
In the ORS 656.260 Manged Care Dispute of

Robin M. Hlobeczy, Claimant

Contested Case No: 06-159H

PROPOSED & FINAL ORDER

March 23, 2007

ROBIN M. HLOBECZY, Petitioner

SAIF CORPORATION, Respondent

Before Steve Rissberger, Administrative Law Judge

Pursuant to notice, a hearing was scheduled in this matter for January 19, 2007 in Salem, Oregon, before Administrative Law Judge Ogawa. Claimant is represented by Brent Wells, attorney at law. Oregon State University and SAIF Corporation are represented by Julene Quinn, attorney at law.

Prior to the hearing date, the parties advised the forum that these matters could be determined on the documentary record and closing arguments. Therefore, no hearing was held. Exhibits 1 through 25 are admitted into evidence. The record closed upon receipt of written closing arguments on March 1, 2007. This case was transferred to ALJ Rissberger for resolution shortly after the record closed.

ISSUES

Medical Services—Palliative Care Request: Whether substantial evidence supports the Workers' Compensation Division's, (WCD), determination in a September 14, 2006 Administrative Order that the palliative care request filed by claimant's attending physician failed to comply with requirements under OAR 436-010-0290(1)(a)(E) that the applicant describe how the requested care will enable claimant to continue current employment and the possible adverse effect if the care is not approved?

FINDINGS OF FACT

Claimant experienced symptoms in her right forearm and wrist due to work-related keyboarding activity. She eventually filed a Workers' Compensation claim listing January 15, 2003 as her date of injury. SAIF accepted a right ulnar nerve irritation condition, secondary to overuse of claimant's right upper extremity.

William Ferguson, M.D., an occupational medicine specialist, began treating claimant in 2003.

SAIF sent a letter to claimant on January 5, 2006 informing her that her condition had been determined to be medically stationary. The letter included a list of medical services for which claimant would remain eligible, provided that the services were related to her accepted condition. Palliative care was one of the listed services, though the letter indicated that it should be provided "only when it is necessary to enable you to continue current employment or a vocational training program." The letter provided further that claimant's physician must first

request palliative care and submit a formal treatment plan to SAIF for prior approval. (Ex. 9.)

Dr. Ferguson examined claimant on May 19, 2006. Claimant reported numbness in her hands, occurring a couple of times each week, occasionally lasting overnight and intermittent throughout the day. Dr. Ferguson noted tenderness of the cubital tunnel and ulnar groove on the right side, with minimal cubital tunnel tenderness on the left side. He concluded that claimant was suffering from intermittent irritation of the ulnar nerve and cubital tunnel related to her work activities. He recommended that claimant receive chiropractic treatment. (Ex. 3, p. 5.)

Dr. Ferguson completed an 827 form requesting palliative care for claimant. In support of the request, he referred to his May 19, 2006 chart note. (Ex. 10.)

On June 13, 2006, SAIF issued a Notice of Palliative Care Disapproval. The notice stated, in part, that chiropractic care had been previously disallowed as not medically appropriate for claimant's ulnar nerve irritation and upheld by an Administrative Order dated December 22, 2005. (Ex. 11.)

Dr. Ferguson requested administrative review on July 11, 2006 on behalf of claimant. He noted that claimant was experiencing "significant symptoms" in her right wrist and elbow due to work-related tasks, such as taking minutes and working at a computer using a mouse and a keyboard. He reported further that claimant had responded favorably to chiropractic treatment in the past, even though coverage had been denied. He proposed that claimant undergo six visits, once weekly, with Frank Heresco, D.C. (Ex. 12.)

WCD sent a Specification of Disputed Medical Issues form to SAIF on August 1, 2006. In response, SAIF checked a box indicating that it had denied claimant's request for chiropractic treatments because the requested services were "excessive, inappropriate, ineffectual." (Ex. 14.)

Dr. Heresco sent a letter to WCD on August 21, 2006. He stated that his treatment of claimant primarily focused on release of nerve entrapment at the elbow and wrist, through manipulation, as well as myofascial release along the tendons of the arm and forearm. Although Dr. Heresco acknowledged that he had performed some spinal manipulation, he reported that he had not charged claimant for this service. (Ex. 19.)

WCD, acting under the authority of the Director of the Department of Consumer and Business Services, issued an Administrative Order on September 14, 2006 that denied the palliative care request filed by Dr. Ferguson. It concluded that Dr. Ferguson's request failed to comply with requirements under OAR 436-010-0290(1)(a)(E) that the applicant describe how the requested care will enable claimant to continue her current employment and the possible adverse effect if the care is not approved

CONCLUSIONS OF LAW AND OPINION

Claimant appeals WCD's administrative order denying her physician's request for authorization for palliative care. Claimant argues that WCD erred when it referred this case to the Hearings Division for the Workers' Compensation Board to consider her appeal. In addition,

claimant argues that WCD's September 14, 2006 Administrative Order should be reversed because there is sufficient evidence in the record to demonstrate that claimant is entitled to palliative care under OAR 436-010-0290(1)(a). SAIF objects to four exhibits offered by claimant that were not part of the record at the time WCD issued its Administrative Order and argues further that WCD's Administrative Order should be affirmed.

1. Hearings Division's Jurisdiction.

Claimant's legal counsel asserted in his reply argument that WCD erred when it referred this matter to the Workers' Compensation Board for hearing. He noted that this case does not entail a compensability issue and asserted, as a result, that the issues raised by claimant's hearing request should be considered by the DCBS Director in a contested case hearing, rather than by an ALJ (Administrative Law Judge), from the Workers' Compensation Board's hearing unit.¹ Although understandable, claimant's jurisdictional arguments are without merit.

This matter is before Hearings Division pursuant to the 2005 amendments to ORS 656.704, which are applicable to all hearings held on or after January 2, 2006. Oregon Laws 2005, Ch. 26, sec. 15 and sec. 19. Pursuant to those amendments, hearings regarding WCD orders addressing medical service and managed care disputes that are within the director's jurisdiction must be conducted by administrative law judges employed by the Workers' Compensation Board. ORS 656.704(2)(a).² This includes—in particular—medical services and managed care disputes that do not involve compensability issues.

Since claimant's hearing was scheduled well after January 2, 2006, the 2005 amendments to ORS 656.704 apply to this case. The Hearings Division has jurisdiction to hold a contested case proceeding in this matter. Both parties agreed to submit claimant's appeal on the written record rather than convene a face-to-face hearing. The parties may seek Director review of this Proposed and Final Order if they disagree with my legal conclusions.

2. Objections to Exhibits 21, 23, 24 and 25.

SAIF objects to the admission into the record of any evidence submitted after the issuance of WCD's Administrative Order on September 14, 2006. This includes exhibits 21, 23, 24 and 25.

ORS 656.327 establishes the procedure to be used in managed care disputes that are within the Director's jurisdiction, as is the case here. A worker who is dissatisfied with a Director's order may request review following a hearing before an ALJ. ORS 656.327(2)

¹ Claimant's legal counsel asserted that Exhibits 21, 23, 24 and 25 would be admissible if this matter had not been referred to the Workers' Compensation Board for hearing. As a result, he asserted that I should either consider these exhibits in conjunction with his appeal or remand this matter back to WCD for hearing.

² Prior to January 2, 2006, all hearings regarding matters other than a claim, such as the managed care dispute involved in this case, were conducted under Chapter 183 by ALJs from the Office of Administrative Hearings.

provides further that: “[t]he 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. No new medical evidence or issues shall be admitted.” ORS 656.327(2). Likewise, OAR 436-001-0225(2) states that an Administrative Law Judge may modify the Director’s order in medical services disputes or medical services disputes that are within the Director’s jurisdiction only if it is not supported by substantial evidence in the record or it reflects an error of law. Further, the rule specifically provides that: “[n]ew medical evidence or issues may not be admitted or considered.”

Here, Exhibit 21, a letter from Dr. Ferguson to claimant’s legal counsel, was authored on September 26, 2006, a little more than a week after issuance of WCD’s Administrative Order. It was submitted by claimant as evidence in this proceeding shortly thereafter. Likewise, exhibits 23, 24 and 25 were submitted by claimant’s legal counsel following the issuance of WCD’s Order. They were submitted pursuant to a cover letter dated January 19, 2007. Each of these exhibits violates the prohibition against new evidence contained in ORS 656.327(2) and OAR 436-001-0025(2). Accordingly, I cannot consider exhibits 21, 23, 24 and 25 in deciding claimant’s appeal.

3. Claimant’s Palliative Care Request

The basis for claimant’s appeal is WCD’s denial of Dr. Ferguson’s request for palliative care. My standard of review in considering claimant’s appeal is a limited one. I may modify WCD’s order only if it is not supported by substantial evidence in the record or it reflects an error of law. ORS 656.327(2); OAR 436-001-0225(2).

OAR 436-010-0290, an administrative rule promulgated by WCD, contains eligibility criteria for a palliative care request. WCD’s Administrative Order of September 14, 2006 found that the palliative care request made by Dr. Ferguson failed to meet criteria contained at subpart (1)(a)(E) of the rule. OAR 436-010-0290(1)(a)(E) requires that claimant’s attending physician: “[d]escribe how the requested care will enable the worker to continue current employment, or a current vocational training program, and the possible adverse effect if the care is not approved.” WCD’s Administrative Order found that Dr. Ferguson failed to describe how chiropractic treatment would enable claimant to continue her employment with the employer, or what adverse effects would result if her care was not approved.

The record contains two medical reports that address the purpose of the palliative care request: a June 28, 2006 letter from Dr. Ferguson, (Ex. 12), and an August 21, 2006 letter from Dr. Heresco, the chiropractor who would provide palliative care under claimant’s request. (Ex. 19.) In his June 28 letter, Dr. Ferguson noted that claimant was working on regular duty and experiencing symptoms. He noted further that claimant had responded favorably in the past to chiropractic care. Dr. Ferguson’s letter suggested a connection between claimant’s continued employment and her palliative care request. However, Dr. Ferguson did not explicitly state in the letter how claimant’s proposed chiropractic care will enable her to continue her regular duty employment and what might occur if chiropractic services were not provided.

Dr. Heresco’s letter also fails to meet the criteria required by OAR 436-010-

0290(1)(a)(E). In his August 21, 2006 letter, Dr. Heresco addressed the techniques and rationale he intended to employ in treating claimant. He also stated that he had not charged claimant for spinal manipulation in the past and did not plan to do so in the future. However, he did not discuss any connection between the proposed treatment and claimant's ability to continue working.

Claimant argues that subsequent correspondence from Dr. Ferguson directly addressed the criteria contained in OAR 436-010-0290(1)(a)(E). This may be so. However, as previously discussed in this Proposed and Final Order, I am unable to consider evidence that was not part of the record at the time WCD issued its Administrative Order.

In sum, I am persuaded that WCD's Administrative Order, dated September 14, 2006, was supported by substantial evidence. Dr. Ferguson's palliative care request failed to comply with the criteria contained in OAR 436-010-0290(1)(a)(E).

ORDER

IT IS THEREFORE ORDERED that

WCD's Administrative Order, dated September 14, 2006, is affirmed without modification.