

In the Managed Care of
Jeremy E. Rice, Claimant

Contested Case No: 09-055H, 09-151H

FINAL ORDER

July 13, 2010

JEREMY E. RICE, Petitioner
SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Jeremy E. Rice (claimant) sought administrative review of the denial of requested surgery by his managed care organization (MCO), Caremark, acting on behalf of insurer SAIF Corporation (insurer). By administrative order, issued on April 1, 2009, the Workers' Compensation Division's (division) Resolution Team (RT) upheld the MCO's decision. Claimant requested a hearing. That hearing was stayed while the matter was remanded to the division to consider claimant's request that the director order a psychological evaluation of claimant. By a separate administrative order issued on September 14, 2009, the director declined to order the examination and the hearing was held. Administrative Law Judge (ALJ) Gregory J. Naugle affirmed both administrative orders by two Proposed and Final Orders issued on March 31, 2010. Claimant now seeks director review of the ALJ's orders. I find no error and affirm the Proposed and Final Orders.

FACTUAL SUMMARY

As I may only modify the administrative orders if they are not supported by substantial evidence or if they contain an error of law, I adopt the facts as found in those orders. OAR 436-001-0225(2); ORS 656.260(16); *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358, 363 (2008).¹

Claimant suffered compensable knee and back injuries on April 15, 2005. The accepted injuries were left knee strain and L5-S1 disc herniation. Claimant was enrolled in the Managed Healthcare Northwest/Caremark Comp managed care organization.

Claimant had three back surgeries for symptoms of pain, mobility, and control of bodily functions. He also received a psychological evaluation in August, 2007, from Dr. Larry S. Friedman. Dr. Friedman concluded claimant had conversion V profile, which is a psychological indication that a patient will not express improvement with treatment, and that claimant was unlikely to report sustained improvement of his symptoms following additional surgery.

¹ OAR 436-001-0225(2) provides in part:

In . . . 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.

ORS 656.260(16) provides in part:

At the contested case hearing, the order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law.

Dr. Eilers, an orthopedic surgeon, saw claimant repeatedly. Dr. Eilers found that the surgeries had not been beneficial in the long term and that claimant had not been active in helping his own recovery. However, Dr. Eilers also endorsed performing an additional ablation surgery, or another surgery that might be recommended by a neurosurgeon.

Dr. Makker, a neurosurgeon, saw claimant. Dr. Makker recommended a redo of the prior L5-S1 left-sided neural foraminotomy. After having several tests performed, Dr. Makker continued recommending surgery.

The MCO had Dr. William Smith review claimant's medical records. Dr. Smith concluded the surgery Dr. Makker was recommending would not relieve claimant's symptoms. The MCO advised Dr. Makker it would not approve the surgery.

Claimant appealed the MCO's decision through its internal process. The MCO's dispute resolution committee reviewed claimant's case. The committee observed that claimant had refused to enter a pain management program and that physical therapy had not been successful. The committee also considered another doctor's conclusion that there was a significant psychological component to claimant's symptoms that would likely negatively affect the outcome of treatment. Based on the results of previous surgeries, the medical testing, and the psychological factors, the review committee upheld the MCO's disapproval of the surgery.

Claimant requested administrative review from the division. As part of that review, the division scheduled claimant to be examined by Dr. Michael Liu. Claimant failed to appear for that examination, but Dr. Liu reviewed claimant's records. Dr. Liu recommended a different surgery, but only if a new psychological evaluation was done and if that evaluation showed different results than the earlier one.

RT found the opinions of Drs. Liu and Smith, and that of the MCO's dispute resolution committee persuasive. RT also agreed that psychological factors in claimant's profile justified not approving the surgery. RT therefore issued its administrative order upholding the MCO's denial of approval for surgery.

Claimant requested a hearing. Claimant then sought a postponement of the hearing in order to ask that the director order a psychological evaluation under OAR 436-010-0008(9).² ALJ Naugle remanded the matter to the division to allow it to consider whether to order this evaluation. RT issued a subsequent administrative order declining to order the examination. RT found Dr. Makker, who was acting as attending physician, did not recommend a psychological evaluation. And the MCO review committee did not feel such an evaluation was necessary in order to make its decision. As the MCO had had the opportunity to recommend or obtain a new psychological evaluation and did not do so, there did not seem to be a need to remand to the MCO to consider that question. RT therefore did not order that the evaluation be conducted.

² OAR 436-010-0008(9) provides in part:

If the director determines a review by a physician is indicated to resolve the dispute, the director, in accordance with OAR 436-010-0330, may appoint an appropriate medical service provider or panel of providers to review the medical records, and, if necessary, examine the worker and perform any necessary and reasonable medical tests

The matter then proceeded to a hearing. ALJ Naugle found substantial evidence supported the order affirming the denial of approval for the surgery and the order declining to order a psychological evaluation. Claimant also argued at the hearing that the initial RT order affirming the MCO's decision contained a legal error because the notice of appeal rights on that order did not advise claimant that he could request a reconsideration of RT's order, rather than a hearing on that order. ALJ Naugle found the appeal rights on the order met statutory requirements and that no rule or statute required the order to advise of the right to a reconsideration. The ALJ therefore affirmed both RT orders.

CONCLUSIONS OF LAW

I may only modify the administrative orders if they are not supported by substantial evidence or if they contain an error of law. OAR 436-001-0225(2); ORS 656.260(16).

Although claimant's requests for review and for hearing challenged the denial of approval for surgery and the denial of the request for a psychological evaluation, claimant's exceptions to the ALJ's orders only challenge the adequacy of the notice of appeal rights on RT's orders. Claimant contends the notice of appeal rights on the administrative orders was insufficient because it did not inform claimant of the right to request reconsideration or that requesting a hearing rather than reconsideration would bar admission of new medical evidence.

Claimant argues that ORS 183.415 establishes notice requirements for the orders at issue in this case.³ Claimant made the same argument at the hearing. The statute does not support claimant's position for several reasons. First, on its face, the statute does not address the matter of giving notice of a right to reconsideration or the exclusion of new medical evidence. Next, the ALJ correctly found that statute does not apply to orders issued by this division in carrying out its responsibilities under ORS chapter 656. ORS 183.315.⁴

Claimant also fails to explain why it should have been necessary to advise him of the right to reconsideration, in order to enable him to make a request for a psychological evaluation,

³ ORS 183.415 provides:

- (1) The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to the actions.
- (2) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, served personally or by registered or certified mail.
- (3) Notice under this section must include:
 - (a) A statement of the party's right to hearing, with a description of the procedure and time to request a hearing, or a statement of the time and place of the hearing;
 - (b) A statement of the authority and jurisdiction under which the hearing is to be held;
 - (c) A reference to the particular sections of the statutes and rules involved;
 - (d) A short and plain statement of the matters asserted or charged; and
 - (e) A statement indicating whether and under what circumstances an order by default may be entered.

⁴ ORS 183.315 states in part:

- (1) The provisions of ORS . . . 183.415 . . . do not apply to . . . the . . . Department of Consumer and Business Services with respect to its functions under ORS chapters 654 and 656 . . .

when claimant had the right to request such an examination during the administrative review process. The rule authorizing the director to order such an examination, upon which claimant ultimately relies, is part of the administrative review process. The authority to order an examination is intended to facilitate the administrative review process. OAR 436-010-0008 is the rule that establishes the right to and procedure for administrative review. Section (9) of that rule is the one that provides authority for the director to order an examination. Within the context of the administrative review, that section provides in part: “If the director determines a review by a physician is indicated to resolve the dispute, the director . . . may appoint an appropriate medical service provider or panel of providers to . . . examine the worker” Claimant presents no reason for having failed to request the exam as part of the administrative review. Claimant does not cite any statute, rule, or decision supporting his position. There is no requirement that the division’s administrative orders advise of the right to request reconsideration, or of the subsequent effect of barring new evidence. There was therefore no legal error in omitting that information from the advisement of rights on the orders.

IT IS HEREBY ORDERED that RT’s April 1, 2009, and September 14, 2009, administrative orders, and ALJ Naugle’s March 31, 2010, Proposed and Final Orders are affirmed. As claimant has not prevailed, he is not entitled to an award of attorney fees.