

In the ORS 656.245 Medical Service Dispute of

Richard D. Chick, Claimant

Contested Case No: 06-148H

ORDER ON REMAND

December 13, 2006

RICHARD D. CHICK, Petitioner

PACIFICORP, Respondent

Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, this matter was scheduled for hearing on January 3, 2007, before Administrative Law Judge Geoffrey G. Wren. Prior to hearing, the undersigned ALJ determined that no new evidence would be relevant and admissible and that the matter should be resolved on the agency record. *See* OAR 436-001-0225(2); *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59 (2006) (under substantial evidence review standard, ALJ cannot make supplemental findings of fact). Claimant was advised to seek counsel, but he proceeded *pro se*. The employer, Pacificorp, and its claims processor, Employers Self Insurance Services, were represented by Mark P. Bronstein. By agreement of the parties, arguments were heard on December 6, 2006. The record closed on December 6, 2006.

Exhibits 1 through 220 are admitted.

ISSUE

Medical Services: Claimant contests the employer's failure to authorize a L4-5 nerve block prescribed by Dr. Belza.

FINDINGS OF FACT

On March 30, 1999, claimant developed pain and numbness in his left foot and some aching in his left leg while working as a meter reader.¹ On June 28, 1999, the employer accepted a claim for ganglion lesion of the left ankle. The originally-accepted claim closed on August 15, 2000 with award of permanent partial disability ("PPD"). That award was affirmed by Order on Reconsideration dated April 25, 2002.

On December 20, 2000, claimant, by counsel, requested acceptance of tenosynovitis of the left flexor hallucis longus tendon and neuritis of the posterior tibial nerve and its plantar branches. The employer accepted these conditions on January 5, 2001.

Claimant complained of low back pain following his 1999 injury. In October 2001, Dr. Belza recommended L4-5 nerve block injections to isolate the source of the pain and a request for authorization was made to the employer. Dr. Belza explained that he believed claimant's current back symptomatology was related to his 1999 work injury. There was "an inherent and subtle transformation of his pre-existing condition to cause his symptoms that he did not have previously."

¹ Some records date the accident to March 29, 1999.

Also in October 2001, Dr. Sacamano and Dr. Eckman, independent medical examiners, opined that any back pain that reasonably could be attributed to claimant's foot injury was medically stationary and could not objectively be related to an abnormal gait or foot pathology. They stated that the proposed L4-5 nerve block would have little, if any, benefit. Dr. Belza concurred with that opinion on November 27, 2001.

On February 6, 2001, claimant, by counsel, requested acceptance of claimant's current low back condition.

On July 16, 2001, ALJ Mongrain approved a Stipulation and Order wherein the employer amended the acceptance of the claim to include temporary exacerbation of preexisting, noncompensable degenerative disk disease and spondylosis as a consequential condition. The Stipulation and Order further provided that there were no unasserted claims and that claimant withdrew his February 2001 request to accept claimant's current low back condition and a request for hearing alleging *de facto* denial arising therefrom. The order portion dismissed with prejudice claimant's request and all issues pertaining to his February 6, 2001 request for acceptance.

On December 14, 2001, the employer issued a partial denial. The denial stated that claimant's original foot injury no longer was the major contributing cause of his back symptoms and that the employer was denying on-going medical services and/or disability relating to claimant's degenerative disk disease and spondylosis as no longer a consequential condition to the left foot. The denial then stated: "Medical services for the accepted exacerbation will be paid through the date of this denial." Claimant requested a hearing challenging the denial.

On December 19, 2001, claimant, by counsel, requested administrative review of the employer's denial of Dr. Belza's request for an L4-5 nerve block. The employer responded that the underlying condition had been formally denied, that the requested service was not causally related to the accepted condition, and that the service was excessive, inappropriate, ineffectual, or in violation of medical service rules.

Dr. Steward performed the requested nerve block on January 3, 2002. Claimant reported significant reduction in his left leg pain for a short time.

The employer closed the newly-accepted claim on January 8, 2002. The employer determined that claimant was medically stationary as of October 27, 2001 and was not entitled to additional PPD. The employer issued a corrected notice of closure on January 23, 2002 awarding scheduled PPD with respect to claimant's left foot. That award was modified by Order on Reconsideration dated June 11, 2002. The reconsideration order did not grant value for unscheduled disability on the ground that the claimant did not have an accepted injury in an unscheduled body area.

On January 10, 2002, the employer, by counsel, responded to claimant's request for medical services review. The employer explained that causation of claimant's current low back condition was in dispute. The employer also contended that Dr. Belza's request for the L4-5

nerve block was moot in any event because he had concurred with Dr. Sacamano's and Dr. Eckman's October 27, 2001 opinion that the procedure would be of little, if any, benefit.

By Defer Order dated January 16, 2002, the Director deferred ruling on the proposed L4-5 nerve block until the Workers' Compensation Board resolved the pending dispute regarding the causal relationship between claimant's low back condition and his 1999 injuries.

By letter dated January 17, 2002, claimant, by counsel, requested acceptance of claimant's current L4-5 and L5-S1 low back condition diagnosed as lumbo radiculopathy, spondylosis, degenerative disk disease, and facet arthrosis. The employer denied that claim on May 17, 2002. Claimant requested a hearing challenging that denial.

Dr. Belza withdrew his concurrence with the October 27, 2001 IME opinion in June 2002. He explained that he concurred with the opinion without having had the opportunity to evaluate claimant's condition fully.

On July 26, 2002, claimant, by counsel, asserted that the employer incorrectly omitted the condition of low back strain from the notice of claim acceptance.

On February 1, 2003, the employer denied compensability of an L4-5 disk bulge and annular tear.

By Opinion and Order dated March 31, 2005, ALJ Peterson set aside the compensability denials dated December 14, 2001, May 17, 2002, and February 1, 2003. The employer sought review by the Workers' Compensation Board.

By Order on Review dated January 12, 2006, the Workers' Compensation Board ruled that claimant was precluded by the July 16, 2001 Stipulation and order from litigating compensability of L4-5 and L5-S1 lumbo radiculopathy, spondylosis, degenerative disk disease, facet arthrosis, and L4-5 disk bulge and annular tear. The Board accordingly reinstated the employer's May 17, 2002 denial of L4-5 and L5-S1 lumbo radiculopathy, spondylosis, degenerative disk disease, and facet arthrosis, and the employer's February 1, 2003 denial of an L4-5 disk bulge and annular tear. The Board then upheld the employer's December 14, 2001 denial on the ground that claimant's condition had changed since acceptance of the claim for temporary exacerbation of preexisting, noncompensable degenerative disk disease and spondylosis as a consequential condition. The

CONCLUSIONS OF LAW AND OPINION

The Director concluded that it would not take further action regarding claimant's request for review of denial of authorization for the L4-5 nerve block requested by Dr. Belza because denials of claimant's low back conditions were upheld by the Board. OAR 436-001-0225(2) frames the scope of my review authority:

In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16),

the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

Under the substantial evidence standard of review, the Director makes factual findings, and I review those findings for substantial evidence. For me to conduct substantial evidence review, the Director's order must be sufficient for review. This means that the Director's order must show what the Director found as fact and why it believed its findings led to the conclusion it reached. *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 205 (1988) (discussion substantial evidence review by the appellate courts).

Here the Director's order is insufficient for review for two reasons:

First, the Director did not consider whether the requested L4-5 nerve block was reimbursable as a diagnostic service. In *Counts v. International Paper Co.*, 146 Or App 768, 771 (1997), the court explained that "if diagnostic services are necessary to determine the cause or extent of a compensable injury, the tests are compensable whether or not the condition that is discovered as a result of them is compensable." See *Brooks v. D & R Timber*, 55 Or App 688, 692 (1982) (where there was a separate exploratory procedure performed as a result of the industrial injury, that procedure was compensable, even though the subsequent procedure relieving the idiopathic condition was not compensable). Dr. Belza requested the L4-5 nerve block to isolate the source of claimant's pain. Although the record may show that the nerve block had nothing to do with pain caused by claimant's accepted conditions, I am not at liberty to so conclude. The Director must make the determination in the first instance (or defer action to permit the Workers' Compensation Board to make the determination).

Second, the employer informed claimant by its December 14, 2001 partial denial that "Medical services for the accepted exacerbation will be paid through the date of this denial." This denial referred to exacerbation of claimant's preexisting low back condition. By the time the employer issued that denial, Dr. Belza already had sought authorization for the L4-5 nerve block. The Director accordingly must determine whether the nerve block is payable even though it was not actually performed until January 3, 2002. The Director also must determine whether the employer is estopped from denying payment because of the language of the partial denial. See *Coos County v. State of Oregon*, 303 Or 173, 180-81 (1987); *Robin M. Glover*, 56 Van Natta 3866, 3867 (2004) (discussing equitable estoppel).

Because the Director's order is insufficient for review, this matter is remanded to the Director for further proceedings.

ORDER

IT IS HEREBY ORDERED that the Director's August 22, 2006 Administrative Order of Dismissal is set aside, and this matter is remanded to the Director for further proceedings in accordance with this opinion.