

In the ORS 656.245 Medical Services of

Edward E. Bores, Claimant

Contested Case No: 10-139H

FINAL ORDER

March 29, 2011

EDWARD E. BORES, Petitioner

BOISE CASCADE, LLC, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Employer Boise Cascade, LLC (employer), failed to grant a request to replace claimant Edward E. Bores' (claimant's) hearing aids. Following administrative review, the Workers' Compensation Division's Resolution Team (RT) affirmed. Administrative Law Judge (ALJ) Robert Pardington held a hearing on the matter and affirmed RT's order. Claimant now seeks director's review.

FACTUAL SUMMARY

RT's factual findings are adopted and summarized here. Claimant has a compensable condition of bilateral hearing loss that was accepted in 2001. At some time after that claimant obtained hearing aids. In 2009, he had a hearing examination performed at Columbia Hearing Center (Columbia). Columbia apparently submitted a request to employer's claims processing agent, Sedgwick Claims Management Services, Inc. (Sedgwick) to provide replacement hearing aids for claimant. Sedgwick inquired of Columbia as to why replacement hearing aids were necessary. Columbia responded that they recommended new hearing aids "due to an upgrade in Hearing Instrument Technology." Although Sedgwick asked for further clarification from Columbia, there is nothing in the record indicating Columbia provided additional explanation. Sedgwick never authorized the purchase of the replacement hearing aids.

Columbia requested administrative review. RT had Dr. Michael Flaming examine claimant to assist its determination. Dr. Flaming's notes indicate he modified claimant's hearing aids by adding a device called "insert domes." In response to questions submitted to him, Dr. Flaming stated indications for replacement hearing aids would be either non-functioning or inappropriately fitted hearing aids. Dr. Flaming found claimant did not demonstrate these indications. The doctor replied to additional questions by stating claimant did not need replacement hearing aids and that the current hearing aids met claimant's needs. Dr. Flaming also noted claimant's hearing aids were two years old.

RT issued an Administrative Order on July 14, 2010. RT found Dr. Flaming's opinion persuasive and concluded claimant's current hearing aids, as modified by Dr. Flaming, were appropriate and that replacement hearing aids were not justified.

Claimant requested a hearing. The parties submitted the case on the documentary record. Claimant's attorney attempted to have admitted into evidence a document labeled "Exhibit A" that allegedly was a record of an audiometric examination performed in 2006. Claimant's counsel asserted the exhibit would show claimant's hearing had worsened since that exam, that claimant's hearing aids were more than two years old, contrary to Dr. Flaming's statement, and that Dr. Flaming's opinion was not adequate because he had not seen this document. This

document was not provided to RT for its review. ALJ Pardington therefore refused to formally admit it into the hearing record. The ALJ also refused a request by claimant's attorney to remand the matter so that RT could consider Exhibit A. ALJ Pardington found the arguments based on this exhibit had not been raised to RT and that claimant had not demonstrated he could not have obtained and provided this document during the administrative review through due diligence. The judge found substantial evidence supported RT's findings and affirmed RT's order.

Claimant's counsel filed exceptions in which he argued Sedgwick improperly withheld Exhibit A when he requested records so that he could not have provided this evidence during the administrative review. Counsel submitted a declaration with the exceptions in which he states he requested all discoverable materials from Sedgwick in 2009 but only learned in December 2010 that Sedgwick had paid Columbia in 2006 to provide claimant with hearing aids. Counsel's declaration asserts he obtained Exhibit A from Columbia in December 2010.

CONCLUSIONS OF LAW

In this medical services dispute, I may not modify RT's order unless substantial evidence does not support it, or it is based on an error of law. ORS 656.327(2); OAR 436-001-0225(2).

It is apparent from the Proposed and Final Order that claimant's counsel did offer Exhibit A into evidence for the hearing. Counsel therefore did have this document in time to present arguments based on it during the hearing. The written arguments the parties submitted to the ALJ are included in the record. It does not appear claimant's attorney offered an affidavit at the hearing explaining how and when he obtained Exhibit A. Claimant's written hearing argument does not contend he was improperly denied access to Exhibit A or that he was prejudiced by not receiving it earlier. Given the evidence presented to him, I cannot find ALJ Pardington erred in finding claimant could not, with due diligence, have provided this evidence during the administrative review. Counsel does not explain why he did not present the affidavit or the argument based on it to the ALJ. The affidavit and related argument therefore constitute new evidence and issues which cannot be raised here. OAR 436-001-0225(2).

Claimant argues Sedgwick improperly failed to provide him with a copy of the 2006 examination. He also asserts Dr. Flaming's opinion, which formed the basis for RT's decision, is subject to question because Dr. Flaming did not review the 2006 examination results and because Exhibit A shows claimant's hearing aids were four years old, not two, as Dr. Flaming believed. Claimant asks for remand on the grounds that Dr. Flaming should have been given the earlier exam results, and because Sedgwick and employer should not benefit from Sedgwick's failure to provide all requested documents.

It is not apparent how Exhibit A would change the outcome of the review. Dr. Flaming tested claimant's hearing and found the current hearing aids were sufficient to address claimant's current level of hearing loss. There is no evidence suggesting that claimant's hearing having worsened over time, or the mere fact of the age of the hearing aids, would change Dr. Flaming's conclusion that, at the time he examined claimant, the hearing aids claimant then possessed adequately met claimant's needs.

It also appears Columbia performed the 2006 and 2009 examinations and therefore would have been aware in 2009 that claimant's hearing had worsened. Columbia is the entity that suggested claimant needed replacement hearing aids. However Columbia did not say this was necessary because claimant's hearing had gotten worse or because of the age of the hearing aids. Instead, Columbia based the request on the availability of improved technology. This reinforces the conclusion the administrative review was not inadequate because of the absence of the 2006 examination results. ALJ Pardington correctly found substantial evidence supported RT's order because Dr. Flaming's opinion constitutes substantial evidence.

Claimant also asserts ALJ Pardington erred in failing to rule on his objection to the admission of exhibits identified as "1A-17A." ALJ Fisher excluded these exhibits from the first hearing held in this matter because they had not been submitted to RT for its review. Employer states in its response to claimant's exceptions that these exhibits were submitted to RT as part of the review it conducted after remand from ALJ Fisher's hearing, so that they were properly part of the record at the subsequent hearing ALJ Pardington held. Claimant does not address employer's argument on this issue in his reply argument. It appears RT did include these exhibits in the review at issue here, so that they were properly admitted at the hearing ALJ Pardington held after RT's second review.

IT IS HEREBY ORDERED RT's July 14, 2010 Administrative Order and ALJ Pardington's January 5, 2011 Proposed and Final Order are affirmed.