

In the ORS 656.327 Medical Treatment Dispute of

LUKE BROWN Claimant

Contested Case No: H04-140

PROPOSED AND FINAL ORDER

November 10, 2004

LUKE BROWN, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Allisson Green Webster, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant Luke Brown appeals an administrative order issued July 24, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services (director or department). On November 1, 2004, Administrative Law Judge Alison Greene Webster of the Office of Administrative Hearings conducted a telephone hearing in this matter. Petitioner Luke Brown (Claimant) was represented by attorney Steven Schoenfeld. Respondent Liberty Northwest Insurance Corporation was represented by attorney Kathryn Olney. Claimant testified on his own behalf. The record closed on the date of hearing.

ISSUE

The issue is whether MRU correctly determined that the spinal cord stimulator trial proposed by Donald Olson, MD is not appropriate medical treatment for Claimant under ORS 656.327.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 72, and insurer's Supplementary Exhibits 57a through 76 (representing 17 additional exhibits) were received and admitted without objection. Claimant's request to hold the record open for a supplemental report from Dr. Olson was denied.

FINDINGS OF FACT

I adopt the Findings of Fact set forth in the July 24, 2004 Administrative Order, with the following summary and supplementation:

(1) Claimant slipped and fell off a forklift at work on February 7, 2002. He experienced momentary loss of consciousness. Cervical, chest and abdominal x-rays taken following the accident were interpreted as normal, but Claimant experienced neck, thoracic and left shoulder pain in the following days and weeks.

(2) A May 9, 2002 thoracic MRI showed a small T7-8 right para-central disc

protrusion/herniation. Claimant continued to experience persistent thoracic pain. In July 2002, Dr. Olson evaluated claimant for treatment options. He recommended continued conservative management. Claimant's thoracic pain persisted and, on January 31, 2003, Dr. Olson provided a T8 epidermal steroidal injection. The injection provided Claimant pain relief for several weeks.

(3) On February 17, 2003, Claimant was released to full time work with lifting and driving restrictions. Claimant returned to Dr. Olson on March 10, 2003. At that time, he was asymptomatic and not taking any medication.

(4) Claimant returned to Dr. Olson in May 2003, reporting that his pain had returned. On May 14, 2003, Claimant had a second epidural steroid injection. This second injection provided Claimant with very limited relief. On June 10, 2004, Claimant returned to Dr. Olson for a follow-up. He complained of axial compression symptoms, elicited pain and a dull aching pain made worse by driving. Dr. Olson provided a third steroid injection on June 25, 2003.

(5) On July 8, 2003, Claimant complained to Dr. Olson of axial compression pain at the nerve and more lateral out in the area of the rib. Dr. Olson was concerned that Claimant experienced some pulling and tearing and may have developed a pneumothorax. He ordered an x-ray, which was negative for pneumothorax. Dr. Olson identified a dorsal column stimulator trial using an ANS stimulator as a possible treatment option.

(6) In September 2003, Leslie Pitchford, PhD evaluated Claimant to determine whether he was a good candidate for the proposed stimulator implant. Dr. Pitchford found that Claimant was a good candidate, because he seemed realistic about his pain and appeared focused on returning to a more active lifestyle.

(7) On September 24, 2003, Dr. Olson reported that Claimant's primary issue is pain. "We are not dealing with objective measurable spinal cord compression and/or measurable radiculopathy. We do have some nerve root irritation radiculitis, which is problematic in the sense that the patient has pain symptoms as a result thereof." (Ex. 16 at 24.)

(8) Dr. Olson requested authorization for a spinal cord stimulator placement trial for Claimant. The insurer denied the request. Claimant requested administrative review. In response, the insurer asserted that the proposed procedure was experimental, not medically necessary and not indicated for Claimant.

(9) On May 28, 2004, Vladimir Fiks, MD examined Claimant at MRU's request. He examined and questioned Claimant and reviewed the relevant diagnostic studies and the medical record. He determined that Claimant had persistent axial thoracic back pain secondary to T7-8 disc herniation without evidence of myelopathy or radiculopathy. Dr. Fiks noted that "95% of the claimant's symptoms are axial contained in the area of the mid thoracic spine. No radicular symptoms are appreciated or reported by the claimant." (Ex. 66 at 9.) Dr. Fiks did not find any significant radicular dystesthesias and/or evidence of radiculopathy in Claimant's upper extremities that would make him a good candidate for the proposed spinal cord stimulator trial. Dr. Fiks concluded that if Claimant had neuropathic pain presentation, the therapy would have

been indicated. But, because this was not the case, the disputed treatment was not appropriate for Claimant.

(10) On July 21, 2004, Dr. Olson acknowledged Dr. Fiks' determination that neural stimulation would not solve Claimant's problems. Dr. Olson noted that although he did not know whether the treatment would work, he thought that Claimant at least deserved the opportunity of a trial with a nerve stimulator to see if it would reduce his pain.

CONCLUSIONS OF LAW AND REASONING

This case presents a medical treatment dispute arising under ORS 656.327. Jurisdiction lies with the director. I may modify the administrative order only if it is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.327(2); OAR 436-001-0225(3). The burden on proving a fact or position falls upon the proponent. ORS 183.450(2). Here, Claimant bears the burden of proving that the proposed treatment is appropriate.

Claimant asserts that MRU's determination that the proposed treatment is not appropriate is not supported by substantial evidence. 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). The "substantial evidence" standard of review can be overcome "only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). A finding is supported by substantial evidence if it is reasonable in light of the countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292 (1990).

It is not for an ALJ to decide which medical opinions are more persuasive. In this context, I am only authorized to determine whether the record contains substantial evidence to support MRU's order. *John J. Rice*, 4 WCSR 173, 176 (1999). Furthermore, under the substantial evidence review standard, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001).

In the Administrative Order, MRU concluded that the spinal court stimulation proposed by Dr. Olson is not appropriate for claimant because he lacks the neuropathic pain presentation for which the treatment is indicated. In making this determination, MRU relied on the assessment of a medical arbiter, Dr. Fiks. MRU reasoned as follows:

Dr. Fiks outlined the indications for the disputed treatment and did not find them present in Mr. Brown's clinical presentation. Although Dr. Olson evaluated Mr. Brown on multiple occasions and observed his response to treatment, and Dr. Fiks only evaluated Mr. Brown once, the director finds Dr. Fiks' reasoning more persuasive and further supported by Liberty's opinion

regarding neuropathic pain presentation. Therefore, the director finds the medical report supports the conclusion that the spinal court stimulation trial proposed by Dr. Olson is not appropriate for Mr. Brown.

In challenging the Administrative Order, Claimant asserts that Dr. Fiks' opinion is not persuasive because he misconstrued Claimant's pain presentation. Specifically, Claimant contends that, contrary to Dr. Fiks' findings, he has nerve root irritation and associated radicular pain. Claimant further maintains that his pain presentation renders the proposed treatment appropriate for him. The insurer, on the other hand, asserts that Dr. Fiks understood Claimant's pain presentation. The insurer also contends that substantial evidence supports MRU's conclusion that the proposed spinal cord stimulation trial is not appropriate for Claimant.

I find that, when viewed as a whole, the record permits a reasonable person to find that the proposed spinal court stimulation is not an appropriate treatment for Claimant. MRU's finding in this regard is reasonable in light of the countervailing as well as supporting evidence. Indeed, although Claimant asserts that he experiences the radicular or neuropathic pain for which spinal cord stimulation is indicated, there is persuasive evidence in the record to the contrary. Even Dr. Olson reported that although Claimant has some nerve root irritation, he did not have measurable radiculopathy. Having reviewed the record in the entirety, I conclude that MRU's reliance on Dr. Fiks' opinion is reasonable. Therefore, MRU's determination is supported by substantial evidence in the record. I therefore affirm the Administrative Order.

ATTORNEY FEES

Claimant has not prevailed at this contested case hearing and is therefore not entitled to an attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated July 23, 2004 is affirmed.