

In the ORS 656.245 Medical Services Dispute of

Durham, Carla I., Claimant

Contested Case No: HH02-024

PROPOSED & FINAL ORDER

June 5, 2002

CARLA I. DURHAM, Petitioner

INTEL CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an administrative order issued on February 6, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On May 16, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Carla I. Durham (claimant) was represented by attorney John Hoadley. Responding self-insured employer Intel Corporation and its claims administrator, Matrix Absence Management Corporation (insurer) were represented by attorney Brad Garber. Claimant testified on her own behalf and the record closed on the date of hearing.

The record of this proceeding, consisting of all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUE

The issue is whether a Jacuzzi and a treadmill prescribed by Daryl K. MacCarter, MD after the medically stationary date are compensable pursuant to ORS 656.245(1)(c)(J) and OAR 436-010-0230(9).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 23 and petitioner's Supplementary Exhibit 24 were received into the record without objection.

FINDINGS OF FACT

I adopt and incorporate the findings of fact contained in the administrative order with the following supplementation:

On August 8, 1995, claimant filed an occupational disease claim while working as a payroll processor. (Ex. 1). Insurer initially accepted a disabling claim for a left shoulder strain, subsequently amended the notice of acceptance to include a neck strain and later was ordered to accept fibromyalgia. (Exs. 2, 5, 7, 8, and 9). The claim was closed in February 2000. (Ex. 14).

In March 2000, the parties executed a Claim Disposition Agreement of the accepted

conditions and a Disputed Claim Settlement of claimant's mental condition, including depression. (Exs. 10 and 11).

On April 2, 2001, claimant sought treatment from Dr. MacCarter at the Idaho Arthritis & Osteoporosis Center. (Ex. 12). Dr. MacCarter noted that claimant suffered Raynaud's syndrome, probably secondary to autonomic nervous system dysfunction and prescribed a treadmill to achieve physical fitness and hydrotherapy in a Jacuzzi, both for the diagnosis of fibromyalgia. (Exs. 12 and 13). On May 16, 2001, claimant followed up with Dr. MacCarter. (Ex. 12-2).

On May 9, 2001, insurer acknowledged receipt of Dr. MacCarter's bills and chart notes, informed him that the claim was closed and requested information regarding claimant's medical status and treatment plan. (Ex. 14). On May 14, 2001, Dr. MacCarter replied that claimant suffered from fibromyalgia and that "a small percentage of such patients develop Raynaud's-like symptoms associated with autonomic nervous dysfunction." (Ex. 15). Dr. MacCarter recommended that claimant continue her current treatment plan consisting of prescription medications. (*Id.*)

On November 27, 2001, claimant requested administrative review of a palliative care dispute pertaining to a Jacuzzi and a treadmill. (Ex. 16-3). Insurer replied that Dr. MacCarter had submitted no request for these articles and disapproved the expenditures. (Exs. 21).

Claimant resides in Emmett, Idaho. There are one or two publicly accessible treadmills in Emmett. The nearest publicly accessible Jacuzzi is located in Boise. For approximately one and a half years, claimant has commuted 40 miles from Emmett to work part-time in Boise. (Testimony of claimant).

By letter dated April 15, 2002, Dr. McCarter noted that claimant suffered fibromyalgia and Raynaud's disease and that he had prescribed a hot tub and a treadmill. Dr. McCarter opined that all patients who suffer these conditions should have access to low impact exercise and hydrotherapy. Dr. McCarter observed that claimant is unable to walk outside during the winter due to the low temperatures and has no access to a hot tub locally. (Ex. 24).

CONCLUSIONS OF LAW AND REASONING

Jurisdiction lies with the director. ORS 656.245(6). The statute does not specify a standard of review and therefore, I review *de novo*. OAR 436-001-0225(1). *See Archie M. Ulrich*, 2 WCSR 152 (1997). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence).

In the administrative order, MRU determined that the disputed articles were not compensable because the request failed to meet the requirements prescribed by OAR 436-010-0230(9). As petitioner, claimant contends that Dr. MacCarter's documentation establishes

reimbursability of the disputed articles as palliative care. In contrast, insurer contends that the disputed articles are not reimbursable because Dr. MacCarter failed to submit a treatment plan as required by OAR 436-010-230(3)(a) and because the disputed treatment is excessive, inappropriate or ineffectual under ORS 656.327.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b). However, pursuant to ORS 656.245(1)(c), after the work-related condition becomes medically stationary, the insurer is no longer liable for payment of medical services with some exceptions. ORS 656.245(1)(c)(J) provides in part:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary¹ are not compensable except for the following:

(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005(12)(b)(A)² prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

ORS 656.005(2) provides:

'Palliative care' means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical

¹ "'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment or the passage of time." ORS 656.0005(17).

² ORS 656.005(12)(b)(A) provides:

"(b) Except as otherwise provided for workers subject to a managed care contract, 'attending physician' means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is:

"(A) A medical doctor or doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or an oral and maxillofacial surgeon licensed by the Oregon Board of Dentistry or a similarly licensed doctor in any country or in any state, territory or possession of the United States;"

services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

Under the heading "Medical Services and Treatment Guidelines", OAR 436-010-0230(9) (eff. 4-28-99) provides:

Articles including but not limited to beds, hot tubs, chairs, Jacuzzis, and gravity devices are not compensable unless a need is clearly justified by a report which establishes that the 'nature of the

injury or the process of recovery requires' the item be furnished. The report must specifically set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. Trips to spas, to resorts or retreats, whether prescribed or in association with a holistic medicine regimen, are not reimbursable unless special circumstances are shown to exist.

The claim was closed in February 2000. Inasmuch as the disputed Jacuzzi and treadmill are directed toward reducing or moderating temporarily the intensity of an otherwise stable medical condition, these articles constitute palliative care as defined by ORS 656.005(20). The medical record fails to establish that the disputed articles are necessary to enable the worker to continue current employment or vocational training as required by ORS 656.245(1)(c)(J). Dr. McCarter prescribed the disputed articles but made no mention of claimant's employment status or any relationship between the disputed articles and her continued employment. Therefore, the Jacuzzi and treadmill are not reimbursable palliative care.

Pursuant to OAR 436-010-0230(9), articles such as Jacuzzis are not compensable unless a need is clearly justified by a report which establishes that the nature of the injury or the process of recovery requires the item be furnished. In order to establish compensability, a medical report must specifically set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. *See Benny Stedham*, 1 WCSR 147 (1996) (Hot tub was not compensable even though attending physician opined that claimant would benefit).

Here, the medical record fails to satisfy the administrative requirements. Dr. McCarter failed to justify claimant's extraordinary need for the Jacuzzi and treadmill. Furthermore, Dr. McCarter observed that claimant is unable to walk for exercise outdoors during winter while in fact public treadmills are available in Emmett where claimant resides. Similarly, Dr. McCarter observed that no hot tub is available locally, when in fact a public Jacuzzi is available in Boise where claimant commutes several times per week. For these reasons, insurer is not liable for the disputed Jacuzzi and treadmill.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated February 6, 2002 is affirmed.

DATED this _____ day of June 2002.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel