

In the ORS 656.245(1)(c)(h) Medical Services Dispute of

ROBERT W. SMITH Claimant

Contested Case No: H04-113

PROPOSED AND FINAL ORDER

November 10, 2004

ROBERT W. SMITH, Petitioner

SAIF CORP., Respondent

Before Ella d. Johnson, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on June 25, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 20, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On September 23, 2004, Administrative Law Judge Ella D. Johnson conducted a contested case hearing. Attorney James Dodge represented petitioner Robert W. Smith (claimant). Attorney David Runner represented respondent SAIF Corporation (SAIF or insurer). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU's decision that SAIF was not liable for a diagnostic medical service performed by Bear Imaging on January 30, 2003 is supported by substantial evidence or reflects an error of law.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 42 were admitted into the record without objection.

FINDINGS OF FACT

I adopt and affirm the findings of fact contained in MRU's June 25, 2004 Administrative Order with the following supplementation.

(1) Claimant was compensably injured on March 27, 1998. SAIF ultimately accepted his claim for lumbar strain, L5-S1 disc herniation central and paramedian on the right and L5-S1 radiculopathy. Claimant subsequently underwent a discectomy and laminectomy surgery in 1998. Claimant's claim statutorily qualified for closure and was closed on October 20, 2002. The closure was affirmed by a May 14, 2003 Order on Reconsideration. (Exs. 1, 5, 15, 21.)

(2) On January 24, 2003, claimant sought treatment complaining of very cold and numb feet. Attending surgeon, Dr Butler, opined that claimant's cold feet were episodic in nature and was related to claimant's autonomic nervous system with sympathetic and parasympathetic fibers affecting his vessels. Dr. Butler ordered an arterial ultrasound of both lower extremities to be sure that claimant had good arterial supply. He also noted that "this is probably related to his back in some weird way." (Ex. 11.)

(3) On January 30, 2003, Bear Imagery performed an ultrasound of both of claimant's

lower extremities. Dr. Bear, a radiologist, interpreted the ultrasound opining that there was no significant stenosis in any of the arteries of the lower extremities, there was normal bilateral ankle/branchial indices indicating no significant arterial compromise, and claimant's abdominal aorta was unremarkable. Bear Imaging billed SAIF, SAIF denied payment, and Bear Imaging billed claimant. (Exs. 28, 29, 31, 37.)

(4) On April 13, 2004, claimant requested administrative review by the director. (Ex. 28.) SAIF explained to MRU that it denied payment because the ultrasound was not causally related to claimant's accepted conditions. (Ex. 35.)

CONCLUSION OF LAW

MRU's decision that SAIF is not liable for the ultrasound performed by Bear Imaging on January 30, 2003 is supported by substantial evidence and does not reflects an error of law.

OPINION

Jurisdiction over this medical service dispute lies with the director. ORS 656.245(6); OAR 436-010-0008(1). I review for substantial evidence or error of law. ORS 656.245(6) and ORS 656.327(2). The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof 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 conclude that claimant has failed to meet his burden.

Following a work injury, an insurer is obligated to provide medical services for conditions caused in material part by the injury for such period, as the nature of the injury or the process of the recovery requires. This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). However, after the compensable condition becomes medically stationary, medical services are no longer compensable with certain exceptions. Listed among the exceptions is diagnostic medical services.

ORS 656.245(1)(c)(H) provides:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

* * * * *

(H) Services that are necessary to diagnose the worker's condition.

MRU reviewed the opinions of Dr. Butler and Dr. Bear concerning the ultrasound. Dr. Butler opined that claimant's cold feet were episodic in nature and was related to claimant's automatic nervous system with sympathetic and parasympathetic fibers affecting his vessels. He

ordered the ultrasound of both lower extremities to be sure that claimant had good arterial supply. Although Dr. Butler noted that “this is probably related to his back in some weird way,” he did not explain how in fact these symptoms were related to claimant’s back conditions. Moreover, following the ultrasound, Dr. Bear interpreted the ultrasound opining that there was no significant stenosis in any of the arteries of the lower extremities, there was normal bilateral ankle/branchial indices indicating no significant arterial compromise, and claimant’s abdominal aorta was unremarkable.

In *Counts v. International Paper Company*, 146 Or App 768 (1997), the court addressed the compensability of diagnostic medical services. The court held that, in order for diagnostic services to be compensable, claimant must show that the compensable injury made the tests necessary. The court further stated that diagnostic medical services are compensable if they are necessary to determine the cause and extent of a compensable injury. *See also Roseburg Forest Products v. Langley*, 156 Or App 454 462 (1998). Here, the record establishes that the ultrasound was necessitated by conditions not related to claimant’s accepted lumbar strain, L5-S1 disc herniation central and paramedian on the right and L5-S1 radiculopathy conditions. Based on the record, I find that opinions of Dr. Butler and Dr. Bear do not satisfy the *Counts* standard, and therefore, the diagnostic ultrasound is not reimbursable.

At hearing, claimant made several arguments about why Dr. Butler would have ordered the ultrasound in connection with claimant’s accepted conditions. However, these arguments are speculative at best because there is nothing in the record to indicate a causal connection between the accepted conditions and the ultrasound, except Dr. Butler’s statement that “this is probably related to his back in some weird way.” This statement does not explain how the diagnostic service will help determine the cause and extent of the compensable conditions. Consequently, I do not find claimant’s arguments to be persuasive.

Substantial evidence exists to support an administrative order “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). Based on the record including the opinions of Dr. Butler and Dr. Bear, I find that a reasonable person could conclude, as MRU did, that the disputed diagnostic ultrasound is not reimbursable. Finally, inasmuch as the administrative order is supported by substantial evidence and reflects no error of law, I affirm.

ATTORNEY FEES

Claimant has not prevailed in the contested case hearing and is not entitled to an assessed attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated June 25, 2004 is affirmed.