
In the Matter of an ORS 656.327 Medical Treatment Dispute of

Abbott, Gerald A., Claimant

Contested Case No: H02-064

PROPOSED & FINAL ORDER

December 13, 2002

GERALD A. ABBOTT, Petitioner

RELIANCE NATIONAL INSURANCE (PINNACLE RISK MANAGEMENT),

Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

The petitioner, Gerald Abbott (claimant), appeals an administrative order finding perfusion with Dexamethasone not medically reasonable or necessary. On September 4, 2002, Hearing Officer Paul Vincent conducted a telephone hearing in this matter. Petitioner appeared and was represented by attorney Matthew Roy. Respondent Reliance National Insurance (insurer) appeared through Pinnacle Risk Management and was represented by attorney Xan Eriksson. The Workers' Compensation Division (WCD) waived appearance.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUE

Pursuant to the Notice of In-Person Hearing dated July 24, 2002, the issue is whether the perfusion of Dexamethasone through a Silverstein Micro Wick delivery system, as proposed by John Epley, MD (Otology) is appropriate medical treatment for the claimant's compensable medical condition under ORS Chapter 656 and OAR Chapter 436.

EVIDENTIARY RULINGS

WCD Exhibits 1-71 were received without objection. Petitioner's Exhibit P1, a report from treating physician John Epley, MD, was received over Respondent's objection that it is new medical evidence and therefore inadmissible under ORS 656.327. Pursuant to 436-001-0195(13)(d), I find that this exhibit does not constitute "new medical evidence." "New medical evidence" does not include evidence which was prepared at the time of or prior to the time of the original record review done by MRU. The largest portion of this document simply comments on existing medical evidence. However, the first sentence of item 3 of the document does refer to an endoscopy that took place following MRU review. That sentence was stricken and the remainder of the document allowed into the record.

FINDINGS OF FACT

Having reviewed the order and the record in its entirety, I adopt the findings of fact contained in the Administrative Order TX 02-431. I make the following supplementary findings:

Claimant's treating physician, Dr. Epley, prepared a clarification report on July 24, 2002, in response to MRU's Administrative Order finding the perfusion of Dexamethasone inappropriate for claimant's compensable condition. (Ex. P1). Dr. Epley opines that the claimant's hearing loss was not age-related or due to occupational exposure over time, but was instead related to an autoimmune reaction in the inner ear, secondary to the compensable trauma. Some physicians, including Dr. Epley, feel that transtympanic Dexamethasone is appropriately used to counteract this automimmune inflammatory effect. (Ex. P1 at 3).

CONCLUSIONS OF LAW AND REASONING

I may modify the director's administrative order in this matter only if it is not supported by substantial evidence in the record, or reflects an error of law. ORS 656.327(2). Petitioner does not raise specific errors of law, but argues that WCD's findings are not supported by substantial evidence. In order to determine whether substantial evidence exists, I am required to:

"[L]ook at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. For instance, and in the context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support. *** The difference between the 'any evidence' rule and the substantial evidence test * * * will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

The Petitioner requests that the order be reconsidered in light of Ex. P1, a letter opinion from Dr. Epley that clarifies his opinions in the record. First, petitioner argues that Dr. Epley's clarification report states that the claimant's hearing loss was not age-related or due to occupational exposure over time, but was instead related to autoimmune reaction in the inner ear, secondary to the compensable trauma. The report also states that some physicians, including Dr. Epley, feel that transtympanic Dexamethasone can be used to counteract this automimmune inflammatory effect. The petitioner feels this new statement is supported by Dr. Olds' opinion in record. The petitioner argues that even if it is unlikely there will be improvement with steroid injections nearly 2 years post-trauma, Dr. Olds' is merely opining that the chances are small, not

that the treatment is inappropriate. Where the only other option is not to treat, the petitioner believes it is reasonable to use a treatment with a small chance of success.

In response, insurer argues that the record is replete with evidence to support the director's conclusion that the treatment is inappropriate for the compensable condition. The insurer relies upon the same argument it originally submitted to MRU. *See* Ex. 67. Essentially, the issue is whether the treatment is appropriate treatment for claimant's compensable condition. Claimant has treated with Dr. Epley since August 2000 and received the same treatment in November 2000 and February 2001. *See* Exs. 7-38, 7-66. Insurer argues that the record supports MRU's conclusion that this treatment was inappropriate. The insurer argues that the new evidence produced by claimant since the MRU review does not substantially change the balance of evidence in the record, and therefore MRU's order should stand.

First, the record shows that claimant had continued complaints after each treatment. For instance, there was a hearing loss after first treatment, attacks of imbalance, vertigo, reports to later examiners that he received no significant benefit from treatment. (Ex. 7-44, Ex. 67). In particular, the insurer relies upon the reports of Drs. Hodgson, Wilson, and Olds. Dr. Hodgson performed an IME and recommended that claimant be evaluated by a physician that performs middle ear explorations. Following that recommendation, the claimant went to Dr. Wilson. MRU then sent claimant to Dr. Olds in Spokane, as the closest physician to claimant that actually performs these treatments other than Dr. Epley. Dr. Olds concluded that there was no benefit to the treatment. Therefore, insurer argues that MRU appropriately found that this was inappropriate and ineffectual treatment. Finally, insurer argues that the record supports four reasons to conclude that the treatment was inappropriate: 1) Drs. Hodgson, Wilson and Olds found no clinical indications for treatment. 2) The medical literature does not support this treatment in cases of head trauma. 3) Claimant had not received any improvement with two prior treatments closer to the date of injury. 4) The elapsed time involved indicates no significant improvement from procedure.

In *SAIF Corp. v. Leland*, 160 Or App 480 (1999), the court considered a post-surgical report and held that a back surgery was appropriate medical treatment under ORS 656.327. Exercising substantial evidence review, the court stated, "Generally, where the record merely reflects a difference in medical opinion, substantial evidence in the record may support either a finding of appropriate medical treatment or of inappropriate medical treatment." *Id* at 487. Here, MRU considered the conflicting medical opinions and concluded that those opposed to the disputed treatment were more persuasive. It is true, as pointed out by claimant, that Dr. Epley continues to opine that the proposed treatment is appropriate. And since MRU's review, claimant has submitted a new report from Dr. Epley that clarifies his statements already in the record. Nevertheless, insurer is correct that the opinions of Drs. Hodgson, Wilson and Olds continue to support MRU's finding that the proposed treatment is inappropriate. On this record, I cannot say that the new evidence cited by claimant along with that already in the record before MRU weighs overwhelmingly in favor of the claimant. Therefore, I find that the administrative order is supported by substantial evidence and, accordingly, I may not modify it.

ORDER

IT IS HEREBY ORDERED that the Medical Review Unit Order dated June 6, 2002, TX 02-431, is affirmed.

DATED this 13th day of December, 2002.

Paul Vincent
Hearing Officer
Hearing Officer Panel