

In the ORS 656.245 Medical Service Dispute of

JAMES M. O'LEARY, Claimant

Contested Case No: H05-059

FINAL ORDER

January 9, 2006

JAMES M. O'LEARY, Petitioner

INDEMNITY INSURANCE COMPANY OF AMERICA, Respondent
Before John Shilts, Administrator, Workers' Compensation Division

Petitioner claimant, through his attorney George J. Wall, timely submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's July 27, 2005 Proposed and Final Order. Respondent insurer, through its attorney Jerald P. Keene, responded.¹ This matter comes before the director for a final order. The issue is reimbursability of massage therapy. I affirm on different grounds.

I adopt the ALJ's findings of fact with two minor modifications.² The record shows that claimant's date of injury is August 14, 2003, not August 18, 2003 as found by the ALJ. (Exs. 1, 2, 3, 4, 16.) Finding of fact (1) is modified accordingly. Additionally, it is not clear that it was Dr. Jura who referred claimant to massage therapy on August 18, 2003, as the ALJ found. The signature on the August 18, 2003 referral does not appear to match Dr. Jura's signature on the Worker's and Physician's Report for Workers' Compensation Claims (form 827). (Exs. 3 and 4.) Therefore, I modify the first two sentences of the ALJ's finding of fact (2) to state,

“On August 18, 2003, claimant was referred for massage therapy three times per week for two weeks; objectives or modalities were not specified. (Ex. 4.) On September 8, 2003, attending physician Randall P. Jura, MD, noted, ‘I am authorizing massage with chiropractic three times per week for the past 2 weeks (6 treatments), this week (three treatments).’ (Ex. 6-7.)”

The underlying issue is whether insurer is liable to reimburse claimant for expenses he paid to receive massage therapy between August 18, 2003 and March 19, 2004. The Medical Review Unit (MRU), by Administrative Order dated March 11, 2005, found that if licensed massage therapists are licensed to provide a medical service, the services are subject to the requirements for treatment plans under OAR 436-010-0230(4)(a). MRU found that the requirements of a treatment plan were not met here, so insurer is not liable to reimburse claimant for the cost or related expenses.

Claimant requested a hearing and the ALJ affirmed. The ALJ found that MRU

¹ Insurer requested an extension of time in which to respond to claimant's exceptions. Insurer indicated that claimant's counsel did not object to its request. Insurer's response is allowed. Claimant's reply, however, was untimely. Claimant's reply was due no later than September 12, 2005, OAR 436-001-0275(2), and is dated September 15, 2005. It is therefore not considered.

² 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).

determined that a licensed massage therapist was not a medical provider as that term is defined in OAR 436-010-0005(28). The ALJ deferred to MRU's interpretation of the rule, finding that massage therapy is not a "healing art." The ALJ further agreed that the requirements of a treatment plan were not met because the attending physician failed to specify objectives or modalities.

Contrary to the ALJ's statement, MRU did not determine that a licensed massage therapist is not a medical service provider within the meaning of OAR 436-010-0005(28). MRU did find that a licensed massage therapist does not qualify as an attending physician or a specialist physician as those terms are defined in statute and rule. MRU then found that *if* a licensed massage therapist is licensed to provide a medical service, the services would be subject to the requirements of a treatment plan. MRU did not determine that a licensed massage therapist was not licensed to provide a medical service, and did not refer to the definition of "medical service provider" in OAR 436-010-0005(28). The ALJ discusses the definition in the proposed order, ultimately deferring to MRU's interpretation of the rule. Because MRU did not interpret the rule and, as discussed below, because it is not necessary to reach the issue of whether a licensed massage therapist is licensed to provide a medical service in order to resolve this matter, I do not adopt the ALJ's discussion of "medical provider." Nevertheless, I reach the same outcome as the ALJ for the following reasons.

The services at issue here were provided between August 18, 2003 and March 19, 2004. Therefore, the rules in effect at that time apply. OAR 436-010-0003(1). The version of the rule that prescribes the requirements of a treatment plan, OAR 436-010-0230(4), in effect at that time was adopted effective January 1, 2002 (WCD Admin. Order 01-065).³ That version applies here. It provided, in relevant part:

"(4)(a) [A]ncillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician * * * shall not be reimbursed unless prescribed by the attending physician * * * and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician * * * within 30 days of beginning treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician * * * and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending physician * * * shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. * * *

³ The rule was amended effective January 1, 2004 to include authorized nurse practitioners; those amendments do not affect this case. The rule was again amended effective April 1, 2004. If applicable, those amendments would affect this case. However, I find that the April 1, 2004 amendments do not apply here. Minor wording changes were made effective April 1, 2005; the ALJ applied that version of the rule.

The rule applies to ancillary services provided by a medical service provider. I find that massage therapy is an ancillary service. I defer the issue of whether a licensed massage therapist is a medical service provider. If the requirements of a treatment plan are not met, the massage therapy is not reimbursable regardless of whether the massage therapist is a medical service provider.

The requirements of OAR 436-010-0230(4) must be met for the services to be reimbursable. *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App 283 (1996). However, a treatment plan need not be contained in a single document; it may be made up of various documents prepared at different times. *SAIF v. Ross*, 191 Or App 212 (2003), *rev'd and remanded on recon*, 192 Or App 200 (2004). The insurer is not liable for services provided before the requirements of a treatment plan are met. *SAIF v. Ross*, 192 Or App 200 (2004).

In order to be reimbursable under OAR 436-010-0230(4), then, the massage therapy must have been prescribed by Dr. Jura and carried out under a treatment plan meeting the requirements of the rule. Dr. Jura prescribed the massage therapy. The issue is whether the requirements of a treatment plan were met. The rule required that a treatment plan be prepared prior to the commencement of treatment; an initial copy be provided to the insurer within seven days of beginning treatment; the plan be signed by the attending physician and provided to the insurer within 30 days of beginning treatment; and that it include objectives, modalities, frequency of treatment, and duration. The plan may be recorded in any legible formation including signed chart notes.

MRU reviewed the medical record and found that the treatment plan, at various times, did not include objectives and was not signed by Dr. Jura. MRU further found that the timeframes in the rule were not met. On these bases, MRU found that the services were not reimbursable. If MRU's finding is supported by substantial evidence in the record, it cannot be modified. ORS 656.245(7), 656.327(2); OAR 436-001-0225.

Claimant argues that Dr. Jura outlined objectives in his January 19, 2004 report; further, the overall objective is inferred throughout his notes. Insurer responds that the January 19, 2004 report was not received by insurer until February 21, 2005, after the treatment was completed. Further, insurer argues the director's interpretation of "objectives" is due deference.

I agree with claimant that Dr. Jura's January 19, 2004 report contains objectives. The report states, "Current goals of therapy are to continue to improve patient's ability to move and walk properly and to tolerate more standing and walking, all this towards getting him back to some kind of gainful employment." However, the other requirements of a treatment plan must also be met, including attending physician signature.

The January 19, 2004 report is not signed by Dr. Jura. The only clear signature of Dr. Jura in the record is on the August 18, 2003 Worker's and Physician's Report for Workers' Compensation Claims (form 827). There is a signed prescription for massage therapy in the file dated August 18, 2003. However, if the two signatures are compared, it is not clear that it was Dr. Jura who signed the prescription. Moreover, the prescription is only for two weeks. On May

4, 2004, Dr. Jura indicated that the treatment plans appeared at the end of his reports, generated throughout the claim. Although in the portion of the reports labeled "Treatment Plan/Discussion" Dr. Jura clearly authorizes massage therapy, the rule requires more than authorization. None of the reports contain a signature as required by the rule. While MRU's finding that none of the reports or treatment plans included objectives is incorrect, MRU's finding that none of the reports or treatment plans were signed by Dr. Jura is supported by substantial evidence in the record. I therefore affirm MRU. Because the treatment plans were not signed by Dr. Jura, they did not meet the requirements of a treatment plan under OAR 436-010-0230(4), and the massage therapy is not reimbursable.

Claimant argues he should not bear the burden of his physician's failure to follow the rules, and cites OAR 436-010-0230(4)(b), which provides in relevant part:

"Failure of the physician * * * to sign * * * the treatment plan may subject the attending physician * * * to sanctions under OAR 436-010-0340, but shall not affect payment to the ancillary medical service provider."

This language was not added to the rule until April 1, 2004, after the services at issue in this case had been provided. If this language appeared in the rule at the time, the lack of Dr. Jura's signature alone would not have been an adequate basis on which to deny reimbursability. However, the rule in effect at the time clearly conditions reimbursability on, among other things, the attending physician's signature. Although insurer may not have denied payment because of the lack of attending physician signature, a signature was nonetheless required by the rule, as MRU found.

Applying the more recent version of the rule, the ALJ did not discuss the requirement of a signature. Rather, she found that the massage therapy was not reimbursable because the treatment plan failed to specify objectives or modalities. I do not reach those issues, nor the other arguments raised by claimant in his exceptions.

IT IS HEREBY ORDERED the July 27, 2005 Proposed and Final Order is affirmed for the reasons stated above.