

In the Matter of the ORS 656.260 Managed Care Dispute of
Blunt, David A., Claimant

Contested Case No: H03-147

PROPOSED & FINAL ORDER

February 4, 2004

DAVID A. BLUNT, Petitioner

SAIF CORPORATION & CAREMARK MCO, Respondent

Before Rick Barber, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

David Blunt (claimant) appeals an administrative order issued on November 17, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services. On January 26, 2004, Administrative Law Judge Rick Barber conducted a telephone hearing originating in Salem, Oregon. Claimant participated in the hearing and represented himself. SAIF Corporation was represented by attorney David Runner. CareMark waived appearance. The record closed on the date of hearing.

ISSUE

Is the Administrative Order of the director, which found that a request for spinal fusion was not appropriate for claimant, supported by substantial evidence and legally correct?

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 57 were admitted into evidence without objection.

FINDINGS OF FACT

(1) Claimant, a police officer with the City of Beaverton, compensably injured his low back in July 1979, while wrestling a suspect to the ground in a domestic disturbance case. SAIF Corporation initially accepted a low back strain, but later accepted a disc herniation condition at L5-6.¹ Dr. Cherry surgically repaired the disk in 1979, and Dr. Waller performed a second surgery in 1985. (Ex. 6, 13). Claimant had good recoveries and returned to police work after both surgeries.

(2) In February 2002, claimant was called to Highway 217 because a furniture truck had accidentally lost some furniture. Claimant had to remove a large recliner chair from the highway by pulling it across three lanes of traffic then lifting it over the guard rail. While he was lifting the chair over the rail, a piece of the chair broke off, causing claimant to wrench his back.

¹ Initial references to the disk condition indicate that claimant had an L4-5 condition and a transitional vertebra. However, the medical information in recent years have treated that vertebra as an additional level, and the surgery received in 1979 (and again in 1985) were at the level which has been designated L5-6.

Claimant had immediate low back pain and lower extremity pain and was seen by Drs. Hart and Carlson, who requested that an MRI scan be performed. (Ex. 18). Later, Dr. Anderson referred claimant to Dr. Waller again. (Ex. 24).

(3) The City of Beaverton's current claim processor accepted a lumbosacral strain based upon the incident on the highway.² (Ex. 22). However, Dr. Waller believed that claimant might need surgery and that the need for surgery was caused by the 1979 injury. The doctor requested authorization to perform a one-level fusion at L5-6. (Ex. 26). Although the 1979 claim was in own motion status, SAIF Corporation voluntarily agreed that the claimant's condition was worse and accepted the new medical condition of an L5-6 herniated disk and degenerative disk disease. (Ex. 33).

(4) SAIF referred Dr. Waller's request for surgery to CareMark to determine whether claimant's condition met the criteria for a fusion under MCO rules. Claimant was examined by a psychologist, Dr. Friedman, and a medical doctor, Dr. Smith, to determine whether he met the criteria. (Ex. 35, 36). Claimant was unhappy with his meeting with Dr. Smith, feeling that the doctor did not really examine him or show him the diagnostic tests. (Testimony of claimant).

(5) Dr. Friedman concluded that claimant had a mildly elevated somatic focus, but that there were no strong contraindications concerning performing surgery. (Ex. 35). Claimant did not have clear radicular symptoms and had no spinal instability, leading Dr. Smith to conclude that claimant did not meet the criteria for a fusion under CareMark's guidelines. (Ex. 36). Dr. Smith discussed the case with Dr. Waller, and concluded that Dr. Waller agreed claimant did not meet the CareMark guidelines. (Ex. 37). However, Dr. Waller's only concern with doing the surgery was his belief that claimant did not understand the magnitude of the surgery and did not understand that the fusion would probably end his police career. (Ex. 40).

(6) CareMark initially denied claimant's request for surgery, and claimant requested reconsideration. CareMark agreed to review the surgery request at the Joint Medical Committee meeting of June 12, 2003. (Ex. 42). After review, the committee again concluded that claimant's surgery request should be disapproved. (Ex. 43). Claimant requested that the Medical Review Unit (MRU) review the MCO denial of surgery. (Ex. 44).

(7) In an effort to resolve the treatment dispute, MRU sent claimant to be examined by Patrick Golden, M.D., a neurosurgeon. Dr. Golden concluded that spinal fusion was not necessary since there was no spinal instability, and because claimant's pain had not been localized to the level where surgery was contemplated. Dr. Golden also concluded that psychological overlay was greater than that found by Dr. Friedman. (Ex. 54).

(8) On November 17, 2003, MRU issued an Administrative Order on behalf of the director which concluded that the requested surgery was not appropriate for claimant. (Ex. 55). Claimant requested a hearing on that decision on December 2, 2003. (Ex. 56).

CONCLUSIONS OF LAW

² The 2002 claim was ultimately closed with no impairment. (Ex. 31).

The requested spinal fusion is not appropriate treatment for claimant under the CareMark guidelines.

OPINION

Scope of Review

The question of the appropriateness of the requested medical treatment lies with the Director of the Department of Consumer and Business Services (DCBS). ORS 656.260(6). 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. ORS 656.260(16). In this case, claimant has the burden of establishing either an error of law or a lack of substantial evidence to support the Administrative Order. ORS 183.450(2).

Basis for the Director's Decision

Through MRU, the director determined that the single-level fusion proposed by Dr. Waller was inappropriate because claimant did not have vertebral instability and because no diagnostic testing (such as discography) had been done to determine whether claimant's pain was due to the degenerative disease and disk pathology at the level where surgery was requested. (Ex. 55 at 4-5). Since the MRU decision was primarily factual in nature, I will first of all review the decision to see if it is supported by substantial evidence.

Substantial Evidence Review. Unlike a case involving *de novo* review, (a case in which the judge determines which facts are true), substantial evidence review looks only to see if the Administrative Order is reasonable, based upon the entire record. In any given case, I might think the director's interpretation of the facts is incorrect, or might have decided the facts differently myself.³ However, if there are facts in the record which support the fact-finding made by the director, there is substantial evidence. The ALJ is required to:

[L]ook at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence...

Armstrong v. Asten-Hill Co., 90 Or App 200, 206, 752 P2d 312 (1988).

In *Armstrong*, the Court of Appeals gave an example quite common to workers' compensation cases:

For instance, and in a context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue,

³ This explanation of the substantial evidence rule is hypothetical, and the question of whether I would have made the same decision in this case is immaterial.

whichever way the Board⁴ finds the facts will probably have substantial evidentiary support. We would not need to choose sides. The difference between the “any evidence” rule and the substantial evidence test...will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the Board finds the other without giving a persuasive explanation...

90 Or App at 206.

Thus, my review of the case will involve determining whether there was substantial evidence in the record which would enable the Director to make the decision that was made in this case. *John J. Rice*, 4 WCSR 173, 176 (1999).

Looking to the director’s decision in this case, I conclude that there is substantial evidence to support the conclusion that the fusion is inappropriate medical treatment for claimant’s condition.⁵ Dr. Smith and Dr. Golden both concluded that the type of fusion requested was not appropriate in claimant’s case. He had had two disk surgeries (rather than the three which are usually an indication for a fusion); he had no spinal instability, and there was no clear evidence that the pain claimant is suffering comes from the level where fusion was recommended. The reports of Drs. Smith and Golden support every conclusion reached by MRU. I have examined all of the other evidence in the case as well, as did the MRU representative, and the opinions of Drs. Smith and Golden are reasonable in the context of the entire evidence in the case. I conclude there is substantial evidence to support the MRU decision in this case.

Review for Errors of Law. As noted under the statute, there are two bases upon which a director’s decision can be overturned. One is on the lack of substantial evidence, the other is for an error of law. ORS 656.260(16). In this case, there is no error of law which has been alleged, and none that is evident. The director correctly applied the law in making the decision in this case.

ORDER

IT IS HEREBY ORDERED that:

1. The Directors Administrative Order dated November 17, 2003 is AFFIRMED.

⁴ *Armstrong, supra.*, was a matter coming to the Court from the Workers’ Compensation Board, not DCBS, but the principle is the same.

⁵ The only fact in the MRU decision which is not supported by substantial evidence was the mistaken identity of the surgeon operating on claimant’s back in 1985. MRU indicated it was Dr. Tanabe, but it was actually Dr. Waller. (Ex. 13).