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In the Matter of the ORS 656.260 Managed Care Dispute of

**Walker, Larry G., Claimant**

Contested Case No: HH02-059

**PROPOSED & FINAL ORDER**

September 26, 2002

LARRY G. WALKER , Petitioner

SAIF CORPORATION AND MANAGED HEALTHCARE NORTHWEST,

Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals an administrative order issued on May 16, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) Department of Consumer and Business Services (director of the department). On August 26, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Larry G. Walker (claimant) was represented by attorney Rory J. Linerud. Respondent SAIF Corporation (insurer) was represented by attorney John B. Motley. Managed Healthcare Northwest (MCO) was represented by attorney Jerald P. Keene. WCD waived appearance. Claimant and Mary Lorraine Walker 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 Total Gym was not appropriate medical treatment.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 150 were admitted into the record without objection.

**FINDINGS OF FACT**

- (1) linen delivery. (Ex. 1.) herniation on the left at the L4-5
- (3) Insurer accepted the claim. (Ex. 3.) Exs. 17 permanently, totally disabled. (
- (6) On January 9, 1992, insurer enrolled claimant in the MCO. (Ex. 47.) Exs. 73, 82-1, 86-1, 87-1, 92-1.)  
actable back pain.
- (9) On January 3, 2001, claimant was discharged from the hospital. Jaime

(10) In January, 2001, claimant began a physical therapy program at Rebound Exs. 83, 88;

(11) On February 27, 2001, Dr. exercise program either in a gym or in the home using exercise equipment

(12) On May 7, 2001, Dr. claimant back to physical therapy for a home program of exercises. (Ex. 88-5).

Nicacio wrote:

has stopped his physical therapy as an outpatient. He is give him a prescription for a Total Gym and after he gets specifically be shown by one of out physical therapists what he can do on the Total Gym. (Ex. 88-6.)

(14) On June 13, 2001, Susan J. Davis, MD wrote a prescription for a Total Gym to strengthen ligaments, muscles and back. (Ex. 94.)

(15) On August 6, 2001, Dr. Davis responded to SAIF and stated,

The Total Gym is more of a chronic conditioning program to continue with exercises and things that he was doing in physical, to try to keep him at a lower pain level and to keep his functioning level higher, whereas physical therapy is a more aggressive treatment program using many more modalities to lead to improvement. Most patients I have do physical therapy for a limited period of time and then do transition into some form of home therapy. (Ex. 101.)

(16) On September 28, 2001, Dr. Davis again responded to SAIF and stated,

Mr. Walker has a very long-standing Workman's (sic) Compensation case, as you know. He has had surgeries on his back. He has had two hospitalizations in the past here for exacerbations of pain and, in fact, at one of the hospitalizations for a period of time the treating physician stated that he was not sure that the patient would ever be able to walk again. However, Mr. Walker did have a very good recovery and he has done a very aggressive

physical therapy program. Unlike most patients with back injuries, Mr. Walker is totally disabled and has significant problems that he struggles with on a chronic basis. He has had difficulty sleeping long-term. He also has shown significant improvement with therapy and was encouraged to continue to work on a program at home to maintain and stabilize the improvements that he has made. Mr. Walker, I believe, has had as much more severe injury to his back than most other people who have lumbar back injuries. He has had multiple surgeries to his back. He has had two hospitalizations in the past year, they were very long and very complex, with concerns that he would possibly not even be able to walk and I do believe that this patient does require a special bed to help him sleep, and also that

he will be less likely to have exacerbations of his back pain and require further hospitalizations if he is able to continue with his home therapy program on the Total Gym. (Ex. 108.)

(17) On November 15, 2001, the MCO disapproved the request for the Total Gym as not medically necessary and claimant appealed. (Exs. 112 and 113.)

(18) On January 10, 2002, the MCO Joint Medical Committee (JMC) upheld the disapproval because a Total Gym was not necessary to an independent exercise program for claimant. Present at the JMC meeting were a doctor of osteopathy specializing in Occupational Medicine, two orthopedic surgeons, one specializing in spinal surgery, a physician addictionologist, a psychiatrist, a psychologist, a physical therapist, two neurosurgeons and a chiropractor. (Ex. 122.)

(19) On February 20, 2002, Franklin Wong, MD, MCO Medical Director responded to WCD and considered the uniqueness of claimant's medical condition. Dr. Wong opined that a Total Gym was not required in order for claimant to maintain a fitness program and would be out of the norm for most individuals with similar conditions. He also noted that in the JMC's collective experience, alternatives to a Total Gym were available and adequate to meet claimant's needs. (Ex. 134.)

(20) On April 22, 2002, Joan Takacs, MD examined claimant at MRU's request. Dr. Takacs opined that a Total Gym is not appropriate for claimant because he suffers gouty arthritis and this equipment would put too much strain on the joints. Dr. Takacs noted that the medical records as well as claimant's

statement to her indicate that he does not maintain a home exercise program. (Ex. 145.)

### CONCLUSION OF LAW

MRU correctly determined that a Total Gym 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 656.245(10)(c)(A) requires an insurer to provide medical services after the medically stationary date to an injured worker who is permanently, totally disabled. ORS 656.260(4)(a) authorizes insurers to provide medical services to injured workers through a contract with a state-certified managed care organization.

OAR 436-010-0230(9) provides:

Articles including but not limited to beds, hot tubs, chairs, Jacuzzis, and gravity traction devices are not compensable unless a need is clearly justified by a report which establishes that the “nature of the injury or the process of recovery requires” the item be furnished. The report must specifically set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. Trips to spas, to resorts or retreats, whether prescribed or in association with a holistic medicine regimen, are not reimbursable unless special medical circumstances are shown to exist.

MRU relied on the opinions expressed by Dr. Nacacio and Dr. Davis and

determined that the prescribed Total Gym apparatus met the test prescribed by OAR 436-010-0239, and therefore, was a compensable medical service. I agree. However, MRU further determined that the Total Gym is not appropriate medical treatment for claimant, and therefore, is not reimbursable. I agree.

ORS 656.327(1)(a) provides:

If an injured worker, an insurer or self-insured employer or the Director of the Department of Consumer and Business Services believes that the medical treatment, not subject to ORS 656.260, that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services, the injured worker, insurer or self-insured employer shall request review of the treatment by the director and so notify the parties.

OAR 436-010-0230(1) provides:

Medical services provided to the injured worker shall not be more than the nature of the compensable injury or the process of recovery requires. Services which are unnecessary or inappropriate according to accepted professional standards are not reimbursable.

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).

Here, the record contains conflicting medical opinions concerning the medical appropriateness of the disputed Total Gym. 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). When there is a dispute between medical experts, the court gives more weight to those medical opinions which are both well-reasoned and based on complete information. *Hammons v. Perini Corp.*, 43 Or App 299 (1979); *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, 621 (1981).

Here, Dr. Takacs examined claimant and reviewed his medical records in the role of medical arbiter. She opined that the Total Gym would place too much stress on claimant's joints because he suffers gouty arthritis. In contrast, Dr. Nacacio and Dr. Davis did not consider the Total Gym in relation to claimant's arthritic condition. Therefore, I find Dr. Takacs' opinion persuasive and conclude that the Total Gym is not appropriate medical treatment for claimant. Accordingly, it is not reimbursable. Finally, inasmuch as the administrative order is supported by substantial 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 May 16, 2002 is affirmed.

DATED this \_\_\_\_ day of September 2002.

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Catherine P. Coburn  
Administrative Law Judge  
Hearing Officer Panel

