

In the Medical Fee Dispute of

Amber Powers, Claimant

Contested Case No: 08-327H

PROPOSED & FINAL ORDER

March 9, 2009

NORDSTROM INC., Petitioner

AMBER POWERS, Respondent

Before Emerson G. Fisher, Administrative Law Judge

The employer appeals the Director's Administrative Order issued on October 30, 2008 by the Medical Review Unit (MRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (Director or Department).

Pursuant to notice, a hearing was convened before the undersigned Administrative Law Judge (ALJ) in Portland, Oregon on February 24, 2009. Claimant, who was not present, was represented by attorney Don Hooton. Nordstrom Inc., was represented by attorney Dennis Reese. The proceedings were recorded by the ALJ.

The documentary evidence consists of Exhibits 1 through 49 submitted by MRU on January 15, 2009.

The record closed on February 24, 2009.

ISSUES

The employer raised the following issues: (1) the timeliness of claimant's September 14, 2007 request for MRU assistance; (2) the classification (palliative care vs. prescription medication) of disputed Botox treatments; and (3) the appropriateness of the disputed Botox treatments.

Claimant raised attorney fees as a cross issue.

CONCLUSIONS OF LAW AND OPINION

MRU's Order of October 30, 2008, may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. OAR 436-0001-0225(2). Insofar as an ALJ's review of factual findings is concerned, if a finding by MRU is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, the finding is supported by substantial evidence. *Liberty Northwest Insurance Corporation v. Kraft*, 205 Or App 59, 62 (2006); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Where appropriate, the ALJ may remand a dispute to the director for further administrative action. OAR 436-001-0170(5).

The pertinent facts, as determined by MRU, are summarized as follows:

Claimant sustained a compensable injury on January 22, 2002. The claim was initially accepted as a facial contusion. Subsequently, the acceptance was modified to include the combined condition of increased migraine headache based on the combination of a pre-existing migraine headache condition and the January 22, 2002 facial contusion.

Dr. Rozell (neurologist) became the attending physician and, in January 2003 began treating claimant's headaches with Botox injections. The injections reduced the severity and frequency of claimant's headaches. Consequently, Dr. Rozell continued that care.

In a January 16, 2007, letter to the employer, Dr. Rozell described the Botox injection treatments as "palliative rather than curative." Botox injections were provided on March 12, 2007, July 6, 2007, September 27, 2007, April 24, 2008, and January 10, 2008.

Dr. Smith (neurologist) evaluated claimant (at the employer's request) on April 23, 2007. Acknowledging there were some case reports where Botox injections seemed helpful, Dr. Smith explained that the FDA had not approved the use of Botox for the treatment of migraine headaches, and that "evidence-based medicine" did not support the use of Botox for that purpose. Dr. Smith opined that the use of Botox for the treatment of migraine headaches was empirical and experimental. In doing so, Dr. Smith further opined that claimant's current frequency and severity of migraine headaches was a reflection of the normal variability and fluctuation of migraine headaches in a person with a history of chronic migraines, and not a continuation of her increased frequency of migraines due to her work injury.

On May 23, 2007, Dr. Rozell requested approval of palliative care for additional Botox injections.

The employer disapproved the request on September 14, 2007, on the grounds that: (1) the treatment was not needed to keep claimant working; and (2) the treatment appeared experimental.

On June 18, 2008, claimant requested Administrative Review seeking payment for Botox injections between February 12, 2007, and January 10, 2008.

The employer responded that claimant's request for Administrative Review was not timely, and the disputed services were excessive, inappropriate, and ineffectual.

Dr. Fiks evaluated claimant at the request of the Director and opined that the disputed Botox treatments were appropriate. In doing so, Dr. Fiks acknowledged that the FDA had not approved Botox injections for the treatment of migraines, but explained that a number of studies had shown the efficacy of such treatment in a certain patient population. Reasoning that claimant appeared to belong in the patient population that benefits from Botox injections, Dr. Fiks supported Dr. Rozell's recommendation to include Botox therapy in claimant's care.

Finding that the disputed Botox injections were "prescription medication and not palliative care," MRU concluded that claimant's request for Administrative Review was timely. Turning to the appropriateness issue, MRU found the opinions of Drs. Rozell and Fiks well reasoned and persuasive, and concluded that the Botox treatments provided by Dr. Rozell from February 12, 2007, through January 10, 2008 were appropriate. Consequently, MRU ordered that the employer was liable for the disputed treatments. MRU also ordered the employer to pay claimant's counsel a fee of \$770.00.

Asserting that MRU erred in concluding that the disputed Botox injections were prescription medication and not palliative care, the employer argues that claimant's request for Administrative Review was not timely. Consequently, the employer requests that MRU's Order of October 30, 2008 be vacated and claimant's request for review be dismissed.

"Palliative care" means:

"medical service 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).

After the worker's condition becomes medically stationary, "palliative care" is not compensable unless it is necessary to enable the worker to continue current employment or a vocational training program. ORS 656.245(1)(c)(J).

Unlike palliative care, "prescription medication" and services necessary to either administer or monitor the administration of prescription medication remain compensable after the worker's condition is medically stationary. ORS 656.245(1)(c)(B) and (C). In this context, the ongoing compensability of prescription medication and services to administer or monitor the administration of the prescription is the same as services provided to permanently and totally disabled workers, prosthetic devices and services necessary to monitor/repair/replace prosthetic devices, diagnostic services, and life-preserving modalities. ORS 656.245(1)(c)(B) through (I). Therefore, insofar as medical disputes under ORS 656.245 are concerned, prescription

medication and services necessary to administer/monitor such medication are not “palliative care.” See OAR 436-010-0230(6).

The determination of whether a treatment modality is prescription medication or palliative care is a question of fact. See *Young v. Hermiston Good Samaritan*, 223 Or App 99, 107 (2008). Reasoning that Botox is a prescription medication that is only available to licensed medical professionals that it also requires administration and monitoring by licensed medical providers, MRU found the disputed treatment modality to be prescription medication. MRU’s factual determination is reasonable considering the record presented. Consequently, I conclude that MRU’s determination that the disputed Botox injections are prescription medication is supported by substantial evidence, and therefore, must be affirmed. *Kraft*, 205 Or App at 62.

Having affirmed MRU’s determination that the disputed treatment modality is not “palliative care,” I necessarily conclude that the timelines provided by OAR 436-010-0008(5)(b), which governs a worker’s or attending physician’s challenge to a carrier’s disapproval of palliative care, are not applicable. Additionally, I conclude that the timelines provided by OAR 436-009-0008(2)(b) are not applicable because the employer’s alternative basis for disapproval of the disputed medical services (unscientific/experimental) are expressly governed by the procedures set forth in OAR 436-010-0300. Accordingly, claimant’s request for administrative review was timely.

Finally, I turn to the appropriateness of the disputed Botox injections. As noted previously, MRU concluded that the disputed treatment was appropriate. In reaching that conclusion, MRU considered the opinions of Drs. Rozell, Smith, and Fiks, eventually concluding that the opinions of Drs. Rozell and Fiks persuasively established that the disputed treatment was appropriate. In arriving at its ultimate conclusion, MRU also took into account: (1) the absence of FDA approval of Botox injections for the treatment of migraine headaches; (2) the absence of an American Academy of Neurology recommendation for the use of Botox injections for treating migraine headaches; (3) claimant’s history of effective relief of migraine headaches as a result of receiving Botox injections; and (4) studies showing the efficacy of treating migraines with Botox injections in certain patient populations. MRU’s appropriateness decision is supported by substantial evidence and therefore is affirmed.

Attorney fees in medical disputes must be proportionate to the benefit to the injured worker, and primary consideration must be given to the results achieved and the time devoted to the case. ORS 656.385(1). Accordingly, the Director has adopted a matrix. OAR 436-001-0265, 436-010-0008(13). The total attorney fee award for services at all levels may not fall outside the ranges in the matrix nor exceed \$2,000 absent a showing of extraordinary circumstances or agreement of the parties. Here, there is no assertion of extraordinary circumstances.

Therefore, giving primary consideration to the benefit to claimant and the time devoted (as demonstrated by the documentary record and time spent at hearing), and remaining within the ranges provided in the matrix, I find that claimant’s attorney is entitled to a total of \$1,500, for services through the hearing.

ORDER

The Administrative Order issued on October 30, 2008 by the Medical Review Unit is affirmed. Claimant counsel is awarded a \$1,500 attorney fee for services rendered through the February 24, 2009 hearing.