

In the Medical Services of
Edward E. Buford, Claimant
Contested Case No: 06-017H
PROPOSED & FINAL ORDER

June 30, 2006

EDWARD E. BUFORD, Petitioner
SAIF CORPORATION, Respondent

Before Jenny Ogawa, Administrative Law Judge, Workers' Compensation Board

Claimant appealed the Director's Review and Order issued on January 23, 2005 by the Medical Review Unit (MRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director). Pursuant to notice, a hearing was scheduled for April 17, 2006, in Coos Bay, Oregon, before Administrative Law Judge Ogawa. Claimant is represented by attorney Scott McNutt, Sr. The employer, City of Coos Bay, and its insurer, SAIF Corporation, are represented by Trial Counsel Janelle Irving. The WCD waived appearance. WCD exhibits 1 through 157 were received into evidence. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. The record closed on June 6, 2006, following receipt of claimant's reply argument.

ISSUE

Whether Dr. Gallo's request for a lumbar discogram is medically appropriate.

FINDINGS OF FACT

Claimant sustained a compensable low back injury on July 4, 1997, as a result of lifting a garbage can full of ice. (Ex. 13). A July 25, 1997 lumbar MRI showed a small 2 mm right posterolateral disc protrusion at L5-S1 on the right, without nerve root impingement. (Ex. 16). Dr. Bert treated claimant and felt that the small L5-S1 disc herniation was causing claimant's symptoms. (Exs. 15 pp. 1, 4). SAIF accepted the claim for lumbosacral strain and a 2 mm right posterolateral disc protrusion at L5-S1. (Exs. 18, 24, 26). On October 15, 1997, Dr. Bert declared claimant medically stationary and released for regular work. Dr. Bert felt that claimant had no limitations from his lumbosacral strain, rather his limitations were due to the L5-S1 disc herniation. (Exs. 21, 22). SAIF closed the claim on January 30, 1998, with an award of eight percent unscheduled permanent partial disability (PPD). (Ex. 63). Claimant's aggravation rights expired on January 30, 2003.

After claim closure, claimant treated twice with Dr. Bert. (Ex. 15-2). He returned to Dr. Bert on January 13, 1999 for increasing back pain radiating into the right leg. Dr. Bert requested an lumbar MRI. (Ex. 15-3). The January 19, 1999 MRI was essentially normal, with no significant disc herniation, nerve root effacement, or spinal stenosis. (Ex. 30). Dr. Bert did not feel that claimant was a surgical candidate. (Ex. 15-4). Dr. Bert declared claimant medically stationary on March 8, 1999. (Ex 15-5). Claimant subsequently exacerbated his back when he slipped and fell at work. A repeat lumbar MRI, taken on December 14, 1999, showed a small herniation in the right paracentral region at L5-S1. (Exs. 15 pp. 6-7, 36).

On December 13, 1999, SAIF enrolled claimant into the OHS managed care organization (MCO). (Ex. 35).

Dr. Coulter, neurosurgeon, performed an insurer-arranged medical examination (IME) on March 23, 2000. He reviewed the July 1997, January 1999, and December 1999 MRIs. Dr. Coulter opined that the 2 mm disc bulge at L5-S1 was insignificant and had not increased in size. Dr. Coulter diagnosed lumbar musculoligamentous sprain superimposed on preexisting, previously symptomatic lumbar degenerative spondylosis and degenerated intervertebral discs at L3-L4, L4-L5 and slight bulging disc at L5-S1 level without significant nerve root compression. Dr. Coulter noted that claimant sustained a recurrent lumbar strain in June 1999 in a slip and fall at work. He felt that claimant's current symptoms were moderately exaggerated in relation to a paucity of objective findings. Dr. Coulter opined that claimant's preexisting degenerative changes were the major contributing cause of claimant's current symptoms. Dr. Coulter opined that there was not sufficient radiculopathy to warrant surgery. If lumbar laminectomy was indicated in the future, the cause would be the lumbar degenerative spondylosis. (Exs. 43, 44). Dr. Bert did not concur. (Exs. 45, 46).

Dr. Bert noted that claimant had progressive back pain and leg numbness. The March 13, 2001 lumbar MRI showed that the L5-S1 disc herniation was unchanged. It also indicated a questionable L4-5 disc bulge. (Ex. 36-2). In October 2001, he recommended surgery consisting of a limited laminectomy at L5-S1 level and fusion at L4-S1. (Exs. 15 pp. 11-18). SAIF denied the request. (Ex. 47). Claimant then filed a claim for aggravation on November 2, 2001. (Ex. 49)

Dr. Young, radiologist, performed a records review on February 7, 2002. He opined that claimant's multilevel degenerative disc disease had remained stable and showed no progression, with slight improvement of the L5-S1 level, between the first July 1997 MRI and the last March 2001 MRI. Dr. Young further opined that all of the degenerative changes preexisted the July 1997 injury. The July 1997 MRI did not show acute or subacute traumatic changes. He disagreed with Dr. Bert that the L4 disc was herniated. Rather, Dr. Young stated the L4-5 level only showed degenerative disc dessication. (Ex. 55).

On February 22, 2002, Dr. Parsons, neurosurgeon, performed an IME. He reviewed the four lumbar MRIs as all showing similar findings, without significant changes between them. Dr. Parsons opined that the work-related lumbar strain had resolved. Claimant had degenerative disc disease at L3-4, L4-5, and L5-S1. Dr. Parsons felt claimant had some slight bulging of the L4-5 disc, but no disc herniation. He did not relate the L4-5 disc changes to the work injury, but due to the preexisting degenerative disease. (Ex. 56).

Dr. Bert believed the work incident was the major contributing cause of claimant's need for treatment of the disc herniations at L4-5 and L5-S1. He explained that claimant's history clearly showed worsening after the 1997 incident. (Exs. 58, 59). In response to Dr. Young's report, Dr. Bert felt although claimant's disc herniations were not large, they were quite symptomatic. Dr. Bert recommended a discectomy and fusion because conservative treatments had been ineffective. (Ex. 62).

Pursuant to Order on Review dated November 5, 2002, (ex. 63), the Board upheld SAIF's December 14, 2001 denial of the L4-5 disc herniation or bulge, (ex. 52), and January 28, 2002 aggravation denial, (ex. 53). (Ex. 78). The Board adopted and affirmed the ALJ's order, which found that claimant had a "slight disc bulging" at L4-5, but was not compensable as an aggravation of the accepted condition nor was caused by the July 1997 work injury. The ALJ also noted that the medical evidence was not persuasive that claimant's L4-5 disc bulge required medical treatment or resulted in disability. (Ex. 63).

In response to inquiries from claimant's attorney, Dr. Bert reported on August 26, 2002, that clinically, claimant was worsening. Dr. Bert felt that worsening of the L5-S1 disc was the pain generator. He had ordered an MRI. (Ex. 70). Based on Dr. Bert's report, claimant submitted an aggravation claim of the L5-S1 disc. (Ex. 71). A September 30, 2002 lumbar MRI showed facet joint arthrosis at L5-S1 level; mild desiccation at L3-S1 discs, and a small area of annular fissure at L5-S1. (Ex. 75).

On September 9, 2002, claimant sought treatment from Mr. Marroquin, physician's assistant. Claimant stated that 80 percent of his pain was in the back and 20 percent in his legs. He was diagnosed with L4-5, L5-S1 lumbar degeneration with disc herniation and ongoing lower extremity radicular symptoms. (Ex. 74).

On October 29, 2002, claimant requested approval for a discogram at the L5-S1 level. (Ex. 77).

Dr. Bert obtained, on January 6, 2003, a lumbar discogram of L3-S1 that showed internal derangement at L3-4 and L5-S1, with positive pain generation at both levels. (Exs. 80, 81). Post-discogram CT showed two level internal derangement without evidence of significant herniation. (Ex. 81).

Claimant submitted claim for aggravation of L5-S1 disc, on February 3, 2003. (Ex. 83). ALJ Myzak found that claimant failed to perfect a claim for aggravation before his aggravation right expired. Thus, jurisdiction rested under the Board's Own Motion jurisdiction. (Ex. 111). Under its Own Motion jurisdiction, the Board denied claimant's request to reopen his claim, because there was no evidence that he was in the work force. (Ex. 122).

Dr. Sacamano, orthopedic surgeon, performed an IME on March 26, 2003. Dr. Sacamano stated that although claimant had symptoms of tingling and pain in the right leg, there were no objective neurologic abnormalities to support a diagnosis of lumbar neuropathy. He opined claimant had no neurologic abnormalities to justify laminectomy, and the degenerative disc changes were of insufficient severity to undergo fusion. (Ex. 88). Dr. Bert did not concur. (Exs. 88, 89). Dr. Sacamano subsequently opined that the L5-S1 disc herniation was medically stationary, without any documented objective evidence of pathologic worsening. However, there was likely some waxing and waning of symptoms as contemplated by the PPD award. (Ex. 98).

On May 23, 2003, the MCO declined Dr. Bert's request for laminectomy at L5-S1, because he was a non-panel provider. (Ex. 93).

Dr. Kitchel examined claimant on August 22, 2003. Dr. Kitchel diagnosed lumbar

degenerative disc disease from L3 to S1, and lumbar radiculitis. He did not recommend surgery. (Ex. 102).

On January 13, 2004, OHSU doctors, Dr. Hettwer and Dr. Hart, examined claimant on referral from Dr. Bert. Claimant's symptoms included constant central low back pain and numbness in the right buttock and thigh. Dr. Hettwer diagnosed degenerative disc disease and discussed the possibility of a L5-S1 fusion. He did not recommend a pure decompressive procedure. (Ex. 113). Dr. Hart felt that the L5-S1 disc appeared to be the most symptomatic disc. He recommended a L5-S1 fusion. Given claimant's degenerative disc disease proximal to the L5-S1 disc, Dr. Hart felt a disc replacement procedure was another option. (Ex. 114). Claimant requested the MCO to review his proposed surgery request. (Exs. 116-118).

On October 22, 2004, the MRU determined that Dr. Bert could not continue as claimant's attending physician, because he did not satisfy the statutory requirements of a "primary care physician." Because Dr. Bert could not serve as claimant's attending physician, he could not authorize surgery. (Ex. 123). The MRU's order was affirmed on appeal. (Ex. 125).

An April 11, 2005 lumbar MRI showed mild degenerative disc changes with L5-S1 disc bulge, without significant disc protrusion. (Ex. 127).

Dr. Gallo, neurosurgeon, began treating claimant on May 9, 2005. Claimant's complaints included low back pain radiating to the right buttock, and numbness and tingling to the right foot. Dr. Gallo felt claimant had lower back and right leg radicular pain with numbness in the L5 to S1 distribution, likely due to internal disc disruption at L5-S1. She recommended a repeat discogram prior to making any surgical decisions. (Ex. 128).

On May 13, 2005, the MCO disapproved the lumbar discogram because it did not meet the MCO's discography guidelines and its fusion guidelines. Claimant had multiple levels of degenerative disc disease and would be a poor candidate for fusion. (Ex. 130). Claimant appealed. (Ex. 131). The MCO's Medical Review Committee upheld the disapproval of the lumbar discogram. (Ex. 133). Claimant appealed to the MRU. (Ex. 134).

Dr. Gallo continued to suspect that the L5-S1 disc was the pain generator. (Ex. 135).

On December 5, 2005, Dr. Purtzer performed a medical review at the request of the MRU. He opined that there was no indication for the discogram, because: there was no indication for surgery, claimant had multilevel degenerative disc disease, and a positive discogram that showed two levels of involvement separated by a probable normal level. Dr. Purtzer also noted that numerous other physicians found normal ranges of motion, normal neurological examinations, absence of nerve tension signs, and essential benign MRIs. Moreover, surgery would unlikely improve claimant's low back pain. (Ex. 148).

The MRU determined that Dr. Gallo's reasons for performing the discogram was to determine a pain generator, rather than for the diagnostic purposes to determine the cause and extent of claimant's condition or the causal relationship between the accepted condition and claimant's current condition. Based on the medical record, in particular the opinions of Dr.

Moore and Dr. Purtzer, the MRU concluded that the proposed discography was not appropriate for claimant's accepted condition. (Ex. 153).

CONCLUSIONS OF LAW AND OPINION

This is a managed care dispute arising under ORS 656.260. The MRU affirmed the MCO's decision to disapprove Dr. Gallo's request for a lumbar discogram. Claimant appealed the MRU's order. The MRU order "may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. No new medical evidence or issues shall be admitted. *** [The dispute may also be remanded to the managed care organization for further evidence taking, correction or other necessary action if the Administrative Law Judge or director determines the record has been improperly, incompletely or otherwise insufficiently developed.] Decisions by the director regarding medical disputes are subject to review under ORS 656.704." ORS 656.260(16); OAR 436-001-0225(2)¹.

Claimant contends that his low back condition is not a multilevel problem and that the discogram is to determine whether his surgery should be directed to the L5-S1 disc level. Claimant relies on the opinion of Dr. Gallo. His argument implies that more weight should be given to Dr. Gallo's opinion and, thus, the MRU's order is not supported by substantial evidence.

Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. ORS 656.183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). In *Armstrong*, the court gave the following example of a substantial evidence review:

"in a context which is likely frequently to occur in workers' compensation cases, if there a doctors on both sides of a medical issue, whichever way the Board finds the facts will probably have substantial evidentiary support. We would not need to choose sides." *Id.*

Here, the MRU weighed the medical evidence and found the opinions of Drs. Moore and Purtzer more persuasive than Dr. Gallo's opinion. The MRU determined that the purpose of the discogram was to identify a pain generator. It found that the medical evidence, except for Dr. Gallo's opinion, established that claimant had multilevel degenerative disc disease. The MRU concluded that the proposed discogram was not appropriate for claimant's accepted L5-S1 disc condition. Claimant has provided no reason to reject the opinions of Drs. Moore and Purtzer or of the other doctors who support their opinions. The MRU's order is supported by substantial evidence.

¹ OAR 436-001-0225(2) states: "In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered."

ORDER

IT IS HEREBY ORDERED that the MRU order dated January 23, 2006 is affirmed.