

In the ORS 656.245 Medical Services Dispute of

Barnes, Dennis L., Claimant

Contested Case No: H03-018

PROPOSED AND FINAL ORDER

June 11, 2003

DENNIS L. BARNES, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an Administrative Order issued on January 29, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On April 9, 2003, Administrative Law Judge¹ Catherine P. Coburn conducted a hearing in this matter. Petitioner Dennis L. Barnes appeared without benefit of counsel. Respondent SAIF Corporation was represented by attorney Mary Goebel Adams. Claimant and his wife Gladys P. Barnes testified on claimant's behalf. On April 9, 2003, insurer submitted a post-hearing memorandum. The record closed on May 9, 2003 upon receipt of a transmitted question.

TRANSMITTED QUESTION

On April 23, 2003, WCD requested that the Office of Administrative Hearings submit the following transmitted question:

Does ORS 656.245(1)(c)(J) apply to medically stationary, permanently disabled workers who are entitled to medical services pursuant to ORS 656.245(1)(c)(A)?

On May 6, 2003, I transmitted the question and stayed the proceeding pending receipt of WCD's response. On May 8, 2003, WCD submitted the Agency response to Transmitted Question. WCD stated that ORS 656.245(1)(c)(J) does not apply to medically stationary, permanently disabled workers who are entitled to medical services pursuant to ORS 656.245(1)(c)(A).

ISSUE

Whether chiropractic manipulation and massage, prescribed for claimant by Lester Hands, MD is appropriate medical care for the compensable conditions.

¹ The office of Administrative hearings was previously the "Hearing Officer Panel" (the Panel). The Panel's name was changed to the Office of Administrative Hearings by House Bill 2526, which became effective on the Governor's signature on may 22, 2003.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 57 were admitted into the record without objection. Claimant's Supplementary Exhibit 58 was admitted into the record over insurer's objection.

FINDINGS OF FACT

(1) On August 7, 1989, claimant suffered a compensable injury while working on a farm. (Ex. 1.) On September 22, 1989, insurer accepted the following medical conditions: fractured right glenoid neck and mid clavicle; lacerations to the right ear, right forehead and right cheek; cerebral contusion right temporal parietal region; Contusions and abrasions right arm, shoulder and knee; post-concussive syndrome, neuropsychological and cognitive deficits, occipital headaches and hearing loss, left side. (Exs. 6, 10-2 and 34.) The accepted conditions became medically stationary on June 19, 1995. (Ex. 7.) Effective June 20, 1995, claimant was determined to be permanently, totally disabled. (Exs. 8-2, 9 and 10-2.)

(2) The parties entered into a Claims Disposition Agreement dated June 29, 1998. (Ex. 10.)

(3) Claimant's attending physician is Lester Hands, MD. (Ex. 11; testimony of claimant.)

(4) In March 2000, claimant began receiving chiropractic treatment from Ronald Clifton, DC at Heresco Chiropractic Association. (Ex. 18-1.)

(5) On April 5, 2000, Thad C. Stanford, MD and M. Earl Duncan, DC examined claimant at insurer's request. They recommended massage and chiropractic palliative care. (Ex. 17-6.)

(6) On May 23, 2002, Dr. Hands requested palliative care consisting of monthly chiropractic adjustments and massage therapy. (Ex. 33.)

(7) On June 5, 2002, Joseph S. Sacamamo, MD and Thomas Freedland, DC examined claimant at insurer's request. They opined that there was no medical justification for ongoing chiropractic and massage treatment for the work injury. (Ex. 36-8.)

(8) On June 19, 2002, Dr. Hands did not concur with the opinions of Dr. Sacamamo and Dr. Freedland. (Ex. 38.)

(9) On July 12, 2002 and July 23, 2002, insurer denied the palliative care request and requested additional information from Dr. Hands. (Exs. 39 and 40.)

(10) On August 29, 2002, Henry H. Holmes, MD examined claimant on referral from Dr. Hands. Dr. Holmes recommended against further palliative chiropractic and massage care. (Ex. 44-5.)

(11) On October 8, 2002, Ross M. Hart, DC examined claimant at WCD's request. He opined that claimant's subjective complaints are related to disuse atrophy and that after two years, chiropractic treatment and massage therapy are of no objective benefit. (Exs. 47-3 and

51.)

CONCLUSION OF LAW

Chiropractic manipulation and massage, prescribed for claimant by Lester Hands, MD is not appropriate medical care for the compensable conditions.

OPINION

This dispute arises under ORS 656.245(1)(c)(A), and therefore, jurisdiction lies with the director. ORS 656.245(6). I review for substantial evidence or error of law. ORS 656.245(6), ORS 656.327 and OAR 436-120-0225(3). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence).

MRU determined that claimant is entitled to appropriate medical care pursuant to ORS 656.245(1)(c)(A). MRU further determined that ongoing chiropractic and massage treatment was not appropriate for the compensable conditions pursuant to ORS 656.327. I agree with both of MRU's determinations.

Entitlement

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for conditions that are caused in material part by the work injury for such period as the nature of the injury or process of the recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b). Also, the obligation to provide appropriate, work-related medical services continues after the parties execute a claims disposition agreement. ORS 656.236(1). However, provision of medical services is limited after the compensable conditions become medically stationary. ORS 656.245(1)(c) provides in pertinent part:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary² are not compensable except for the following:

(A) Services provided to a worker who has been determined to be permanently and totally disabled.

(J) With the approval of the insurer or self-insured employer, palliative care³ that the worker's attending physician referred to in ORS

² ORS 656.005(17) provides:

“Medically stationary” means that no further material improvement would reasonably be expected from medical treatment, or the passage of time.

³ ORS 656.005(2) provides:

656.005(12)(b)(A) prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

MRU determined that a permanently, totally disabled worker is entitled to appropriate medical care under ORS 656.245(1)(c)(A) and is not subject to the requirements specified by ORS 656.245(1)(c)(J). I agree. ORS 174.020 appears under the heading “Legislative intent; general and particular provisions and intents” and provides:

In the construction of a statute the intention of the legislature is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.

ORS 656.245(1)(c)(A) and ORS 656.245(1)(c)(J) are inconsistent because each subsection specifies different circumstances under which an insurer is obligated to provide medical services after the medically stationary date. Also, subsection (J) is a general provision because it applies to medically stationary injured workers in general. In contrast, subsection (A) is a specific provision because it applies to the subcategory of injured workers who have been determined permanently, totally disabled. Therefore, subsection (A), as the particular provision is paramount. Accordingly, claimant, who is permanently, totally disabled, is entitled to medical services under ORS 656.245(1)(c)(A) and is not subject to the requirements specified by subsection (J). Finally, this conclusion is logical because injured workers who are permanently, totally disabled, by definition, do not work or participate in vocational retraining. ORS 656.206(1)⁴.

Appropriateness

Even though a permanently, totally disabled worker is entitled to provision of medical services under ORS 656.245(1)(c)(A), those services are subject to ORS 656.327 which pertain to medical appropriateness. 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

‘Palliative care’ means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

⁴ ORS 656.206(1)(a) provides in part:

Notwithstanding ORS 656.225, “permanent total disability” means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.

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.

MRU determined that the chiropractic and massage therapy prescribed by Dr. Hands was inappropriate. I review for substantial evidence or error of law. ORS 656.245(6), ORS 656.327(2) AND oar 436-001-0225(3). 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 (1990). To determine whether substantial evidence exists, an administrative law judge is 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).

It is not for an ALJ to decide which medical opinions are more persuasive. I am authorized only to determine whether the record contains substantial evidence to support MRU’s order. See *John J. Rice*, 4 WCSR 173, 176 (1999). Under substantial evidence review standard, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001).

Here, MRU acknowledged that claimant suffers impairments. However, MRU relied on the opinions of Dr. Holmes and Dr. Hart who recommended against further chiropractic and massage therapy. MRU found these medical opinions more persuasive than that of attending physician Hands. I note that Dr. Sacamano and Dr. Freedland also opined that there was no medical justification for the disputed treatment. Based on the record, I conclude that substantial evidence supports MRU’s determination that the disputed medical treatment is not appropriate for the compensable conditions. Therefore, I affirm.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated January 29, 2003 is affirmed.

DATED this 11th day of June 2003.

Catherine P. Coburn
Administrative Law Judge
Office of Administrative Hearings