

In the ORS 656.260 Managed Care Dispute of

SHANDA M. DALHAUG, Claimant

Contested Case No: H05-051

FINAL ORDER

February 3, 2006

SHANDA M. DALHAUG, Petitioner

SAIF CORP., Respondent

Before John Shilts, Administrator, Workers' Compensation Division

Petitioner claimant, through her attorney Thomas M. Cary, timely filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's August 2, 2005 Proposed and Final Order. Providence Managed Care Organization (MCO), through its attorney Jerald P. Keene, responded. Respondent insurer, represented at hearing by its attorney David L. Runner, did not respond. This matter comes before the director for a final order. The issue is compensability of a proposed lumbar discogram. I adopt and affirm with the following supplementation.

I adopt the ALJ's findings of fact with two minor corrections.¹

Finding of fact (4) states: "On August 27, 2004, the MCO denied Dr. Kitchel's request for a lumbar discectomy for lack of medical necessity." At issue here is not a lumbar discectomy, but a lumbar discogram. The finding is modified to read: "On August 27, 2004, the MCO denied Dr. Kitchel's request for a lumbar discogram for lack of medical necessity."

Finding of fact (6) states, in part: "In a medical arbiter's report dated December 15, 2004, Dr. Ballard opined, * * *." Dr. Ballard was retained by MRU as a physician reviewer under ORS 656.327, not as a medical arbiter under ORS 656.268. The first line of the finding is modified to read: "In a physician reviewer's report dated December 15, 2004, Dr. Ballard opined, * * *."

Claimant raises a clerical error on the bottom of page 2 of the proposed order. The last sentence reads: "Having reviewed the record, I conclude that claimant has met his burden." This sentence is inconsistent with the balance of the order, which affirms the administrative order finding against claimant. The sentence is corrected to read: "Having reviewed the record, I conclude that claimant has not met her burden."

The underlying issue is whether a lumbar discogram, proposed by Scott Kitchel, MD, is a compensable medical service. Providence MCO, the managed care organization in which insurer enrolled claimant, disapproved the discography as not medically necessary because claimant's circumstances did not meet the MCO's criteria or exceptions for approval of discography. Claimant requested administrative review of the MCO's decision by the Medical Review Unit (MRU). In a March 9, 2005 Administrative Order, MRU determined that the discogram was not an appropriate medical service for claimant's accepted condition. MRU reasoned that although diagnostics that are necessary to determine the cause or extent of a compensable injury are

¹ I may modify a finding of historical fact made by the ALJ if I find that the finding is not supported by a preponderance of the evidence in the record. ORS 183.650(3); OAR 137-003-0665(4).

compensable, Dr. Kitchel did not state that the discogram was to evaluate the cause or extent of claimant's compensable injury. In addition, MRU reasoned, the independent medical examiner and the physician reviewer both believed the discogram was related to claimant's pre-existing degenerative disc disease, not claimant's accepted L5-S1 disc herniation.

Claimant requested a contested case hearing and argued that (1) she did not receive notice of the medical causation issue, and (2) MRU applied the incorrect standard of causation. The ALJ affirmed MRU. The ALJ found that claimant was not surprised by the causation issue and MRU acted within its purview to determine whether the proposed discogram was related to the accepted condition or to an unrelated condition. The ALJ further found that MRU applied the correct standard for determining the compensability of diagnostics. The ALJ finally found that MRU's determination that claimant's compensable injury did not make the discogram necessary was supported by substantial evidence in the record.

Claimant raises the same two arguments in her exceptions. First, she argues that MRU should have notified the parties that it intended to consider the causal relationship of the proposed discogram to the accepted condition. Next, she argues that MRU and the ALJ applied the wrong standard in determining causation.

Notice

Claimant does not argue that MRU lacked jurisdiction to decide the causation issue. Rather, she argues that MRU was required to notify the parties what factual and legal issues would be considered in its review. That the issues were implicit in the medical record, according to claimant, is not enough. Claimant requests that this matter be remanded to MRU for proper notification of which issues will be considered.

The problem with claimant's argument is that she does not point to any legal authority that requires MRU to notify the parties of what issues it will consider in its review. Claimant has the burden of supporting her position, and I find that she has not met her burden.

Further, I agree with the ALJ's finding that claimant should not have been surprised by the medical causation issue. Claimant's accepted condition is L5-S1 disc herniation. However, the medical record also clearly documents preexisting degenerative disc disease. Dr. Kitchel appealed the MCO's disapproval of the proposed discogram, stating, "A followup MRI * * * shows no evidence of persisting or recurrent disc herniation. There does appear, however, to be disc degeneration at L5-S1, as well as annular tear at L4-5." (Ex. 26.) In his IME report, Dr. Carr states,

"[T]he preponderance of evidence is that her continued back pain is on the basis of her pre-existing degenerative disc disease. * * * [T]o a degree of medical probability the major cause of her continued back pain is her pre-existing degenerative disc disease and not the effect of the [work] injury. [A]ny evaluation of this, particularly discography, would not be related to the [work] injury."

(Ex. 30-7.) Dr. Ballard, the physician reviewer, stated, “[T]he reason for the diskogram more likely than not would be due to her degenerative changes in her back and not due to the L5/S1 disk herniation.” (Ex. 39-5.) These were the records that were before MRU in its review. They clearly raised the issue of whether the proposed discogram was causally related to claimant’s accepted condition or her pre-existing condition. Both parties had the opportunity to present argument to MRU or to further delineate the issues raised by the record before MRU issued its order, but I find no evidence that either party did so.

I find that MRU did not err by not providing notice to the parties that it would consider the issue of causation, and there is no basis for remand.

Proportion of contribution

Claimant next argues that MRU and the ALJ applied the wrong standard in determining whether diagnostic services are compensable in that they required the compensable condition to be the sole cause of the need for the service. Rather, claimant argues, the work injury must only materially contribute to the need for the service.

Medical services for conditions caused in material part by the compensable injury are compensable. ORS 656.245(1)(a). Diagnostic services are compensable if the compensable injury made the services necessary. *Counts v. Int’l Paper Co.*, 146 Or App 768, 770 (1997). If the services are necessary to determine the cause or extent of the compensable injury, they are compensable even if a non-compensable condition is discovered as a result. *Id.* at 771. The medical evidence in the record does not support the finding that claimant’s compensable injury and the accepted L5-S1 disc herniation made the discogram necessary. Rather, the medical evidence supports the finding that the discogram is directed to claimant’s degenerative disc disease.

Claimant cites *Brooks v. D & R Timber*, 55 Or App 688 (1982) for the proposition that “diagnostic tests are compensable when the work injury materially contributes to the need for the test in order to determine the cause or extent of the injury.” Claimant argues that the injury must only materially contribute to the need for medical services. However, in *Brooks*, the need for the diagnostic exploratory surgery was a direct result of the compensable injury. Consistent with ORS 656.245(1)(a), *Brooks* supports the proposition that the injury must materially contribute to *the condition* which makes the medical services necessary. *Brooks* at 691-92. The issue here is not whether claimant’s work injury materially contributed to her degenerative disc disease. Rather, under *Counts*, the issue is whether claimant’s work injury makes the discogram necessary. The medical evidence supports the finding that it is the degenerative disc disease, not claimant’s work injury, that makes the discogram necessary.

I do not find claimant’s arguments persuasive. The ALJ correctly found that MRU’s order is supported by substantial evidence in the record and does not reflect an error of law.

IT IS HEREBY ORDERED the August 2, 2005 Proposed and Final Order is affirmed.