

In the ORS 656.260 Managed Care Dispute of

Dalice L. Vukasin, Claimant

Contested Case No: 09-160H

PROPOSED & FINAL ORDER

July 26, 2010

DALICE L. VUKASIN, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, a hearing was set for May 18, 2010. Prior to hearing, the parties advised that this matter could be decided on the documentary record. Claimant is represented by Donald E. Beer. The employer, OHSU, and its insurer, Liberty Northwest Insurance Corporation, are represented by Ronald C. Holloway. The record closed on July 19, 2010, following receipt of written arguments.

Exhibits 1 through 27 are admitted. The remaining exhibits are excluded. OAR 436-001-0225.

ISSUE

Jurisdiction: Claimant contends that the Director improperly exercised subject matter jurisdiction regarding the causal relationship of a medical service to claimant's March 3, 2000 accidental injury. Claimant seeks a Defer and Transfer Order.

STATEMENT OF FACTS

The claimant suffered an accidental injury on March 3, 2000. The insurer accepted a right distal tibiofibular sprain, synovitis, and ankle neuroma. Claimant sought inclusion in the accepted claim of fibular avulsion of the right lateral malleolus, chronic tear of the right anterior talofibular ligament, plantar fasciitis of the left foot, right flexor hallucis longus tenosynovitis, right ankle instability, and sprain/strain of the calcaneofibular ligament of the right foot. The insurer denied the claim for those conditions. By Opinion and Order dated August 8, 2008, an administrative law judge set aside denial of fibular avulsion of the right lateral malleolus, chronic tear of the right anterior talofibular ligament, and right flexor hallucis longus tenosynovitis. The ALJ upheld denial of left plantar fasciitis, right ankle instability, and sprain/strain of the calcaneofibular ligament of the right foot. (Exs. 1, 2, 3). The denial of right ankle instability became final by operation of law.

The insurer issued a Modified Notice of Acceptance on October 20, 2008. The insurer stated that the accepted conditions were right distal tibiofibular sprain, synovitis, neuroma, fibular avulsion of the right lateral malleolus, right flexor hallucis longus tenosynovitis, and chronic tear of the right anterior talofibular ligament. (Ex. 4).

Claimant treated with Dr. Sauvain.

Claimant saw Dr. Yodlowski for an independent medical evaluation (“IME”) on May 18, 2009. The doctor concluded that claimant’s right distal tibiofibular sprain had fully resolved. Claimant required no treatment for her synovitis, neuroma, fibular avulsion of the right lateral malleolus, or right flexor hallucis tenosynovitis. Dr. Yodlowski stated that a recent MRI scan showed findings consistent with a right anterior talofibular ligament tear, but there was no documented instability of claimant’s ankle that required treatment. (Ex. 7).

On July 9, 2009, claimant consulted Dr. Veri, an orthopedic surgeon. The doctor assessed chronic right lateral ankle instability, cavus foot, and gastroc equinus. He stated that claimant appeared quite symptomatic from the right ankle instability and recommended arthroscopy followed by reconstructive surgery. Dr. Veri said that the surgery would address the ankle instability, not claimant’s pain complaints. (Ex. 11).

On July 15, 2009, Dr. Sauvain said that the proposed surgery was “for curative care - which includes the pathology of the documented accepted conditions.” She stated that the surgery was medically indicated “in this large active woman.” (Ex. 12).

Dr. Sauvain reviewed Dr. Yodlowski’s IME report. She noted on July 29, 2009 that claimant’s chronic talofibular tear condition warranted “stabilizing curative care – See note Dr. Veri.” Claimant’s other conditions were medically stationary. (Ex. 15).

The insurer wrote Dr. Sauvain on August 6, 2009, stating:

I would like to point out that Dr. Veri feels that [claimant’s] current need for treatment/surgery is related to her right chronic lateral ankle instability. His chart note does not relate the need for surgery to her chronic tear talofibular ligament condition.

Based on this there is no curative treatment or reopening on Ms. Vukasin’s claim. Her right chronic lateral ankle instability is a denied condition.

The insurer asked if Dr. Sauvain now would agree “with the 05/18/09 independent medical examination report by Dr. Yodlowski.” Dr. Sauvain checked a box for “yes.” (Ex. 17).

Dr. Veri requested authorization for the proposed surgery. The insurer denied that request on August 18, 2009 on the ground that the surgery “appear[ed] to be for a condition that ha[d] been formally denied and [is] now final.” (Ex. 19).

Claimant sought Director’s review of the denial of authorization. (Ex. 20). The insurer responded that the proposed surgery was for a denied condition. The insurer asserted that there was no issue whether the proposed service was causally related to an accepted condition. (Ex. 23).

On September 2, 2009, the Director issued an Administrative Order of Dismissal. The Director dismissed claimant’s request for review on the ground that the proposed surgery was for

a denied condition. (Ex. 24). Claimant requested reconsideration. (Ex. 25). The Director reiterated the dismissal on September 11, 2009. (Ex. 26).

CONCLUSIONS OF LAW AND OPINION

The Director, by Administrative Order of Dismissal, dismissed claimant's request for review of the insurer's denial of authorization for a medical service - arthroscopic and reconstruction surgery - proposed by Dr. Veri. The Director relied on the insurer's assertion that the proposed service pertained solely to a denied condition: right ankle instability. (Exs. 24, 26). Claimant challenges the Director's action. She contends that the Director should have issued a Defer and Transfer Order. As claimant appeals from an Administrative Order of Dismissal, my review of this matter is governed by OAR 436-001-0225(2).

The insurer contends that application of preclusion principles and the substantial evidence standard of review set out in OAR 436-001-0225(2) require that I dismiss claimant's request for review. The insurer's grounds for upholding the Administrative Order of Dismissal put the analytical cart before the jurisdictional horse. An adjudicative body must have subject matter jurisdiction over an issue to have power to dismiss a litigant's request for review of that issue. ORS 656.704 addresses the respective scope of the Board's and the Director's subject matter jurisdiction regarding medical services. In *AIG Claim Services v. Cole*, 205 Or App 170, 173-74, *rev den*, 341 Or 244 (2006), the court explained that ORS 656.704(3)(b) sets out three types of medical service disputes that potentially arise in the context of a claim and establishes which forum has jurisdiction to resolve them:

- (1) A dispute concerning the compensability of the medical condition for which medical services are proposed is a "matter concerning a claim" and is within the jurisdiction of the board. ORS 656.704(3)(b)(A).
- (2) A dispute concerning whether medical services are excessive, inappropriate, ineffectual, or in violation of the rules regarding the performance of medical services, or 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" and falls within the jurisdiction of the director. ORS 656.704(3)(b)(B).
- (3) A dispute concerning whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim, within the jurisdiction of the board.

The determination whether a proposed medical service pertains to a denied condition as opposed to an accepted one necessarily implicates questions of causation solely within the Board's subject matter jurisdiction. *See Hazel M. Hand*, 59 Van Natta 1028, 1033 (2007) (board had subject matter jurisdiction to determine whether a sufficient causal relationship existed between a medical service and an accepted condition).

In this case, the ultimate determination may be that the surgery proposed by Dr. Veri pertains solely to the denied condition of right ankle instability and, hence, is not compensable. That determination, however, is by no means certain. Dr. Yodlowski asserted that claimant does not have right ankle instability. (Ex. 7). Dr. Sauvain initially stated that the accepted condition

of right chronic tear of the right anterior talofibular ligament warranted the surgery proposed by Dr. Veri. (Ex. 15). She later agreed that all of claimant's accepted conditions are medically stationary, but she did so only when instructed by the insurer that Dr. Veri requested the surgery to treat just right ankle instability. (Ex. 17). Further development of the medical record, including cross examination of the doctors, conceivably could result in evidence supportive of compensability. The Legislature did not empower the Director with authority to foreclose the possibility of claimant adducing such evidence.

The appropriate remedy is to have compensability of the proposed medical service determined in the first instance by a Board ALJ. The Director erred as a matter of law. A Defer and Transfer Order shall issue.

ORDER

IT IS HEREBY ORDERED that claimant's request for administrative review is deferred, and this matter is transferred to the Workers' Compensation Board Hearings Division for further proceedings.