
In the ORS 656.245 Medical Services of

Kristina M. Weber, Claimant

Contested Case No: 10-121H

PROPOSED & FINAL ORDER

November 18, 2010

KRISTINA M. WEBER, Petitioner

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, Respondent

Before David D. Lipton, Administrative Law Judge

Pursuant to notice, a hearing was held and closed on November 1, 2010 in Portland, Oregon before David D. Lipton, Administrative Law Judge. Claimant was not present but was represented by Dean Heiling. The employer, Alaska Airlines Inc., and its claims management service, Broadspire, were represented by Gordon Clark.

Exhibits A through C and 1 through 10 were admitted.

ISSUE

Claimant protests the July 23, 2010 Administrative Order on Remand which found that the May 12, 2009 palliative care request of Frances Verzosa, M.D. was insufficient pursuant to OAR 436-010-0290(1). In the event that Claimant prevails, her attorney seeks an award of attorney's fees.

FINDINGS OF FACT

Claimant was compensably injured on August 15, 2002. Her claim was accepted for cervical-thoracic sprain and lumbar strain. The claim was closed pursuant to a February 26, 2004 Notice of Closure which awarded Claimant permanent disability benefits. Additional conditions were accepted pursuant to an April 27, 2004 Modified Notice of Acceptance. The claim was then closed pursuant to a May 3, 2004 Notice of Closure which did not award additional permanent disability benefits.

Claimant's attending physician is Frances Verzosa, M.D. On May 12, 2009 Dr. Verzosa completed a Form 827 requesting palliative care consisting of adjustments, active exercise, manual therapy and massage to be provided two to four times per month from May 12, 2009 to November 12, 2009.

On July 1, 2009 Dr. Verzosa wrote to Claimant's attorney. She explained that Claimant's injury required ongoing palliative care in order to allow Claimant to continue working. Dr. Verzosa noted that there was a dispute arising from a September 29, 2008 compelled medical examination which opined that there were factors other than Claimant's compensable conditions causing her symptoms. Dr. Verzosa wrote that in her opinion Claimant's work as a flight attendant caused her symptoms to flare-up and that Claimant needed palliative care in order to continue to work.

On July 9, 2009 a Form 827 requesting palliative care was faxed from Dr. Verzosa's office to Broadspire, the claims processor. On July 13 the palliative care request was denied. Claimant protested that decision. The Workers' Compensation Division (WCD) issued an Administrative Order finding that Dr. Verzosa's palliative care request was incomplete and affirmed Broadspire's decision. That decision was appealed to the Workers' Compensation Board and heard by Judge Sencer who entered his Proposed and Final Order on February 8, 2010. He noted Claimant's challenge to the Administrative Order and reversed the Order. Finding that Dr. Verzosa had substantially complied with the administrative rule, Judge Sencer remanded the matter to the Workers' Compensation Division for a decision on the merits of Claimant's entitlement to palliative care.

The Administrator of WCD issued a final order remanding to the Resolution Team on June 9, 2010. The Director ordered the Resolution Team to allow the parties to address any procedural defects in the May 12, 2009 palliative care request which had been raised by WCD and which had been determinative to its September 17, 2009 decision.

On June 10, 2010 the Resolution Team wrote to Broadspire and Dr. Verzosa inviting an opportunity to address the alleged procedural defects in Dr. Verzosa's May 12, 2009 palliative care request. On June 17, 2009 Broadspire's attorney responded to the Resolution Team stating that Dr. Verzosa's May 12, 2009 request for palliative care did not meet the requirements of OAR 436-010-0290(1)(a)(D) and (E). Claimant's attorney also responded to the invitation from the Resolution Team.

On July 23, 2010 the WCD issued its Administrative Order on Remand. It found that, "(a)lthough Dr. Verzosa submitted Form 827 and a supplemental letter explaining the need for continued palliative care, the two forms together did not meet the palliative care reporting requirements." This appeal followed.

OPINION AND CONCLUSION

The Administrative Order may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence may be admitted. OAR 436-001-0225(2).

Claimant argues that Broadspire paid for palliative care in the past based on no more information than that which it received with the May 12, 2009 Form 827 palliative care request. Judge Sencer determined that to be a fact. While employers are free to provide greater benefits than the statute requires, a decision here must address not only Broadspire's processing but the requirement that the Director follow his own rules. *Aetna Casualty and Surety Company v. Sue A Blanton, D.C.*, 139 OR App 283 (1996). Claimant further argues that the Director's Order favors form over substance. The court in *Blanton* addressed that argument and dismissed it.

Given the issue raised by the compelled medical examination that Claimant's palliative care was directed to an unrelated medical condition, it is not "obvious" that the palliative care recommended is related to the compensable condition. Therefore, a description of how the proposed treatment is related to the compensable condition is necessary. [OAR 346-010-0290(1)(a)(D)].

While the most recent Administrative Order concluded that "Dr. Verzosa submitted Form 827 and a supplemental letter explaining the need for continued palliative care", there is no finding of fact that the July 1, 2009 letter from Dr. Verzosa to Claimant's attorney was provided to Broadspire prior to its July 13, 2009 decision or the Administrative Order which was addressed by Judge Sencer. I cannot, on the record before me, find that it was. The Administrative Order before me concluded (and I agree) that even if the May 12, 2009 palliative care request was supplemented by the July 1, 2009 letter, it did not satisfy OAR 436-010-0290(1)(a)(D)(E). Without the July 1, 2009 supplement it is clear that the requirements of that administrative rule have not been satisfied. Consequently, there is substantial evidence in the record to support the Administrative Order on Remand's decision that the palliative care request is deficient and no error of law was made. The July 23, 2010 Administrative Order on Remand shall be affirmed.

ORDER

IT IS HEREBY ORDERED that the July 23, 2010 Administrative Order on Remand in MS 10-0246 is affirmed.