
In the Matter of the ORS 656.260 Managed Care Organization Dispute of

Spencer, Sheri A., Claimant

Contested Case No: HH01-085

FINAL ORDER

May 23, 2002

SAIF CORPORATION, Petitioner

SHERI A. SPENCER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On July 25, 2001, the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) issued an administrative order determining that a discogram was an appropriate diagnostic test and that a proposed intradiscal electrotherapy (IDET) procedure was appropriate medical treatment.

On October 12, 2001, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Petitioner, SAIF Corporation (insurer), and its insured, Santa Clara Residential Inn, were represented by attorney Dennis S. Martin. Attorney James L. Edmunson represented respondent Sheri A. Spencer (claimant). The WCD, Oregon Health Systems, and Dr. Joseph Scott Dunn waived appearance. No witnesses testified.

The respondent filed exceptions to Hearing Officer Coburn's February 19, 2002 Proposed and Final Contested Case Hearing Order, which vacated MRU's July 25, 2001 order (MTX 01-509) for lack of jurisdiction over the IDET dispute and which did not award an assessed attorney fee. The petitioner timely responded to the exceptions. Before the Director, the issue is attorney fees. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Findings of Fact

The director adopts the hearing officer's findings of fact.

Conclusions of Law and Opinion

In December 2000, Dr. Dunn submitted a precertification request for a discogram to determine whether claimant was a candidate for IDET. The discogram was performed on January 9, 2001. The managed care organization (MCO) disapproved the discogram as not medically appropriate. Claimant appealed that decision to the MCO medical review committee. The committee upheld the disapproval, determining that discography would only be approved to clarify the level for a fusion, but claimant was not a candidate for a fusion nor was IDET an approved procedure. On March 26, 2001, claimant requested administrative review of the MCO committee's March 14, 2001 decision and contended that "the proposed discogram is reasonable diagnostic treatment to clarify the levels involved in a proposed IDET." MRU listed the issue as whether the performed discography and the proposed IDET were appropriate medical services. MRU concluded that the discography was an appropriate diagnostic test and that the proposed

IDET was an appropriate medical service.

On August 2, 2001, the insurer requested a contested case hearing to appeal MRU's July 25, 2001 order. On the specification of issues form listing the reasons for the request for hearing, the insurer checked the following boxes: no. 3. Medical services or treatment; no. 5. MCO medical dispute; no 8. Other MCO dispute: "MCO decision concerned only the appropriateness of the discogram"; and no. 13. Other: "MRU's decision on appropriateness of IDET was premature as this aspect of claimant's care was not yet at issue." (Ex. 43).

At the October 21, 2001 hearing, the insurer stated its issues as follows: (1) MRU lacked jurisdiction to determine whether the proposed IDET procedure was reimbursable because the issue of the appropriateness of the IDET procedure had not been raised, processed, or decided by the MCO; and (2) since issuance of MRU's order, OAR 436-009-0015(6) had been amended to exclude IDET procedures as reimbursable treatment. The hearing officer found that the insurer only appealed MRU's determination pertaining to the IDET procedure. She, thus, concluded that claimant had not prevailed at the contested case hearing and, therefore, was not entitled to an attorney fee under ORS 656.385(1).

Claimant limits her exceptions to the issue of entitlement to an attorney fee award. Claimant contends that, by marking box no. 8 on its Request for Hearing, the insurer raised the issue of the appropriateness of the discogram. Claimant further argues that not until hearing did the insurer withdraw the discogram issue and clarify that it was only proceeding on the issue of the proposed IDET procedure. To support her argument, claimant indicated that the insurer did not concede to pay for the discogram until one week after the hearing officer's order issued. Claimant, thus, asserts entitlement to an attorney fee for services rendered prior to the insurer's withdrawal of the issue of the appropriateness of the discogram and to a fee for services in obtaining payment of the discogram.

SAIF counters that, when boxes no. 8 and no. 13 are read together, its appeal of MRU's decision was limited to the IDET procedure. Thus, it did not withdraw any issues which would entitle claimant to an attorney fee.

The director's review of the hearing officer's decision regarding the attorney fee issue is for substantial evidence or errors of law. ORS 656.260(16). Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. ORS 183.482(8). Here, substantial evidence supports the hearing officer's finding that the insurer only appealed MRU's determination regarding the appropriateness of the IDET procedure. Thus, the hearing officer did not err in concluding that MRU lacked jurisdiction, and that claimant's attorney was not entitled to an assessed attorney fee.

Considering that the insurer had not paid for the January 2001 discogram by the time of the October 21, 2001 hearing and considering that the insurer's checking of box 8 in its request for hearing could be interpreted as raising an issue regarding the discogram, a reasonable person could find that MRU's decision regarding the issue of the appropriateness of the discogram was an issue. However, considering the posture of the proceeding, a reasonable person could also find that, by checking boxes 8 and 13 together, the insurer was only raising the issue of MRU's

jurisdiction to decide the IDET issue in the context of a MCO dispute. The substantial evidence standard of review requires looking “at the the whole record with respect to the issue being decided, rather than at 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.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). That is the case here. Therefore, the hearing officer’s decision is supported by substantial evidence.

IT IS HEREBY ORDERED that the February 19, 2002 Proposed and Final Contested Case Hearing Order is affirmed.

DATED this _____ day of May, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division