at 648-49 (neither erroneous factual foundation nor change of opinion creates unobtainable evidence; thus, even though certain medical reports were not available at the time of hearing, the substance of the reports was obtainable); *Suzanne M. Wilson*, 55 Van Natta 1819, 1820 (2003); *James E. Gore*, 45 Van Natta 1652 (1993) ("Evidence is not newly discovered merely because it was generated after the hearing."). In this case, we are not persuaded that the substance of the April 17, 2003 file review letter was unobtainable prior to the hearing in this matter. Consequently, we deny claimant's motion to remand.

Finally, we adopt and affirm the ALJ's reasoning and conclusions in the section entitled "Compensability." (Opinion and Order, pp. 6-7).

ORDER

The ALJ's order dated May 31, 2003 is affirmed.

Entered at Salem, Oregon on November 25, 2003