

In the Matter of the ORS 656.245 Medical Services Dispute of

Michelle M. Beck, Claimant

Contested Case No: 09-201H

PROPOSED & FINAL ORDER

September 1, 2010

MICHELLE M. BECK, Petitioner
WAUSAU UNDERWRITERS INS. CO., Respondent
Before Keith Kekauoha, Administrative Law Judge

Hearing was scheduled for July 8, 2010 before the undersigned Administrative Law Judge. The parties agreed to submit this matter on the documentary record, in lieu of personally appearing at hearing. Claimant is represented by her attorney, Marybeth Wosko. The employer, KMPG Peat Marwick LLP, and its insurer, Wausau Underwriters Insurance Company, were represented by their attorney, Sally Curey. Exhibits 1-11 were admitted into evidence. Claimant's Proposed Exhibits A and B were excluded for the reasons set forth in this order. After receipt of written closing arguments and claimant's waiver of a reply argument, the record closed on August 4, 2010.

ISSUE

Medical Services Dispute. Claimant requested a hearing on the Workers' Compensation Division's (WCD's) Administrative Order dated November 20, 2009, which ordered that the insurer is not liable for acupuncture treatments provided by Shuyi Dong, LAc, on August 21 and 27, 2009.

FINDINGS OF FACT

Claimant sustained a compensable injury on November 18, 1998. Her claim was accepted for L4-5 herniated disc, and her condition was most recently determined medically stationary on October 5, 2005.

On June 8, 2009, claimant's attending physician, Dr. Lorish, referred her for "acupuncture 6-12 visits." (Ex. 1).

Claimant received acupuncture from Shuyi Dong, LAc, on August 21 and 27, 2009. (Ex. 3-3).

The insurer disapproved the acupuncture services as not authorized by the case manager. (Ex. 2-10).

Ms. Dong requested administrative review by the WCD. (Ex. 6)

In response to the WCD's request for specification of the disputed medical issue(s), the insurer indicated that the acupuncture services were disapproved because they are not compensable medical services under ORS 656.245(1)(c). (Ex. 8).

CONCLUSIONS OF LAW AND OPINION

The issue is whether the insurer is liable for acupuncture services provided by Ms. Dong on August 21 and 27, 2009. The WCD concluded that the services are not reimbursable because there was no evidence that a complete treatment plan was sent to the insurer within seven days of beginning treatment, as required under OAR 436-010-0230(4).

Claimant does not dispute the validity, or the WCD's interpretation, of the aforementioned rule. She also concedes that, based on the existing evidentiary record, the WCD's determination was not erroneous. However, she moves to admit Proposed Exhibits A and B (attached to her initial closing argument) into evidence, and argues that the new evidence establishes a treatment plan complying with the rule.

The threshold issue is the admissibility of new evidence at hearing. OAR 436-001-0225(2) provides:

“In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. *New medical evidence or issues may not be admitted or considered.*” (Italics supplied.)

This rule clearly prohibits the admission of new medical evidence in a medical services dispute under ORS 656.245. The proposed exhibits consist of an 827 form (Worker's and Physician's Report for Workers' Compensation Claims) completed by claimant and Dr. Lorish and a June 8, 2009 chart note by Dr. Lorish; they are clearly medical evidence and are thus inadmissible under the rule.

Claimant argues that an administrative law judge has discretionary power to admit exhibits if their admission is necessary to achieve “substantial justice.” Asserting that substantial justice requires that the Director have all the relevant information and that she was not represented by an attorney at the time of the administrative review, she argues that the interests of justice “trump” the rule barring admission of new medical evidence.

I disagree. OAR 436-001-0170 sets forth the “Duties and Powers of the Administrative Law Judge” in a hearing on matters within the Director's jurisdiction. Subsection (1) provides: “The administrative law judge may conduct the hearing in any manner, *consistent with these rules*, that will achieve substantial justice. (Italics supplied.) This rule places an express limitation on the administrative law judge's discretion in conducting a hearing; it provides that the hearing must be conducted “consistent with these rules.” Because the rules bar the admission of new medical evidence at this hearing, I conclude that my discretion to conduct the hearing in any manner that will achieve substantial justice does not permit me to admit new medical evidence. I therefore deny claimant's motion to admit Proposed Exhibits A and B.

Given claimant's concession that the WCD's determination is correct based on the existing record, I will affirm the WCD's Administrative Order.

ORDER

Claimant's request for relief is denied, and the Director's Administrative Order dated November 20, 2009 is affirmed.