
In the Medical Services of
Greg A. Harsha, Claimant
Contested Case No: 07-045H
PROPOSED & FINAL ORDER

October 22, 2007

GREG A. HARSHA, Petitioner
SAFECO INS. CO. OF AMERICA, Respondent
Before Jenny Ogawa, Administrative Law Judge

The insurer appealed the Director's Review and Order issued on February 21, 2007 by the Medical Review Unit (MRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (Director). Pursuant to notice, a hearing was scheduled for September 21, 2007, in Salem, Oregon, before Administrative Law Judge Ogawa. Claimant is represented by attorney James Dodge. The employer, Choice Cablevision Service Inc., and its insurer, Safeco Ins. Co., are represented by attorney Neil Jones. The WCD waived appearance. WCD Exhibits 1 through 425 were received into evidence. The record closed at the conclusion of the hearing.

ISSUE

1. Whether the MRU erred in determining that claimant's request for administrative review was timely.
2. Whether substantial evidence supported the MRU's finding that the surgery proposed Dr. Keenen was appropriate treatment of claimant's compensable condition.

FINDINGS OF FACT

The standard of review is for substantial evidence or errors of law, rather than *de novo*. Thus, independent findings of fact are not rendered. *Liberty Northwest Insurance Corporation v. Kraft*, 205 Or App 59 (2006). Therefore, the following facts are taken from the MRU's findings of fact and the record created by the MRU.

Claimant sustained a compensable back injury on March 20, 1985. Claimant has undergone three surgeries consisting of a March 1987 lumbar laminectomy and disc excision at L5-S1; a December 1987 lumbar laminectomy, discectomy, and foraminotomy; and a March 2000 fusion at L5-S1. The surgeries did not relieve claimant's pain.

On August 25, 2004, Dr. Keenen requested authorization to perform a L5-S1 anterior fusion revision with posterior instrumentation revision to treat pseudoarthrosis. (Ex. 355). On October 5, 2004, Dr. Keenen faxed to the MCO another request for authorization for surgery. (Ex. 359).

On November 4, 2004, the MCO issued a "Notice of Lack of Medical Necessity" letter to Dr. Keenen denying the surgery and recommended additional treatment for the psychological

and substance abuse issues. The letter was copied to the insurer, claimant, and claimant's attorney. The parties had 30 days (or until December 4, 2004) to appeal the MCO decision to the MCO. (Ex. 368).

In a letter dated November 9, 2004, claimant's attorney requested the MRU to review the denial of the proposed surgery. (Ex. 369). On November 15, 2004, claimant's attorney appealed the MCO decision to the MCO. (Ex. 370). On November 19, 2004, the MRU denied review on the ground that the dispute had not completed the MCO internal dispute resolution process. (Ex. 371). On December 6, 2004, the MCO wrote claimant's attorney advising that it would only act upon an appeal if Dr. Keenan initiated the appeal. Because Dr. Keenan did not wish to appeal the MCO decision, the MCO indicated that claimant may request administrative review from the MRU. The letter was copied to claimant, to Dr. Keenan, and to the insurer. (Ex. 376). Claimant had 60 days (or until February 4, 2005) to submit his request to the MRU.

On January 12, 2005, the insurer denied claimant's post-aggravation rights new and/or omitted medical condition claims for several listed conditions. (Ex. 378).

On March 16, 2005, the insurer wrote the MCO memorializing a telephone conference between the insurer, its attorney, and the MCO. The MCO indicated its concern that claimant's attorney may not have received its December 6, 2004 letter. The insurer understood that the MCO orally advised claimant of his rights in December 2004 and that there was no evidence that the December 2004 letter was not mailed to claimant's attorney. The insurer further believed that the MCO had no further obligation to issue an additional notice of rights letter to claimant or to his attorney. (Ex. 384).

On March 21, 2005, in response to claimant's inquiry, Dr. Keenan clarified that he continued to believe that the requested surgical fusion was medically reasonable and necessary. (Ex. 382).

On March 22, 2005, the MCO mailed, and faxed, a copy of its November 4, 2004 decision to claimant's attorney. The MCO also stated that claimant's copy of the decision had been returned as undeliverable. The new letter provided new appeal rights. (Exs. 385, 387). On March 22, 2005, claimant requested the MRU to review the MCO's surgery decision. (Ex. 386).

CONCLUSIONS OF LAW AND OPINION

I may modify the MRU's administrative order "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). Substantial evidence supports a finding when the record, viewed as a whole and keeping in mind the evidence against the finding as well as the evidence supporting it, permits a reasonable person to make the finding. ORS 656.183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). "[I]n addition to the statutory requirement that findings be supported by substantial evidence, agencies also are required to demonstrate in their opinions the *reasoning* that leads the agency from the *facts* it has found to the *conclusions* that it draws from those facts." *Drew v. PSRB*, 322 Or 491, 500 (1996) (Emphasis in original).

Jurisdiction

The MRU relied on OAR 436-010-0008(5)(a)¹ to determine that the MCO process had not been completed until March 22, 2005, the date the MCO issued a new letter informing him of its earlier decision. The MRU found that the MCO process was not completed because claimant had not received the MCO's December 6, 2004 final decision. The MRU also found that, on March 22, 2005, the MCO re-opened the time period for appeals to the MRU. Therefore, the MRU concluded that claimant's March 29, 2005 appeal was timely, and that it had jurisdiction.

The section of the rule upon which the MRU relied on is inapplicable. When the MCO determined that the disputed surgery lacked medical necessity, further action by the MCO was dependent upon an appeal by Dr. Keenen. The MCO indicated that Dr. Keenen did not wish to appeal. Thus, the MCO had completed its internal dispute resolution process. The MCO considered its December 6, 2004 letter its final decision. There is no indication there was "failure of the MCO process."

Whether the MRU correctly determined that it had jurisdiction turns on whether claimant timely appealed the MCO's December 6, 2004 letter.² The insurer has the burden of proving that claimant's request for administrative review was untimely. *See Madewell v. Salvation Army*, 49 Or App 713, 716 (1980); *SAIF Corporation v. Tull*, 113 Or App 449, 451 (1992). Neither ORS 656.260 nor WCD rules provide clear guidance what burden the insurer must meet.

ORS 656.260(14) states:

"If a worker, insurer, self-insured employer or the attending physician is dissatisfied with an action of the managed care organization regarding the

¹That rule states: "The following time frames and conditions apply to requests for administrative review before the director under this rule:

(a) For all disputes subject to dispute resolution within a Managed Care Organization, upon completion of the MCO process, the aggrieved party must request administrative review by the director within 60 days of the date the MCO issues its final decision. If a party has been denied access to an MCO internal dispute process *or the process has not been completed for reasons beyond a party's control, the party may request director review within 60 days of the failure of the MCO process*. If the MCO does not have a process for resolving the particular type of dispute, the insurer must advise the medical provider or worker that they may request review by the director." (Emphasis provided by the MRU).

² As the insurer points out, a colorable argument can be made that the November 4, 2004 "Notice of Lack of Medical Necessity" was its final decision because it denied the surgery. However, according to the MCO's internal dispute resolution process, Dr. Keenen, the requesting surgeon, had to appeal in order for the MCO to review its decision. When Dr. Keenen declined to appeal, then the MCO's decision became a final decision that claimant could appeal to the MRU. In addition, when claimant appealed the MCO's November 4, 2004 decision to the MRU, the MRU advised claimant that the surgery dispute had not completed the MCO internal dispute resolution process. (Ex. 371). Thus, in this case, the December 6, 2004 letter was the "final" MCO decision.

provision of medical services pursuant to this chapter, peer review, service utilization review or quality assurance activities, that person or entity must first apply to the director for administrative review of the matter before requesting a hearing. Such application must be made not later than the 60th day after the date the managed care organization has completed and issued its final decision.”

The statute and OAR 436-010-0008(5)(a) do not refer to mailing or notification. In comparison, OAR 436-015-0110(3), (4), and (6) use the terms mailing, notification, and notify.³

For the purpose of determining timeliness, notification had been equated with mailing. *Norton v. State Compensation Dept.*, 252 Or 75 (1968); *Madewell*, *supra* at 715. The court in *Madewell* acknowledged that there were presumptions that a writing is truly dated, and that a letter directed and mailed was received in the regular course of mail, but that there was no presumption of mailing. Rather, to establish untimely filing required evidence showing when the letter was mailed. *Madewell*, 49 Or App at 716.

³ OAR 436-015-0110(3) requires “notification” “be provided to the worker and the worker’s attorney when the MCO ... issues any decision pursuant to this rule.” Subsection (4) requires the following appeals language when the MCO has an internal dispute resolution process:

“NOTICE TO THE WORKER AND ALL OTHER PARTIES: If you want to appeal this decision, you must **notify** us in writing **within 30 days of the mailing date of this notice**. Send a written request for review to: {MCO name and address}. If you have questions, contact {MCO contact person and phone number}. If you do not notify us in writing within 30 days, you will lose all rights to appeal the decision. If you appeal timely, we will review the disputed decision and notify you of our decision within 60 days of your request. Thereafter, if you continue to disagree with our decision, you may appeal to the director of the Department of Consumer and Business Services (DCBS) for further review. If you fail to seek dispute resolution through us, you will lose your right to appeal to the director of DCBS.”

Whereas, when the MCO issues its final decision, subsection (6) requires:

“NOTICE TO THE WORKER AND ALL OTHER PARTIES: If you want to appeal this decision, you must **notify** the director of the Department of Consumer and Business Services (DCBS) in writing **within 60 days of your receipt of this notice**. Send written requests for review to: Department of Consumer and Business Services, Workers’ Compensation Division, Medical Review Unit, 350 Winter Street NE, PO Box 14480, Salem, OR 97309-0405. If you do not notify DCBS in writing within 60 days, you will lose all rights to appeal the decision. If you have questions, call a Workers’ Compensation Division Benefit Consultant at (503)947-7585 (TTY 503-947-7993) or (toll-free in Oregon) 1-800-452-0288.” (Emphasis added).

In its April 29, 2005 response to the MRU, the MCO stated that on December 6, 2004, claimant's attorney was notified in writing of its decision and that the parties could appeal to the Director. Further, copies were mailed to claimant, Dr. Keenen, and the insurer. However, claimant's copy (no such address) and the insurer's copy (forwarding time expired) were returned by the post office. On March 20, 2005, claimant's attorney advised the MCO he had not received a copy of the December 6th letter. (Ex. 393 pp. 50-51). Because the letter was not successfully mailed, the presumption of receipt is rebutted by the failure of delivery. *See Lilia A. Estanislao*, 59 Van Natta 1697 (2007). Because the MCO's December 6, 2004 decision was not successfully mailed to all the parties, it could republish its decision. *See Berliner v. Weyerhaeuser Company*, 90 Or App 450 (1988). Claimant timely appealed the March 22, 2005 republished decision. The MRU did not err in concluding that claimant's appeal was timely.

Appropriateness of the Proposed L5-S1 Fusion Revision

In denying the proposed surgery, the MCO opined that claimant needed additional treatment for the psychological and substance abuse issues in order to maximize pain coping skills. The MCO felt that resolution of those issues would increase the chances for a successful surgery. (Exs. 368, 393).

The MRU found that claimant "has a prior history of three unsuccessful surgeries, extensive pain behaviors including drug seeking and substance abuse and a demonstrated unwillingness to use nonsurgical, non-narcotic means of dealing with his chronic pain." The MRU determined that the psychological issues did not outweigh the objective clinical evidence that claimant had a pseudoarthrosis. The MRU stated that a pseudoarthrosis was one of the well-accepted indications for an exploration and possible refusion. The MRU disagreed with the MCO and the insurer that it was necessary for surgery to relieve 100 percent of symptoms, because there was no statute or rule that required such. The MRU, therefore, concluded that the proposed surgery was appropriate. (Ex. 412).

The insurer relied on the opinions of Drs. Vessely, Dordevich, Lorber, and Glass to argue before the MRU that the preponderance of the evidence established that the proposed surgery was inappropriate. (Ex. 392). The MCO also provided to the MRU an explanation of its review process and the basis for not approving the proposed surgery. The MCO noted that the intended purpose/result of the proposed surgery was to resolve severe back pain from pseudoarthrosis and radiculopathy, as noted in Dr. Keenen's May 25, 2004 chart note. (Ex. 393-1). In evaluating claimant's medical status, the MCO weighed the imaging findings against claimant's 20-year history of functional interference with pain behaviors. The MCO found that the pain behaviors, combined with the drug and alcohol issues, made it very difficult to objectively evaluate claimant's condition and appropriate treatment. Thus, the MCO recommended additional treatment for the psychological and substance abuse issues in order to increase the chances for a successful surgery. In addition, when the psychological and substance abuse issues were addressed, the MCO felt that surgery could be more clearly assessed. (Ex. 393 pp. 51-52).

At hearing, the insurer argues that the MRU incorrectly found claimant's "emotional conditions, including adjustment disorder, anxiety disorder, depression, pain disorder, and pain

medication addiction” were accepted conditions.⁴ (Ex. 412-1). That erroneous finding, the insurer asserts, lead to an incorrect analysis consisting of editorial comment regarding claimant’s psychological conditions and chronic pain. The insurer also contends that the MRU incorrectly interpreted Dr. Lewis’ opinion. Rather, it asserts that Dr. Lewis’ opinion does not support the MRU’s ultimate decision regarding surgery. The insurer, therefore, argues that the MRU order is not supported by substantial evidence or substantial reason, and also reflects an error law.

Claimant’s psychological and substance abuse conditions are relevant considerations in determining the appropriateness of the proposed surgery. The expected surgical results are also a relevant consideration in determining the compensability of medical services. *See Linn Care Center v. Cannon*, 74 Or App 707, 710 (1985). Relevant opinions were provided by Drs. Vessely, Glass, Lorber, Keenen, and Lewis.

Dr. Glass examined claimant on September 16, 2004. Dr. Glass diagnosed opioid dependence, alcohol dependence, nicotine dependence, pain disorder, personality disorder, and somatoform disorder. Dr. Glass opined that none of these diagnoses were caused or worsened by claimant’s 1985 injury or resulting surgeries. Dr. Glass opined that claimant was not a good surgical candidate from a psychiatric standpoint. He explained that claimant would unlikely report improvement until the drug abuse was discontinued. Thus, any successful approach to claimant’s subjective pain complaints was to avoid drugs of abuse in his overall management. (Ex. 356).

When asked to respond to Dr. Glass’ report, Dr. Lorber stated that he shared similar concerns regarding claimant’s drug abuse. He also noted that claimant’s surgery was not based only on subjective reports of pain; there was evidence of pseudoarthrosis. Lastly, Dr. Lorber stated that he had told claimant that he would only cover opiates for three months postop and then opiates would be decreased. (Ex. 364). Dr. Patrick, a psychologist and an associate of Dr. Lorber, also agreed with Dr. Glass that avoidance of narcotic medication should be a primary goal and that psychological intervention would be generally unsuccessful until claimant maintained abstinence from alcohol and other drugs of abuse. (Ex. 366).

Dr. Vessely examined claimant on January 26, 2005. In his report, he discussed Dr. Dordevich and his June 2004 examination. In that report, the doctors concurred that the diagnostic studies demonstrated no motion at the fusion level. Thus, the doctors felt that the pseudoarthrosis was not the pain generator. Considering the complicated psychological issues and the pain behavior, the doctors did not feel that claimant was a good candidate for the surgery recommended by Dr. Keenen. At the 2005 examination, claimant again demonstrated significant pain magnification and inconsistencies. Based on the March 2004 flexion/extension views, Dr. Vessely opined there was no evidence of movement at L5-S1, thus the pseudoarthrosis was not a factor in claimant’s pain. Dr. Vessely further opined that claimant’s pain was multifactorial and not related to the pseudoarthrosis or to his disc abnormality. (Ex. 380). Dr. Lorber concurred, but deferred to Dr. Keenen regarding the surgery issue. (Ex. 342).

⁴ Claimant withdrew his claims for these conditions. Thus, the emotional conditions, including adjustment disorder, anxiety disorder, depression, pain disorder, and pain medication addiction are not accepted conditions. Prior to the MRU’s order, on February 9, 2007, ALJ Mills issued an order finding claimant’s chronic pain syndrome/chronic pain disorder not compensable.

Dr. Keenen believed that the surgery was reasonable and necessary, taking into account the totality of claimant's medical history and issues, both physical and mental. He explained the fusion was to attempt to prevent pain from bone movement and to replace any loosened surgical hardware. (Ex. 382).

Dr. Lorber subsequently reported on March 15, 2005 that the proposed surgery was reasonable, but the prognosis would be extremely guarded for a positive outcome. (Ex. 383).

Dr. Lewis performed a records review on June 26, 2006 at the request of the MRU. Dr. Lewis opined the CT scan documented objective evidence of a pseudoarthrosis at L5-S1. He noted that claimant's low back pain was purely subjective, and that there were well documented subconscious psychological factors and dependency issues that influenced claimant's perception of pain. He also expected a pseudoarthrosis to cause low back pain. Dr. Lewis opined that even if claimant's psychological issues were resolved, "he would still have a persistent source of low back pain that could easily trigger more issues of dependency and exacerbations of the psychological issues." *** "Fixing his pseudoarthrosis would correct some pathology, but in my opinion would not significantly change his outlook for pain control and functional improvement." (Ex. 398-5).

Under a substantial evidence review, the whole record is looked at with respect to the issue being decided, rather than at one piece of evidence in isolation. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62 (2006); *Armstrong*, 90 Or App at 206. Considering the whole record, substantial evidence does not support the MRU's finding that the existence of a pseudoarthrosis outweighed claimant's psychological and substance abuse issues. The MCO and the examining doctors weighed the clinical evidence of a pseudoarthrosis against claimant's psychological and substance abuse issues. Except for Dr. Keenen, the doctors and the MCO concluded that the psychological and substance abuse issues weighed against a successful surgery. Rather, the overwhelming medical evidence establishes that claimant was not expected to achieve favorable surgical results because of his chronic pain syndrome, and psychological and substance abuse issues. The MRU did not explain why the medical opinions against surgery were not persuasive. Based on the record as a whole, a reasonable person would not find that the proposed surgery was appropriate without first dealing with claimant's psychological and substance abuse issues. Substantial evidence does not support the MRU's findings and conclusion that the proposed surgery is appropriate.

ORDER

IT IS THEREFORE ORDERED that the MRU's February 21, 2007 Administrative Order is reversed.