
In the ORS 656.260 Managed Care Dispute of

MICHAEL HUMPHREYS, Claimant

Contested Case No: H04-169

PROPOSED AND FINAL ORDER

APRIL 21, 2005

SAIF CORP., Petitioner

MICHAEL HUMPHREYS, Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

SAIF Corporation (SAIF) appealed an October 6, 2004 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. In the Order, MRU concluded that a neurosurgical evaluation proposed by the treating doctor of Michael Humphreys (Claimant) was appropriate for the diagnosis and evaluation of Claimant's compensable injury. SAIF's appeal was referred to the Office of Administrative Hearings (OAH) on December 10, 2004.

On March 21, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith conducted a telephone hearing. Attorney Stefan Gonzalez represented SAIF. Attorney Aaron Clingerman represented Claimant. No one testified. The record was closed that day.

ISSUE

Whether there is substantial evidence to support MRU's Administrative Order that a neurosurgical evaluation proposed by Claimant's treating doctor was appropriate for the diagnosis and evaluation of Claimant's compensable injury.

EVIDENTIARY RULING

The record consists of Exhibits 1 through 79, which were admitted into the record without objection. Claimant submitted Exhibit 80, a subsequent medical report from his treating physician. This exhibit was not considered because issues or medical evidence not considered by WCD may not be considered. OAR 436-001-0225(1).¹

FINDINGS OF FACT

The Findings of Fact in the October 6, 2004 Administrative Order are accepted and

¹ OAR 436-001-0225(1) states:

Scope of Review/Limitations on the Record

(1) Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. New medical evidence or issues may not be considered at the contested-case hearing.

incorporated in this Final and Proposed Order, except for the findings of treating physician Read in the last two paragraphs on page two because Dr. Read's notes are not in the record, and with the following supplementation:

(1) On April 13, 2004, a Medical Review Committee for the MCO reviewed Claimant's records, including a lumbar spine MRI on January 20, 2004, and concluded, "These findings are essentially identical to the prior examination dated 2/18/03." (Ex. 52.) On April 27, 2004, the Committee of three board-certified orthopedic surgeons and a board-certified physiatrist unanimously upheld the disapproval of the referral to a neurosurgeon and opined that Claimant "has no clinical or imaging evidence of a surgical lesion. He has chronic low back pain secondary to degenerative disc disease with no clinical findings to substantiate referral to a neurosurgeon." (Ex. 64.)

CONCLUSION OF LAW

There is no substantial evidence to support the conclusion in MRU's Administrative Order that a neurosurgical evaluation proposed by the treating doctor of Claimant was appropriate for the diagnosis and evaluation of Claimant's compensable injury.

OPINION

SAIF has the burden of showing that the Administrative Order is not supported by substantial evidence or that it reflects an error of law. OAR 436-001-0225(1)²; ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.")

"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). A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292 (1990). To determine whether substantial evidence exists, an administrative law judge is required to:

[L]ook at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. 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. *** For instance, and in the context which is likely to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support. [The administrative law judge] would not need to choose sides. The difference between the 'any evidence' rule and the substantial evidence test *** will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of the

² *Id.*

finding and the [director] finds the other without giving a persuasive explanation.

Armstrong v. Asten-Hill Co., 90 Or App 200 (1988).

The question is not what medical opinions are more persuasive, but only whether the record contains substantial evidence to support MRU's order. See *John J. Rice*, 4 WCSR 173, 176 (1999). In reviewing for substantial evidence, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001).

Under ORS 656.245 and ORS 656.327, the insurer is required to provide medical services for a compensable injury unless the treatment is excessive, inappropriate, ineffectual or in violation of the administrative rules. The court generally defers to the opinion of the attending physician unless the record reflects persuasive reasons to do otherwise. *Weiland v. SAIF Corp.*, 64 Or App 810 (1983); *Timothy Krushweitz*, 45 Van Natta 158 (1993). Where the medical dispute involves expert analysis, rather than expert external observation, the court does not give special deference to the attending physician's opinion as opposed to other doctors. *Hammons v. Perini*, 43 Or App 299 (1979).

In its Administrative Order, WCD concluded that a referral of Claimant for neurosurgical evaluation was appropriate, based on his treating doctor's opinion and notes on February 4, 2004, because the evaluation was necessary to diagnose the worker's condition. ORS 656.245(1)(c)(H).³ The notes relied upon by WCD were not offered and are not part of the hearing record. They are referred to in Exhibit 68 as a record from SAIF, but not included in the exhibits offered at hearing. Without these notes, the record lacks substantial evidence for MRU's conclusion, especially in light of the contrary opinion of two reviewing doctors and a panel of three board-certified orthopedic surgeons and a board-certified physiatrist.

ATTORNEY FEES

Claimant has not prevailed in defending MRU's decision and is not entitled to attorney fees. ORS 656.385(1).

ORDER

MRU's October 6, 2004 Administrative Order is set aside.

³ ORS 656.245(1)(c) states in relevant part:

(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.