
In the Matter of the ORS 656.245 Medical Services Dispute of

Bottoms, William H. III, Claimant

Contested Case No: H03-104

FINAL ORDER

February 10, 2004

WILLIAM H. BOTTOMS III, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Insurer, by and through its attorney Mary Goebel Adams, timely filed exceptions to Administrative Law Judge (ALJ) Catherine P. Coburn's October 22, 2003 Proposed and Final Contested Case Hearing Order. Claimant, by and through his attorney Glen J. Lasken, timely submitted a response. This matter comes before the director for issuance of a final order.

The director may adopt the proposed order as the final order or may modify the proposed order. OAR 137-003-0655(6), 436-001-0275(3). If the director modifies the proposed order in any substantial manner, the agency must identify and explain the modifications. OAR 137-003-0665(3). The director may only modify the ALJ's findings of historical fact if the director determines that the finding is not supported by a preponderance of the evidence in the record. OAR 137-003-0665(4).

The issues raised by the parties are the ALJ's substantial evidence review, compensability of a diagnostic SPECT scan, and attorney fees. The entire record has been reviewed, including the exhibits received into evidence, the audio recording of the hearing, and the parties' written arguments. For the reasons below, the director modifies the proposed order and affirms the administrative order.

The parties do not dispute the ALJ's findings of fact, which the director adopts.

Substantial evidence

Insurer argues that the ALJ's conclusion that the administrative order is not supported by substantial evidence is not supported by facts in the record. Insurer contends that the ALJ incorrectly re-weighed the evidence and substituted her own opinion of the evidence. Further, insurer argues that the administrative reviewer clearly did consider the April 4, 2003 letter; she simply gave it less weight than other evidence in the record.

Claimant disagrees with insurer's substantial evidence argument, arguing that there is no contrary medical opinion. Claimant further contends that the administrative reviewer failed to provide an explanation for disregarding the facts.

Decisions of the director in medical service cases are reviewed at contested case hearing for substantial evidence or errors of law. ORS 656.245(6), 656.327(2). Although the claimant argued at hearing that the administrative reviewer made an error of law, the ALJ reversed on substantial evidence grounds. "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). “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. Astenhill Co.*, 90 Or App 200, 206, (1988); see also *Younger v. City of Portland*, 305 Or 346 (1988). The agency must give a persuasive explanation if the credible evidence weighs overwhelmingly in favor of one finding and the agency finds the other. *Armstrong* at 206. To be sufficient for substantial evidence review, the agency’s order must contain explicit findings of fact and explain how those facts lead to the conclusion reached. *Id.*, at 205.

Diagnostic services

Insurer argues that diagnostic testing must be related to the accepted condition. Testing to “rule in” possible additional conditions is not compensable.

Claimant responds that his “serious compensable condition may now be manifesting itself in other diagnoses as well. We expect that the [SPECT] scan * * * will allow the doctor to assess this compensable condition and determine if different diagnoses are appropriate.”

“For every compensable injury, the insurer * * * shall cause to be provided medical services for conditions caused in material part by the injury * * * including such medical services as may be required after a determination of permanent disability.” ORS 656.245(1)(a). “Services that are necessary to diagnose the worker’s condition” are compensable after the worker’s condition is medically stationary. ORS 656.245(1)(c)(H). To be compensable, the claimant must show that the compensable injury made the diagnostic service necessary. *Counts v. Int’l Paper Co.*, 146 Or App 768, 770 (1997). “Diagnostic services for the purpose of determining a causal relationship, if any, between an accepted condition and the worker’s condition are therefore compensable.” *Roseburg Forest Prod. v. Langley*, 156 Or App 454, 462 (1998). The service is compensable if necessary to determine the cause or extent of the compensable injury, even if a non-compensable condition is discovered as a result. *Counts*, at 771. Tests to determine the extent of a compensable injury are compensable; tests to establish the existence of a new or consequential condition are not. *Langley*, at 463.

The record

Primarily at issue are three pieces of evidence in the record. The most recent is a letter to Dr. Belza from claimant’s attorney,¹ dated April 4, 2003. The letter states, in part,

“* * * [Y]ou have requested authorization to perform a SPECT scan to investigate the C7 and C8 distribution. * * * [Y]ou have indicated that the SPECT scan is for diagnostic purposes. More importantly, you feel that it is possible that there may be disc problems at the C7 or C8 level which could be related directly or indirectly to the accepted condition. As such, you are requesting this SPECT scan in an effort to further diagnose the accepted condition and determine whether or not a new or consequential condition has developed as a result of the accepted on-the-job injury.” (Ex. 32.)

¹ The ALJ’s findings of fact attribute this letter to Dr. Belza.

The letter contains a space for Dr. Belza to check “Yes” or “No” and to include any comments. Dr. Belza checked “Yes,” without further comment, and signed the letter on April 14, 2003.

The next piece of evidence is a chart note dated February 27, 2003 from Dr. Belza and Stewart Brooks, PA-C. The note states, in relevant part,

“The patient presents today to follow up on his ongoing cervical pain with bilateral upper extremity radiculopathy in a C7 verse C8 distribution. At last visit 11/01/02 we had requested bone scan. * * * **ASSESSMENT:** 1) Cervical spondylosis. 2) Cervical disc disease. 3) Left cervical radiculopathy with bilaterally C7 versus C8 distribution. **PLAN:** We will get the SPECT scan.” (Ex. 2-15.)

Finally, in the chart note dated November 1, 2002, the same date as the palliative care request (Ex. 26), Dr. Belza mentions claimant’s “ongoing neck pain at the base of his neck,” assesses “cervical disk disease, cervical radiculopathy,” and states, “I believe his symptoms are coming from his cervical spine disk disease. At this time it is unclear which level is particularly affecting him.” (Ex. 2-14.)

The administrative reviewer considered each of these pieces of evidence in the administrative order. She noted the contents of each in the Findings of Fact. In the Conclusion and Opinion, she concludes,

“After review of the submitted record and Dr. Belza’s chart notes, the director concludes the reason for the SPECT scan was above and beyond evaluating the cause and extent of the compensable cervical strain and C5-6 herniated disc. The director is persuaded that the purpose of the disputed SPECT scan was not to determine the cause and extent of the accepted cervical strain and C5-6 herniated disc, but to further evaluate and diagnose progression of cervical disc disease, new or consequential conditions at other levels. Diagnostic purposes for this purpose are not compensable.” (Ex. 43-3).

Although the administrative reviewer only referred specifically to the November 1, 2002 chart note in that portion of the order, the reviewer explained that she had relied on the “submitted record and Dr. Belza’s chart notes” in reaching her decision. Furthermore, the findings of fact set forth referenced that section of the April 4, 2003 letter from Dr. Belza that said the SPECT scan was necessary to “further diagnose the accepted condition,” as well to determine whether or not a new or consequential condition had developed as a result of the accepted on-the-job injury. The reviewer concluded that, based on the submitted record and Dr. Belza’s chart notes, the purpose of the SPECT scan was *not* to determine the cause and extent of the accepted cervical strain and C5-6 herniated disc. *See Langley*, 156 Or App at 462-63.

The ALJ found that the reviewer’s conclusion was not supported by substantial evidence in the record, relying only on the statement in the April 4, 2003 letter from Dr. Belza that the scan was requested to “further diagnose the accepted condition.” However, under the substantial

evidence standard, *all* evidence must be considered, not one piece of evidence in isolation. The ALJ disagreed with the reviewer based on one statement in the record, rather than the record as a whole. However, the director finds that the administrative reviewer considered the record as a whole and determined that the purpose of the SPECT scan was to further evaluate and diagnose progression of cervical disc disease or new or consequential conditions at other levels. The director concludes that the administrative order was supported by substantial evidence.

Attorney fees

Claimant's attorney requests an additional fee in the range of \$500 to \$700 for 3 hours spent reviewing the exceptions and exhibits, researching the law, and drafting the response. However, because the claimant has not prevailed, no fee is awarded.

IT IS ORDERED that:

- 1) The October 22, 2003 Proposed and Final Contested Case Hearing Order is modified.
- 2) The July 29, 2003 Administrative Order is affirmed.
- 3) The SPECT scan is not compensable, and SAIF is not liable.
- 4) Claimant's attorney is awarded no fee.