

In the Matter of the ORS 656.260 MCO Medical Services Dispute of

Gilbert, Lisa E., Claimant

Contested Case No: H03-111

PROPOSED AND FINAL ORDER

November 26, 2003

LISA E. GILBERT, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals a July 24, 2003 administrative order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director) which determined that SAIF was not liable for reimbursement of medical services provided by Victor Lin, MD (Physical Medicine and Rehabilitation) on September 14, 2001 and May 10, 2002 and those provided by McKenzie Willamette Hospital on October 10, 2002. Claimant filed her appeal on August 21, 2003. WCD referred this matter for hearing to the Office of Administrative Hearing on August 27, 2003.

On October 8, 2003, Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter. Petitioner Lisa E. Gilbert (claimant) was represented by attorney Dale Johnson. The SAIF Corporation (insurer or SAIF) was represented by attorney H. Thomas Anderson. WCD and manage care organization, Oregon Health Care Systems, waived appearance. Claimant testified on her own behalf. The record closed following the hearing.

ISSUES

(1) Whether MRU's decision that SAIF was not liable for reimbursement of medical services provided by Dr. Lin on September 14, 2001 and May 10, 2002 is not supported by substantial evidence or reflects an error of law.

(2) Whether MRU's decision that SAIF was not liable for reimbursement of medical services provided by McKenzie Willamette Hospital on October 10, 2002 is not supported by substantial evidence or reflects an error of law.

EVIDENTIARY RULING

The record consists of WCD's Exhibits 1 through 24 and claimant's Supplementary Exhibits A, B, C, D, E, F, G, H, I, J, K, 3A, 3B, 3C, 3D, 3E, 3F, 3G, 3H, 3I, 3J, 3K, 9A, 25 and 26, which were admitted into the record without objection. Exhibit 3K was corrected by interlineation without objection to read that claimant is "left-hand dominant."

FINDINGS OF FACT

I adopt by this reference the findings contained in MRU's July 24, 2001 Administrative Order "Findings of Fact" with the following supplementation.

(1) On or about August 5, 1996, claimant experienced exacerbation of previous shoulder, wrist and thumb symptoms. She filed an occupational disease claim on September 12, 1996. Following litigation which found claimant's claim compensable, SAIF accepted claimant's left scapular bursitis, left wrist tendonitis and left thumb tenosynovitis conditions. (Exs. 1, K7.) On February 12, 1998, SAIF notified claimant that she was enrolled in the MCO and that her current attending physician, Dr. Lin, was an authorized MCO provider. (Ex. 2.) Claimant was found to be medically stationary on May 8, 1998. A May 29, 1998, Notice of Closure (NOC) closed claimant's claim, noting a temporary disability overpayment of \$342.75 and awarding no permanent disability. (Ex. 3A.) An October 2, 1998 Order on Reconsideration awarded 5 percent (7.5 degrees) permanent partial disability for loss of use of her left wrist/forearm. (Ex. 3H.) Dr. Lin notified SAIF on September 1, 2000 that claimant's need for a wrist splint was ongoing and would periodically need a replacement splint for the duration of her life time. (Ex. 3I.)

(2) On May 11, 2001, claimant underwent an independent medical examination (IME) by William Courogen, MD (Orthopedic Surgeon) and William Parsons, MD (Neurosurgeon). They diagnosed somatoform disorder. Noting marked discrepancies in the examination, Drs. Courogen and Parsons opined that claimant's perceived impairment had no valid physical basis on examination. (Ex.5.) A psychiatric evaluation done by Eugene E. Klecan, MD (Psychiatry) performed on the same date agreed that claimant's subjective complainants had no physical basis. Dr. Klecan opined that claimant had functional, disproportional complainants, with secondary monetary and emotional gain. He concurred with the IMEs that she should not wear a brace or be prescribed Xanax. Dr. Klecan also opined that the claim should be closed. (Ex. 6.)

(3) Dr. Lin disagreed with the opinions of Drs. Courogen, Parsons and Klecan. (Ex. 4.) Dr. Lin continued to diagnose left parascapular shoulder strain and "periscapular bursitis." On September 14, 2001, he injected claimant with 1% Lidocaine. (Ex. 7.) On September 19, 2001, Dr. Lin submitted a billing to SAIF for the medical services performed on September 14, 2001. (Ex. 8.)

(4) On May 10, 2002, claimant sought treatment from Dr. Lin complaining of swelling in the first and second metacarpal phalangeal joints of her left hand. Dr. Lin diagnosed probable degenerative joint disease and x-rayed her hand. (Ex. 7) On May 17, 2002, Dr. Lin submitted a billing to SAIF for the medical services performed on May 10, 2002. (Ex. 8.)

(5) On October 18, 2001, SAIF denied payment of the medical services bill for September 14, 2001 for \$344.00. On June 26, 2002, SAIF denied payment of the medical services bill for May 10, 2002 for \$148.00. (Ex. 9.) The denials were issued because SAIF determined that the medical services were not related to claimant's accepted injury. (Ex. 10.) Dr. Lin filed a request for administrative review with MRU but MRU referred claimant to the

Workers' Compensation Board's Hearings Division because it appeared that compensability was at issue. (Ex. 11.)

(6) Dr. Lin subsequently stated that the medical services provided to claimant on May 10, 2002 were related to claimant's accepted left thumb tenosynovitis condition. (Exs. 25, 26.)

(7) On April 3, 2002, MRU denied as untimely Dr. Lin's February 26, 2002 request for resolution of the dispute concerning the denied billing for the medical services performed on September 14, 2001, inasmuch as it was filed more than 60 days from the date of service. (Ex. 9A.)

(8) On October 10, 2002, Dr. Linn prescribed a replacement splint for claimant. (Ex. 14.) On November 13, 2002, McKenzie-Willamette Hospital billed SAIF \$219.00 for medical services rendered to claimant, including medical/surgical supplies, orthotics fitting and training, and fabrication of a splint. The chart note from McKenzie-Willamette Hospital indicated that the support was directed to claimant's arthralgia resulting from rheumatoid arthritis. SAIF denied payment on January 26, 2003 and the hospital billed claimant. (Exs. 12, 13, 15.)

(9) Dr. Lin subsequently stated that the left hand and wrist splint was written for a combination of claimant's accepted wrist tendonitis and left thumb tenosynovitis. (Exs. 25, 26.)

CONCLUSIONS OF LAW

(1) MRU's decision that SAIF was not liable for reimbursement of medical services provided by Dr. Lin on September 14, 2001 and May 10, 2002 is supported by substantial evidence and does not reflect an error of law.

(2) MRU's decision that SAIF was not liable for reimbursement of medical services provided by McKenzie Willamette Hospital on October 10, 2002 is supported by substantial evidence and does not reflect an error of law.

OPINION

Jurisdiction lies with the director. ORS 656.260(6). The issues arise under ORS 656.245(6) and 656.260(6). Consequently, I review for substantial evidence and errors of law. OAR 436-001-0225(4). 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), *reversed* 315 Or 643 (1993). As the proponent of her 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). I find that claimant has failed to meet her burden.

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 not related to the compensable condition or is excessive, inappropriate, ineffectual or that violates administrative rules. ORS 656.327(1)(a).

I review the question of whether SAIF is liable for payment of medical services provided by Dr. Lin and McKenzie Willamette Hospital for substantial evidence and errors of law. ORS 656.327(2). Claimant does not assert that the administrative order on review reflects an error of law; rather she 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).

SAIF denied reimbursement of the medical services because it determined that the services were not related to claimant’s compensable conditions. MRU determined that claimant’s appeal of SAIF’s denial of reimbursement for the medical services provided by Dr. Lin on September 14, 2001 was untimely filed. Claimant concedes that the matter was not timely and does not contest MRU’s decision in that regard. MRU also determined that the medical services performed by Dr. Lin on May 10, 2002 and the splint provided by McKenzie Willamette Hospital on October 10, 2002 were not reimburseable because there was no evidence that they were directed to claimant’s compensable conditions.

The medical evidence here is divided. In that regard, the record contains the medical opinions of Drs. Courogen, Parsons and Klecan. Drs. Courogen and Parsons diagnosed somatoform disorder and opined that claimant’s perceived impairment had no valid physical basis on examination. Dr. Klecan agreed that claimant’s subjective complainants had no physical basis. Dr. Klecan opined that claimant had functional, disproportional complainants, with secondary monetary and emotional gain. He concurred with Drs. Courogen and Parsons that she should not wear a brace or be prescribed Xanax.

The record also contains the medical opinion of claimant’s attending physician, Dr. Lin, who disagreed with Drs. Courogen, Parsons and Klecan and continued to diagnose left parascapular shoulder strain and “periscapular bursitis.” When claimant sought treatment from Dr. Lin complaining of swelling in the first and second metacarpal phalangeal joints of her left hand, he diagnosed probable degenerative joint disease and x-rayed her hand. Dr. Lin subsequently clarified that the medical services provided to claimant on May 10, 2002 were

related to claimant's accepted conditions of left thumb tenosynovitis. Dr. Lin also prescribed a new splint for claimant's left hand, which was provided by McKenzie Willamette Hospital. The chart note from McKenzie-Willamette Hospital indicated that the support was directed to claimant's arthralgia resulting from rheumatoid arthritis. Dr. Lin later stated that the left hand and wrist splint was written for a combination of claimant's accepted wrist tendonitis and left thumb tenosynovitis.

In reaching its conclusions, MRU found the opinions of Drs. Courogen, Parsons and Klecan the most persuasive. Although Dr. Lin has now opined that the May 10, 2001 medical service was directed to claimant's compensable conditions, I find this constitutes a change in opinion from his previous opinion that the services were due to "probable degenerative joint disease." Because he does not explain why he changed his opinion, I do not find his new opinion to be persuasive. Furthermore, the splint provided by McKenzie Willamette Hospital was previously attributed to claimant's arthralgia resulting from rheumatoid arthritis. Again, this change in opinion that the splint is related to her compensable conditions is not explained by either Dr. Lin or McKenzie Willamette Hospital. Consequently, I do not find the new opinion concerning the need for the splint to be persuasive. Accordingly, I conclude that MRU's administrative order is supported by substantial evidence and affirm.

ATTORNEY FEE

Claimant has not prevailed in a contested case before the director involving compensation benefits pursuant to ORS 656.245. Claimant's attorney is, therefore, not entitled to attorney's fee for services at hearing and in preparation therefore. ORS 656.385(1)

ORDER

IT IS HEREBY ORDERED that MRU's Administrative Order number MMS03-763 dated July 24, 2003 is affirmed.

DATED this 26th day of November 2003.

Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings