

In the Medical Services of
Edward W. Cole, Claimant
Contested Case No: 06-063H

PROPOSED & FINAL ORDER

December 19, 2006

EDWARD W. COLE, Petitioner
SEDGWICK CLAIMS MANAGEMENT SERVICES INC., Respondent
Before Jill M. Riechers, Administrative Law Judge

Claimant, through his counsel, Jeffrey S. Ratliff, filed a request for hearing on March 31, 2006, raising issues relating to a March 8, 2006 Administrative Order, MS 06-023, issued by the Director, Department of Consumer and Business Services, Workers' Compensation Division ("WCD"), Medical Review Unit ("MRU"). The statutory claim administrator, Sedgwick CMS ("Sedgwick"), is represented by H. Thomas Andersen.

WCD referred the request for hearing to the Workers' Compensation Board, Hearings Division, on April 20, 2006, pursuant to ORS 656.704(2)(a) and OAR 436-001-0019. The matter was assigned for hearing and consolidated with claimant's request for hearing in WCB Case Number 06-04153.¹ In the present matter, WCD provided counsel and the undersigned ALJ an Exhibit list and packet on May 2, 2006, consisting of Exhibits 1 through 46. Those exhibits are hereby admitted.

In lieu of hearing, the parties presented written closing arguments. The record closed on November 20, 2006, when claimant's reply argument was received.

ISSUE

Claimant contests the March 8, 2006 Administrative Order, which found Sedgwick not liable for medical services, including orthotics, provided by Gregory Brockbank and Douglas Romney at the Spokane Foot Clinic from June 13, 2005 through August 29, 2005.

SUMMARY OF FACTS

The Director made the following Findings of Fact:

On September 12, 2004, Mr. Cole sustained a compensable injury. Sedgwick accepted right foot/ankle strain and disabling right os calcis fracture.

Spokane Foot Clinic (Gregory Brockbank and Douglas Romney) treated Mr. Cole for his compensable condition from June 13, 2005, through August 29, 2005, as well as prescribing orthotics, and billed Sedgwick. When payment was not received, Mr. Cole, through his attorney, requested Administrative Review to resolve the matter.

¹ The decision in WCB Case No. 06-04153 will be issued in a separate order. See ORS 656.704(3)(c).

On November 21, 2005, Sedgwick responded to the director regarding review, including chart notes and bills from the different providers. (Ex 44-1).

The director concluded that Dr. Brockbank's and Dr. Romney's services were not performed in compliance with OAR 436-010-0230(4)(a) and (b), and OAR 436-010-0210(1), and therefore, that Sedgwick was not liable.

On appeal, claimant contends that because the insurer expressly denied compensability of claimant's right os calcis fracture, pre-approval for treatment of that condition was not required, and claimant was free to treat with whomever he chose. He further maintains, "If the denial is later rescinded or overturned, the medical bills incurred, wherever from, must be paid by the insurer. See ORS 656.245(4)(D); Laura Golden, WCB# 00-06840, *dissent*, footnote 4. Additionally, pursuant to OAR 436-010-0219(8), the insurer had 14 days to disapprove of Claimant's treatment with the Washington based Dr. Brockbank. It failed to do so."

Sedgwick argues that pursuant to OAR 436-010-0230(4)(a), medical services provided by a provider other than an attending physician or specialist physician shall not be reimbursed unless prescribed by the attending or specialist physician and carried out under a treatment plan prepared prior to the beginning of treatment and signed by the attending physician within 30 days of the beginning of treatment. Because Dr. Carpenter, the attending physician, did not prescribe such services or prepare a treatment plan providing for such services, under the mandatory language of the rule, the services shall not be reimbursed.

The following is a summary of facts from the documents contained within the record before the Director, Exhibits 1 through 46. On September 12, 2004, after claimant's injury of the same date, x-rays of his right foot made at Good Shepherd Medical Center revealed a calcaneus fracture. (Ex 3). Claimant's attending physician, Richard Carpenter, M.D., did not observe a fracture on x-ray, and diagnosed an ankle strain. (Exs 5, 6-1). The claim was accepted as a right foot/ankle strain. (Exs 9, 10). On December 30, 2004, the claim was closed by Notice of Closure. (Ex 11).

On April 22, 2005, Sedgwick received a request from claimant to accept his right os calcis fracture. (Ex 46). On May 9, 2005, Sedgwick issued a denial of the new condition claim for os calcis fracture. (Ex 14). Claimant filed a request for hearing with respect to the May 9, 2005 denial. (Ex 16). Claimant treated with the providers at the Spokane Foot Clinic from June 13, 2005 through August 29, 2005. (Exs 18, 21, 35).

On August 22, 2005, Dr. Carpenter signed a concurrence letter prepared by Sedgwick's counsel following a conference, in which he agreed that claimant probably suffered an os calcis (calcaneus) fracture as a result of the September 12, 2004 work injury. (Ex 19). On July 20, 2005, Gregory Brockbank of the Spokane Foot Clinic wrote to claimant's counsel that claimant had sustained a right calcaneus fracture on September 12, 2004, and was currently experiencing post-traumatic arthritis secondary to the fracture. (Ex 20).

On July 20, 2005, Sedgwick wrote to claimant, advising him that new medical information required a withdrawal of the partial denial of right os calcis fracture, and that it was accepting claimant's claim for that condition. (Ex 22). The parties entered into a stipulation confirming Sedgwick's rescission of the denial. (Exs 36, 39, 40). The claim was subsequently closed on October 6, 2005. (Exs 29, 30). Claimant asked Sedgwick to pay billings from the Spokane Foot Clinic; Sedgwick declined to pay. (Exs 25, 26, 27, 31, 32). Thereafter, claimant sought review of the disputed billings with DCBS/WCD MRU. (Ex 33).

Sedgwick advised MRU of its position that the services performed at Spokane Foot Clinic were in violation of the medical service rules. (Exs 38, 41, 42). Sedgwick also informed MRU that claimant was not covered by a Managed Care Organization ("MCO") contract. (Ex 42-2). Sedgwick's stated:

The disputed services were offered by an out-of-state podiatrist. All services were offered beyond 30 days after the injury. Podiatric services were not offered with written authorization from the attending physician, and the out-of-state podiatrist did not qualify as an attending physician at the time services were rendered. (Ex 42-2; see also -4, -5).

CONCLUSIONS OF LAW AND OPINION

The Hearings Division of the Workers' Compensation Board has jurisdiction to consider the disputed services addressed in the Administrative Order. See ORS 656.704(2)(a). The administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.327(2); OAR 436-001-0225(2). No new medical evidence or issues shall be admitted. *Id.* 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).

The Director concluded that pursuant to ORS 656.005(12)(b), a podiatrist does not qualify as an attending physician in the Oregon workers' compensation system. The Director further concluded that the disputed services were not provided in accordance with the requirements set forth in OAR 436-010-0230(4) or 436-010-0210(1), and therefore were not reimbursable.

On review, claimant does not appear to challenge whether there was substantial evidence in the record to support the findings of fact made by the Director. In other words, claimant does not dispute that billings for podiatric treatment rendered by the providers at Spokane Foot Clinic was not paid by Sedgwick. Claimant's contentions are that the Director did not apply the correct law to the facts. Specifically, claimant argues that pursuant to ORS 656.245(4)(D) and *Laura Golden*, WCB Case No. 00-06840, *dissent*, footnote 4, the medical services are compensable.²

ORS 656.245(4)(b)(D) provides:

² *Laura J. Golden*, 53 Van Natta 1463, 1465-66, n. 4 (2001).

(4) Notwithstanding subsection (2)(a) of this section, when a self-insured employer or the insurer of an employer contracts with a managed care organization certified pursuant to ORS 656.260 for medical services required by this chapter to be provided to injured workers:

(b)(A) ***

(D) If the claim is denied, the worker may receive medical services after the date of denial from sources other than the managed care organization until the denial is reversed. Reasonable and necessary medical services received from sources other than the managed care organization after the date of claim denial must be paid as provided in ORS 656.248 by the insurer or self-insured employer if the claim is finally determined to be compensable.

By its terms, this provision applies only to the self-insured employer or insurer that contracts with a managed care organization (“MCO”) to provide medical services. The record before the Director indicates that no such contract existed in this case. (Ex 42-2). Thus, ORS 656.245(4)(b)(D) and the commentary discussing this statutory provision in *Golden* are inapplicable to the present case.

Claimant also contends, “pursuant to OAR 436-010-0219(8), the insurer had 14 days to disapprove of Claimant’s treatment with the Washington based Dr. Brockbank. It failed to do so.” There is no such rule in OAR Division 010, WCD Admin. Order 05-071; it appears that claimant intended to refer to OAR 436-010-0210(8), which provides:

In accordance with ORS 656.245(2)(a), with the approval of the insurer, the worker may choose an attending physician outside the state of Oregon. Upon receipt of the worker’s request, or the insurer’s knowledge of the worker’s request to treat with an out-of-state physician, the insurer must give the worker written notice of approval or denial of the worker’s choice of attending physician within 14 days.

ORS 656.245(2)(a) provides, in pertinent part:

*** The worker also may choose an attending doctor or physician in another country or in any state or territory or possession of the United States with the prior approval of the insurer or self-insured employer.

It is apparent from reviewing the record before the Director that neither prior nor subsequent approval of out-of-state treatment was given. (Ex 32). It is unclear from the record when Sedgwick received notice that claimant was treating with Spokane Foot Clinic. In any event, even if Sedgwick’s response regarding denial of the worker’s choice was not provided

within 14 days as required by OAR 436-010-0210(8), claimant did not choose a provider qualified to serve as an “attending physician,” pursuant to ORS 656.005(12) (medical doctors, osteopathic physicians, oral/maxillofacial surgeons, and, for a period of 30 days from the date of the first visit on the initial claim or for 12 visits, whichever first occurs, a chiropractic physician). See also ORS 656.245(2)(b)(A). A podiatrist is not an “attending physician” according to the statutory definition. For this reason, claimant has not established legal error by the Director, regardless of when Sedgwick notified claimant of its decision not to approve the services.

The Director relied on OAR 436-010-0230(4), quoted in the Administrative Order, in forming the conclusion that Sedgwick should not be liable for services performed at Spokane Foot Clinic. Subsection (4)(a) of this rule provides that ancillary services not provided by an attending physician, authorized nurse practitioner or specialist physician will not be reimbursed unless prescribed and carried out under a treatment plan prepared prior to the commencement of treatment and sent by the ancillary service provider to the attending physician, authorized nurse practitioner or specialist physician and the insurer within seven days of beginning treatment. Subsection (4)(c) provides that medical services prescribed by an attending physician, specialist physician, or authorized nurse practitioner and provided by a podiatrist are subject to the treatment plan requirements set forth in subsection (4)(a) of the rule.

There is no evidence that the providers at Spokane Foot Clinic prepared a treatment plan or sent any treatment plan to Dr. Carpenter, attending physician of record, or to Sedgwick, prior to commencing treatment. OAR 436-010-0230(4)(a) states that the services “will not be reimbursed,” in this situation. Claimant has not established that the Director erred in interpreting the applicable law.

PROPOSED AND FINAL ORDER

IT IS THEREFORE ORDERED that the Director’s Administrative Order dated March 8, 2006 is affirmed.