

In the Medical Fee Dispute of
Kristina M. Weber, Claimant
Contested Case No: 09-152H
PROPOSED & FINAL ORDER

February 8, 2010

KRISTINA WEBER, Petitioner
AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, Respondent
Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing convened on January 11, 2010 in Portland, Oregon before Administrative Law Judge Nicholas M. Sencer. Claimant was present and represented by her attorney, Dean Heiling. Gordon Clark represented the employer, Alaska Airlines, Inc., and its processing agent, Crawford & Co. Exhibits 1 through 98 were admitted into the record. The record closed on January 11, 2010 following recorded closing arguments.

ISSUES

Claimant requested a hearing to challenge the September 17, 2009 Administrative Order in MS 09-1182, a medical service dispute. The issue that claimant raised before the Workers' Compensation Division concerns whether prescribed palliative care is reasonable and necessary medical treatment under her August 15, 2002 injury claim. The Medical Reviewer concluded that the prescribing doctor's palliative care request was incomplete and, accordingly, affirmed the processing agent's denial of the requested palliative care on that basis without addressing the issue of reasonableness and necessity. The issue for my consideration concerns whether the Administrative Order is supported by substantial evidence or reflects an error of law.

STANDARD OF REVIEW

The Administrative Order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted. ORS 656.327(2).

FINDINGS OF FACT

Claimant is 41 years of age. She sustained a compensable injury on August 15, 2002 when a box fell out of an overhead bin and struck her on the head. (Ex 4). On February 26, 2004, the processing agent issued an Updated Notice of Acceptance at Closure that set forth the accepted conditions as "Cervical-Thoracic Sprain, Lumbar Strain." (Ex 25). Also, on February 26, 2004, the processing agent issued a Notice of Closure that awarded claimant 4 percent unscheduled permanent partial disability for her neck. (Ex 26).

On April 27, 2004, the processing agent issued a Modified Notice of Acceptance in which it added the additional conditions of "C5-6 right paracentral disc protrusion and with [*sic*] thoracic myofascitis." (Ex 29). On May 3, 2004, the processing agent issued a Notice of Closure that awarded claimant no additional temporary or permanent partial disability compensation. (Ex 31).

Claimant's attending physician is Frances V. Verzosa, M.D. Dr. Verzosa has submitted multiple palliative care requests to the processing agent since at least December 29, 2003. (Exs 21, 32, 33, 34, 61, 72, 73, 75, 82 and 85). The issue before me concerns the May 12, 2009 palliative care request. (Ex 85). All of Dr. Verzosa's palliative care requests were completed in essentially the same manner. Dr. Verzosa completed the physician part of the form, providing the requested information in the space provided. Dr. Verzosa described claimant's symptoms, the objective findings and described the nature of the palliative care requested. Apparently, the processing agent did not object to the earlier palliative care requests.

On July 30, 2009, the processing agent's attorney set forth the processing agent's position concerning Dr. Verzosa's May 12, 2009 palliative care request. He wrote, "Employer disputes that the prescribed palliative care is reasonable and necessary almost nine [*sic*] years after this industrial injury. A preponderance of medical evidence establishes that it is not. . . . After almost seven years, palliative massage, ultrasound, acupuncture, traction and chiropractor adjustment is excessive, unreasonable, and unnecessary. No doctor in this record besides Dr. Verzosa has ever seen the necessity for all of this treatment." (Ex 94). The employer did not challenge the manner in which Dr. Verzosa completed the palliative care request form.

On September 17, 2009, the Workers' Compensation Division issued its Administrative Order in this case. The Medical Reviewer did not address the merits of the dispute. Rather, she concluded that Dr. Verzosa had failed to comply with the administrative requirements set forth in OAR 436-010-0290(1).

CONCLUSIONS OF LAW AND OPINION

Claimant bears the burden of proof to establish that the challenged order either reflects an error of law or that it is not supported by substantial evidence. ORS 656.327(2). For the following reasons, I conclude that the order both reflects an error of law and is not supported by substantial evidence. Accordingly, it will be reversed.

The procedure for obtaining approval of palliative care is set forth at OAR 436-010-0290. Pursuant to that rule:

- "(1) Palliative care means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition. Palliative care is compensable when it is prescribed by the attending physician and is necessary to enable the worker to continue current employment or a vocational training program. When the worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment or a current vocational training program, the attending physician must first submit a written request for approval to the insurer.
- (a)The request must:
- (A) Describe any objective findings;

- (B) Identify by ICD-9-CM diagnosis, the medical condition for which palliative care is requested;
- (C) Detail a treatment plan which includes the name of the provider who will render the care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;
- (D) Explain how the requested care is related to the compensable condition; and
- (E) Describe how the requested care will enable the worker to continue current employment, or a current vocational training program, and the possible adverse effect if the care is not approved.”

In this case, the Medical Reviewer concluded that Dr. Verzosa did not comply with OAR 436-010-0290(1)(a)(D) and (E). These sections of the rule request explanations concerning how the requested care is related to the compensable condition, how it will enable claimant to continue current employment, and the possible adverse effects if the care is not approved.

Pursuant to ORS 656.245(1)(c)(J), workers are entitled to palliative care that enables them to continue current employment. I conclude that the information requested from attending physicians at OAR 436-010-0290(1)(a) amounts to suggested indicia of what constitutes compensable palliative care; it does not constitute a mandatory list the omission of any element of which would render the request for palliative care insufficient. See, *Mark S. Neufeldt*, 13 CCHR 293 (2008).

In this case, Dr. Verzosa described the objective findings, “intermittent pain, stiffness, spasms, restricted ROM, tenderness, spasms, joint rigidity,” she identified the ICD-9-CM diagnosis codes and she set forth a treatment plan. She did not, however, explain how the requested care is related to the compensable conditions and did not describe how the care would enable claimant to continue with her current employment. However, the answer to both inquiries is apparent from the record. The disputed treatment is the same treatment Dr. Verzosa has prescribed for claimant’s compensable conditions for over six years. It should go without saying that medical treatment that reduces pain and increases mobility enhances that ability of a worker to perform their job duties. To deny the requested palliative care based on the attending physician’s failure to set forth the obvious, elevates form over substance and deprives claimant of the opportunity to challenge the denial of prescribed medical care based on the merits.

I conclude that Dr. Verzosa substantially complied with the requirements for requesting palliative care. To the extent the challenged order concludes otherwise, it is not supported by substantial evidence and reflects an error of law.

ORDER

IT IS HEREBY ORDERED that the September 17, 2009 Administrative Order in MS 09-1182 is reversed. This case is remanded to the Workers’ Compensation Division to address the issue of the reasonableness and necessity of the prescribed palliative care.