
In the Matter of the ORS 656.245 Medical Services Dispute of

Graham, Willie J., Claimant

Contested Case No: H02-071

FINAL ORDER

July 30, 2004

FRED MEYER STORES INC., Petitioner

WILLIE J. GRAHAM, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

This matter comes before the director for issuance of a final order. Nancy Bieber, Manager of the Reemployment and Dispute Resolution Services Section¹ of the Workers' Compensation Division filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's March 4, 2004 Amended Proposed and Final Contested Case Hearing Order. Claimant, by and through his attorney Margaret F. Weddell, also filed exceptions and submitted a Memorandum in Support of Statement of Services. Employer has not responded to either filing of exceptions, or to the statement of services. The director adopts and affirms in part, and reverses.

The issue before the ALJ was whether the swim therapy requested by Dr. Pribnow is compensable under the statutory and rule requirements regarding palliative care. The ALJ concluded that substantial evidence supported the Medical Review Unit's conclusion that the swim therapy is reimbursable under ORS 656.005(20) and 656.245(1)(c)(J), but did not support the unit's conclusion that the therapy is reimbursable under OAR 436-010-0290(1)(a) and (1)(c).² The ALJ found that Dr. Pribnow's January 7, 2002 Attending Physician's Palliative Care Request form failed to satisfy OAR 436-010-0290(1)(a) because a bare notation of "Same findings" fails to satisfy the definition of "objective findings" in ORS 656.005(19). The ALJ also found that the request failed to satisfy OAR 436-010-0290(1)(c), reasoning that "Kaiser" fails to detail the medical provider who was to render the proposed therapy. As the claimant did not prevail, the ALJ awarded no attorney fee.

Ms. Bieber disagreed that the palliative care request did not meet the requirements of OAR 436-010-0290(1)(a) and (1)(c). She contends that the rule only requires the request to describe any objective findings that exist; it does not require there to be objective findings. She further contends that the rule requires a detailed treatment plan but only the name of the provider; Kaiser is the name of the provider, and the rule does not require the attending physician

¹ The Medical Review Unit (MRU) is part of the Reemployment and Dispute Resolution Services Section.

² OAR 436-010-0290(1)(a) and (1)(c) (eff. 1/1/02) provide:

"(1) When the worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment or a current vocational training program, the attending physician must first submit a written request for approval to the insurer. The request shall:

"(a) Describe any objective findings;

"* * * *"

"(c) Detail a treatment plan which includes the name of the provider who will render the care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;

"* * * *"

to know which individual therapist will provide the therapy.

Claimant contends that the diagnoses themselves as listed by Dr. Pribnow on the form are descriptions of objective findings and satisfy the rule and statute. Further, claimant argues, the objective findings on which claimant's award of permanent disability was based are the law of the case. Claimant notes that there is no requirement, and no evidence that the legislature intended, that a palliative care request be in any particular form or on a single form. Additionally, claimant argues that there is no requirement in statute that objective findings support the need for palliative care. To the extent that OAR 436-010-0290 requires them, claimant contends it is inconsistent with the statute and invalid. Lastly, claimant argues that the name of the provider is the Kaiser physical therapy department. To require more is an unreasonable interpretation of the rule.

Because the exceptions are limited to the ALJ's interpretation of the requirements in OAR 436-010-0290(1)(a) for a description of objective findings and OAR 436-010-0290(1)(c) for the name of the provider, the director limits her review to those portions of the ALJ's order. The director adopts the remainder of the ALJ's reasoning and accepts her findings of fact.

OAR 436-010-0290(1)(a) requires a palliative care request to "[d]escribe any objective findings." The relevant portion of the form provided by the department with which to request palliative care leaves a space for the physician to fill in "ICD-9-CM diagnosis for which the palliative care is requested" and "Objective findings supporting the diagnosis." Dr. Pribnow wrote in "Post laminectomy syndrome, bilateral lumbar radiculopathies" and "Same findings."

Presumably, in stating "same findings" Dr. Pribnow was referring to findings he previously described. Indeed, a review of the record shows that in Dr. Pribnow's March 20, 2001 request for palliative care³, in the space provided for "Objective findings supporting the diagnosis," Dr. Pribnow noted "See dictated reports." Dr. Pribnow's dictated reports dated December 1, 1997 through January 23, 2001 (Ex. 32), in turn, describe objective findings. Objective findings were also described in Dr. Rosenbaum's January 18, 2001 report (Ex. 105), with which Dr. Pribnow concurred on February 12, 2001. Additionally, Dr. Blumberg described objective findings in support of Dr. Pribnow's March 20, 2001 palliative care request in his December 14, 2001 Report of Record Review (Ex. 154-3). Rather than describe the objective findings on the request form itself, Dr. Pribnow referenced the descriptions of objective findings already contained in the medical record. He provided objective findings; he provided them in different documents at an earlier time. There is nothing in the rule that prohibits the physician from referring to earlier findings when requesting palliative care.⁴

The director agrees with the ALJ that a bare notation of "Same findings," in itself, fails to

³ Exhibit 183 is an Attending Physician's Palliative Request form signed by Dr. Pribnow requesting health club membership and TNS unit. The date on the form is not legible, but the form was stamped "RECEIVED" on March 22, 2001. Based on the other documents in the record, the director infers that this request was made on March 20, 2001. (See April 23, 2001 letter from Pinnacle to Dr. Pribnow approving TNS unit but disapproving health club membership (Ex. 120); Dr. Pribnow's June 12, 2001 letter to WCD referring to March 20, 2001 palliative care request for health club membership (Ex. 131).)

⁴ See *SAIF v. Ross*, 191 Or App 212 (2003), *withdrawn on recon* 192 Or App 200 (2004) (required components of treatment plan may be submitted in different documents at different times).

satisfy any definition of “objective findings.”⁵ However, the substance and context of the notation must also be taken into consideration. The logical and reasonable inference from this notation is that findings previously described by Dr. Pribnow are the same findings that support this request.⁶ The director finds that substantial evidence supports the conclusion that the palliative care request met the requirements of OAR 436-010-0290(1)(a), and that portion of the ALJ’s order finding otherwise is reversed.

The portion of OAR 436-010-0290(1)(c) in dispute requires a palliative care request to “[d]etail a treatment plan which includes the name of the provider who will render the care * * *.” The relevant portion of the department’s form leaves a space for the physician to write in “Proposed palliative care plan” and “Provider/facility who will render care.” Dr. Pribnow wrote in “Up to 12 sessions pool therapy at Kaiser under supervision of PT.”

“Medical provider” means “a medical service provider, a hospital, medical clinic, or vendor of medical services.” OAR 436-010-0005(29). “Medical service provider” means “a person duly licensed to practice one or more of the healing arts.” OAR 436-010-0005(28). The palliative care rule only requires that the request include the name of the “provider.”⁷ Kaiser is a medical clinic, and under the definitions a medical clinic is a provider. Substantial evidence supports the conclusion that Dr. Pribnow’s January 7, 2002 request meets the requirements of OAR 436-010-0290(1)(c), and the ALJ’s finding to the contrary is reversed.

The January 7, 2002 request for palliative care meets the statutory and rule requirements, and the swim therapy is compensable palliative care. In light of the director’s disposition, claimant’s remaining argument that OAR 436-010-0290 is inconsistent with statute and therefore invalid is not reached.

Claimant has prevailed and his attorney is entitled to a fee. ORS 656.385(1). Claimant’s attorney states that she has devoted 42.35 hours to this matter since May 2001. She asserts that the procedural and substantive issues were complex and that the value of the interest involved, in terms of pain relief, is considerable even if the dollar amount is modest. Claimant’s attorney requests a fee in the amount of \$8,000. Employer has not objected to claimant’s attorney’s request.

Effective January 1, 2004, new rules apply to attorney fees awarded by the director in medical service disputes. ORS 656.385(1), as amended by Oregon Laws 2003, chapter 756, section 2 (Enrolled Senate Bill 620),⁸ provides, in relevant part:

“In all cases involving a dispute over compensation benefits

⁵ “Objective findings” are defined as “verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm.” They do not include “physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable.” ORS 656.005(19).

⁶ A different conclusion may have been reached if the form mentioned nothing about findings, or if Dr. Pribnow’s notation had been more vague.

⁷ It does not require that the name of the provider be detailed, as the ALJ stated.

⁸ The amendments to ORS 656.385(1) apply to all claims for which an order relating to the issue on which attorney fees are sought has not become final on or before January 1, 2004. Or Laws 2003, ch 756, § 3.

pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. * * * The attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department. The attorney fee * * * must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances."

The director has amended OAR 436-001-0265 in response to this statutory change. The rule now provides a matrix outside of which the fee award may not fall absent a showing of extraordinary circumstances or agreement of the parties. The matrix factors in time devoted and results achieved. The maximum number of hours on the matrix is 12; the maximum result achieved is \$10,000. Other factors may also be considered, including the complexity of the issues involved; the quality of the legal representation; the value of the interest involved; the nature of the proceedings; the risk in a particular case that an attorney's efforts may go uncompensated; the assertion of frivolous issues or defenses; a statement of services; and any other relevant consideration deemed appropriate. OAR 436-001-0265(2)(a)-(h).

Claimant's attorney requests a fee that falls outside the matrix. The director finds that extraordinary circumstances exist in this case that warrant going outside of the matrix. However, claimant's attorney is only entitled to a fee for services performed in relation to those issues on which claimant has prevailed under ORS 656.245. Time spent in requesting attorney fees may not be included, but time spent in the exceptions process may be included.

The statement of services begins with a request for hearing dated May 23, 2001 regarding the disapproval of Dr. Pribnow's previous palliative care request for a health club membership. That request was ultimately denied by ALJ Johnson's May 31, 2002 Proposed and Final Contested Case Hearing Order, so claimant did not prevail on that issue. The statement of services also includes services performed in the reconsideration proceeding before the Appellate Review Unit under ORS 656.268. Those services may not be considered in awarding a fee under ORS 656.385(1). Because claimant has prevailed on the issue of swim therapy, the director considers his attorney's services beginning with Dr. Pribnow's January 7, 2002 request for approval of the swim therapy.

The Medical Review Unit's Administrative Order approving the disputed swim therapy as compensable palliative care was issued on June 10, 2002. Employer requested a contested case hearing and the matter was referred to the Hearing Officer Panel.⁹ The parties submitted the

⁹ As of May 22, 2003 the Hearing Officer Panel became known as the Office of Administrative Hearings. Or Laws 2003, ch 75, § 2; ORS 183.605.

matter on written argument in lieu of a telephone hearing. The parties' briefs were relatively short. The ALJ issued a Proposed and Final Contested Case Hearing Order on January 14, 2003 finding that swim therapy is a physical restorative service to which claimant is not entitled. Ms. Bieber and claimant filed exceptions, and claimant's attorney requested a total fee in the amount of \$2,000. The director, by Request for Further Hearing dated June 9, 2003, held that the requested swim therapy did not meet the rule requirements regarding physical restorative services, but that it could meet the rule requirements regarding palliative care. However, because the ALJ did not reach the issue of palliative care, the director referred the matter for further hearing on whether the requested swim therapy was compensable under the palliative care rules. Further hearing was held on February 23, 2004 and the ALJ issued the Amended Proposed and Final Contested Case Hearing Order on March 4, 2004. The parties' briefs in support of their exceptions to the amended order were neither lengthy nor particularly complicated.

Upon review of the statement of services, the director finds that 28 hours were devoted to the issue of swim therapy. By prevailing, the worker is now entitled to 12 sessions of pool therapy over a 180-day period, or one session every 15 days. In light of the number of hours devoted and the moderate benefit to claimant, and in keeping in proportion with the amounts provided in the matrix, the director finds that a fee of \$3,500 is appropriate.

IT IS HEREBY ORDERED that the March 4, 2004 Amended Proposed and Final Contested Case Hearing Order is reversed. Claimant's attorney is awarded a fee, payable by employer, in the amount of \$3,500.

DATED this 30th day of July, 2004