

In the ORS 656.245 Medical Services of

Nichele Bergmanis, Claimant

Contested Case No: 08-154H

FINAL ORDER

December 14, 2009

CRAWFORD & COMPANY, Petitioner

NICHELE BERGMANIS, Respondent

Before Jerry Managhan, Workers' Compensation Division Deputy Administrator

Claimant Nichele Bergmanis (claimant) has an accepted claim. Crawford and Company (insurer) is the third party administrator for the employer's former workers' compensation insurer. Insurer failed to pay medical providers for some of claimant's palliative care. As to some of the care, the Workers' Compensation Division (WCD) Resolution Team (RT) found claimant's request for review was untimely. After a hearing, Administrative Law Judge (ALJ) Kathryn A. Poland reversed RT's order. Insurer filed exceptions and I affirm ALJ Poland's order.

FACTUAL SUMMARY

I adopt the facts as found in the ALJ's and RT's orders. Claimant has an accepted claim based on a 1997 work injury. She has been receiving palliative care from Dr. Verzosa as the attending physician and Dr. Stellflug, a chiropractor. In October, 2007 Dr. Verzosa submitted a request for palliative care to be provided by Dr. Stellflug, for the period until April 3, 2008. Dr. Stellflug treated claimant on January 23, February 11, March 3 and March 19, 2008.

On April 14, 2008, Dr. Verzosa authorized further palliative care from Dr. Stellflug until October 14, 2008. Dr. Stellflug treated claimant on April 16 and May 5, 2008. Dr. Stellflug was not paid for any of the treatment provided in 2008 and Dr. Verzosa was not paid for the two times she saw claimant during this period. Neither claimant nor the doctors received a written denial of authorization from insurer prior to June 12, 2008.

Insurer issued an explanation of benefits form to Dr. Stellflug on June 12, 2008, denying payment for the January 23rd treatment. Some time before July 8, 2008, Dr. Stellflug told claimant he had not been paid for any treatment provided during 2008. Claimant filed a request for administrative review of these matters with WCD on July 8, 2008.

RT issued an Administrative Order on August 12, 2008. RT found claimant had not requested approval from the director for the palliative care within 120 days of submitting the original request for authorization to the insurer, as required by rule. OAR 436-010-0290(1)(c).¹ RT did find insurer owed payment to Dr. Verzosa as the attending physician.

¹ OAR 436-010-0290(1)(c) provides:

If the insurer fails to respond in writing within 30 days [to a request for authorization of palliative care], the attending physician or injured worker may request approval from the director within 120 days from the date the request was first submitted to the insurer.

Claimant sought a hearing to review RT's order. ALJ Poland issued a Proposed and Final Order on October 6, 2009. In her order, ALJ Poland observed there were two requests for authorization of palliative care involved, covering two separate time periods. The first authorization request covered the period until April 3, 2008. The ALJ found the request for review for that period was not timely under the 120 day limit that applies where an insurer fails to respond to an authorization request. ALJ Poland did find, however, that claimant's request for review was timely for that period under OAR 436-010-0290(1)(d).² That rule requires that a request for administrative review be submitted within 90 days of an insurer's denial of authorization for palliative care.

ALJ Poland also found there was a second authorization request from Dr. Verzosa which began on April 14, 2008. The ALJ found claimant's request for review of an insurer's failure to respond was timely for the April 16 and May 5 treatments by Dr. Stellflug as it was submitted to WCD within 120 days of Dr. Verzosa's request for authorization from the insurer for that period.

CONCLUSIONS OF LAW

I may modify the director's order only if there is not substantial evidence in the record supporting it or if it is based on an error of law. OAR 436-001-0225(2). Substantial evidence supports a finding when the record as a whole permits a reasonable person to make the finding. *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Palliative care that is intended to enable a medically stationary worker with an accepted claim to continue working or participating in a vocational training program and that the attending physician prescribes is compensable if the insurer approves it. If the insurer does not approve the palliative treatment the worker or attending physician can request approval from the director of the Department of Business and Consumer Services (the director). ORS 656.245(1)(c), (1)(c)(J).³ If an insurer fails to respond to a request to approve palliative care within 30 days of the request's submission, the worker or attending physician can request approval from the director within 120 days of the request having been submitted to the insurer. OAR 436-010-0290(1)(c). Where an insurer denies a request for authorization the worker or attending physician can request administrative review by the director within 90 days of the date of the insurer's disapproval. OAR 436-010-0290(1)(d).

² OAR 436-010-0290(1)(d) provides:

When the attending physician or the injured worker disagrees with the insurer's disapproval, the attending physician or the injured worker may request administrative review by the director in accordance with OAR 436-010-0008, within 90 days from the date of insurer's notice of disapproval.

³ ORS 656.245(1)(c) provides in 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:

(J) With the approval of the insurer . . . palliative care that the worker's attending physician . . . prescribes and that is necessary to enable the worker to continue current employment or a vocational training program. If the insurer . . . does not approve, the attending physician or the worker may request approval from the director of the Department of Consumer and Business Services.

Neither RT's Administrative Order nor insurer acknowledged that there were two separate attending physician requests for approval covering two separate time periods, as ALJ Poland astutely describes in her Proposed and Final Order. Dr. Verzosa submitted a request on April 14, 2008, covering the April 16 and May 5 treatments by Dr. Stellflug. Claimant requested director approval on July 8, 2008. That is clearly within the 120 day limit of OAR 436-010-0290(1)(c) and it was unequivocally a timely request as to the last two Dr. Stellflug treatments. The implied factual finding in RT's Administrative Order that the request for authorization of these treatments was not timely is not supported by substantial evidence in the record.

Insurer sent Dr. Stellflug an explanation of benefits form dated June 12, 2008, denying payment for the January 23, 2008, treatment. The record contains no earlier written payment denials allegedly provided to claimant or either doctor.⁴ A worker or attending physician may request administrative review of an insurer's denial of authorization for palliative care if the request is submitted within 90 days of the date of the insurer's denial. OAR 436-010-0290(1)(d). Claimant submitted her request for review on July 8, 2008, within the 90 day period for appealing a denial. The request was timely and RT should have reviewed the merits of the request. The RT Administrative Order contains an error of law in that it does not address the issue of whether claimant's request for review was timely under subsection (1)(d) as to the June 12, 2008, denial of payment.

Insurer argues ALJ Poland erred because it contends insurer "did not provide written disapproval or otherwise (sic) of the requests for palliative care." Insurer does not explain why the June 12 denial of payment is not a disapproval of the request for palliative care. The June 12 explanation of benefits form is a written document denying payment for requested palliative care and therefore constitutes a denial of a request for palliative care. Insurer concedes a denial may be challenged within 90 days. No rule states the denial must be provided during the 120 appeal period of subsection (1)(c) or that a denial cannot be appealed if it is issued beyond that 120 day period. The request for administrative review of insurer's denial of authorization for palliative care for the first time period at issue here was timely and RT should have acted on the merits of the request.

Claimant's attorney requests attorney's fees. Attorney fees are only awarded once a claimant has finally prevailed in a dispute. ORS 656.385(1). Claimant has prevailed as to Dr. Verzosa's fee. However, claimant's attorney did not participate in the RT review which first found in claimant's favor on this issue, and that payment was not disputed in the contested hearing. Claimant has not yet prevailed on the issue of payment for Dr. Stellflug because this matter must be remanded to RT for it to rule on the merits of claimant's requests. If RT finds in claimant's favor as to the palliative care provided by Dr. Stellflug, claimant's attorney could be entitled to fees at that point for his work at the hearing and any potential, future work he contributes towards the pending RT review.

I must address a discrepancy in ALJ Poland's order. Claimant originally challenged insurer's refusal to pay both Dr. Verzosa and Dr. Stellflug. RT's Administrative Order found

⁴ The record does contain several explanation of benefits forms sent to Dr. Verzosa denying payment for treatment during this same time period, and also dated June 12, 2008. This creates a reasonable inference this was the first date insurer notified any party in this case that it was denying payment.

insurer was liable for the payments to Dr. Verzosa as claimant's attending physician. Claimant's request for hearing on RT's order does not discuss payment to Dr. Verzosa and insurer did not challenge this portion of RT's order. However ALJ Poland's order simply states RT's Administrative Order is reversed. As the issue of payment to Dr. Verzosa was not raised during review of the Administrative Order and ALJ Poland found there were timely requests for review as to each treatment, I presume ALJ Poland did not intend to reverse that portion of the Administrative Order that found insurer liable for the payments to Dr. Verzosa. It is only for the purpose of clarity on this issue that I do not affirm ALJ Poland's order in full.

IT IS HEREBY ORDERED ALJ Poland's October 6, 2009, Proposed and Final Order is affirmed in part and reversed in part. The parts of ALJ Poland's order that reverse RT's Administrative Order on the issue of whether claimant's requests for review concerning payment of Dr. Stellflug were timely are affirmed. Only to the extent that ALJ Poland's Proposed and Final Order could be construed to reverse RT's order on that order's finding that insurer is liable for payment to Dr. Verzosa, I reverse ALJ Poland's order and affirm RT's order. The matter is remanded to RT. That unit is to consider the merits of claimant's requests for review as to those palliative care authorization requests that were denied and request for approval of palliative care as to those authorization requests to which insurer did not respond.