

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 CONSTANCE MALIK,

Claimant,

vs.

MERRITT CHIROPRACTIC CLINIC,PC,

Employer,

and

AMERICAN FAMILY MUTUAL INS. CO.,

 Insurance Carrier,
 Defendants.

File No. 21003565.02

ALTERNATE MEDICAL

CARE DECISION

Head Note No.: 2701

 STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Constance Malik. Claimant appeared via telephone and through her attorney, Robert Rosenstiel. Defendants appeared through their attorney, Kelsey Paumer. Claimant's petition was filed on November 30, 2022. Claimant has alleged injuries to her left rotator cuff, left biceps, left median nerve, and upper back. She requests defendants be ordered to authorize an EMG/NCV study to evaluate for left median nerve entrapment, and a second opinion to evaluate her left shoulder and left median nerve symptoms at a tertiary center, specifically the University of Iowa Work Injury Recovery Clinic.

Defendants filed an answer on December 12, 2022. Defendants admit liability for the left shoulder, but deny liability for the median nerve and upper back/neck.

The alternate medical care claim came on for hearing on December 12, 2022. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

At hearing, claimant offered exhibits 1 and 2, and defendants offered exhibits A and B, which were all admitted with no objections. Claimant testified on her own behalf. Counsel for both parties also offered oral arguments to support their positions.

DISMISSAL WITHOUT PREJUDICE

Defendants deny liability for the left median nerve and upper back/neck. Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27, as more particularly described in rule 876 IAC 4.48, are not designed to adjudicate disputed compensability of a claim.

The Iowa Supreme Court has held:

We emphasize that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course of treatment for the compensable injury is disputed. . . . Thus, the commissioner cannot decide the reasonableness of the alternate care claim without also necessarily deciding the ultimate disputed issue in the case: whether or not the medical condition Barnett was suffering at the time of the request was a work-related injury.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

Given the denial of liability for the alleged injuries to claimant's left median nerve and upper back/neck, the petition for alternate medical care must be dismissed as to those claims. R. R. Donnelly, 670 N.W.2d at 197-198. Claimant's request for alternate medical care regarding the admitted left shoulder injury will be considered.

"[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). Further, when compensability is contested, "the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." R. R. Donnelly, 670 N.W.2d at 197-198.

Ultimately, therefore, defendants are precluded from asserting an authorization defense as to any future treatment related to the denied body parts during its period of denial, and defendants lose the right to control the medical care claimant seeks for the denied body parts during this period of denial. Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018); Bell Bros., 779 N.W.2d at 204.

As a result, claimant may obtain reasonable medical care from any provider for treatment related to the denied body parts, but at claimant's expense, and claimant may seek reimbursement for such care using regular claim proceedings before this agency. Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985).

ISSUE

The remaining issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of authorization for a second opinion to evaluate her left shoulder symptoms at a tertiary center, specifically the University of Iowa Work Injury Recovery Clinic.

FINDINGS OF FACT

Claimant is a massage therapist at Merritt Chiropractic Clinic, where she has worked for 15 years. Claimant sustained a work-related injury to her left shoulder on February 22, 2021, when she slipped on ice and fell in the parking lot. (Testimony) She was seen at ORA Orthopedics, given a sling, and sent for a CT of the shoulder. (Claimant's Exhibit 2, p. 7) She followed up with Suleman Hussain, M.D., on March 5, 2021, who recommended physical therapy to help her in weaning out of the sling. However, physical therapy did not begin until May 25, 2021, as defendants were waiting on a causation opinion. (Testimony; Cl. Ex. 2, p. 7) In the time between seeing Dr. Hussain and starting physical therapy, claimant remained in the sling and did not use her left arm.

Claimant had an MRI of the left shoulder on July 8, 2021. (Cl. Ex. 2, p. 7) Based on the MRI, Dr. Hussain performed arthroscopic surgery on August 19, 2021. Claimant started physical therapy in September 2021. Claimant continued to follow up with Dr. Hussain, and by May 6, 2022, she was released to return to work with no restrictions and placed at maximum medical improvement (MMI). (Defendants' Exhibit A, p. 1) Dr. Hussain indicated he would see her on an "as-needed" basis, but did not anticipate any future treatment.

Claimant had an independent medical evaluation (IME) with Richard Kreiter, M.D., on October 19, 2022. (Cl. Ex. 2, p. 6) Dr. Kreiter documented claimant's complaints of decreased range of motion in the left shoulder, a mild, constant ache in the anterolateral shoulder, and weakness compared to the right shoulder. (Cl. Ex. 2, p. 8) Claimant also complained of numbness and tingling in her left thumb, index finger, and long fingers since the fall. After physical examination, his impression was adhesive capsulitis status post left rotator cuff repair, intra-articular debridement, biceps tenolysis, labral debridement with subacromial bursectomy and acromioplasty; left median nerve entrapment, and myofascial dorsal upper back pain. He recommended further treatment including an EMG/NCV to evaluate the left median nerve entrapment, and a second opinion to evaluate both the left shoulder and left median nerve symptoms at a tertiary center, such as the University of Iowa Work Injury Recovery Clinic. (Cl. Ex. 2, p. 6)

Claimant has requested Dr. Kreiter's recommended treatment be authorized. As noted above, defendants have denied liability for the median nerve, upper back, and neck. As such, the petition as it relates to those body parts is dismissed. However, claimant still seeks a second opinion with respect to the admitted left shoulder. Claimant testified that she has not contacted Dr. Hussain's office to schedule a follow-up appointment since she last saw him in May 2022. However, defendants' attorney stated

on the record that Dr. Hussain remains the authorized treating physician, and claimant is free to follow up with him if she desires. This information was also communicated to claimant's attorney via email on December 10, 2022. (Def. Ex. B, pp. 1-2) Claimant argues that there were unreasonable delays in claimant's treatment in the past, which entitle her to alternate medical care at this time. Defendants deny that any delays were unreasonable.

REASONING AND CONCLUSIONS OF LAW

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Iowa Code section 85.27(4) provides, in relevant part:

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment — and seeking alternate care — claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he or she has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. See Iowa Code § 85.27(4). Thus, by challenging the employer's choice of treatment and seeking alternate care, claimant assumes the burden of proving the

authorized care is unreasonable. See Iowa R. App. P 14(f)(5); Long, 528 N.W.2d at 124.

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that “when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is ‘inferior or less extensive’ than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care.”

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123. In this case, defendants continue to authorize Dr. Hussain for treatment of claimant’s left shoulder. Claimant has not seen Dr. Hussain since May. At that time he indicated she would be followed on an as-needed basis, although he did not anticipate any future treatment would be needed. Claimant has not contacted Dr. Hussain’s office since that time to request additional care. Claimant did not present any evidence that Dr. Hussain’s treatment was not reasonably suited to treat the injury or unduly inconvenient. Additionally, while claimant contends there were unreasonable delays in her prior treatment, which defendants deny, there is nothing to suggest the current treatment was not offered promptly. In short, there is no evidence at this time to prove that Dr. Hussain’s treatment is or will be “inferior or less extensive” than treatment at a tertiary care clinic, such as the University of Iowa Work Injury Recovery Clinic.

It is understandable that claimant would like to have a second opinion. However, desirability of a certain course of action is not the legal standard utilized in alternate medical care proceedings. Id. Therefore, I conclude that claimant has failed to prove that the care offered by defendants – additional follow up with Dr. Hussain - is unreasonable. Claimant has not carried her burden, and for that reason her alternate care petition as it relates to the accepted left shoulder claim is denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant’s petition for alternate medical care is DISMISSED WITHOUT PREJUDICE with respect to the alleged injuries to claimant’s left median nerve and upper back/neck. If claimant seeks to recover the charges incurred in obtaining care for those denied conditions, defendants are barred from asserting lack of authorization as a defense to those charges during the period of their denial.

Claimant's petition for alternate medical care related to the accepted left shoulder injury is DENIED.

Signed and filed this 13th day of December, 2022.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert Rosenstiel (via WCES)

Kelsey Paumer (via WCES)