In the ORS 656.327 Medical Treatment Dispute of

REBECCA S. MUNDELL, Claimant

Contested Case No: H05-144

PROPOSED AND FINAL ORDER

December 23, 2005

LIBERTY NORTHWEST INSURANCE CORP., Petitioner

REBECCA S. MUNDELL, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on August 25, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 10, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On November 23, 2005, Administrative Law Judge Catherine P. Coburn of the OAH conducted a hearing in Beaverton, Oregon. Attorney Barbara Woodford represented petitioner Liberty Northwest Insurance Corporation (insurer). Attorney Christopher D. Moore represented respondent Rebecca S. Mundell (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that psychiatric medical services provided by Douglass S. Johnson, M.D. (Psychiatry and Psychosomatic Medicine) from September 8, 2003 through December 15, 2004 were medically appropriate.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 93 were admitted into the record without objection.

FINDINGS OF FACT

1. On February 6, 1997, claimant began treating with Dr. Johnson for anxiety and suicidal ideation. (Ex. 23-1.) On February 22, 1997, claimant was admitted to Meridian Park Hospital for a drug overdose suicide attempt. (Exs. 22-9 and 23-1.)

2. On May 26, 1998, claimant was assaulted by a psychiatric patient while working as an R.N. at Oregon Health Sciences University (OHSU). (Exs. 4, 5, 6 and 10.) Claimant worked in this capacity for 13 years before the work injury. (Ex. 55-36.) Insurer initially accepted right thigh contusion, nasal contusion, cervical strain, mild closed head injury and subsequently accepted major depressive disorder and post- traumatic stress disorder (PTSD). (Exs. 15, 18, 28, 30 and 42.)

3. After the work injury, claimant continued treating with Dr. Johnson who is not a managed care organization (MCO) panel member. (Exs. 1-1, 7, 11, 12, 13, 14 and 36.) He

provided insight-oriented therapy and medications. (Exs. 1, 51, 54-1 and 57-12.) On June 10, 1998, insurer enrolled claimant in an MCO. (Ex. 9.)

4. On October 15, 1998, Ronald N. Turco, M.D. (Psychiatry) examined claimant at the insurer's request. (Ex. 22.) He diagnosed a major depressive disorder due to multiple stressors, including the August 1998 work injury. (Ex. *Id.* at10.) He stated that claimant's psychotherapy and medication treatment with Dr. Johnson was appropriate. (*Id*. at 10 and 11.)

5. By Determination Order dated December 21, 1998, the claim was closed. (Exs. 27, 34, 38 and 40.)

6. In March 1999, Dr. Johnson administered a valid MMPI which indicated that claimant suffered "longstanding personality problems predisposing [her] to develop physical symptoms under stress." (Ex. 55-13.) The report also indicated that claimant was not a strong candidate for psychotherapy treatment approaches that require insight development and instead recommended behavior modification treatment. (*Id.* at13.)

7. On May 28, 1999, claimant began treating at OHSU with Rachel E. Jessen, M.S.W. and Joshua Boverman, M.D., who were MCO panel members. (Exs. 37-1 and 37-10.)

8. In November 1999, claimant moved to Joseph, Wallowa County, Oregon and was released from care at OHSU. (Exs. 33, 39 and 55-40.)

9**.** On February 9, 2000 claimant sought treatment for depression and suicidal ideation with Wallowa Valley Mental Health Center. (Exs. 41 and 44.) While living in Joseph, Wallowa County, claimant attempted suicide by drug overdose, but was not hospitalized. (Ex. 55-40.)

10. In May 2000, claimant returned to the Portland area and resumed treating with Dr. Johnson. (Exs. 41-5 and 48.) On December 13, 2000, Dr. Johnson indicated that her diagnosis was PTSD, that she remained unable to work and would require ongoing psychiatic treatment for two to three years. (Ex. 51.) On April 24, 2002, Dr. Johnson confirmed that he continued to treat claimant weekly for PTSD, which was not medically stationary. (Ex. 53.)

11. On June 7, 2001, the Workers' Compensation Board approved a claims disposition agreement between the parties. (Ex. 52.)

12. In June 2002, claimant began treating with Dr. Johnson twice per week. (Ex. 55-38.)

13. On September 12, 2002, Dr. Johnson advised insurer that he believed an independent medical examination would be stressful for claimant and would result in regression in her level of improvement. (Ex. 54.)

14. On September 17, 2002, Eric E. Goranson, M.D. (Psychiatry) examined claimant and reviewed her medical records at insurer's request. (Ex. 55.) He noted that she had not worked in four years, spent most of her time isolated in a bedroom and engaged in suicidal ideation. He found that claimant's primary diagnosis was a non-work-related severe personality disorder with borderline, antisocial and histrionic features and that her symptoms fluctuated in response to

non-work related problems. He opined that claimant did not suffer PTSD and that any psychiatric condition stemming from the May 1998 work injury was medically stationary. (*Id.* at 45 and 47.) He stated that Dr. Johnson's treatment was directed to non-work related problems and that her psychiatric condition had been worsened by inappropriate treatment with Dr. Johnson. (*Id.* at 44.) Dr. Gorham stated, in part:

> *****
> …her psychiatric difficulties have substantially been iatrogenic. That is, they have been a result of Dr. Johnson's inaccurate diagnosis and inappropriate treatment, including his irrational use of medications, his fostering a pathological dependency on him, also assuming an advocacy position (rather than maintaining an objective professional stance), treating her family, ignoring her marijuana abuse, and finally, his poor professional judgment in not encouraging her to seek appropriate medical care.
> (*Id.* at 45.)

He further stated,

> When a treatment is not helping, a prudent physician would recognize this, get more data, revise the diagnosis, and the treatment. Dr. Johnson has not done this. Dr. Johnson appears to have arrived immediately early on at an opinion of what the diagnosis was, and has not changed his mind since, despite the contrary evidence that his own records provide. It should be recalled that the MMPI that Dr. Johnson himself administered advised that insight-oriented therapy would not be appropriate with this woman. My review of the record of Dr. Johnson's treatment confirms that opinion.
> (Ex. 55-46.)

15. On February 18, 2003 Dr. Johnson did not concur with Dr. Goranson's opinion, indicating that Dr. Goranson's report was biased because the insurer requested the examination. (Ex. 57-1.) Dr. Johnson agreed with Dr. Goranson's assessment that claimant's psychiatric condition was worse in September 2002 than when Dr. Johnson first treated her in February 1997. (*Id.* at 10.) Dr. Johnson wrote that claimant's suicidal ideation did not begin until after the May 1998 work injury. (*Id.* at 4.) He stated that claimant had a chance to improve and overcome PTSD. (*Id.* at 57-12.)

16. On July 9, 2003, Dr. Turco conducted a records review at insurer's request. (Ex. 58.) He noted that in July, 2003, he had examined claimant and had opined at that time that her treatment with Dr. Johnson was appropriate, based on the assumption that it would last approximately six to eight months. (*Id.* at 2.) He agreed with Dr. Goranson's opinion that claimant does not suffer PTSD and that any psychiatric condition that stemmed from the work injury was medically stationary in approximately October 1998. (*Id.* at 4.) He diagnosed intermittent depressive disorder, likely biologic based. (*Id.* at 5.) He stated, "I must reluctantly agree that iatrogenic complications have entrenched [claimant] in a disability status." (*Id.* at 4.)

He wrote:

> With regard to this woman's work related issues, the current regimen prescribed by Dr. Johnson is not appropriate. There appears to be no rationale for this woman's continued visits to Dr. Johnson. It is likely that she would benefit from some ongoing counseling, perhaps on a monthly basis to deal with her life's problems and to be able to "vent" her many complaints, but this has nothing to do with the May 26, 1998 incident or her experiences at OHSU.
> (*Id.* at 4.)

17. On August 29, 2003, Dr. Johnson did not concur with Dr. Turco's recent report and summarized his treatment during the previous two months. (Ex. 59.) On October 7, 2003, Dr. Johnson explained that he provided a combination of supportive and insight oriented therapy. (Ex. 64-2.) He disputed the personality disorder diagnosis made by Dr. Turco. (*Id.*) Dr. Johnson explained in detail claimant's new memory experience and indicated that workers' compensation claim processing had traumatized her. (*Id.* at 4.)

18. On August 29, 2003, Dr. Johnson requested administrative review of the nonpayment of his bills. (Ex. 59.) On October 27, 2003, MRU issued a Deferral Order, transferring the causation question to the Workers' Compensation Board. (Ex. 66.) On April 12, 2005, Administrative Law Judge Douglas C. Crumme issued an Opinion and Order finding that Dr. Johnson's treatment was causally related to the work injury. (Ex. 69.)

19. In December 2004, Dr. Johnson retired and transferred claimant's psychiatric treatment to Robin G. Henderson, M.D. (Exs. 80 and 87-2.) Dr. Henderson characterized the independent medical examination as "hostile and abusive" and questioned the integrity of the medical arbiter. (Exs. 74-5, 78 and 79.)

20. On July 21, 2005, medical arbiter Michael Sasser, M.D. examined claimant and her medical records at MRU's request. (Ex. 75.) He wrote, "The disputed treatment is not appropriate." (*Id.* at 2.) He stated that the clinical record does not contain any complaints or symptoms indicating a need for treatment of PTSD. and explained an instance where Dr. Johnson had failed to follow up on claimant's noncompliance with PTSD treatment. (*Id.* at 4.) MRU sought clarification and on August 1, 2005, Dr. Sasser reiterated that his opinion remained unchanged. (Ex. 77.) Dr. Sasser stated that nothing in Dr. Johnson's progress notes indicate that the focus of treatment was major depression, or any of the physical accepted conditions. (*Id.*) Dr. Sasser wrote:

> It is not clear from Dr. Johnson's notes what he was treating nor specifically what the treatment was. None of his notes during the time period under dispute identify any mental or emotional components of post traumatic stress disorder and do not discuss the medication treatment, the behavioral treatment, or psychodynamic issues associated with the diagnosis.

(Ex. 75-2.)

CONCLUSION OF LAW

MRU incorrectly determined that psychiatric medical services provided by Douglass S. Johnson, M.D. from September 8, 2003 through December 15, 2004 were medically appropriate.

OPINION

Jurisdiction lies with the director. ORS 656.327(2) and ORS 656.260(15). I may modify the administrative order only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.327(2), ORS 656.260(16) and OAR 436-001-0225(1). The burden of presenting evidence to support a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.,* 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings 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 (1998). Having reviewed the record, I find that insurer has met its burden.

MRU determined that the disputed medical services were medically appropriate and compensable. MRU relied on the opinions of former and current attending physicians Dr. Johnson and Dr. Henderson and discredited the opinions of Drs. Turco, Goranson and Sasser. Additionally, MRU referred to the DSMIV[1] concerning PTSD and determined that Dr. Johnson's treatment was appropriate. Insurer contends that MRU's determination is not supported by substantial evidence in the record and that MRU erred by substituting its own judgment for that of the medical experts. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Pursuant to ORS 656.245[2] and ORS 656.327,[3] 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. Substantial evidence exists to support a finding "when

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[1] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.

[2] ORS 656.245(1)(a) provides in pertinent part:
For every compensable injury, the insurer or the self-insured employer shall cause to be provided 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, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability.

[3] ORS 656.327(1)(a) provides:
If an injured worker, an insurer or self-insured employer or the Director of the Department of Consumer and Business Services believes that the medical treatment, not subject to ORS 656.260, that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services, the injured worker, insurer or self-insured employer shall request review of the treatment by the director and so notify the parties.

the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c) and ORS 656.327(1)(b). To determine whether substantial evidence exists, an administrative law judge is required to:

> "look 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 findings as well as the evidence supporting it, there is substantial evidence. *** For instance, and in the context which is likely frequently 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 ALJ 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 finding and the (director) finds the other without giving a persuasive explanation."
> *Armstrong v. Asten-Hill Co.,* 90 Or App 200, 206 (1998).

It is not for an ALJ to decide which medical opinions are more persuasive. I am authorized only to determine whether the record contains substantial evidence to support MRU's order. *See John J. Rice,* 4 WCSR 173, 176 (1999). Under substantial evidence review standard, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.,* 172 Or App 484 (2001). 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 that of other doctors. *Hammons v. Perini,* 43 Or App 299 (1979). When medical experts disagree, more weight is given to those medical opinions that are both well-reasoned and based on complete information. *Somers v. SAIF,* 77 Or App 259 (1986).

In finding the disputed medical services compensable, MRU relied on the opinions of former and current attending physicians Johnson and Henderson. However, under substantial evidence review, I am not obliged to defer to the attending physician's opinion. Here, I decline to do so for several reasons. To begin, Dr. Johnson, as attending physician, failed to account for claimant's medical history. For example, he wrote that claimant's suicidal ideation did not begin until after the May 1998 work injury. However, the record establishes that claimant was hospitalized for a suicide attempt in February 1997, while she was under Dr. Johnson's care. Next, Dr. Johnson disregarded an objective medical test, the MMPI, in formulating claimant's diagnosis and treatment plan. He discounted the importance of her preexisting personality disorder even though the MMPI revealed longstanding, severe personality problems. Next, he provided insight oriented therapy even though the MMPI indicated that it would not be effective as treatment for claimant. Moreover, in numerous reports, Dr. Johnson has failed to explain how insight oriented psychotherapy is expected to assist claimant in overcoming PTSD. Additionally, Dr. Johnson overstepped the boundaries of his role as medical provider and assumed an advocacy stance by attempting to exempt claimant from an independent medical examination

(IME) which is authorized by statute[4] and administrative rule.[5] I further note that Dr. Henderson has similarly assumed an advocate's role by vilifying an IME and a medical arbiter's examination which are standard workers compensation claim procedures.

Additionally, it is apparent that MRU found the two attending physicians' opinions insufficient to support its determination because MRU resorted to the DSMIV. However, MRU failed to explain how the insight oriented therapy provided by Dr. Johnson was appropriate treatment for claimant. Finally, there is no question that Dr. Johnson's treatment was ineffective; after years of treatment, claimant not only had not returned to work in any capacity, but was nonfunctional, isolated in her bedroom and engaged in suicidal ideation. Having reviewed the record, I conclude that the administrative order is not supported by substantial evidence in the record.

On the other hand, I find that the opinions of Dr. Turco, Dr. Goranson and Dr. Sasser are well-reasoned and based on complete information. First, Dr. Turco examined claimant in October 1998 and diagnosed major depressive disorder due to multiple stressors. At that time, he opined that Dr. Johnson's treatment was appropriate, based on an assumption that it would last approximately six to eight months. However, approximately four years later, Dr. Turco reviewed the medical records and found that Dr. Johnson's continuing treatment had not benefited claimant, but had entrenched her in a disability status. Secondly, Dr. Goranson examined claimant, reviewed her medical records and wrote a detailed, 47-page report. He found that the MMPI had recommended against the insight oriented psychotherapy that Dr. Johnson provided. Moreover, he found that the medications Dr. Johnson prescribed were inappropriate and unhelpful to claimant. Following lengthy analysis, Dr. Goranson opined that Dr. Johnson's treatment was not only inappropriate, but actually made claimant's psychiatric condition worse. Third, medical arbiter Sasser agreed with Dr. Turco and Dr. Goranson's opinions concerning the appropriateness of treatment.

The medical opinions here are divided. Former attending physician Dr. Johnson and current attending physician Dr. Henderson made statements to justify the disputed treatment and seek payment. On the other hand, Dr. Goranson and Dr. Turco, who examined claimant at insurer's request, opine that the disputed treatment was medically inappropriate. The record is replete with unsubstantiated accusations of bias in favor of the insurer. However, pursuant to

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[4] ORS 656.325(1)(a) provides:
Any worker entitled to receive compensation under this chapter is required, if requested by the Director of the Department of Consumer and Business Services, the insurer or self-insured employer, to submit to a medical examination at a time reasonably convenient for the worker as may be provided by the rules of the director. However, no more than three examinations may be requested except after notification to and authorization by the director. If the worker refuses to submit to any such examination, or obstructs the same, the rights of the worker to compensation shall be suspended with the consent of the director until the examination has taken place, and no compensation shall be payable during or for account of such period. The provisions of this paragraph are subject to the limitations on medical examinations provided in ORS 656.268.

[5]OAR 436-010-0265(1) provides in pertinent part:
The insurer may obtain three medical examinations of the worker by physicians of their choice for each opening of the claim.

ORS 656.327(2),[6] MRU appointed Dr. Sasser as a medical arbiter to render a neutral, unbiased opinion concerning the appropriateness of Dr. Johnson's treatment. Significantly, Dr. Sasser unequivocally sided with Dr. Goranson and Dr. Turco in opining that the disputed treatment was not medically appropriate. Medical arbiter Sasser explicitly stated, "The disputed treatment is not appropriate." Finally, having reviewed the record as a whole, and weighing both sides of the evidence, I conclude that a reasonable person could not find otherwise. Accordingly, I reverse.

ATTORNEY FEES

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

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated August 25, 2005 is reversed.

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[6] ORS 656.327(2) provides in pertinent part:
The director shall review medical information and records regarding the treatment. The director may cause an appropriate medical service provider to perform reasonable and appropriate tests, other than invasive tests, upon the worker and may examine the worker. Notwithstanding ORS 656.325 (1), the worker may refuse a test without sanction.