
In the Matter of an ORS 656.327 Medical Treatment Dispute of

Jarose, Jeannie , Claimant

Contested Case No: HH01-134; H01-135

PROPOSED & FINAL ORDER

March 13, 2002

JEANNIE JAROSE, Petitioner

TOKIO MARINE AND FIRE INS., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

PROCEDURAL HISTORY

In H01-134 the petitioner, claimant Jeannie Jarose, appeals an administrative order finding medical treatment inappropriate for her compensable medical condition. In H01-135 the petitioner, claimant Jeannie Jarose, appeals an administrative order finding insurer not liable for a medical bill.

On January 30, 2002, Hearing Officer Paul Vincent conducted a hearing in these combined matters. Petitioner appeared through and was represented by her attorney, Gail Gage. Respondent, insurer Tokio Marine and Fire Insurance (insurer), appeared through its attorney, Gerald Keene. 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.

ISSUES

In H01-134: Whether an anterior L4-S1 discectomy and fusion by Timothy Keenen, MD (Orthopedic Surgery) was appropriate medial treatment for Ms. Jarose's compensable condition; Whether insurer is liable for costs associated with a subsequent April 18, 2000 ventral incisional hernia repair by Kevin R. Johnson, MD (General Surgery).

In H01-135: Whether insurer correctly reduced Dr. Long's August 14, 2001 office visit current procedural code (CPT) from 99215 to 99214.

EVIDENTIARY RULINGS

In H01-134, WCD Exhibits 1-185 were received without objection. In H01-135, WCD Exhibits 1-14 were received without objection.

FINDINGS OF FACT

In H01-134, I adopt the findings of fact in the November 1, 2001 Administrative Order, TX 01-942. In H01-135, I adopt the findings of fact in the November 15, 2001 Administrative Order, MF 01-1206. In addition, I make the following supplemental findings:

During the period of time prior to the disputed surgery, claimant's symptoms waxed and waned. Her prescription medications included muscle relaxants, anti-spasmodics, and pain relievers. Her pain was consistently present, although there were good days and bad days in regard to intensity. The pain was always there, but not always same degree. Hot tub therapy, resting, ice and heat helped with pain, but not always. On most days she couldn't perform normal activities such as physical hobbies, bowling, horse riding, walks, jogging, or even personal relations with her husband. On bad days she could only alternate positions and take medication. On a good day, with help of prescription pain relievers, she could go out in the yard with her animals, and do light yard work. The surveillance video prepared by insurer showed activities only on what she would describe as a good day. Generally, she paid for it later when she was active – her pain was elevated, she would not be able to get around and do housework, couldn't stand and fold laundry, etc. The video presented by insurer was not representative of her life prior to surgery in that it didn't show her in pain. (Testimony of Claimant).

Following surgery, claimant's back pain symptoms have gradually decreased. She still requires pain medication, but pain has decreased over time. She can now go walking, hiking, and snow shoe hiking, which she was unable to do prior to surgery. She now has only what she describes as "bad moments, not days." Claimant has also enrolled in vocational training as a cosmetologist, which she does not believe she could have done prior to surgery. Physical duties would have caused her to have too many "bad days" and she wouldn't have been able to complete the vocational program. (Testimony of claimant).

CONCLUSIONS OF LAW AND REASONING

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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).

Claimant frames this dispute as one in which the administrative order that I review failed to properly evaluate the evidence presented or which gave undue weight to certain types of evidence. In particular, claimant argues that MRU improperly evaluated the worth and value of the surveillance video tape prepared by insurer. Additionally, claimant argues that the order gave undue weight to the medical opinion reviewing physician Burkowitz, and failed to properly take into account claimant's subjective accounts of improvement following the disputed surgery. In a case where claimant reports subjective improvement that enabled her to engage in life activities that she was not able to perform prior to surgery, claimant argues, substantial evidence does not support the director's determination that the surgery was inappropriate.

In response, insurer argues that claimant has failed to properly apply the substantial evidence standard to this dispute. The question, argues insurer, is not whether I believe MRU reached the right conclusion, but whether a reasonable person could review the evidence and reach the same conclusions.

This case involves a medical question requiring proof by medical evidence. I agree with claimant that the medical record (specifically, the reports of Dr. Keenen and Long) along with the claimant's testimony could support a conclusion that this treatment was appropriate even in the presence of medical opinion to the contrary. Nevertheless, MRU found the medical opinions opposed to surgery more persuasive. As pointed out by insurer, any of the medical opinions provided by Dr. Tonkonin (Exs. 65, 151), Dr. Bergquist (Exs. 88, 107 and 119) or Dr. Long (Exs. 161, 164 and 166) would be sufficient to support the director's decision on substantial evidence review. To use the language of *Armstrong*, after reviewing the record in the entirety I cannot say that I find Dr. Keenen's opinion so persuasive as to render the evidence in this record "overwhelmingly in favor" of the surgery. On substantial evidence review, my role is not to re-weigh the evidence, but simply to determine whether the record supports MRU's decision in this matter. It does.

This is not a case where MRU failed to give proper deference to an attending physician. In *Dillon v. Whirlpool Corp.*, 172 Or App 484, 19 P3d 951 (2001), the court clarified that rules governing the evidentiary weight to be assigned to medical opinions in a *de novo* review by an appellate body do not apply where the standard of review is limited to substantial evidence. The court stated:

"[W]hile under the previous [*de novo*] standard of review, divided medical opinion led us as finders of fact frequently to give greater weight to the opinions of treating physicians, under the current standard of review that prior tendency is irrelevant. We no longer review Board decisions *de novo*. Under the current

statutory scheme, divided medical opinion leaves the Board in the position of evaluating the evidence. The Board properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. On review, we will affirm the Board's findings so long as substantial evidence supports them. *Winters v. Woodburn Carcraft Co.*, 142 Or.App. 182, 187, 920 P.2d 1118 (1996); *Queener v. United Employers Ins.*, 113 Or.App. 364, 367, 832 P.2d 1265, rev. den. 314 Or. 176, 836 P.2d 1345 (1992).”

As I have already concluded that the record contains substantial evidence to support MRU’s decision in this matter, I find no error for failing to defer to the treating physician.

Similarly, I find no error in the weight placed by MRU on the surveillance video. Placed in context of the entire order, it was only one factor examined by MRU in concluding that subjective factors did not support the appropriateness of the surgery:

“The decision to proceed with the disputed surgery seems largely based on Ms. Jarose’s subjective reporting of her symptoms, the intensity of those symptoms, and the impact they had on her ability to function. Consequently, the director is persuaded that Dr. Bergquist’s reasoning provides a sound basis for decision in this dispute. The subjective symptoms, and Ms. Jarose’s reporting of those symptoms, provide a vital insight to the appropriateness of the disputed treatment, and therefore, must be beyond challenge. Herein lies the difficulty in this instant case. When evaluating clinical evidence, the record as a whole is fraught with inconsistencies. Multiple consultants and medical providers have expressed concern in this regard. In fact, the surveillance video clearly exemplifies the significant inconsistencies between Ms. Jarose’s reported presurgical physical limitations and her actual abilities. These documented inconsistencies devalue all subjective evidence that might have otherwise supported appropriateness of the disputed surgery, i.e., findings of tissue tenderness, ROM and SLR testing, sensory changes, gait changes, and experienced pain levels, all of which can be largely controlled by the patient. Given the well documented inconsistencies, the director is not persuaded to approve the disputed surgery based on the subjective or quasi-subjective findings.” (Ex. 182-9).

Following this discussion and evaluation, the director went on to note that objective evidence might still justify surgery, but found that any objective evidence present (discography) was outweighed by the opinion of multiple examining or reviewing physicians that claimant’s overall clinical picture called for conservative treatment, not surgery. (Ex. 182).

Based on the director’s thorough evaluation of factors both supporting and opposing the appropriateness of treatment, I cannot say that the director erred in finding the disputed treatment inappropriate.

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Pursuant to OAR 436-009-0030(3), any service billed with a code number commanding a higher fee than the services provided shall be returned to the medical provider for correction or paid at the value of the service provided. Insurer reduced payment from code 99215 to 99214 on the grounds that the services rendered by Dr. Long on August 14, 2001 were better described by the latter. While the parties did not address this issue at hearing, the record supports the director's decision in this matter and I affirm the administrative order.

ORDER

IT IS HEREBY ORDERED that

- 1) In contested case H01-134, the Medical Review Unit Order dated November 1, 2001, TX 01-942, is affirmed.
- 2) In contested case H01-135, the Medical Review Unit Order dated November 15, 2001, MF 01-1206, is affirmed.

DATED this _____ day of March 2002.

Paul Vincent
Hearing Officer
Hearing Officer Panel