

In the Managed Care of
Dan L. McKay, Claimant
Contested Case No: 07-092H
PROPOSED & FINAL ORDER

October 31, 2007

DAN L. MCKAY, Petitioner
NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURG, Respondent
Before John Mark Mills, Administrative Law Judge

Hearing convened and closed before Administrative Law Judge John Mark Mills in Portland, Oregon on October 18, 2007. Claimant was present and was represented by his attorney, John Oswald. The employer, Active Transportation, and its insurer, AIG, were represented by their attorney, Matthew Fisher. Exhibits 1 through 8 and 2A, 2B were received into evidence.¹

ISSUES

Claimant contests the Administrative Order issued in this matter on June 20, 2007, which approved the insurer's refusal to pay for medical services provided by Dr. Brett. The Order was issued by the Medical Review Unit (MRU), of WCD. The insurer defends the Order on Reconsideration. Claimant seeks an assessed fee.

FINDINGS OF FACT

I do not make new findings of fact beyond those set forth in the Administrative Order. The scope of review in this case, which concerns medical treatment denied by insurer and its managed care organization (MCO), is limited to the substantial evidence or error of law standard. ORS 656.260(16), OAR 436-001-0225(2).

While OAR 436-001-0225(2) arguably suggests that some type of new evidence can be received during a hearing, the Court of Appeals has made it clear that substantial evidence review does not contemplate that the reviewing body, in this case the Hearings Division, will make additional or supplemental findings of fact. *Liberty Northwest Insurance Co., v. Kraft*, 205 Or App 59 (2006).²

CONCLUSIONS AND OPINION

Claimant has the burden of proving that the Administrative Order issued by MRU should be modified. Claimant's initial position is that the Order should be remanded to MRU.

¹ Exhibits 1 through 8 were submitted by the employer and reflect the exhibit list submitted to the Board by the Workers' Compensation Division (WCD). At the time of hearing claimant submitted exhibits 2A and 2B. These exhibits were in the certified record obtained by Mr. Fisher prior to the time of the hearing and therefore are not new evidence, but were part of the Director's record. It is not clear why all of the exhibits in that record were not submitted to the Hearings Division when this matter was referred for hearing.

² In view of this ruling, made at the time of the hearing, claimant made an offer of proof.

The dispute in this case concerns medical treatment received by claimant from Dr. Brett for the period from January 17, 2005 through April 25, 2005. The bills were not paid because claimant, at the time that his claim was accepted, was enrolled in a MCO. Dr. Brett is not on the approved panel of physicians for this MCO and therefore the benefits claimed in 2005 are not compensable under ORS 656.245(4)(a).

The insurer, in response to claimant's request for review of its decision, submitted documentation of claimant's enrollment in an MCO at time of the acceptance of his claim and of the fact that Dr. Brett, who provided services in 2005 was not on the MCO panel. The MRU Order made findings of fact based upon this documentation and those findings are supported by substantial evidence. They are not in dispute.

Claimant's request for remand is based on his contention that, under ORS 656.245(4)(a), a worker is not subject to the MCO contract after it expires or terminates without renewal. Claimant's position is that there were no findings made with regard to whether the MCO contract had expired or been terminated and that remand is appropriate for the development of evidence and a finding on that question.

Remand is not appropriate in this case. In the proceedings before MRU claimant presented no evidence, documentation or argument which would have suggested or even led to an inference that the MCO contract how somehow terminated or become ineffective in some fashion. The administrative review was carried out at claimant's request and claimant carried the burden of proof. It was not, under those circumstances, incumbent upon either the insurer to provide evidence on that question or for the MRU to address it factually. The factual findings necessary to MRU's decision and the denial of benefits by the insurer were reflected by the evidentiary record and supported by substantial evidence as noted above.

Claimant's second position is that because claimant entered into a claims disposition (CDA) with the insurer in 2001, he is no longer required to obtain medical services covered by the MCO contract. I note that the record does not reflect that this issue was raised before MRU. It was raised at the time of claimant's request for review of the MRU Order. (Ex. 7-1).

A CDA is governed by ORS 656.236. Under that statute the parties to a claim may resolve all issues regarding the claim, except for medical services. The CDA in this case (Ex. 2B-3) specifically maintains, consistent with the statute, claimant's right to medical services benefits under ORS 656.245. Pursuant to ORS 656.245(4) that claimant, when enrolled in MCO, must obtain medical services from physicians on the MCO panel. Otherwise they are not compensable and reimbursable.

There is no suggestion from the CDA statute, the medical services statute, and the administrative rules interpreting those statutes, or the CDA agreement that claimant entered into itself, that the MCO provisions of ORS 656.245 become ineffective when a CDA is entered into by the parties. As a practical and legal matter, the effect of a CDA on claimant's claim is to continue his right to medical benefits as if the claim remained compensable, even though all other benefits pertaining to a compensable claim may be settled and resolved. It was not an error

of law for MRU to apply the MCO provisions of ORS 656.245 to claimant's request for benefits in the presence of a CDA.

I therefore approve the Director's Order.

ORDER

IT IS HEREBY ORDERED that the Administrative Order issued in this matter on June 20, 2007, MMS 07-554, is approved.