
In the ORS 656.260 Managed Care Dispute of

Daren S. Kirkpatrick, Claimant

Contested Case No: 10-170H

ORDER REMANDING

April 5, 2011

DAREN S. KIRKPATRICK, Petitioner

SAIF CORPORATION, Respondent

Before Scott L. Harra, Acting Director

The managed care organization (MCO) in which claimant Daren S. Kirkpatrick (claimant) is enrolled denied a request by claimant's physician for authorization of epidural steroidal injections. Claimant's physician requested administrative review. The Workers' Compensation Division's Resolution Team (RT) affirmed the denial. Claimant requested a hearing and Administrative Law Judge (ALJ) Chuck Mundorff reversed RT's order. Insurer SAIF Corporation (insurer) requested director review. Because the original request for administrative review was ambiguous, RT failed to address one of the issues presented. I therefore remand to permit RT to address this issue.

FACTUAL SUMMARY

I adopt the facts as found by RT and summarize them for brevity. Claimant was originally injured in 1977. He has accepted conditions of cervical strain, C5-6 disc herniation, and C6-7 disc herniation. He has undergone multiple treatments for pain, including surgery, medication, and epidural injections. Claimant's physician, Dr. Kosek, requested approval from the MCO to perform epidural steroidal injections. The MCO denied the request.

RT asked Dr. John A. Borgoy to review the case and examine claimant to aid RT in resolving the dispute. Dr. Borgoy concluded in his report that repeated injections were not justified but suggested instead that one or two injections be tried followed by a clinical assessment, as a treatment for post-surgical pain.

RT issued its administrative order on September 14, 2010. That order states: "[t]he issue is whether a series of three C7-T1 epidural steroid injections are appropriate treatment for [claimant]." The order found Dr. Borgoy's opinion was the most persuasive of the medical opinions in the record. Citing Dr. Borgoy's conclusion that repeated injections were not justified, the order affirms the MCO's denial of authorization for the series of three injections.

After receiving RT's order, claimant's attorney requested a hearing in an October 14, 2010 letter. The letter states "[t]he issue is whether Dr. Kosek's proposed cervical epidural steroid injections at C7-T1 are appropriate for [claimant]."

At the hearing on this matter, no participant specified whether the dispute concerned the request for three injections or for one injection. Claimant's attorney argued RT should have adopted Dr. Borgoy's suggested approach of trying one or two injections, with subsequent assessment, because it found his opinion persuasive. Claimant's attorney did not suggest RT's order had addressed an incorrect issue in focusing on the request for the series of three injections.

ALJ Mundorff found substantial evidence did not support RT's order. He pointed out that RT had found Dr. Borgoy's opinion the most persuasive of the medical opinions in the record. Because Dr. Borgoy recommended performing one or two injections, rather than ultimately concluding none should be provided, the ALJ concluded that substantial evidence did not support RT's finding rejecting all injections.

CONCLUSIONS OF LAW

I may only modify RT's order if substantial evidence does not support it or if it reflects an error of law. No new medical evidence or issues may be considered. ORS 656.260(16); OAR 436-001-0225(2).

Insurer argues the Proposed and Final order errs in addressing an issue not raised before RT; the propriety of performing one or two injections. Claimant contends, regardless of the issue specified in the heading in RT's order, that the issue which RT was asked to review was the MCO's denial of authorization for a single injection.

To resolve this dispute, it is necessary to review documentary evidence in the record, as to which RT failed to make specific factual findings. Documents in the record indicate:

On April 23, 2010, claimant's physician, Dr. Kosek, requested approval from the MCO for a series of three epidural steroidal injections. The MCO denied the request and Dr. Kosek appealed that decision through the MCO's internal review process. The MCO notified Dr. Kosek on May 5, 2010, that it affirmed its denial of authorization. On May 11, 2010, Dr. Kosek requested authorization from the MCO to perform a single injection in place of the series of three. The MCO reviewed that request and issued a denial on May 19, 2010. On June 14, 2010, Dr. Kosek requested administrative review of the MCO's denial of authorization from the Workers' Compensation Division. Dr. Kosek's request for administrative review states: "Dr. Kosek is asking that the denial for the C7/T1 IL ESI be reviewed."

On June 16, 2010, RT sent insurer a "Specification of Disputed Medical Issues" form. The form stated the subject of the dispute was: "C7-T1 epidural steroid injection requested by Dr. Peter Kosek, MD." Insurer responded with a letter to RT on June 25, 2010. That letter was copied to claimant and his attorney. The letter stated the dispute concerned Dr. Kosek's request for authorization of "a series of 3 interlaminar epidural steroid injections at C7-T1." A July 6, 2010 letter from the MCO to insurer is included in the record. The letter says the disputed treatment is: "C7-T1 Interlaminar ESI, series of 3 injections."

RT sent Dr. Borgoy a letter on July 29, 2010, that was copied to claimant's attorney. This letter stated: "The treatment in dispute is a series of three C7-T1 interlaminar epidural steroid injections." Dr. Borgoy produced a report that was delivered in August 2010. The opening sentence of Dr. Borgoy's report states he examined claimant ". . . regarding the appropriateness of 3 C7-T1 interlaminar epidural steroid injection[sic]."

It appears Dr. Kosek made two distinct requests for authorization; one for three injections, and one for a single injection. RT did not make an explicit finding about whether Dr. Kosek was requesting review of the denial of the request for three injections or for one. RT's issuing a decision on the propriety of three injections constitutes an implied factual finding that was the decision for which Dr. Kosek requested review.

The MCO separately rejected each request. Dr. Kosek's request for review does not specify the date of the request or of the denial for which he seeks administrative review. Several pre-review communications and RT's order specify the issue is the request for three injections. No party attempted to correct the statement of the issue before administrative review occurred or asked for reconsideration after the order was issued. OAR 436-010-0008(10)(c)(C).¹ At the hearing, claimant's attorney did not argue RT had addressed the wrong issue. He instead argued RT should have shown flexibility in reaching a result and should have adopted Dr. Borgoy's alternative approach.

On detailed review, however, it is clear Dr. Kosek actually sought administrative review of the denial of his request for one injection. His request asks for review of the "denial for the C7/T1 IL ESI." He did not ask for review concerning three injections. He did not request review when the MCO formally denied the request for three injections. He only requested administrative review after receiving the MCO's denial of the request for one injection. Substantial evidence therefore does not support RT's implied finding that Dr. Kosek asked for review of the request for three injections.

As RT did not consider, or issue a ruling on, the question of whether the denial of the request for authorization of a single injection was correct, that issue was not before ALJ Mundorff at the hearing. RT therefore addressed an issue not before it and the issue it was asked to resolve remains undecided. This constitutes legal error. ORS 656.260(16); OAR 436-001-0225(2). The appropriate remedy is to remand to allow RT to review the issue Dr. Kosek submitted, denial of authorization for a single injection. OAR 436-001-0246(3); see *Howard D. Smith*, 13 CCHR 15 (2008)²

It is also important to note Dr Kosek never requested authorization to perform one or two injections, followed by clinical evaluation, as suggested by Dr. Borgoy. Neither the ALJ nor RT can review that option until it is proposed to and reviewed by the MCO. OAR 436-015-0008.

IT IS HEREBY ORDERED ALJ Mundorff's January 27, 2011 Proposed and Final Order is not adopted. RT's September 14, 2010 Administrative Order is vacated. The matter is remanded to RT to make a determination on whether the MCO's denial of Dr. Kosek's request for authorization for a single epidural steroidal injection was proper.

¹ OAR 436-010-0008(10)(c)(C) provides in part: "A party may . . . request reconsideration of an administrative order upon an allegation of error, omission, [or] misapplication of law. . . ."

² OAR 436-001-0246(3) provides in part: "If exceptions are filed, the director may . . . remand the matter for further administrative action."