BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAINEE FRANK, Claimant, vs. IOWA FAMILY SERVICES, INC., Employer, and MARKEL INS. CO., Insurance Carrier, Defendants.	File No. 19002028.02 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, Rainee Frank. Claimant appeared personally and through her attorney, Benjamin Roth. Defendants appeared through their attorney, Tyler Laflin.

The alternate medical care claim came on for hearing on December 13, 2022. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's order dated February 16, 2015, 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.

The record consists of claimant's exhibits A and B, attached to the petition. The parties did not call any witnesses to testify. Rather, counsel offered oral arguments to support their positions.

ISSUE

The issue presented for resolution is whether claimant is entitled to alternate care; specifically, an order requiring defendants to authorize the treatment plan set forth by authorized treating physician John Femino, M.D.

FINDINGS OF FACT

Claimant sustained an injury to her left lower extremity on August 4, 2019. (Petition) Defendants admit liability for the injury and have provided medical care. (Answer) The parties agree that John Femino, M.D., is currently the authorized treating physician.

Claimant saw Dr. Femino on November 4, 2022. (Claimant's Exhibit B, p. 1) Dr. Femino notes that since the date of injury, claimant had undergone "Multiple surgeries (5) with multiple podiatrists on the left foot and ankle." On the date of her appointment, Dr. Femino documented claimant's complaints of pain with any form of weight bearing. He noted she was "toe touch" weight bearing, and using a scooter to get around. She was also wearing a walking boot for protection. Claimant advised Dr. Femino that after her most recent surgery, she felt like she was in worse pain.

Dr. Femino performed a diagnostic ultrasound of the lateral ankle and hindfoot. His findings are noted. (Cl. Ex. B, p. 1) He performed and recorded his physical examination in detail. (Cl. Ex. B, p. 2) He provided an anesthetic injection of her left ankle, and then allowed claimant to walk around for a few hours with a pain diary in order to evaluation the efficacy of the injection. (Cl. Ex. B, p. 3) He also had claimant get a long-leg x-ray of both lower limbs to evaluate alignment. Dr. Femino then stated:

> After careful history taking, meticulous physical examination, and careful evaluation of the ultrasound report, long-leg film, and the pain diary after the injection, we discussed with the patient that here (sic) chronic left foot and ankle pain is very complex and its (sic) a result of many things:
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> 1. Valgus malalignment at the ankle as well as subtalar joint.
> 2. Ankle instability.
> 3. Pain from soft tissues namely peroneal tendons at peroneal tubercle, subfibular impingement and neuropathic pain from sural nerve.
> 4. Hyper mobile first ray.

(Cl. Ex. B., p. 3)

After a long discussion with claimant about all treatment options, Dr. Femino recommended a staged treatment of her condition, with stage one including "hardware removal, debridement or tenotomy of peroneal tendons, subfibular debridement, deltoid and ATFL reconstruction, sural nerve neuroma excision and burial." After appropriate recovery and follow up, stage two would then include "left foot and ankle/supramalleolar osteotomy, medial displacement calcaneal osteotomy, cotton osteotomy." After some additional discussion, including claimant mentioning an outside provider offered her a below-knee amputation, claimant agreed with Dr. Femino's plan. (Cl. Ex. B, p. 4) He noted regarding the potential amputation that he believes her foot and ankle is

salvageable and "amputation option is always there down the road if her chronic pain becomes uncontrolled."

On November 30, 2022, Darren Laflamme, senior claims examiner for the insurance carrier, wrote to claimant's attorney. (Cl. Ex. A) He indicated that after review of Dr. Femino's surgical request, they would agree to authorize the hardware removal portion of Dr. Femino's plan. [1] However, with respect to the remainder of the request, Mr. Laflamme stated, "Dr. Femino admits himself that after 5 prior left ankle/foot surgeries, that her condition is very complex and is a result of many things." As such, he indicated that defendants plan to solicit an independent opinion regarding the request.

Claimant's attorney replied to Mr. Laflamme the same day, and noted that while defendants have the right to send claimant for an independent medical evaluation (IME) under Iowa Code section 85.39, they do not have the right to interfere with the judgment of the authorized treating physician. As such, he advised he would file an alternate care petition if Dr. Femino's treatment plan was not immediately authorized. The petition was filed the next day.

At hearing, claimant's counsel argued that defendants cannot interfere with the treatment plan of the authorized treating physician by requiring claimant to submit to an IME prior to authorization. Defendants argue that Dr. Femino's statement that claimant's chronic left foot and ankle pain is "very complex" and a "result of many things" bring causation of the need for surgery into question. Therefore, defendants argue an IME prior to authorization of Dr. Femino's plan is reasonable.

I find that defendants have accepted liability for the injury to claimant's left lower extremity. While the denial of Dr. Femino's recommended treatment is based on the argument that it may not be causally related to the work injury, there is no evidence to support that position. Dr. Femino is the authorized treating physician. Dr. Femino has provided a treatment plan, which defendants have not authorized. As the authorized treating physician, defendants are not entitled to interfere with his medical judgment. Therefore, claimant is entitled to alternate medical care.

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).

[1] Defense counsel clarified at hearing that only the hardware removal is currently authorized, not the remainder of the stage one plan.

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.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he 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.

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 18, 1988). Defendants are not entitled to interfere with the medical judgment of their own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

The right to choose the care means the right to choose the provider, not the treatment modalities recommended by the provider. The employer must provide the treatment, testing, imaging or other treatment modalities recommended by its own authorized treating physician, even if another consulting physician disagrees with those recommendations. Haack v. Von Hoffman Graphics, File No. 1268172, p. 9 (App. July 31, 2002) [MRI and x-rays]; Cahill v. S & H Fabricating & Engineering, (Alt Care, File No. 1138063, May 30, 1997) (work hardening program); Hawxby v. Hallett Materials, File No. 1112821, (Alt Care, February 20, 1996); Leitzen v. Collis, Inc. File No. 1084677, (Alt Care, September 9, 1996). The right to choose the care does not authorize the employer to interfere with the medical judgment of its own treating physician. Boggs v Cargill, Inc. File No. 1050396, (Alt Care, January 31, 1994).

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123. In this case, I found that defendants have accepted liability for the injury to claimant's left lower extremity. Dr. Femino is the

authorized treating physician. Dr. Femino has provided a treatment plan, which defendants have not authorized. As the authorized treating physician, defendants are not entitled to interfere with his medical judgment. There is no evidence that the treatment Dr. Femino has recommended is not related to the accepted work injury. Dr. Femino listed the "many things" contributing to claimant's chronic left foot and ankle pain. Nothing on that list suggests something other than the work injury caused the need for the recommended treatment. Additionally, the employer must provide the treatment recommended by its own treating physician, even if another consulting physician disagrees with those recommendations. As such, even if defendants get an IME, there will be no basis to deny the treatment the authorized treating physician has recommended.

Defendants' denial of the treatment recommended by the authorized treating physician, Dr. Femino, is unreasonable. Claimant has carried her burden to prove she is entitled to the requested alternate medical care.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is granted.

Defendants shall immediately authorize and pay for claimant's ongoing treatment with Dr. Femino, including but not limited to his treatment plan as outlined in claimant's exhibit B.

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

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

L. Tyler Laflin (via WCES)