

In the Matter of an ORS 656.245 Medical Services Dispute of

Mason, James, Claimant

Contested Case No: H02-085

PROPOSED & FINAL ORDER

December 13, 2002

JAMES MASON, Petitioner

WEYERHAUSER COMPANY, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

The petitioner, James Mason, appeals an administrative order finding a medical expense non-compensable. On October 24, 2002, Hearing Officer Paul Vincent conducted a telephone hearing in this matter. Petitioner appeared and was represented by attorney Scott McNutt, Sr. The respondent appeared and was represented by attorney John Pitcher. The Workers' Compensation Division (WCD) waived appearance at the proceeding. No testimony was taken. On July 31, 2002, the Workers' Compensation Division, Medical Review Unit issued an administrative order, MS 02-528, finding that because there is no attending physician recommendation for the disputed replacement hearing aids, the services are not compensable or reimbursable. (Ex. 16). The claimant has appealed this decision to contested case. (Ex. 17).

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 Hearing dated September 16, 2002, the issue is whether Weyerhaeuser Company should purchase new hearing aids for Mr. Mason under ORS Chapter 656 and OAR Chapter 436.

EVIDENTIARY RULINGS

WCD Exhibits 1-17 were received without objection.

FINDINGS OF FACT

Having reviewed the order and the record in its entirety, I adopt the findings of fact contained in the Administrative Order MS 02-528¹. I make the following supplementary findings:

Claimant has an accepted nondisabling claim for tinnitus and hearing loss. (Exs. 1, 2, 3, 4, 5, 6, 16).

¹ The parties did not contest the factual findings below.

In November 1999, claimant was seen by Alan Henderson, BC-HIS, of Hearing Aid Counselors, Inc. in Roseburg, Oregon. Mr. Henderson performed an audiological examination and recommended compression hearing aids. Weyerhaeuser reimbursed Hearing Aid Counselors, Inc. for the \$2500 cost.

Claimant began having problems with the hearing aids immediately after the purchase, and eventually stopped wearing them.

In February 2002, claimant was authorized by Weyerhaeuser to be evaluated for hearing loss at Eugene Springfield Hearing and Speech Centers (Eugene). Eugene determined that the hearing aids purchased in November 1999 were functioning properly but were insufficient to meet claimant's needs. Eugene recommended another model, which they believed the best hearing aid available for masking tinnitus such as Mr. Mason experiences. (Ex. 8).

In a letter dated March 7, 2002, Weyerhaeuser denied claimant's request for new hearing aids. The letter acknowledged that Eugene had indicated that the claimant's present aids were functioning but were not the proper aids for claimant's hearing loss. However, Weyerhaeuser declined the request based on the determination that the claimant's current hearing aids were only 2 years old, whereas it was Weyerhaeuser's "normal practice" to "not replace hearing aids at intervals of less than 5 years unless there is significant change in hearing loss to support new aids." Weyerhaeuser stated that they would not consider purchase of new aids until November of 2004. (Ex. 9).

In a letter to the Workers' Compensation Division on April 10, 2002, Weyerhaeuser acknowledged its practices in regard to the processing of hearing loss claims as follows:

"In the majority of our hearing loss claims, workers do not maintain an attending physician. Once compensability is determined, workers usually have their hearing tested by an audiologist of their choice. While [Weyerhaeuser] may recommend to the worker a particular vendor for their geographic area, the decision is ultimately theirs as would be their choice of attending physician.

"In most cases, like Mr. Mason's, the audiologist submits the hearing tests and a letter outlining their recommendations for hearing aids. If the recommendations are reasonable for the particular worker, we then authorize the vendor to dispense the aids to the worker." (Ex. 13 at 1-2).

The letter reiterated that it was Weyerhaeuser's position that even though the aids provided in 1999 were inappropriate when dispensed, and remained so, "[i]f Mr. Mason was not satisfied with his hearing aids, he should have returned them within the trial period and requested he be fitted with different aids." (Ex. 13-2). The letter requested a finding that the 'previous aids were dispensed inappropriately' and that "Hearing Aid Counselors, Inc. be joined and that you require them to refund the \$2250.00 Weyerhaeuser paid for the inappropriately prescribed and dispensed aids." (Ex. 13-3).

On May 8, 2002, claimant's attorney requested that the Workers' Compensation Division review Weyerhaeuser's denial of new hearing aids for claimant. (Ex. 14).

On May 8, 2002, a nurse reviewer from the Workers' Compensation Division confirmed through Weyerhaeuser that claimant has no attending physician on the claim and that Weyerhaeuser's policy is to not require one. Weyerhaeuser policy is to allow a worker to go to a vendor of his choice, and get whatever he needs. Weyerhaeuser acknowledged that they authorized treatment at Eugene, who say that the current hearing aids aren't right for claimant. (Ex. 15).

CONCLUSIONS OF LAW

Weyerhaeuser Company should purchase appropriate new hearing aids for Mr. Mason pursuant to ORS Chapter 656 and OAR Chapter 436.

OPINION

Medical service disputes are not matters concerning a claim under ORS 656.704(3) and are within the Director's jurisdiction. *See Larry Archer*, 7 WCSR 76 (2002). The Director has captioned this matter as an ORS 656.245 Medial Services Dispute. In the past, the director has treated these cases as subject to *de novo* contested case review pursuant to ORS 656.245. *See Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-010-0225(1). However, I find that the standard of review for this dispute is now governed by ORS 656.327. ORS 656.245(6) now generally authorizes WCD to conduct administrative review of a disapproved medical service "pursuant to ORS 656.260 or 656.327." Based on this statutory directive, I find that my standard of review is governed by ORS 656.327. Therefore, 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). 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 assigns error to MRU's finding that insurer is not liable for the requested reimbursement due to the absence of an attending physician's recommendation for the disputed replacement hearing aids. Respondent agrees that WCD erred in finding that the disputed services were not compensable or reimbursable due to the absence of an attending physician's prescription and should not have ceased its review without reaching the issue of appropriateness of treatment. Insurer renews its argument to WCD and requests a finding that the previous aids were dispensed inappropriately. Insurer further requests that Hearing Aid Counselors, Inc. be joined and required to refund the \$2250.00 Weyerhaeuser paid for the inappropriately dispensed hearing aids.

I agree with claimant and insurer that in a case where insurer has told a claimant that they will reimburse otherwise reimbursable services pursuant to an internal policy, WCD should not have ceased review on that ground. Claimant obtained the hearing aids in 1999 through the process established by insurer for the processing of its own claims. While insurer could insist on the participation of an attending physician at virtually every step in the processing of a hearing loss claim, Weyerhaeuser has clearly determined that it is not in its best interest to do so in every claim. Instead, the record makes clear that Weyerhaeuser notifies claimants of its willingness to reimburse the purchase of hearing aids through a simplified process. Given Weyerhaeuser's explicit acknowledgement that this was the process they desired claimant to follow, it was error for WCD to find the claimant's request for compensation was barred because he followed that process. *Cindy R. Castro*, ___ WCSR ___ (2002)(insurer liable for insurer-directed treatment that was otherwise non-compensable)².

Weyerhaeuser does not dispute the finding by Eugene that claimant's current hearing aids are inappropriate for the accepted condition. Given that finding, I find that claimant is entitled to new hearing aids. Weyerhaeuser has argued that its concern in this matter is that they be found to have a recourse against the original vendor. However, Weyerhaeuser has cited no authority for the proposition that at this date, over 2 years after the original purpose, I can join Hearing Aid Counselors, Inc. to this action and require them to refund the \$2250.00 Weyerhaeuser paid for the inappropriately dispensed hearing aids. Accordingly, I deny Weyerhaeuser's request to join Hearing Aid Counselor's Inc. to this contested case.

ORDER

IT IS HEREBY ORDERED that the Medical Review Unit Order dated July 31, 2002, MS 02-528, is reversed. Weyerhaeuser shall provide claimant with hearing aids appropriate to his compensable condition.

Paul Vincent
Hearing Officer
Hearing Officer Panel

² The agency has cited *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App 283, 287 (1996) for the proposition that the agency cannot ignore its own rules and therefore WCD must enforce OAR 436-010-0220(2) that prohibits nurse practitioners from providing treatment beyond an initial period of treatment. The doctrine is simply not applicable here where it would be used as a shield by an insurer from liability where the claimant followed insurer's own claims processing procedures.