

In the ORS 656.245 Medical Services Dispute of

Douglas Paulson, Claimant

Contested Case No: 07-076H

FINAL ORDER

March 26, 2008

DOUGLAS PAULSON, Petitioner

SAIF CORPORATION, Respondent

Before Cory Streisinger, Department of Business and Consumer Services

Claimant, through his attorney George J. Wall, timely requested director review of Workers' Compensation Board Administrative Law Judge (ALJ) Geoffrey G. Wren's September 17, 2007 Proposed and Final Order. Insurer, though its attorney James B. Northrop, timely responded. This issue comes before the director for a final order. The issue is whether insurer is liable for a physical capacities evaluation. I do not adopt the ALJ's proposed order and issue this final order in its place.

I review the proposed order under ORS 656.704(2)(a).¹ The Medical Review Unit's May 22, 2007 Administrative Order is reviewed for substantial evidence and errors of law. ORS 656.245(7) and 656.327(2).

I adopt the findings of fact as stated in the May 22, 2007 Administrative Order, and briefly restate them. Claimant sustained a compensable injury on January 17, 2006. He was declared medically stationary as of September 11, 2006. On December 11, 2006, insurer found claimant ineligible for vocational assistance because he had been released to regular work. On December 20, 2006 Dr. Blair noted the main issues surrounding claimant's case appeared to be his work ability and employability with respect to his job at injury. Dr. Blair referred claimant for a physical capacity evaluation (PCE). A PCE was scheduled and then cancelled when insurer did not authorize it. Claimant requested review by the Medical Review Unit (MRU).

Claimant's position before MRU was that insurer's decision to not authorize the PCE is inconsistent with ORS 656.340(15).² Insurer's position was that the proposed service is excessive, inappropriate, or ineffectual, or is not a compensable medical service under ORS

¹ ORS 656.704(2)(a) provides, in part: "Review of an order issued by the Administrative Law Judge shall be by the director and the director shall issue a final order that is subject to judicial review as provided by ORS 183.480 to 183.497."

² ORS 656.340(15) provides,

"A physical capacities evaluation shall be performed in conjunction with vocational assistance or determination of eligibility for such assistance at the request of the insurer or self-insured employer or worker. Such request shall be made to the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245. The attending physician or nurse practitioner, within 20 days of the request, shall perform a physical capacities evaluation or refer the worker for such evaluation or advise the insurer or self-insured employer and the worker in writing that the injured worker is incapable of participating in a physical capacities evaluation."

656.245(1)(c). MRU issued an Administrative Order on May 22, 2007. MRU concluded that the proposed PCE is not a medical service entitlement under ORS 656.245(1)(c)³ and that claimant was not entitled to the PCE under ORS 656.340(15) as his eligibility for vocational assistance had already been determined.

Claimant requested a hearing. Claimant argued that the PCE should be classified as a diagnostic service under ORS 656.245(1)(c)(H) because it would assess claimant's state of health. Claimant alternatively argued that the PCE should be considered as separate and distinct from ORS 656.245(1)(c) and should fall under ORS 656.340(15). That section, according to claimant, does not contain a time limit on when a PCE may be requested. In claimant's reply argument, he asserted, "it would be quite a stretch to characterize a PCE as a vocational rather than a medical dispute."

Insurer argued that the PCE is not a diagnostic service under ORS 656.245(1)(c) because its purpose was to determine whether claimant was capable of returning to work, not to diagnose claimant's condition. Insurer further argued that claimant brought his case as a medical dispute and MRU and the ALJ lacked jurisdiction to order insurer to pay for the PCE under ORS 656.340(15). Further, according to insurer, ORS 656.340(15) does not apply. Insurer finally argued that it would be premature to address claimant's entitlement to a PCE for a redetermination of his eligibility for vocational assistance.

ALJ Wren vacated MRU's order to the extent that it addressed payment for the PCE as a diagnostic service reasoning that the Hearings Division, not the director, has jurisdiction to determine compensability of diagnostic medical services. Because claimant had not requested a hearing in a matter concerning a claim, reasoned ALJ Wren, the ALJ likewise did not have jurisdiction to resolve the dispute.

ALJ Wren otherwise dismissed claimant's request for hearing. Noting the different standards of review for medical and vocational disputes,⁴ the ALJ determined that disagreement about payment for a PCE presents a vocational assistance dispute, not a medical services dispute.

³ ORS 656.245(1)(c) provides, in relevant part:

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

"* * * * *

"(H) Services that are necessary to diagnose the worker's condition."

⁴ Medical disputes are reviewed for substantial evidence and errors of law, ORS 656.245(7) and 656.327(2), and vocational disputes are reviewed under ORS 656.283(2)(c), which provides in part:

"[T]he decision of the director's administrative review shall be modified only if it:

"(A) Violates a statute or rule;

"(B) Exceeds the statutory authority of the agency;

"(C) Was made upon unlawful procedure; or

"(D) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The ALJ noted that although MRU stated that it reviewed the case as a medical services dispute, it in fact invoked the director's jurisdiction to review vocational disputes by addressing whether the PCE was compensable under ORS 656.340(15). Although claimant titled his request for review as one for medical services, based on the body of the request, according to the ALJ, claimant sought review regarding a vocational services issue. The ALJ concluded, however, that he lacked jurisdiction to address claimant's arguments under ORS 656.340(15). He reasoned that because claimant challenged MRU's order as a medical services order, there was no hearing request before him with respect to the director's decision under ORS 656.340(15). Accordingly, he dismissed claimant's request for hearing.

In his exceptions claimant reasserts that a PCE is a medical service, and contends MRU correctly treated his request as a request for review of medical services. Alternatively, claimant asks that I find that the Hearings Division does have jurisdiction and refer the matter back for hearing on the merits.

In its response, insurer reiterates the arguments it made at hearing.

The parties do not seem to dispute the fact that this is a medical services dispute, and I do not find otherwise. Claimant addressed his request for review to a Medical Reviewer within the Medical Review Unit, and titled it "Request for Review of Medical Dispute." While claimant's argument was that insurer should pay for the PCE under ORS 656.340(15), claimant has continued to hold that this is a medical services dispute, not a dispute over vocational assistance.

Moreover, this dispute arose in the context of claimant's medical care, not claimant's vocational services. Claimant saw Dr. Blair for the first time on December 20, 2006 with a chief complaint of ongoing pack pain. After an exam, Dr. Blair concluded that a PCE would be helpful to answer his questions related to claimant's work ability and employability. While the parties are or were apparently also involved in the process of determining claimant's eligibility for vocational assistance, the record does not demonstrate that the PCE was requested or recommended in that context. Rather, claimant's physician believed it would be helpful.⁵ I find that MRU did not err in treating the dispute as one brought under ORS 656.245(7).⁶

After the worker is medically stationary, medical services are limited to those enumerated in ORS 656.245(1)(c). Services that are necessary to diagnose the worker's condition are compensable. ORS 656.245(1)(c)(H).

Insurer argues the ALJ wrongly concluded that the director lacks jurisdiction over the issue of whether the PCE is diagnostic. I agree. ORS 656.704(3) provides, in part:

⁵ It may be that a PCE would be appropriate in the context of claimant's vocational assistance or in determining his eligibility for vocational assistance, but that issue is better resolved in the processes provided under ORS 656.283(2) and OAR 436-120-0008.

⁶ ORS 656.245(7) provides, "Subject to the provisions of ORS 656.704, if a claim for medical services is disapproved, the injured worker, insurer or self-insured employer may request administrative review by the director pursuant to ORS 656.260 or 656.327."

“(3)(b) The respective authority of the board and the director to resolve medical service disputes shall be determined according to the following principles:

“* * * * *

“(B) Any dispute that requires * * * a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245 (1)(c), is not a matter concerning a claim.

“(C) Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim.”

The director has jurisdiction over disputes regarding whether medical services for an accepted condition qualify as compensable medical services listed in ORS 656.245(1)(c). Diagnostic services are listed at ORS 656.245(1)(c)(H). If the issue is whether a particular service falls under ORS 656.245(1)(c)(H), then the matter falls within the director’s authority.

The board has jurisdiction over disputes that require a determination of whether a sufficient causal relationship exists between medical services and an accepted claim. This includes disputes over diagnostic services, if the insurer disputes the causal relationship between the diagnostic and the accepted claim. That is not the case here. Claimant is arguing that the PCE qualifies as a diagnostic service under ORS 656.245(1)(c)(H) and should therefore be compensable. Insurer disagrees with claimant’s argument that the PCE is diagnostic. Insurer does not argue that the PCE is not causally related to the accepted claim. MRU had jurisdiction to decide the dispute, and the ALJ had jurisdiction to review MRU’s order under ORS 656.704(2)(a).

The final order in *Hazel M. Hand* and the board’s Order on Review in *Hazel M. Hand* are not inconsistent with my finding of jurisdiction. In that case, the board stated,

“Here, * * * the ALJ had jurisdiction to address the issue regarding claimant’s lumbar MRI pursuant to ORS 656.704(3)(b)(C) *because the dispute requires a determination of whether a sufficient causal relationship exists between the ‘diagnostic’ medical service and the accepted thoracic conditions.*”

(Emphasis added.) 59 Van Natta 1028, 1034 (2007). Similarly, the director’s final order stated:

“Because the dispute does not pertain to * * * whether medical services for an ‘accepted condition’ qualify as compensable medical services, ORS 656.704(3)(b)(B) does not apply. * * * *This dispute requires a determination of whether a sufficient causal*

relationship exists between medical services and an accepted claim. Therefore, under ORS 656.704(3)(b)(C), I do not have jurisdiction to resolve this dispute.”

(Emphasis added.) 11 CCHR 297, 300 (2006). Neither case stands for the proposition that the director lacks jurisdiction over all disputes involving diagnostic services. Because there is no issue of causation here, the director has jurisdiction.

MRU determined that the PCE was not proposed for diagnostic purposes, and substantial evidence in the record supports MRU’s finding, notwithstanding claimant’s arguments to the contrary.⁷ The PCE is not a compensable medical service under ORS 656.245(1)(c), and insurer is not liable to pay for it as a medical service.⁸

As claimant has not prevailed, his attorney is not entitled to a fee under ORS 656.385(1).

IT IS HEREBY ORDERED the September 17, 2007 Proposed and Final Order is not adopted. The March 22, 2007 Administrative Order is affirmed.

⁷ Claimant does not challenge MRU’s conclusion that the proposed PCE does not qualify as palliative care under ORS 656.245(1)(c)(J) or curative care under ORS 656.245(1)(c)(L)

⁸ Because I find that insurer is not liable to pay for the PCE, I do not reach insurer’s argument that MRU and the ALJ lack jurisdiction to direct it to pay for the PCE under ORS 656.340(15).