
In the ORS 656.245 Medical Services Dispute of
Guy A. Landis, Claimant

Contested Case No: 12-057H

FINAL ORDER AFTER REMAND

May 14, 2013

GUY A. LANDIS, Petitioner
LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent
Before John Shilts, Workers' Compensation Division Administrator

Liberty Northwest Insurance Corporation (insurer) denied Guy A. Landis' (claimant's) request for care on the grounds the care was palliative and claimant was not employed. Following a hearing, Administrative Law Judge (ALJ) Gregory J. Naugle found the care was curative and compensable. After a remand, and an additional administrative order, another Proposed and Final Order issued, affirming insurer's decision. I affirm the Administrative Order on Remand and the related Proposed and Final Order, upholding insurer's decision.

FACTUAL SUMMARY

I adopt the facts as found in the administrative orders and restate them here in part for clarity. Claimant has an accepted claim for disabling arachnoiditis, thoracic and lumbar strains combined with underlying unrelated L5-S1 disc bulge, facet arthrosis and stenosis. In 2008, claimant's condition was found to be medically stationary and claimant settled his claim through a Claims Disposition Agreement.

Claimant used multiple pain medications and a TENS¹ unit to address chronic pain. In 2010, claimant reduced his use of prescription pain medications. He particularly tried to eliminate his use of Methadone because of the side effects. In May 2010, claimant's physician, Dr. McKellar, submitted a request to insurer for physical therapy and continued use of the TENS unit. Insurer responded in June 2010 by letter, stating insurer would not pay for the requested care because the doctor had not submitted a formal palliative care request. Insurer also said it did not have current information on whether claimant was working and sent claimant a form he could use to report whether he was employed. Claimant did not respond to insurer with any proof he was working. Dr. McKellar responded with a letter in July 2010 stating claimant's medical condition had been stationary since 2008 and that he had been using physical therapy and the TENS unit to address chronic pain. The doctor stated claimant's arachnoiditis was stable but was causing chronic pain. Dr. McKellar stated claimant's condition would deteriorate without therapy and that the physical therapy improved claimant's pain tolerance and allowed him to reduce his narcotics usage. The doctor stated that, without the proposed treatment, claimant would become bedridden and his health would deteriorate. The doctor's chart notes indicated claimant was not working.

Claimant requested administrative review of insurer's refusal to pay for treatment. The Workers' Compensation Divisions Resolution Team (RT) issued an Administrative Order on

¹ Transcutaneous Electrical Nerve Stimulation.

November 18, 2010. The reviewer made factual findings that claimant's physician had stated claimant's pain was chronic and his condition was stable. Finding that claimant was not experiencing a temporary and acute waxing and waning of symptoms, the reviewer concluded the requested treatment was palliative. Since the reviewer also concluded claimant was not working, the reviewer held claimant was not entitled to palliative care. Claimant requested a hearing.

At the hearing, claimant's attorney offered to have claimant testify about his circumstances. ALJ Naugle ruled the evidence was not admissible because the substantial evidence review standard applied and new medical evidence and issues may not be introduced at the hearing.² Claimant testified out of the ALJ's presence. He said that while using the TENS unit he had taken training for and started a taxidermy business. Claimant testified he had completed a number of projects for clients for which he had been paid. After insurer disapproved his request for continued use of the TENS unit his pain and discomfort prevented him from continuing to work at the same level. Claimant also said he had been using a TENS unit since 2004, that it helped his pain, and that without the TENS, pain made it difficult for him to work or do daily activities.

Claimant said he had attended taxidermy school from April through June of 2009. He obtained a business license for taxidermy in 2009 and has renewed that license. From June 2009 through June 2010 claimant completed 12 taxidermy projects. He submitted invoices showing he had been paid for taxidermy projects in August, October, November, and December, 2010. Claimant also submitted a written statement in which he said he only made \$100.00 to \$150.00 per job and that he had not filed a tax return reporting this income because it was so minimal. He also testified that not having the TENS unit had forced him to reduce this work.

ALJ Naugle issued a Proposed and Final Order on August 10, 2011. The ALJ concluded that, because Dr. McKellar stated claimant's condition would worsen without the requested treatment, the treatment was intended to stabilize acute waxing and waning of pain symptoms. ALJ Naugle therefore found the treatment was curative and that the administrative order erred in finding the insurer was not liable for the treatment.

Insurer filed exceptions to the Proposed and Final Order. On January 20, 2012, the director issued an Order Remanding that sent the matter back to RT. That order found claimant had attempted to offer evidence at the hearing that he was employed, which could affect a determination as to whether claimant was entitled to palliative care. ALJ Naugle had admitted the evidence for the record, but refused to consider it under the controlling standard of review. The remand order required RT to consider claimant's evidence concerning his employment status and, in light of that evidence, to make a decision about whether claimant was entitled to the requested care as palliative care.

RT issued an Administrative Order on Remand on May 30, 2012. That order states the issues to be determined are whether claimant is entitled to the TENS unit and physical therapy.

² ORS 656.327(2); OAR 436-001-0225(2).

RT found the requested treatment was not curative because claimant was medically stationary, the pain was chronic, not acute or intermittent, and because claimant had been using the TENS chronically for several years.

Because it had concluded the requested care was not curative, RT further reasoned the care was palliative. The treatment was used to treat ongoing, chronic pain, rather than an acute waxing and waning of symptoms, which supported the conclusion the treatment was palliative.

RT pointed out that palliative care is compensable only if necessary to enable an injured worker to continue working or remain in vocational training. RT found claimant had trained in taxidermy and obtained a business license for that profession. However, RT also found the first invoice claimant submitted to show he was working in taxidermy was dated in August 2010 while claimant's doctor had requested the TENS unit and physical therapy in May 2010. RT therefore found claimant had not been working at the time his doctor requested this treatment and that the care was not compensable as palliative care. The administrative order also found the requested treatment was not compensable as a prescription medication or a prosthetic device.

Claimant requested a hearing on RT's order. ALJ Kirk Spangler heard the matter and issued a Proposed and Final Order on February 4, 2013. The ALJ found the requested care was palliative, that claimant had not been currently employed when the care was requested, and that the care was therefore not compensable. The order also found the TENS unit was not compensable as a prosthetic device. Claimant filed exceptions to the Proposed and Final Order.

CONCLUSIONS OF LAW

An administrative order in a medical services dispute may only be modified if it is not supported by substantial evidence or reflects an error of law. OAR 436-001-0225(2). The reviewing entity may not make original fact findings. *Liberty Northwest Insurance Corp. v. Kraft*, 205 Or App 59, 62-63 (2006). The reviewing body may not reweigh or assess the credibility of the evidence. *Golliher v. DMV*, 173 Or App 586, 590 (2001).

Some types of care may be compensable for a post-medically stationary worker with an accepted compensable condition. ORS 656.245(1) provides:

“(c) [M]edical services after the worker's condition is medically stationary are not compensable except for the following:

* * * * *

(J) With the approval of the insurer . . . palliative care that the worker's attending physician . . . prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

* * * * *

(L) Curative care provided to a worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition.”

Palliative care includes:

“[M]edical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition. “

ORS 656.005(20); OAR 436-010-0290(1).

A. Is the Requested Care Curative or Palliative?

Claimant contends RT exceeded the scope of the remand in considering the question of whether the requested care was curative or palliative. RT had originally found the care palliative. The first Proposed and Final Order found the care curative. The question of whether the care was palliative or curative was subject to review by the director on review of the first administrative order and the Proposed and Final Order. The remand order was issued because the first administrative order found the care palliative and claimant offered additional evidence at the hearing that he had been working. RT did not change its findings or attempt to “overrule” the conclusions of the first Proposed and Final Order. However, the conclusions in that order were subject to director review. RT therefore only carried out the remand order in considering whether claimant’s supplemental evidence established he was working, which was relevant to RT’s original finding the care was palliative. That conclusion was still subject to ultimate review by the director.

It appears from claimant’s exceptions to the February 4, 2013 Proposed and Final Order that claimant contends the care is curative, not palliative. Palliative care is intended to moderate the permanent symptoms of a stable condition. ORS 656.005(20); OAR 436-010-00290(1). Curative care is intended to address a temporary and acute increase and decrease of symptoms. ORS 656.245(1)(c)(L). Palliative care treats symptoms that are a fixed and stable element of a medically stable accepted condition. Curative care treats symptoms that are temporary, and intermittent, and that increase and decrease over time. All of the evidence supports the conclusion claimant’s pain is constant, long-term, and chronic, not acute or intermittent. Claimant has been receiving treatment for this pain for years and claimant’s physician states this care is necessary to prevent claimant’s overall condition from deteriorating. The requested care is palliative.

B. Is the Requested Palliative Care Compensable?

Palliative care is compensable if needed to assist an injured worker in continuing current employment or participating in a training program. ORS 656.245(1)(c)(J). Claimant presented evidence he had trained to perform taxidermy, obtained a business license, and had received payment for providing that service. RT found this did not constitute current employment because the first invoices showing payment were dated several months after claimant’s physician submitted the treatment request. Claimant asserts he was employed because he was starting or operating his taxidermy business when his physician requested the disputed treatment.

Although the bare fact claimant was not yet being paid for the taxidermy work at the time his doctor requested the disputed treatment may not be enough, in itself, to establish claimant was not currently employed, claimant did fail to provide sufficient evidence to prove he was employed. The controlling statute, ORS 656.245(1)(c)(J), makes palliative care compensable if that care “. . . will enable the worker to continue current employment” Claimant cites *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989), for the proposition that a worker who is making reasonable efforts to obtain employment should be considered to be in the work force. *Dawkins* relies on *Cutright v. Weyerhaeuser*, 299 Or 290 (1985). Those decisions concerned eligibility for temporary disability benefits, and relied in part on ORS 656.206(3). That statute specifically takes into account whether an injured worker is making “reasonable efforts to obtain” employment. The statute at issue here does not contain such language and the statute at issue in *Dawkins* and *Cutright* does not contain the phrase “current employment.” The statutes contain different wording and it must be presumed the legislature intentionally chose to use different language in each case, with a different intended meaning. *Dawkins* and *Cutright* are therefore not controlling in determining whether claimant was currently employed when he requested medical treatment.

One fact challenging claimant’s position is that he did not present potentially available evidence that would have established he was truly operating a taxidermy business. Under Oregon law, a person must be licensed to engage in the business of taxidermy. ORS 497.238(2). A taxidermy license expires every year on December 31. OAR 635-043-0003(7). Claimant did assert he was licensed. However, a licensed taxidermist must also make and keep detailed records identifying the animal, stating the date it was received, the date and location the animal was taken, the name and address of the person who killed the animal, and the price quoted for the work. OAR 635-043-0003(9). Although claimant was licensed, he did not produce any such records.

There was other evidence claimant could have, but failed to present that would have supported his position. He did provide records indicating he began being paid for taxidermy work in August 2010. And it is possible in the period preceding that time he was actively working at establishing and growing his business. However, he did not testify or present any evidence of any efforts he had been making to obtain work or publicize his business. Claimant also did not testify how many hours per day or per week he worked on his taxidermy projects. In addition, when insurer sent claimant forms to establish his work status, he did not return that paperwork or in any other way assert to insurer that he was working. Claimant’s doctor’s chart notes from August 19, 2010 also reported claimant was not working or in school. Claimant never provided evidence about the prospects for future earnings for his taxidermy business, or how much he thought he might ultimately be able to earn from it. He never offered evidence that he expected to be able to support himself on its earnings, or to earn a significant income from it.

Although claimant did show he had been paid for some of his taxidermy work after his doctor requested the treatment, those earnings were minimal and did little more than cover claimant’s expenses. Claimant said that when he returned from training, he mostly worked on mounting his own and his friends’ animals. Even when paid, claimant received only \$100-\$150 for three to four weeks’ work on each animal, and he did not consider the income significant enough to report on tax returns.

Claimant's taxidermy work does not constitute employment in light of the purpose of the workers' compensation system. In *Cutright v. Weyerhaeuser Co.*, 299 Or 290 (1985), distinguished on other grounds in *Dawkins v. Pacific Motor Trucking*, 308 Or 254 (1989), the court stated: [t]he entire scheme of the Workers' Compensation law is to compensate *workers*, who are active in the labor market, for wages lost because of inability (or reduced capacity) to work as a result of a compensable injury and to pay for medical expense incurred on treatment of injury." *Cutright* at p. 296. The purpose of the workers' compensation system is also spelled out in the enabling statutes. ORS 656.012(2)(c) states one purpose of the workers' compensation system is to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable.

After operating his taxidermy business for more than a year with no earnings, claimant began making a profit of \$100-\$150 per month. He did not explain what efforts he was making to develop this work into a financially viable business or how he ever expected to earn enough to support himself from taxidermy work. "Current employment," as used in the statute, must mean work that pays enough to approximately substitute for an injured worker's pre-injury earnings, not simply any trivial amount of income. Activities that an injured worker engages in for which that person is paid a minimal and financially insignificant amount are not a substitute for employment that makes a significant contribution towards an injured worker becoming financially self-sufficient. In this case, claimant's taxidermy has not generated significant income, and claimant failed to present evidence that it will, or that he intends that it will, produce enough income to help claimant to be financially self-sufficient. This activity therefore has the appearance more of a hobby than of employment. At the time the care was requested, claimant was not currently employed. The requested treatment is therefore not compensable as palliative care.

C. Is the TENS Unit a Prosthetic Device?

After a worker is medically stationary, compensable medical services include prosthetic devices. ORS 656.245(1)(c)(D). OAR 436-009-00080(2) defines a prosthetic as:

"[a]n artificial substitute for a missing body part or any device aiding performance of a natural function. For example: hearing aids, eye glasses, crutches, wheelchairs, scooters, artificial limbs, etc."

Claimant argued below that the TENS was compensable as a prosthetic device. RT and the ALJ rejected this assertion. Claimant further contends this is a question of fact on which he should prevail because the only expert evidence on this point is a concurrence by his physician in a letter submitted by claimant's counsel that supports claimant's position.

Determining the meaning of a statute and of statutory terms is a question of law, not fact. *Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County*, 351 Or 219, 250 (2011); *Staffing Services v. Kalaveras*, 241 Or App 130, 136 (2011). As an example, the meaning of the statutory term "arthritis" is determined as a question of law, even though the same term may have a medical meaning as well. Medical testimony may be offered on the issue of whether

a statutory term has been met, but the meaning of the term is established as a question of law. *Kalaveras*, 241 Or App at p. 136. The Supreme Court of Oregon has stated in a workers' compensation case, "[t]he meaning of a statutory term is a matter of law, not a question of fact for expert testimony. . . . Whether one expert is more persuasive than another in a particular case can be important in resolving a factual question; it cannot, however, determine the legal meaning of a statutory term." *Hopkins v. SAIF Corp.*, 349 Or 348, 355 (2010) (meaning of "arthritis" in statute is a question of law). The meaning of the term "prosthetic," as used in ORS 656.245, is therefore determined as a question of law.

Based on the examples given in the defining rule, OAR 436-009-0080(2), a TENS unit is not a prosthetic. A prosthetic is a mechanical device that physically replaces or supports a body part, or physically assists a body part in performing its mechanical functions. The TENS electrically stimulates muscles and nerves to attempt to reduce pain. A TENS unit is a medical treatment intended to reduce pain, not to mechanically assist a body function. The TENS is therefore not compensable as a prosthetic device.

D. Is the TENS Unit a prescription Medication?

Prescription medications, and services necessary to administer or monitor prescription medication, or to monitor the administration of prescription medication, are also compensable after an injured worker is medically stationary. ORS 656.245(1)(c)(B), (C). Claimant argues the TENS unit is compensable under this portion of the statute.

A TENS unit has previously been held not to be a prescription medication. *Miguel A. Godoy*, 17 CCHR 42 (2012), affirmed, *Miguel A. Godoy*, 17 CCHR 146 (2012). A medication is a substance that is applied, injected, or ingested, to cause a chemical or biological reaction to achieve some beneficial effect. A TENS uses electricity to mechanically stimulate nerves. The rules categorize TENS units as durable medical equipment. OAR 436-009-0080(1). The TENS is therefore not compensable as a medication.

IT IS HEREBY ORDERED the May 30, 2012 Administrative Order on Remand, and the February 4, 2013 Proposed and Final Order are affirmed.