
In the Matter of the ORS 656.245 Medical Services Dispute of
Astorino, Sheri, Claimant
Contested Case No: H03-058
PROPOSED & FINAL ORDER
March 29, 2004
SHERI ASTORINO, Petitioner
NORDSTROM, INC., Respondent
Before Beth Bierman, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Claimant appeals an Administrative Order issued on April 24, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Office of Administrative Hearings (OAH) on June 11, 2003. On July 23, 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a hearing in this matter. Petitioner Sheri Astorino (claimant) appeared and was represented by her attorney Scott McNutt. Respondent Nordstrom Inc. (Nordstrom or insurer) was represented by attorney Dennis Reese. Claimant testified on her own behalf.¹ The record was left open for receipt of information from Mr. McNutt regarding his attorney fees. That information was received July 24, 2003. The record closed that day.

After the record closed, ALJ Vincent began working in a different section of the OAH and this matter was transferred to ALJ Beth Bierman. I reviewed the record including the exhibits, hearing tape, and insurer's hearing memorandum before making the decision in this case.

ISSUE

Whether chiropractic treatment requested by Art Walker, DC, on October 12, 2002 should be approved under OAR 436-010-0290.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 19 were admitted into the record without objection.

FINDINGS OF FACT

(1) On January 26, 1994, claimant suffered a compensable back injury. On February 26, 1994, the insurer accepted a non-disabling lumbar strain with sciatic radiculitis and claimant was enrolled in an MCO. Her condition was found medically stationary on July 22, 1996. Her claim was closed October 4, 1996 and she was awarded permanent partial disability. (Exs. 1-3, 17.)

(2) Dr. Walker began treating claimant in 1996. In October and December 2002 and January 2003, claimant saw Dr. Walker for treatment of lower back pain. (Claimant's testimony; Ex. 5 at 10-12; Ex. 7).

¹ Insurer's attorney objected to claimant's testimony on the basis that she was not competent to testify as to medical issues. ALJ Vincent overruled the objection and denied insurer's motion to strike claimant's testimony.

(3) Authorization for palliative care expired September 15, 2002. Insurer notified claimant and Dr. Walker by letter dated November 18, 2002, that the authorization had expired and that no further palliative care was authorized. (Ex. 11).

(4) Dr. Walker's chart notes and reports do not establish causation. (Ex. 5 at 10-12). The cause of the temporary flare-up is unknown. (Ex. 6).

(5) In the palliative care request, dated October 2, 2002, Dr. Walker stated he wanted to treat claimant "...only as required for palliation of LBP. Estimate 1-2 per month." (Ex. 19).

(6) The palliative care request did not describe how the requested care will enable the claimant to continue working and the possible adverse effect if the care is not approved. (Ex. 19).

CONCLUSION OF LAW

Chiropractic treatment requested by Art Walker, DC, on October 12, 2002 is not reimbursable.

OPINION

This dispute arises under ORS 656.245, and therefore, jurisdiction lies with the director. ORS 656.245(6)(c)(J). Claimant was enrolled in an MCO. ORS 656.260(16) provides that 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. 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 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.) See *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).

ORS 656.245(1)(a) compels an insurer to cause to be provided medical services caused in material part by the injury for such period as the nature of the injury or process of recovery requires. The duty to provide this care continues for the life of the worker. However, after a worker is found medically stationary, medical services are limited to those listed in ORS 656.245(1)(c). Subsection (j) of that provision allows for palliative care necessary to enable a worker to continue current employment. Claimant was found medically stationary on July 22, 1996. Therefore, subsection (j) applies if the care in question is palliative.

In the administrative order, MRU determined that insurer was not liable for payment of the chiropractic care provided by Dr. Walker in October and December 2002 and January 2003 because the care provided was unauthorized palliative care. MRU also determined that the care

did not meet the definition of palliative care because claimant was medically stationary and her need for treatment was not the result of an acute exacerbation of her compensable condition.

Dr. Walker's chart notes and reports do not establish causation as required by ORS 656.245(1)(a). He in fact states that the cause of the temporary flare-up is unknown.

Palliative care is defined in ORS 656.005(20) as:

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

In order to receive approval for palliative care, a provider's request must meet the requirements in OAR 436-010-0290(1)(a) through (e). That rule provides that the request shall:

- (a) Describe any objective findings;
- (b) Identify by ICD-9-CM diagnosis, the medical condition for which palliative care is requested;
- (c) Detail a treatment plan which includes the name of the provider who will render care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;
- (d) Explain how the requested care is related to the compensable condition; and
- (e) Describe how the requested care will enable the worker to continue current employment, or a current vocational training program, and the possible adverse effect if the care is not approved.

Dr. Walker's palliative care request fails to meet the requirements of OAR 436-010-0290(1)(e) because it fails to describe how the requested care will enable the claimant to continue working and the possible adverse effect if the care is not approved.

Claimant argued that the care provided by Dr. Walker was curative. Curative care is defined as medical treatment to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition. ORS 656.245(1)(c)(L). The problem with this contention is that Dr. Walker never indicated the care was curative; instead, he filed a palliative care request. There is no medical evidence that the care is curative as opposed to palliative.

Based on the evidence presented, I find that the administrative order is supported by substantial evidence and reflects no error of law. Accordingly, I affirm.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated April 24, 2003 is affirmed.