In the ORS 656.260 Managed Care Dispute of

Allen W. Van Dyke, Claimant

Contested Case No: 07-063H

FINAL ORDER

February 25, 2008

ALLEN W. VAN DYKE, Petitioner
SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

---

Claimant, through attorney Bruce W. Brewer, timely filed exceptions to Workers' Compensation Board Administrative Law Judge Elizabeth Fulsher's October 10, 2007 Proposed and Final Order. Insurer, through attorney James Booth, timely responded to the exceptions. This matter comes before the director for a final order. The issue is whether the Resolution Team (RT)[1] of the Workers' Compensation Division correctly determined that the surgery proposed by Randy C. Watson, MD is not appropriate and whether ALJ Fulsher applied the proper standard on review. I adopt and affirm with the following supplementation.

On April 19, 2007, RT issued an order finding that absent a change in claimant's medical condition, the surgery proposed by Dr. Watson on October 18, 2006 and clarified on November 30, 2006 is not appropriate and insurer is not liable if rendered. ALJ Fulsher affirmed that order on October 10, 2007. Claimant seeks review of that decision.

RT's order may be modified only if it is not supported by substantial evidence or if it reflects an error of law. ORS 656.327; OAR 436-001-0225(2). Substantial evidence exists to support a finding when the record, viewed as a whole, would permit a reasonable person to make that finding. *See Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988).

Claimant first contends that ALJ Fulsher erred because she did not look at the whole record when applying the substantial evidence standard of review. Claimant argues that ALJ Fulsher "stated that she did not need to look at the record as a whole because review was for 'substantial evidence.'" However, ALJ Fulsher's order actually states "[b]ecause the standard of review is for 'substantial evidence,' the following findings are summarized from the April 19, 2007 Administrative Order." *Allen W. Van Dyke,* 12 CCHR 270 (2007). ALJ Fulsher goes on to support her statement by citing *Liberty Northwest Ins. Corp. v. Kraft,* in which the Court of Appeals stated that substantial evidence review did not comport with an adjudicator rendering findings of fact. 205 Or App 59, 63 (2006). By summarizing the facts from RT's order, ALJ Fulsher was complying with the prohibition against making her own findings of fact. It does not, however, mean that she did not review the record.

Furthermore, under the "Conclusions of Law" section of the proposed order, ALJ Fulsher states "[s]ubstantial evidence exists to support a finding when the record, viewed as a whole, would permit a reasonable person to make a finding." *Van Dyke* at 271. Additionally, there is evidence in ALJ Fulsher's order that she did review the whole record in that she quoted specific

[1] The former Medical Review Unit (MRU) is now known as the Resolution Team of the division's Medical Section.

parts of Dr. Watson's November 30, 2006 letter (Ex. 56) that were not quoted in RT's order. I find that ALJ Fulsher reviewed the whole record when reviewing RT's order, thus applying the substantial evidence standard of review.

Claimant next contends that RT's order is not supported by substantial evidence because the proposed procedure has a diagnostic purpose and there is no evidence in the record that it should not be performed to satisfy a diagnostic purpose. The issue, however, is whether the proposed procedure is appropriate. A diagnostic procedure is not appropriate by the fact that it is diagnostic. RT determined that claimant's proposed surgery is not medically appropriate by relying on the opinions of Timothy R. Borman, DO and John Ballard, MD. The record supports RT's conclusion in that each doctor provided multiple reasons for why they believed the proposed procedure is inappropriate.

Dr. Borman's report states, "Dr. Watson has requested authorization for surgery. The first surgery would be arthroscopy of the right shoulder glenohumeral joint. This would be a diagnostic procedure most likely coupled with an examination under anesthesia." Based on these statements, claimant argues that there are not doctors on both sides of the issue. However, Dr. Borman's report goes on to state that the proposed procedures are not necessary or appropriate and that he doubted any new information not already present in the medical records would be obtained by a glenohumeral joint arthroscopy. Overall, Dr. Borman states that claimant is not a good surgical candidate and he would "strongly advise Dr. Watson to reconsider his decision to perform further surgery on Mr. Van Dyke."

Dr. Ballard also examined claimant and determined that nothing would be gained by doing a shoulder arthroscopy and lysis of adhesions. Dr. Ballard agreed with Dr. Borman's opinion that claimant had multiple surgeries on his shoulder and that no further surgery of any type would benefit claimant. Dr. Ballard concluded that the proposed treatment is not appropriate.

Further, as ALJ Fulsher noted, Dr. Watson indicated that the primary reason for the surgery was to approach the pericapsular adhesions so any diagnostic purpose of the surgery was secondary.

ALJ Fulsher did not err in concluding that based on this record a reasonable person could reach RT's conclusion and that RT's conclusion that the proposed surgery is not appropriate is supported by substantial evidence.

Lastly, claimant's attorney is not entitled to a fee because he has not prevailed. ORS 656.385(1); OAR 436-010-0008(12).

IT IS HEREBY ORDERED the October 10, 2007 Proposed and Final Order is adopted and affirmed.