

In the Medical Services Matter of
CRAIG A. PHILLIPS, Claimant
Contested Case No: H05-112
PROPOSED AND FINAL ORDER

February 16, 2006

CRAIG A. PHILLIPS, Petitioner
CITY OF EUGENE, Respondent
Before Daina Upite, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on July 22, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 4, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On October 12, 2005, Administrative Law Judge Daina Upite conducted a hearing in Salem, Oregon. Attorney Nelson R. Hall represented petitioner Craig A. Phillips (claimant). Attorney Jay E. Perry represented responding self-insured employer City of Eugene (insurer). Claimant called Edward R. Schwartz M.D., and Todd Berger, P.T. as witnesses and he testified on his own behalf. Steve Auferoth, City of Eugene Director of Employee Health and Fitness, testified on insurer's behalf. The record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that Pilates Allegro Reformer exercise equipment for home use was not compensable.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 73, as well as claimant's Supplementary Exhibit 74, were admitted into the record without objection.

FINDINGS OF FACT

1. On October 21, 2003, claimant suffered a compensable lumbar injury when he lifted a patient while working as a firefighter/paramedic. (Exs. 2 and 3.) On October 28, 2003, Dr. Schwartz prescribed physical therapy. (Exs. 5 and 7-1) On November 11, 2003, Dr. Schwartz declared claimant's low back condition medically stationary. (Ex. 7-3.) On November 26, 2003, insurer accepted an acute musculoligamentous lumbar strain. (Exs. 17 and 21-6.)
2. On December 5, 2003, claimant completed physical therapy and Dr. Schwartz stated that the back condition was resolved. (Ex. 7-5.) On January 7, 2004, the claim was closed without permanent disability. (Ex. 21.)

3. On June 3, 2004, Dr. Schwartz noted that claimant suffered increased symptoms and took claimant off work. (Exs. 7-6, 23, 25 and 38.) An MRI revealed an L5-S1 disc herniation and an L4-5 disc bulge. (Ex. 24.) Claimant resumed physical therapy in a clinic, including use of Pilates Allegro Reformer exercise equipment. (Ex. 22-5.)

4. On July 23, 2004, Andrew J. Kokkino, M.D. released claimant to medium work. (Ex. 33.) In August 2004, claimant returned to full duty as a firefighter. (Exs. 37-1, 40-2.)

5. On December 10, 2004, the lumbar condition returned to medically stationary status. (Exs. 40-5 and 50.) On January 11, 2005, insurer accepted an L5-S1 disc herniation. (Ex. 42.)

6. On January 18, 2005, Dr. Schwartz noted that claimant derived benefit from use of Pilates Allegro Reformer exercise equipment. (Ex. 7-11.) Claimant was interested in obtaining Pilates Allegro Reformer exercise equipment for use at home. (Ex. 7-12.) On November 18, 2005, Dr. Schwartz stated,

He continues with his physical therapy. He is deriving benefit from it. He has been using a Pilates table. This provides him the greatest amount of benefit. He lives 15 miles away from town, and therefore, it is difficult for him to come in for physical therapy. He is interested in getting a Pilates table for home. Over the long term, having equipment at home would be more cost effective than continued trips to physical therapy. *** I agree that he would benefit from having a Pilates table at home.
(Ex. 7-11.)

7. On February 11, 2005, insurer accepted an L4-5 paracentral annular disc bulge. (Exs. 45 and 46.)

8. On February 25, 2005, Todd Berger, P.T., who provided physical therapy to claimant, wrote to Dr. Schwartz, recommending that claimant purchase a Pilate Allegro Reformer in lieu of continued physical therapy. Berger indicated that claimant could maintain adequate core strength for continued long term employment on his own if he had access to this equipment in his home. (Exs. 22, 48 and 52.)

9. On March 4, 2005, Dr. Schwartz wrote a prescription for Pilates Allegro Reformer exercise equipment. (Exs. 49 and 52.)

10. On March 11, 2005, claimant requested insurer to purchase Pilates Allegro Reformer exercise equipment for home use. Claimant indicated that use of this equipment would enable him to continue working as a firefighter and avoid lumbar surgery. (Exs. 51 and 52.)

11. On March 11, 2005, insurer denied compensability of Pilates Allegro Reformer exercise equipment. (Exs. 52 and 54.)

12. On March 28, 2005, Dr. Schwartz stated

[Claimant] has found that by far the most effective treatment for him has been Pilates treatment. This consists of a comprehensive regimen using the “Allegro Reformer”. He is educated in its use and has demonstrated the ability to use it properly. He is motivated to maintain his health and has demonstrated compliance in the past. He uses Pilates for 80 percent of his physical therapy. I believe that it makes sense financially to reimburse him for this one time expense as opposed to paying for ongoing supervised physical therapy (he does not require supervision). *** I believe this is needed to maintain his ability to function as a fire fighter.

(Ex. 53.)

13. On April 12, 2005, the claim was closed without permanent disability. (Exs. 40-5, 44, 50 and 56.) In an Order on Reconsideration dated May 26, 2005, the department determined that the claim had been closed prematurely and the claim remained in open status. (Ex. 64.) On August 5, 2005, the claim was again closed. (Ex. 74.)

14. Eleven Eugene fire stations have exercise equipment, not including Pilates Allegro Reformer, that is available to claimant 24 hours per day. (Ex. 65.)

CONCLUSION OF LAW

MRU correctly determined that Pilates Allegro Reformer exercise equipment was not compensable.

OPINION

Jurisdiction over this medical services dispute lies with the director. ORS 656.245(6), ORS 656.704(3)(a) and OAR 436-010-0008(1). I may modify the administrative order only if it is not supported by substantial evidence or reflects error of law. OAR 436-001-0225(2). The burden of presenting evidence to support a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

MRU determined that the disputed exercise equipment was not compensable because the medical record failed to satisfy the requirements specified in OAR 436-010-0230(10). MRU further found that purchase of exercise equipment for home use was not necessary because claimant was a firefighter and exercise equipment was available for his use in eleven city fire stations. Claimant contends that the administrative order is not supported by substantial evidence and reflects error of law. In support of his position, claimant argues that the statements

of Dr. Schwartz and physical therapist Berger establish his entitlement to the Pilates Allegro Reformer exercise equipment for use in his home. Claimant further argues that MRU erred in relying on the availability of exercise equipment in eleven city fire stations. In contrast, insurer contends that the administrative order is correct and should be affirmed.

Dr. Schwartz has prescribed use of Pilates Allegro Reformer exercise equipment and this equipment is available to claimant at the physical therapy clinic where he has received treatment. The only issue is whether insurer is liable to purchase Pilates Allegro Reformer exercise equipment for claimant's use in his home.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b). However, after the medically stationary date, medical services are not compensable with some exceptions. ORS 656.245(1) provides in pertinent part:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are **not compensable** except for the following:

(J) With the approval of the insurer or self-insured employer, palliative care¹ that the worker's attending physician referred to in ORS 656.005 (12)(b)(A)² prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

Additionally, OAR 436-010-0230(10) provides:

(10) Articles including but not limited to beds, hot tubs, chairs, Jacuzzis, and gravity traction devices are **not compensable** unless a need is clearly justified by a report which establishes that the "nature of the injury or the process of recovery requires" the item be furnished. The report must specifically set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. Trips to spas, to

¹ ORS 656.005(20) provides:

(20) "Palliative care" means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

² ORS 656.005(12) provides in pertinent part:

(b) Except as otherwise provided for workers subject to a managed care contract, "attending physician" means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is:
 (A) A medical doctor or doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or an oral and maxillofacial surgeon licensed by the Oregon Board of Dentistry or a similarly licensed doctor in any country or in any state, territory or possession of the United States;

resorts or retreats, whether prescribed or in association with a holistic medicine regimen, are not reimbursable unless special medical circumstances are shown to exist.

(Emphasis added.)

In construing the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). See also *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (court's task in determining the legislative intent is to first examine the statute, including text and context, and if the intent is clear, to proceed no further with its analysis.) Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *Don't Waste Oregon Com. v. Energy Siting Council*, 320 Or 132 (1994). Here, MRU interpreted OAR 436-010-0230(10) to mean that the medical record failed to meet the two-prong test. I agree and defer.

To begin, OAR 436-010-0230(10) provides that articles are generally not compensable unless a need is clearly justified by a report which establishes that the nature of the injury or the process of recovery requires the item be furnished. Here, physical therapist Berger stated that use of the Pilates Allegro Reformer at the physical therapy clinic has improved claimant's core strength. Additionally, Dr. Schwartz stated that use of the Pilates Allegro Reformer has enabled claimant to continue working as a firefighter without further injury. However, these statements fail to explain why claimant requires this equipment at home. I agree with MRU's analysis, finding the medical record inadequate to establish that the nature of the injury or the process of recovery requires the use of exercise equipment at home.

The second prong of the OAR 436-010-0230(10) test requires a medical report explaining why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. Here, Dr. Schwartz sought to justify the purchase of home exercise equipment by explaining that claimant lives fifteen miles out of town and home exercise equipment is more convenient for claimant than continued physical therapy in a clinic. However, these circumstances are the same as those of many other injured workers with similar impairments. Dr. Schwartz further stated that purchase of a Pilates Allegro Reformer would be less expensive for insurer than continued physical therapy in a clinic. However, insurer's expense is not a relevant factor under OAR 436-010-0230(10).

Next, Dr. Schwartz sought to justify the purchase of home exercise equipment because claimant's work as a firefighter is physically demanding. Again, this factor is no different from that of many other workers with similar impairments. Moreover, physically demanding work does not justify the purchase of exercise equipment for use at home.

In conclusion, I agree with MRU's interpretation of OAR 436-010-0230(10) and its application to the facts of the case. Finally, finding no basis for modifying the administrative order, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated July 22, 2005 is affirmed.