
In the Matter of the ORS 656.260 Managed Care Dispute of

Sullivan, Kerry O., Claimant

Contested Case No: HH02-083

PROPOSED & FINAL ORDER

October 11, 2002

KERRY O. SULLIVAN , Petitioner

SAIF CORPORATION AND PROVIDENCE MANAGED CARE ORGANIZATION ,
Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an administrative order issued on July 22, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) Department of Consumer and Business Services (director or the department). On October 3, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Kerry O. Sullivan (claimant) was represented by attorney Bruce D. Smith. Respondent SAIF Corporation (insurer) was represented by attorney Michael G. Fetrow. Providence Managed Care Organization (MCO) was represented by attorney Allen W. Lyons. WCD waived appearance. Claimant testified and the record closed on the date of hearing.

The record of this proceeding, consisting of all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUE

The issue is whether MRU correctly determined that a neurolysis of the peroneal nerve of the right knee, proposed by Daniel Saviers, MD on August 21, 2001, was not appropriate medical treatment.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 55 were admitted into the record without objection. I overruled insurer's objection to claimant's testimony based on ORS 656.260(16)¹ because his testimony does not constitute medical evidence, and therefore, it is admissible.

FINDINGS OF FACT

(1) Claimant's history includes a 1998 right knee injury and an arthroscopic meniscectomy in January 1999. (Exs. 1-4 and 5.)

¹ ORS 656.260(16) provides in part:

At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. No new medical evidence or issues shall be admitted.

- (2) On December 31, 1999, claimant suffered a compensable right knee injury while working as an auto detailer when he tripped over elevated forklift prongs. (Exs. 2 and 18-2.)
- (3) On March 23, 2000, Richard E. James, MD (Orthopedic Surgeon) performed arthroscopic partial medial meniscectomy and chondroplasty of the medial femoral condyle, right knee. (Ex. 7).
- (4) On May 8, 2000, insurer accepted “torn right medial meniscus” as a compensable condition and enrolled claimant in the MCO. (Ex. 8.)
- (5) In July 2000, Daniel A. Savier, MD (Physical Medicine and Rehabilitation) examined claimant upon referral from Dr. James and in August 2000, claimant designated Dr. Savier as his attending physician. (Exs. 9 and 13.)
- (6) On September 13, 2000, Dr. Savier conducted electrodiagnostic studies and found normal results. Dr. Savier prescribed medications, continued physical therapy and a knee brace. (Exs. 9, 16 and 17.)
- (7) On September 20, 2000, Stanley L. James, MD (Orthopedic Surgeon) examined claimant and reviewed his medical records at insurer’s request. Dr. James found that claimant was not medically stationary and recommended continued physical therapy in lieu of another surgery. Dr. Savier concurred. (Exs. 18 and 20.)
- (8) On December 7, 2000, Dr. Savier declared claimant’s condition medically stationary but noted that claimant needed further surgery. He prescribed medications and continued bracing. (Ex. 21-3.)
- (9) On December 19, 2000, the Workers’ Compensation Board approved a Claims Disposition Agreement. (Ex. 25.)
- (10) On May 4, 2001, claimant returned to Dr. Savier complaining of increased right knee pain and swelling and lower leg paresthesia. EMG studies revealed right peroneal neuropathy but no evidence of lumbosacral radiculopathy or sciatic neuropathy. Dr. Savier recommended loosening the knee brace to relieve any pressure on the peroneal nerve and noted that claimant may need surgical exploration. (Ex. 28.)
- (11) On August 21, 2001, claimant sought treatment from Dr. Savier for increased paresthesia and right foot drop. Dr. Savier conducted EMG studies and found persistent right peroneal neuropathy. He prescribed a lightweight, hinged knee brace and also recommended surgical exploration and decompression of the peroneal nerve at the knee level. (Ex. 30.)
- (12) On October 25, 2001, the MCO denied the proposed surgical neurectomy of the peroneal nerve based on lack of medical necessity. The MCO acknowledged that it

would reconsider the request for surgery after claimant wore a new knee brace that did not exert pressure on the peroneal nerve. (Ex. 32.)

- (13) On November 6, 2001, Dr. Richard James discussed the possibility of postponing surgery while claimant wore a new knee brace but he agreed with Dr. Savier's surgical recommendation. (Exs. 34 and 1-32.)
- (14) On December 21, 2001, the MCO Utilization Management Department denied the proposed surgery and claimant appealed. (Exs. 35 and 36.)
- (15) The MCO obtained a file review by a Board-certified neurologist² who indicated that medical necessity of the proposed surgery had not been established. The neurologist noted that lumbar radiculopathy and sciatic neuropathy had not been excluded as alternate causes. (Ex. 42-5.)
- (16) On April 29, 2002, Douglas P. Morrison, MD (Orthopedic Surgeon) examined claimant, reviewed his medical record at MRU's request, and opined that the proposed peroneal nerve exploration and neurolysis was an appropriate procedure. (Ex. 49.)
- (17) On May 13, 2002, Victor K. Lin, MD (Rehabilitation Medicine) examined claimant and reviewed his medical records at MRU's request. Dr. Lin noted that eight months had passed since claimant ceased wearing the knee brace that apparently compressed the peroneal nerve. He recommended repeating EMG studies and reconsidering the proposed surgery in light of the results. (Ex. 50-8.)

² The MCO report fails to identify the author and date.

CONCLUSION OF LAW

MRU correctly determined that a neurolysis of the peroneal nerve of the right knee, proposed by Daniel Saviers, MD on August 21, 2001, was not appropriate medical treatment.

OPINION

This managed care dispute arises under ORS 656.260, and therefore, jurisdiction lies with the director. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (General rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard of proof, the standard in an administrative hearing is preponderance of evidence.) Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery requires. ORS 656.260(4)(a) authorizes insurers to provide medical services to injured workers through a contract with a state-certified managed care organization. However, an insurer is not obligated to provide medical treatment that is excessive, inappropriate, ineffectual or that violates administrative rules. ORS 656.327(1)(a).

I review the medical appropriateness question for substantial evidence or error of law. ORS 656.327(2). Claimant does not assert that the administrative order on review reflects an error of law; rather he contends that it is not supported by substantial evidence.

Substantial evidence exists to support a finding of fact “when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c). The “substantial evidence” standard of review can be overcome only when “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 292, 295 (1998). A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990). Upon substantial evidence review, my role is not to re-weigh the evidence; rather, I am required to:

“look 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 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 Administrative Law Judge] would not need to choose sides. 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 the finding and the [director] finds the other without giving a persuasive explanation." *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988).

The medical evidence here is divided. In determining that the proposed right knee surgical neurolysis was not appropriate medical treatment, MRU relied on the opinion of physician reviewer Lin and the MCO internal review. Dr. Lin recommended repeat EMG studies and reconsidering the proposed surgery in light of the test results. On the other hand, attending physician Savier recommended surgery and Drs. James and Morrision agreed. Upon substantial evidence review, I may or may not give greater weight to the opinion of the attending physician and the court will affirm the finding if it supported by substantial evidence in the record. *Dillon v. Whirlpool*, 172 Or App 484, 487-489 (2001).

Upon substantial evidence review, my role is not to reweigh the evidence, but to determine whether the record supports MRU's decision. To use *Armstrong* language, I cannot say that the evidence weighs overwhelmingly against MRU's decision. Furthermore, I conclude that the record, read as a whole, would permit a reasonable person to find, as MRU did, that the proposed surgery was inappropriate absent a documented change in claimant's medical condition. Inasmuch as the administrative order is reasonable in light of countervailing as well as supporting evidence, I affirm.

ATTORNEY FEES

Claimant has not prevailed and therefore is not entitled to an attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED:

The administrative order dated July 22, 2002 is affirmed.

DATED this _____ day of October 2002.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel