
In the ORS 656.260 Managed Care Dispute of

ROBERTA DICKEY, Claimant

Contested Case No: H04-197

PROPOSED AND FINAL ORDER

APRIL 14, 2005

ROBERTA DICKEY, Petitioner

SAIF CORP., Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Roberta Dickey (Claimant) appealed a December 8, 2004 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services, which determined that the bilateral L3-S1 surgical procedure by Dr. Grewe was outside the scope of the accepted conditions of Claimant's claim. The matter was referred to the Office of Administrative Hearings (OAH) for hearing on January 13, 2005.

On March 1, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith of OAH conducted a telephone hearing. Attorney Stefan Gonzalez represented Respondent, SAIF Corporation (SAIF). Attorney Aukjen Ingraham represented Claimant. No one testified. The record remained open until March 18, 2005, for receipt of SAIF's Hearing Memorandum and, if any, Claimant's response. SAIF's Hearing Memorandum was received on March 2, 2005. No response was received from Claimant by March 18, 2005, when the record was closed.

ISSUES

(1) Whether substantial evidence supports MRU's Administrative Order that the bilateral L3-S1 surgical procedure proposed by Claimant's doctor, Dr. Grewe, was treatment outside the scope of the accepted conditions of Claimant's claim

(2) Whether MRU made an error of law in its Administrative Order.

EVIDENTIARY RULING

The record consists of Exhibits 1 through 45, which were admitted into the record without objection.

FINDINGS OF FACT

The Findings of Fact in the December 8, 2004 Administrative Order are accepted and

incorporated in this Final and Proposed Order, with the following supplementation:

(1) MRU's Administrative Order, issued December 8, 2004, concluded in part:

In this case, SAIF accepted the claim for lumbar strain and S1 radiculopathy, left leg. Dr. Grewe requested to proceed with a bilateral L3, L4, L5, S1 laminoforaminotomy. After review of the record, the director finds that Dr. Grewe proposed surgery to treat non-compensable conditions of severe stenosis at L3-4, with central disc protusion; and significant stenosis at L4-L5, and L5-S1, more than the accepted conditions. The director finds that absent a change in the accepted compensable conditions of this claim, SAIF is not liable for the bilateral L3-S1 surgical procedure as proposed by Dr. Grewe for [Claimant].

(Ex. 42 at 2.)

(2) On January 12, 2004, Joan Takacs, D.O., examined Claimant per the request of WCD for a medical arbiter examination. Dr. Takacs reviewed a prior MRI of Claimant's low back and her medical records and assessed:

1. Lumbar strain and acute left S1 radiculopathy, resolved.
2. Pre-existing degenerative joint disease, degenerative disc disease and stenosis, lumbar spine.
3. Symptom magnification and pain behavior with invalid range of motion on muscle strength testing.

(Ex. 19 at 3.)

(3) On August 12, 2004, Claimant's treating doctor, Dr. Kent Grewe, responded in a hand-written note to the inquiry from Claimant's attorney whether the condition at L3-4 was related to Claimant's injury. Dr. Grewe's note says:

I saw her on 6/23/04. Her old 2001 MRI scan was not avail [sic] to compare, but the L3-4 changes may be new since then. Regardless, decompression surgery was recommended at L3-S1, including the previously accepted portion. Shouldn't wait for all the delays to add the levels. Kent Grewe, M.D.

(Ex. 32.)

CONCLUSIONS OF LAW

(1) Substantial evidence supports MRU's Administrative Order that Dr. Grewe's proposed surgery to treat severe stenosis at L3-4, with central disc protusion and significant stenosis at L4-L5, and L5-S1, was treatment for conditions not accepted and therefore non-compensable.

(2) MRU's reliance on the opinion of Dr. Takacs does not reflect an error of law.

OPINION

Claimant does not dispute that jurisdiction in this case lies with WCD. Claimant has the burden of showing that the Administrative Order is not supported by substantial evidence or that it reflects an error of law. No issues or medical evidence not considered by WCD may be considered. OAR 436-001-0225(1)¹; ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”)

“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). A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292 (1990). To determine whether substantial evidence exists, an administrative law judge 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. ***For instance, and in the context which is likely to occur in workers’ compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support. [The administrative law judge] 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 the finding and the [director] finds the other without giving a persuasive explanation. *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988).

The question is not what medical opinions are more persuasive, but only whether the record contains substantial evidence to support MRU’s order. See *John J. Rice*, 4 WCSR 173, 176 (1999). In reviewing for substantial evidence, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001).

Under ORS 656.245 and ORS 656.327, the insurer is required to provide medical services for a compensable injury unless the treatment is excessive, inappropriate, ineffectual or in violation of the administrative rules. The court generally defers to the opinion of the attending physician unless the record reflects persuasive reasons to do otherwise. *Weiland v. SAIF Corp.*, 64 Or App 810 (1983); *Timothy Krushweitz*, 45 Van Natta 158 (1993). Where the medical dispute involves expert analysis, rather than expert external observation, the court does not give

¹ OAR 436-001-0225(1) states:

Scope of Review/Limitations on the Record

(1) Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. New medical evidence or issues may not be considered at the contested-case hearing.

special deference to the attending physician's opinion as opposed to other doctors. *Hammons v. Perini*, 43 Or App 299 (1979).

In its Administrative Order, MRU concluded that the proposed surgery was not for an accepted condition. SAIF has approved surgery for the accepted conditions of lumbar strain and SI radiculopathy, but has not approved surgery to treat the conditions at L3-4. The condition at L3-4 was not addressed or accepted in the Opinion and Order issued August 13, 2003. (Ex. 12.) Moreover, Dr. Takacs concluded there was no connection between Claimant's L3-4 condition and her injury. This report provides substantial evidence for MRU's conclusion, especially when Claimant's treating doctor, Dr. Grewe, reported only that there may be a relation and did not say that there was probably a connection.

ATTORNEY FEES

Claimant did not prevail and is not entitled to attorney fees. ORS 656.385(1).

ORDER

MRU's December 8, 2004 Administrative Order is affirmed.