
In the Matter of the ORS 656.260 Managed Care Dispute of

Kelley, Douglas, Claimant

Contested Case No: H03-023

PROPOSED AND FINAL ORDER

October 16, 2003

SAIF CORPORATION, Petitioner

DOUGLAS KELLEY & PROVIDENCE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

SAIF Corporation appeals an administrative order issued on January 28, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services. On September 3, 2003, Administrative Law Judge Paul Vincent conducted a telephone hearing originating in Salem, Oregon. Petitioner SAIF Corporation was represented by its attorney, Tom Anderson. Respondent Douglas Kelley appeared personally and through his attorney, Brian Pocock. Providence MCO, the other respondent in the case, appeared through its attorney, Allen Lyons.¹ No testimony was provided in the hearing, which consisted almost entirely of legal argument. The record closed on the date of hearing.

After the record closed in this matter, ALJ Vincent began working for a different section of the Office of Administrative Hearings and this matter was transferred to the undersigned. I have listened to the tape of the September 3 hearing, including the arguments of the parties, and I have reviewed all of the exhibits in the record before making the decision that follows. I have also received the September 16 fax from Mr. Pocock which constitutes his statement of time spent on this case.

ISSUE

(1) Did claimant lose his appeal rights on the MCO decision when his doctor failed to appeal that decision?

(2) Is the Administrative Order of the director supported by substantial evidence and legally correct?

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 85, except for Exhibit 33, were admitted into evidence without objection. The parties agree that Exhibit 33 is a medical report involving a different individual than claimant and it was not admitted. An additional document, a report from Dr. Weller, was initially offered by SAIF

¹ Providence is technically a respondent although its interests and its position in this matter more closely coincide with those of petitioner.

Corporation but, before it could be marked, the offer was withdrawn. The document is in the file but is not marked and is not part of the evidence of the case.

FINDINGS OF FACT

(1) On March 14, 2001, claimant suffered a work injury while working as a maintenance worker for the Junction City School District. Claimant injured, among other body parts, his low back. (Ex. 32). On April 9, 2001, SAIF accepted as disabling a scalp contusion, lumbar contusion and sprain, left wrist sprain, and left ankle sprain. (Ex. 36).

(2) Claimant initially treated for his injury with Drs. Brandt and Jonasson. Dr. Jonasson took claimant off work for a week, noting that claimant had old injuries to his low back and left ankle. (Ex. 30). Claimant agreed his back had been injured before. (Ex. 32). Dr. Brandt had treated the low back after a fall from a roof in October 2000, five months prior. (Ex. 1).

(3) Claimant's low back complaints lessened in the month after the injury and, by April 23, 2001, claimant had been released back to regular work with only "common sense restrictions." (Ex. 1 p 15). When claimant returned to Dr. Brandt on May 8, he was complaining about his ankle, not his low back. In June, claimant reported intermittent low back pain. By June 26, claimant was complaining that the back pain was increasing, with pain radiating into both legs. Dr. Brandt sent claimant for an MRI scan. (Ex. 1 p 18).

(4) Claimant underwent MRI testing on July 2, 2001. The scan showed partially desiccated discs at the levels from L3-4 to L5-S1, small bulges, some apophyseal joint arthropathy, and spinal stenosis. (Ex. 38). Another MRI scan on April 8, 2002 showed no interval change between July and April. (Ex. 62). During the intervening period of time, claimant continued to work for the school district except when undergoing treatment for an unrelated carpal tunnel condition.²

(5) Claimant was examined by Alexis Norelle, MD on April 26, 2002. Although Dr. Norelle had treated claimant for other conditions, this was her first treatment of his low back condition. Dr. Norelle's impression at that time was "chronic low back pain with stenosis at the L4L5 level and degenerative disc disease at L3L4, L4L5 and L5S1." The doctor then indicated that claimant needed flexion/extension films and a discogram "to better determine if his symptoms are exclusively from the stenosis or if the degenerative disc disease is contributing to his symptoms." (Ex. 64 p 3, 4). Neither stenosis nor degenerative disc disease are accepted conditions in claimant's claim.

(6) On May 14, Providence wrote to Dr. Norelle and informed her that the discogram was not approved because her reasons for requesting the test did not meet the criteria under MCO rules for that diagnostic procedure. (Ex. 65). Dr. Norelle performed the discogram anyway, (Ex. 66), with claimant's private insurer paying for it.

(7) On May 30, 2002, claimant's attorney requested review of the May 14 MCO

² Many of the documents in the exhibits supplied by the Department are part of another accepted claim filed by claimant, concerning carpal tunnel syndrome. Those records are not pertinent to the issue in this case.

decision. On June 11, the MCO informed claimant that the doctor did not wish to appeal the decision and gave claimant information about contacting DCBS and requesting administrative review. (Ex. 67). On July 27, claimant's attorney prepared a Medical Fee Dispute Resolution Request, contesting the denial of the discogram. The request was received by DCBS on July 30, 2002. (Ex. 72). On August 13, 2002, the Department informed the parties of the dispute and requested responses to the director on or before August 28, 2002. (Ex. 74).

(8) On August 19, SAIF wrote to the MRU, the director's designee in these cases, contending that the discogram was appropriately denied because 1) the service was not causally related to the accepted condition; 2) the treatment was inappropriate for the accepted condition; and 3) there was no timely appeal of the MCO decision. (Ex. 76). In order to determine the appropriateness of the diagnostic test, the MRU set up a file review with Michael Potter, MD. The questions asked of Dr. Potter did not indicate what conditions were accepted by the insurer. (Ex. 80). Dr. Potter reviewed the records and concluded that the discogram was appropriate treatment. (Ex. 81).

(9) After Dr. Potter's review, SAIF reiterated its position that there was no timely appeal from the MCO decision, and that it should not have to pay for Dr. Potter's opinion. (Ex.82).

(10) On January 28, 2003, the MRU issued an Administrative Order finding that the discogram was appropriate: "*Since the medical evidence persuasively documented the disputed discography was provided to further explore Mr. Kelley's symptoms, the same symptoms he experienced since injury, the director concludes the disputed lumbar discography is a compensable medical service.*" (Ex. 83 p 4). Finding that the MCO's view of discography was "very narrow" and that the opinions of Drs. Norelle and Potter were "well-reasoned," the reviewer determined that discography was an appropriate service for claimant. (Ex. 83 p 5).

(11) Claimant has not asked SAIF Corporation to accept any other conditions in the low back besides the contusion and sprain originally accepted.

CONCLUSIONS OF LAW

(1) Claimant did not lose his appeal rights on the MCO decision when his doctor failed to appeal that decision.

(2) The Administrative Order of the director contains an error of law.

OPINION

The question of the appropriateness of the requested diagnostic test in this case lies with the Director of the Department of Consumer and Business Services (DCBS). ORS 656.260(6). The Administrative Order may be modified only if it is not supported by substantial evidence in the record or if it contains an error of law. ORS 656.260(16). SAIF Corporation, as the petitioner in this matter, has the burden of establishing either an error of law or a lack of substantial evidence to support the Administrative Order. ORS 183.450(2).

Timeliness of Appeal

SAIF's initial argument in this case is that claimant's appeal of the MCO decision was untimely. SAIF and Providence argue that Dr. Norelle's refusal to appeal the matter leaves claimant with no standing to appeal or, in the alternative, that his appeal was untimely.

SAIF's analysis of the appeal process is incorrect on the face of the statute. ORS 656.260(14) states:

(14) If a *worker*, insurer, self-insured employer *or* the attending physician is dissatisfied with an action of the managed care organization...that person or entity must first apply to the director for administrative review of the matter before requesting a hearing before the director. Such application must be made not later than the 60th day after the date the managed care organization has completed and issued its final decision.

(Emphasis added). The emphasized portion of the statute indicates that a worker has a right (which is independent of the treating doctor's right) to contest an MCO decision. Thus, there does not appear to be a standing issue. What remains to be evaluated is whether claimant's request was timely.

On May 14, 2002, Providence gave notice to claimant and to Dr. Norelle that it would not approve the discogram. The notice indicated that any appeal should be sent to Providence MCO within 30 days. (Ex. 65). On May 30, sixteen days after Providence's decision, claimant's attorney sent a letter to the MCO requesting review of the May 14 decision. On June 11, the MCO responded to Mr. Pocock with the information that Dr. Norelle did not want to appeal the decision. The letter continued:

We have contacted Dr. Norelle regarding your request, and have established that the physician does not wish to appeal this decision. *Therefore, you may request review* from the Director of the Department of Consumer and Business Services, Workers' Compensation Division [address omitted]. *Your request must be in writing and must be submitted within 60 days.*

(Ex. 67, emphasis added). Mr. Pocock then requested review on July 27 (received July 30).

Based on these facts, I conclude that the claimant's request was timely in the case. Claimant timely requested the Director's involvement in the discography issue and is entitled to a decision on the merits.

Basis of the Director's Decision

The administrative reviewer determined that discography was appropriate in this case based upon a finding that the medical condition for which it was sought was compensable and that the medical evidence supported the appropriateness of the diagnostic test. I may alter that

decision only if I conclude that it was not supported by substantial evidence or that it contains an error of law. In this case, I find both an error of law and a substantial evidence problem.

Error of Law

The error of law made by the agency in this case is found in the director's analysis of how discography was compensable in this case:

Since the medical evidence persuasively documented the disputed discography was provided to further explore Mr. Kelley's symptoms, the same symptoms he experienced since injury, the director concludes the disputed lumbar discography is a compensable medical service.

(Ex. 83 p 4; emphasis added). The italicized portions of the director's decision show the error of law made by the director. As SAIF noted in its argument, there is a difference between symptoms and conditions. The workers' compensation statutes contemplate the acceptance or denial of conditions; there is nothing that requires an insurer to address symptoms unless there is a claim being made for a condition.

It is axiomatic that decisions of medical treatment (including diagnostic services) must be reviewed in the context of what is accepted in the workers' compensation claim. In this case, the only accepted conditions involving the low back include lumbar contusion and lumbar sprain. (Ex. 36). No requests had been made by claimant to expand the scope of acceptance, either by alleging an omitted condition or a new medical condition under ORS 656.262.³

Claimant argues that the director had the right to make the compensability decision in this case, even though claimant did not ask for additional conditions to be accepted. Claimant argues that the insurer never gave him anything to deny concerning the other low back conditions (spinal stenosis and degenerative disc disease, for example), and that the director made the compensability decision in the insurer's stead. In essence, claimant argues that the MCO statute is an exception to the general requirements to make a claim for specific conditions codified in ORS 656.262.

However, nothing in ORS 656.260 (the MCO statute) gives the director the authority to make a compensability decision outside the context of the rest of the chapter. The director's ability to determine the appropriateness of medical treatment must be predicated on what the insurer has accepted or—in cases where there is a new or omitted condition claimed—on appropriate diagnostic testing for the newly claimed condition. As SAIF argued, claimant never asked the insurer to accept additional diagnoses. Therefore, the director's compensability decision—a decision that all of the symptoms in claimant's low back must be due to the injury without regard to the scope of the acceptance—was an error of law.

That this was an error is further demonstrated by the medical evidence. Although the director makes a seemingly direct connection (claimant has symptoms, the symptoms started at

³ ORS 656.262(6)(d) covers omitted conditions, while 656.262(7)(a) covers new medical conditions.

the time of the injury, therefore the injury caused the symptoms), that temporal connection ignores other medical evidence. For instance, Dr. Norelle's request for discography was to differentiate between stenosis and degenerative disc disease—neither one of which is a condition claimed by claimant in this case.

Thus, it was error for the director to disregard the actual accepted condition and to make a separate compensability decision.

Substantial Evidence Issues

If there had not been an error of law in this case, I would nevertheless have reversed the director's decision based upon substantial evidence grounds. The director relied upon the "wellreasoned" opinions of Drs. Norelle and Potter, but the basis for those opinions are virtually nonexistent or erroneous.

Substantial evidence supports 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). This statutory standard has been interpreted by the Court of Appeals to mean:

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, 752 P2d 312 (1988). The Court of Appeals later clarified its method of reviewing such cases:

We review the Board's order for, among other things, the existence and soundness of its rationale to determine whether it is supported by substantial reason. The requirement of a rational explanation is designed to facilitate "meaningful judicial scrutiny of the activities of an administrative agency* * * ." *Home Plate, Inc. v. OLCC*, 20 Or App 188, 190, 530 P2d 862 (1975).

Furnish v. Montavilla Lumber Co., 124 Or App 622, 625, 863 P2d 524 (1993).

It is clear from the case law that there must be a rational basis for the decision that is made by any agency. In this case, the rational basis is missing. The director based the decision to allow discography, first of all, on the erroneous notion that the director can make compensability decisions. Second, the decision was based on the "well-reasoned" opinions of Drs. Norelle and Potter. It is this last comment which deprives the director's decision of any rational basis, as will be seen.

Dr. Norelle's opinion. When Dr. Norelle requested the discogram, she clearly stated the purpose for the test:

[Claimant] will need to undergo flexion/extension films and a discogram *in order to better determine if his symptoms are exclusively from the stenosis or if the degenerative disc disease is contributing to his symptoms.*

(Ex. 64 p 4, emphasis added). Dr. Norelle was trying to determine whether claimant's symptoms were due to spinal stenosis or due to the degenerative disc disease—in a case where neither condition had been claimed by the claimant or processed by the insurer. There is no indication that discography was intended to treat or diagnose the accepted condition.

The only other statement by Dr. Norelle concerning the reason for the discography was in a response to counsel's request for further information:

Dear Mr. Pocock:

Please see the enclosed reports from the discogram and post-discogram CT scan. *Mr. Kelley has a diagnosis of multilevel internal lumbar disc derangement. The fall from the ladder at work on March 14, 2001 was the major cause of his current lumbar disability and need for treatment. That is based on all the potential factors that could cause the need for treatment including his pre-existing degenerative disc disease of the lumbar spine. The discogram was a necessary test to determine if a surgical fusion would provide Mr. Kelley with relief of his back symptoms.*

(Ex. 79, emphasis added). Once again, while Dr. Norelle's concern for the entirety of claimant's low back is certainly understandable from a clinical standpoint, her opinion fails to explain the relationship to the accepted conditions of lumbar contusion and lumbar sprain.

Dr. Potter's Opinion. Although the director found the opinion of Dr. Potter to be wellreasoned like that of Dr. Norelle, there are two parts of that conclusion which are not explained in the record. First, since the sum of Dr. Potter's opinion on the discography issue⁴ appears to be that discography should be authorized because the treating doctor wanted it, the persuasiveness of Dr. Potter's opinion must rise or fall based on the reasons provided by Dr. Norelle for doing the discography. As noted, Dr. Norelle's reasons are perhaps medically sound but are not related to the claimed conditions.

Second, it does not appear that Dr. Potter was ever informed of the actual accepted conditions in the case, except perhaps by reading what he called the "voluminous exhibits." Dr. Potter was not asked to address the relationship of the treatment to the accepted conditions, and the tone of his comments make it clear that he was not considering those limitations.

In summary, the opinions of Drs. Norelle and Potter are lacking in substantial reason and are insufficient to support the decision reached by the director. Given the error of law and the lack of substantial evidence, I conclude that the Administrative Order must be reversed. The discogram is not reimburseable in this case.

⁴ I am separating the discography issue from the doctor's unfortunate editorial comments about his perceptions of the insurer and focusing on the former, although it would seem that a thorough analysis of the doctor's report should have explored whether the doctor could actually be impartial in this case.

Claimant's attorney is not entitled to an attorney fee in this case because claimant has not prevailed.

ORDER

IT IS HEREBY ORDERED that:

1. The Directors Review and Order dated January 28, 2003 is REVERSED.

DATED this 16th day of October, 2003.

Rick D. Barber,
Administrative Law Judge
Office of Administrative Hearings