

In the ORS 656.327 Medical Treatment of

Agnes K. Foster, Claimant

Contested Case No: 11-084H

PROPOSED & FINAL ORDER

October 21, 2011

AGNES K. FOSTER, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Martha J. Brown, Administrative Law Judge

Pursuant to notice, a hearing was scheduled to be held on September 13, 2011 in Coos Bay, Oregon before Administrative Law Judge Martha J. Brown. Prior to the scheduled hearing, the parties requested that the matter be decided on the written record. Claimant is represented by her attorney, Christine Jensen. The employer, Legacy Health-Good Samaritan Hospital, and its insurer, Liberty Northwest Insurance Corp., are represented by their attorney, Sally Curey. Following receipt of the parties' written closing arguments, the record closed on October 3, 2011.

Exhibits 1 through 62 have been admitted into the record.¹

ISSUES

1. Medical Services. Claimant appeals that portion of the Department's May 18, 2011 Administrative Order that found that the prescription medication Zolpidem was not appropriate for treatment with regard to her compensable conditions. (Ex. 61).
2. Attorney fees.

FINDINGS OF FACT

The Director's Findings of Fact are hereby adopted and incorporated by reference.

CONCLUSIONS OF LAW AND OPINION

Claimant argues that the issue of the appropriateness of her use of Zolpidem (Ambien) has been previously litigated and claim preclusion applies to bar the insurer from re-litigating the issue. Claimant further contends that the portion of the Administrative Order that found that Zolpidem was not an appropriate medical service should be reversed on the ground that Dr. Harris has provided the most persuasive expert opinion. The insurer contends, however, that the Administrative Order should be affirmed.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c). Under substantial evidence review, the reviewing tribunal looks at the whole record with respect to the

¹ As discussed in this order, I decline to admit claimant's proposed, additional exhibits that were not part of the record before the Department.

issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the findings as well as the evidence supporting it, there is substantial evidence. *Liberty Northwest Insurance Co. v. Kraft*, 205 Or App 59 (2006); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

As noted above, claimant first requests either the admission of proposed Exhibits 18A and 27A, or requests that judicial or administrative notice be taken of those documents. In light of the statute and the court case previously cited, I do not find that the record can be supplemented with evidence not submitted to and considered by the Department. With regard to the issue of administrative notice, the Board has held that, under limited circumstances, it may take administrative notice of agency orders involving the same claimant. *See, e.g., Perry F. Peters*, 58 Van Natta 1672 (2006).

Here, I conclude that, even if administrative notice is taken of the documents relied upon by claimant, it would not change the outcome of this case. Claimant argues that this matter has been actually litigated and determined, and the determination of the issue was essential to the decision; therefore, the determination is conclusive in a subsequent proceeding between the parties, whether on the same or a different claim. *See Drews v. EBI Companies*, 310 Or 134, 139-40 (1990).

Here, the issue is whether Zolpidem, as prescribed by claimant's current doctors, is appropriate treatment for the compensable injury. However, in the prior Administrative Order, the issue determined involved whether 180 tablets per month of the drug was appropriate. Moreover, the insurer challenged the Administrative Order only with regard to whether it was required to pay claimant directly without prior documentation of the expense. Under the circumstances, I do not find that the current issue was actually litigated and determined by the prior proceedings and orders. Therefore, I conclude that claim preclusion does not bar the insurer from challenging the reasonableness of the prescription in this case.

Alternatively, claimant contends that Dr. Harris should be given deference regarding the issue of appropriateness of the drug. Claimant further contends that, in light of the fact that she is a trained nurse, her own observations and comments should be given weight. The insurer contends, however, that claimant has relied on medical opinions from 2006 or earlier, which do not reflect her current condition or need for the prescription.

The Director found that Dr. Fix and Dr. Olbrich provided the most persuasive opinions with regard to claimant's use of Zolpidem/Ambien. Dr. Fix stated in detail his reasons for finding that the use of that drug was unreasonable and unnecessary. Accordingly, I conclude that the Director's finding is reasonable and is supported by substantial evidence. Therefore, the decision that Zolpidem is not an appropriate prescription for claimant must be affirmed.

ORDER

IT IS HEREBY ORDERED that the May 18, 2011 Administrative Order is affirmed and the insurer's denial of Zolpidem is affirmed.