

In the Matter of the Compensation of
JOEL GARCIA-VASQUEZ, Claimant

WCB Case No. 13-02229

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that upheld the SAIF Corporation's denial of his new/omitted medical condition claim for an L4-5 disc herniation and annular tear. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable injury on November 1, 2012, which SAIF accepted for a lumbar strain. (Exs. 1, 7). A December 2012 MRI showed multiple disc bulges and a mild, broad-based L4-5 disc protrusion with an annular tear. (Ex. 9). In March 2013, claimant requested that SAIF accept the L4-5 disc herniation and annular tear as new/omitted medical conditions. SAIF denied the claim, and claimant requested a hearing. (Exs. 13, 17).

In upholding SAIF's denial, the ALJ determined that the medical evidence did not establish that the compensable injury was a material contributing cause of the claimed disc conditions. The ALJ also found the presence of a combined condition at L4-5. However, the ALJ concluded that the compensability of a combined condition was not at issue because claimant neither requested the acceptance of a combined condition, nor had SAIF denied such a condition. Consequently, the ALJ did not address the compensability of a combined condition.

On review, claimant contends that the medical evidence establishes that the compensable injury was a material contributing cause of the disability/need for treatment of the claimed conditions and that SAIF was required to establish the presence of a "combined condition" and disprove its compensability under ORS 656.266(2)(a).

Although our analysis of the compensability issue differs from the ALJ's, we agree that the claimed conditions are not compensable. We reason as follows.

To establish compensability of his claimed L4-5 disc conditions as new/omitted medical conditions, claimant must prove their existence, and that the work injury was a material contributing cause of the disability/need for treatment for the conditions. See ORS 656.266(1); ORS 656.005(7)(a); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Claimant need not prove that the work injury caused the conditions themselves; rather, the relevant inquiry is whether it caused the disability/need for treatment for the conditions.¹ See *Jaymin Nowland*, 63 Van Natta 1377, 1382 n 3 (2010).

If claimant satisfies his burden of proof and the medical evidence establishes that the “otherwise compensable injury” (*i.e.*, the work injury/incident) has combined with a statutory “preexisting condition,” SAIF has the burden to prove that the “otherwise compensable injury” is not the major contributing cause of the disability/need for treatment of the combined condition.² ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *Kasey D. Brown*, 62 Van Natta 1192, 1193 (2010); *Jason J. Skirving*, 58 Van Natta 323, 324 (2006) *aff'd without opinion*, 210 Or App 467 (2007).

Here, the parties do not dispute the existence of the L4-5 disc herniation/annular tear. Claimant contends that the opinion of Dr. Lorber, a physiatrist, establishes the necessary material causal relationship between the work injury and the disability/need for treatment of the L4-5 disc conditions. We disagree.

¹ Thus, we disagree with the ALJ's statement that the applicable legal standard requires that the work injury cause the claimed conditions.

² The ALJ relied on *Emma R. Traner*, 62 Van Natta 669 (2010), in placing the burden on claimant to assert a claim for a combined condition. We find *Traner* distinguishable, because in that case, the claimant asserted that she *had* perfected a claim for a combined condition. Here, because claimant did not claim a combined condition, he was required to prove material causation with respect to the disability/need for treatment for the claimed low back conditions.

Dr. Lorber examined claimant in March 2013, and described the December 2012 MRI as showing a mild to moderate left paracentral disc protrusion at L2-3 with no distinct nerve root impingement. (Ex. 14-4). He opined that it was “conceivable” that the L2-3 disc was responsible for claimant’s symptoms, but recommended a repeat MRI to see if the disc morphology at that level had changed.³ Although Dr. Lorber noted a zone of increased diagonal intensity involving the L4-5 disc, he did not indicate that it had any clinical significance. In fact, other than the L2-3 disc protrusion, Dr. Lorber read the MRI as showing minor, but insubstantial disc bulges at other levels. (*Id.*) As such, Dr. Lorber’s initial opinion does not support compensability of the L4-5 disc condition.

In July 2013, Dr. Lorber signed a concurrence letter authored by claimant’s attorney. (Ex. 22-2). In this letter, Dr. Lorber again suggested that the L2-3 disc herniation might be the direct cause of claimant’s symptoms. He also indicated that he was “less likely to agree that the L4-5 disc condition was directly attributable to the injury event.” (*Id.*) Much of this concurrence letter was directed to a discussion of the L2-3 disc level (which is a condition that is not at issue on review) and, although there are brief references to a combined condition at L4-5, Dr. Lorber did not directly address material causation between the November 2012 work injury and the treatment of the L4-5 disc conditions specifically.

Dr. Rosenbaum, who examined claimant at SAIF’s request, described the L4-5 disc condition as part of a larger preexisting degenerative process in claimant’s lumbar spine.⁴ (Ex. 15-5). He found no clinical correlation between that specific disc level and claimant’s symptoms. (*Id.*) In his final report, Dr. Rosenbaum reiterated that the L4-5 disc conditions were part of a degenerative process. (Ex. 19-3, -4). Thus, Dr. Rosenbaum’s opinion also does not establish that the compensable injury was a material cause of the disability or need for treatment for the claimed L4-5 disc conditions.

Accordingly, having reviewed the medical evidence, we find that it does not satisfy claimant’s burden of proving that the November 2012 work injury was a material contributing cause of the disability/need for treatment of the claimed

³ Dr. Lorber stated that if the disc morphology was unchanged, the disc findings at L2-3 were likely a coincidental finding. (Ex. 14-4).

⁴ Noting annular tearing present at L2-3 and L4-5, Dr. Rosenbaum described the MRI as showing ‘central bulging of multiple discs all having relatively similar type of appearance* * *.’ (Ex. 15-5).

disc conditions. However, even assuming that he has established an otherwise compensable injury with respect to the L4-5 disc conditions, we would still not find the claim compensable. We reason as follows.

Both Dr. Lorber and Dr. Rosenbaum identified the presence of a “combined condition” at L4-5. (Exs. 19-4, 22-2). Claimant challenges the existence of a legally cognizable “preexisting condition,” asserting that there is no evidence that his preexisting spondylosis is arthritis or an “arthritic condition.”⁵ Based on Dr. Rosenbaum’s opinion, we disagree.

Dr. Rosenbaum explained that claimant’s spondylosis consists of degenerative disc disease (DDD) and degenerative joint disease (DJD). (Ex. 19-1). He discussed how both DDD and DJD affect the synovial facet joints, and that the disease process of each condition involves inflammation and an inflammatory process. (Ex. 19-2). Dr. Rosenbaum described it as a “slow process marked chiefly by the formation of new connective tissue and/or resulting in breakdown, degeneration, or structural change in the joint/and/or its component parts.” (*Id.*) We find Dr. Rosenbaum’s well-reasoned opinion to be persuasive. Accordingly, it establishes the presence of a statutory “preexisting condition.” Therefore, we address whether SAIF established that the otherwise compensable injury is not the major contributing cause of the disability/need for treatment for the combined condition. ORS 656.266(2)(a); *Kollias*, 233 Or App at 505.

Dr. Rosenbaum opined that the work injury was never the major contributing cause of the disability/need for treatment of the L4-5 disc protrusion combined condition or annular tear combined condition.⁶ (Ex. 19-4, -5). In determining the relative contribution of the injury versus the preexisting condition in regard to the treatment for the combined condition, Dr. Rosenbaum explained that he looked at several factors. He noted that: (1) claimant had widespread

⁵ For purposes of determining a ‘preexisting condition’ under ORS 656.005(24)(a)(A), the Supreme Court has determined that the legislature intended the term ‘arthritis’ to mean the ‘inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.’ *Schleiss v. SAIF*, 354 Or 637, 652-53 (2013); *Hopkins v. SAIF*, 349 Or 348, 364 (2010).

⁶ In a decision involving a ‘ceases denial’ of a combined condition, the court held that a ‘compensable injury’ is the work injury/incident and not the ‘accepted condition.’ *Brown v. SAIF*, 262 Or App 640 (2014). Assuming (without deciding) that the *Brown* holding applies to new/omitted medical condition claims, we note that Dr. Rosenbaum’s opinion referred to the ‘injury event,’ and thus would satisfy the *Brown* standard. (Ex. 19-4, -5).

degenerative disease in his low back, with similar findings at all levels; (2) there was a lack of acute pathology at any level; and (3) in regard to the L4-5 disc protrusion, it was not compressing any nerve roots. (*Id.*) Although he could not state with medical certainty that the work injury played no role in the need for treatment for the L4-5 combined condition, Dr. Rosenbaum, based on his analysis of claimant's longstanding and multilevel degenerative back condition, opined that it was not the major cause.

In contrast, Dr. Lorber was more focused on the L2-3 level as the source of claimant's symptoms. Yet, he then opined that claimant's "lumbar strain" combined with the preexisting L4-5 disc condition to prolong symptoms and make the L4-5 disc symptomatic.⁷ (Ex. 22-2.) Dr. Lorber did not explain how he determined that the L4-5 disc in particular was responsible for claimant's disc pain. Considering that claimant's MRI revealed degenerative disc disease throughout his lumbar spine, and that Dr. Lorber also indicated that the L2-3 disc might be the pain generator, we find his opinion conclusory, and therefore, unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *see also Skirving*, 58 Van Natta at 324.

In sum, based on Dr. Rosenbaum's persuasive opinion, we find that SAIF has met its burden of proving the presence of a combined condition, and that the work injury was not the major contributing cause of the need for treatment for the combined condition at L4-5. Consequently, claimant's new/omitted medical condition claim for L4-5 disc conditions is not compensable. Thus, we affirm.

ORDER

The ALJ's order dated November 21, 2013 is affirmed.

Entered at Salem, Oregon on August 7, 2014

⁷ In regard to the L4-5 disc protrusion, claimant's attorney indicated that he had filed the claim for that condition because of the high-intensity zone seen on the MRI. (Ex. 22-2). Dr. Lorber, however, explained that the presence of a high-intensity zone does not necessarily indicate an acute disc herniation; rather, it simply indicates that fluid is present in that location. (*Id.*)