

In the Matter of the ORS 656.245 Medical Services Dispute of Claimant
of

Graham, Willie, Claimant

Contested Case No: HH02-037

PROPOSED & FINAL ORDER

May 2, 2002

WILLIE GRAHAM , Petitioner
FRED MEYER STORES, INC. AND PINNACLE RISK MANAGEMENT SERVICES,
INC., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Petitioner appeals a February 20, 2002 Administrative Order issued by the Medical Review Unit (MRU) of the Department of Consumer and Business Services, Workers' Compensation Division (the department or WCD). On May 8, 2002, Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter. Petitioner Willie Graham (claimant) was represented by Attorney Margaret Weddell, who relied on the record before MRU and did not appear at the hearing. Attorney Bruce Byerly represented respondent self-insured employer Fred Meyer Stores, Inc. and its claims processing agent Pinnacle Risk Management Services, Inc. (employer). WCD waived appearance. No witnesses were called to testify. The record of this proceeding, consisting of all evidence received, and all hearing papers filed, has been considered.¹ The findings of fact set out below are based on the entire record.

ISSUE

Whether the six-month gym membership prescribed by Jock T. Pribnow, MD is a reimbursable medical service for claimant's condition under ORS 656.245(1)(b).

¹ The record does not contain an audio tape recording inasmuch as respondent's counsel made only unrecorded closing argument.

EVIDENTIARY RULING

The record consists of WCD Exhibits 1 through 177, which were received into the evidence without objection.

FINDINGS OF FACT

I adopt the findings of fact set forth in MRU's February 20, 2002 Administrative Order with the following supplementation:

Claimant injured his back on August 12, 1997. (Exs. 1, 2). He was treated conservatively by his attending physician, Dr. Pribnow, and several other medical providers through the Kaiser On-the-job managed care organization. (Exs. 30, 38). Claimant ultimately underwent two surgical procedures performed by Antonia Zelaya, MD (Neurosurgery). (Exs. 65, 68, 71, 96, 97, 98)

Following an aggravation of his condition, employer accepted claimant's claim for an L5-6 and S1 disc herniation and consequential post laminectomy syndrome, including L5 and right radiculopathy. (Ex. 133).

After the second surgical procedure, claimant experienced foot drop, numbness, chronic pain, and radiculopathy. (Ex. 107). Dr. Pribnow prescribed pool therapy through a licensed physical therapist. Claimant reported that the pool therapy reduced his symptoms. (Ex. 120).

On February 20, 2001, Dr. Pribnow found claimant to be medically stationary and the claim closed on February 21, 2001. (Ex. 131).

On March 20, 2001, Dr. Pribnow submitted a palliative care request to employer requesting a six-month membership for independent pool and Jacuzzi use to diminish claimant's pain and radiculopathy. (Ex. 135).

On April 23, 2001, employer denied Dr. Pribnow's request. On May 29, 2001, claimant requested administrative review by MRU contending that the membership was a restorative service. (Ex. 149).

CONCLUSIONS OF LAW

The gym membership prescribed by Jock Pribnow, MD is not a reimbursable restorative medical service for claimant's condition.

OPINION

This case involves a dispute as to whether a gym membership is a reimbursable medical service for claimant's condition. Jurisdiction lies with the director. ORS 656.245(6) and ORS 656.704(3)(a). The resolution of this issue requires the application of ORS 656.245(1). In hearings before the director, "the scope of review is *de novo* unless otherwise prescribed by statute or administrative rule." OAR 436-001-0225(1). Inasmuch as ORS 656.245 does not specify a standard of review, I review *de novo*. *Archie M. Ulbich*, 2 WCSR 152, 153 (1997). The burden of proving any fact or position falls upon the proponent. ORS 183.450(2).

ORS 656.245(1) requires insurers and self-insured employers to provide medical services for conditions caused in material part by the injury for such a period as the nature of injury or the process of recovery requires. This obligation continues for the life of the worker. Specifically, ORS 656.245(1)(b) provides in pertinent part:

Compensable medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. * * * The duty to provide such medical services continues for the life of the worker.

The record establishes that, following two surgeries performed by Dr. Zelaya, claimant experienced foot drop and bilateral lumbar radiculopathy. Claimant's attending physician, Dr. Pribnow, prescribed pool therapy, and claimant received symptomatic relief from the therapy. Thereafter, Dr. Pribnow recommended that claimant continue the therapy and prescribed a six month gym membership to maintain muscle tone, flexibility and prevent recurrence of low back problems.

OAR 436-010-0210(3) states in relevant part:

Attending physicians may prescribe treatment to be carried out by persons licensed to provide a medical service or by persons not licensed to provide a medical service. Those persons not licensed to treat independently or not licensed to provide a medical service, may only provide treatment prescribed by the attending physician which is rendered under the physician's direct control and supervision.

Employer argued at administrative review that the gym membership was not a compensable medical service because claimant exercised independently at the gym. Employer further argued that the exercises were not provided to claimant by a person licensed to provide a medical service and was not carried out under the direct control and supervision of Dr. Pribnow. Claimant argued that the gym membership constituted a "restorative service" which does not require that services be provided by a licensed provider or under the direct control and supervision of the attending physician.

Finding that his condition was medically stationary and that he was employed, MRU determined that claimant was entitled to medical services in the form of palliative care which would enable him to continue his employment. Although MRU agreed with claimant that the gym membership was a physically restorative service, MRU also concluded that claimant did not qualify for physically restorative services because his condition was not one of the conditions enumerated in OAR 436-010-0005(34). I agree that the gym membership is not a reimbursable restorative service for claimant. OAR 436-010-0005(34) defines "physical restorative services" as

[T]hose services prescribed by the attending physician to address permanent loss of physical function **due to hemiplegia, a spinal cord injury, or to address residuals of a severe head injury**. Services are designed to restore and maintain the injured worker to the highest functional ability consistent with the worker's condition. Physical restorative services are not services to replace medical services usually prescribed during the course of recovery. (Emphasis added).

In this case, claimant's accepted condition is an L5-6 and S1 disc herniation and consequential post laminectomy syndrome, including L5 and right radiculopathy. Consequently, I find on this record that the gym membership is not a reimbursable physically restorative service because his condition does not qualify him for such services. Accordingly, I conclude that MRU's order is correct and should be affirmed.

ATTORNEY FEES

Claimant has not prevailed in a contested case before the director involving compensation benefits pursuant to ORS 656.245. Claimant's attorney is, therefore, not entitled to attorney's fee for services at hearing and in preparation therefore. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The February 20, 2002 Administrative Order, PC 02-129, is affirmed.

DATED this _____ day of May 2002.

Ella D. Johnson
Administrative Law Judge
Hearing Officer Panel