

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHARRON MCKEE,

FILED

Claimant,

MAY 18 2018

vs.

WORKERS COMPENSATION

MCGRAW-HILL COMPANIES, INC.,

File No. 5039716

Employer,

ALTERNATE MEDICAL

and

CARE DECISION

ZURICH c/o SEDGWICK CMS,

Insurance Carrier,
Defendants.

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, Sharron McKee. Claimant appeared personally and through her attorney, James Ballard. Defendants appeared through their attorney, Valerie Landis.

The alternate medical care claim came on for hearing on May 18, 2018. 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.

The evidentiary record consists of Defendants' Exhibits A and B, a stipulation by the parties that Thomas G. Klein, D.O., declared maximum medical improvement for claimant in January 2014, and claimant's testimony during the telephonic hearing.

ISSUE

The issue presented for resolution is whether the claimant is entitled to an order directing defendants to authorize and pay for additional medical treatment through a prior treating pain specialist, Thomas G. Klein, D.O.

FINDINGS OF FACT

The undersigned, having considered all the evidence in the record, finds:

Claimant sustained an admitted work injury on June 27, 2011. As a result of that injury, claimant developed complex regional pain syndrome (CRPS). Treatment was authorized for that condition through a pain specialist, Dr. Klein. Dr. Klein recommended and performed a spinal stimulator trial. It was successful and Dr. Klein referred claimant to a neurosurgeon, John M. Gachiani, M.D., for implantation of a spinal stimulator.

Dr. Gachiani implanted a Boston Scientific spinal stimulator in claimant's spine in April 2013. Dr. Gachiani subsequently released claimant from his care. Dr. Klein continued to manage claimant's care, including prescribing pain medications and management of the spinal stimulator. In January 2014, Dr. Klein declared claimant to be at maximum medical improvement and released claimant from his care.

At the time that he released claimant from his care, Dr. Klein noted that claimant required ongoing medications and indicated that she could receive the ongoing prescriptions from her personal physician, Kathleen A. Lange, M.D. Claimant continues since January 2014 to receive prescriptions for necessary medications from Dr. Lange and testified that defendants continue to pay for those prescriptions.

Ms. McKee testified that she was satisfied with the medical care provided to her by Dr. Klein and Dr. Gachiani. However, within the past few months, claimant's spinal stimulator has begun to function improperly. Claimant described a sensation that she is being randomly shocked from the inside by the stimulator.

Claimant testified that she has contacted Boston Scientific and spoken numerous times with her assigned representative about reprogramming and the function of her spinal cord stimulator. She testified that the stimulator is no longer, or at least only sporadically, responding to her remote. She testified that the stimulator is not responding appropriately to interface with the Boston Scientific representative's computer.

Ms. McKee testified that the Boston Scientific representative has advised and recommended she return for evaluation by Dr. Klein. However, she did not produce any written evidence to document this recommendation.

Claimant testified that she contacted Dr. Gachiani's office to request a return evaluation. She testified that Dr. Gachiani's office recommended she return to Dr. Klein for evaluation, but expressed willingness to re-evaluate claimant if Dr. Klein recommended further surgical consultation or intervention. Again, claimant produced no written evidence to document the verbal recommendations made by Dr. Gachiani's office.

Ms. McKee testified that her personal physician, Dr. Lange, has discussed this situation with her. Claimant testified that Dr. Lange recommended she return to Dr. Klein for evaluation of the stimulator.

Ms. McKee testified that she contacted Dr. Klein's office three to four dozen times in the past few months. She reported that Dr. Klein's office is willing to schedule a return evaluation with Dr. Klein but requires authorization from the workers' compensation insurance carrier before scheduling the appointment. Given the delay, Ms. McKee testified she even attempted to schedule a return evaluation with Dr. Klein and pay out-of-pocket for the evaluation. Dr. Klein's office would not schedule the evaluation on a personal-pay basis because the case has previously been found to be and assigned as a work-related injury.

Claimant testified that she prefers a return evaluation with Dr. Klein because Dr. Klein has provided extensive care for claimant in the past, including numerous prior injections and the spinal stimulator trial. Defendants are offering an evaluation with a spine surgeon, Trevor Schmitz, M.D. Dr. Schmitz practices at Iowa Orthopaedics in the same clinic where Dr. Klein now practices. (Defendants' Exhibit A)

Defense counsel presented statement, or argument, about her attempts to contact Dr. Gachiani, the Boston Scientific representative, and Dr. Klein's office. Although no documentary evidence, or specific testimony, was introduced, counsel advanced that Iowa Orthopaedics has recommended scheduling an evaluation with Dr. Schmitz, presumably because claimant seeks to have the spinal stimulator surgically removed (or replaced).

Defendants' Exhibit B is an April 9, 2018 office note from claimant's treating family physician, Dr. Lange. Dr. Lange's note confirms claimant's testimony that her spinal stimulator is "misfiring" and "shocks her randomly." (Ex. B, page 1) Dr. Lange notes that the stimulator "needs to be replaced." (Ex. B, p. 1)

Dr. Lange's note also confirms claimant's testimony that there was a conversation between claimant and Dr. Lange. The April 9, 2018 medical note specifically discusses claimant's back stimulator, the fact that it was shocking her, and that it may need to be replaced. In her orthopaedic evaluation, Dr. Lange notes, "back stimulator is not working. Going to have Dr [sic] Thomas Klein take it out, possibly needs approval." (Ex. B, p. 2) Dr. Lange then specifically notes in her plan that claimant is to be referred to a specialist for replacement of her spinal stimulator and increased the medications she was left to prescribe by Dr. Klein. (Ex. B, p. 3)

In her discussion of the spinal cord stimulator, the only other physician or specialist referenced by Dr. Lange is the pain specialist, Dr. Klein. It appears that Dr. Lange was contemplating and intending to refer claimant back to Dr. Klein. In other words, there appears to be a trail of authorizations in this case that lead from Dr. Klein to other physicians and then back to Dr. Klein.

Dr. Klein attempted several invasive procedures, including the spinal cord stimulator trial. Once successful, Dr. Klein referred claimant to a neurosurgeon, Dr. Gachiani. After surgical implantation of the stimulator, Dr. Gachiani returned medical management to Dr. Klein.

Once claimant achieved maximum medical improvement, Dr. Klein referred claimant to her personal physician, Dr. Lange, for management of ongoing prescriptions necessitated by the work injury. Now, once additional problems have arisen, Dr. Lange appears to be recommending and referring claimant back to Dr. Klein for further evaluation of the spinal cord stimulator.

Defendants argue that they are not attempting to make medical diagnoses and have attempted not to interfere with the medical decision-making. Instead, defendants contend that they left it up to Iowa Orthopaedics, where Dr. Klein now works, to determine which medical specialist should evaluate claimant. While possibly true, it does not appear this is consistent with the chain of referrals that have occurred throughout this medical care. To date, based upon the evidentiary record before me at this time, it appears that care has flowed through Dr. Klein out to other physicians and, when appropriate, back to Dr. Klein.

There is no doubt that claimant requires additional care. Defendants do not dispute that an evaluation is appropriate. The only dispute between the parties is to whom claimant should be referred for additional evaluation and treatment.

This evidentiary record does not clarify whether claimant specifically requires surgical intervention and the services of a spine surgeon. There is reference to removal or replacement of the stimulator. However, claimant testified she is under the impression that Dr. Klein is qualified and will perform this function, if authorized.

Like defendants, I do not wish to attempt to practice medicine to diagnose the difficulties with claimant's stimulator or attempt to determine the proper medical course for dealing with the current difficulties claimant is experiencing. There is no evidence in this record to demonstrate that Dr. Schmitz is qualified to deal with or manage a Boston Scientific spinal cord stimulator. On the other hand, Dr. Klein has specifically managed claimant's care with this stimulator implanted.

I find that Dr. Klein is the physician in the best position to re-evaluate claimant at this time. Dr. Klein knows claimant's medical history, has provided past care, was an authorized physician, and is the physician to whom claimant's primary care physician is referring claimant. The personal physician's recommendations are bolstered by the recommendations of the Boston Scientific representative and Dr. Gachiani's office. While those statements were clearly hearsay and I give them significantly less weight than the referral chain back from Dr. Lange to Dr. Klein, they certainly lend credence to the fact that claimant was investigating this situation, asking the advice of the various physicians, and that Dr. Lange's referral back to Dr. Klein is reasonable and appropriate.

Given that there is no medical evidence recommending a referral directly to a spine surgeon or specifically to Dr. Schmitz and given that there is competing evidence in this record suggesting that a referral back to the treating pain specialist, Dr. Klein, is appropriate, I find that claimant has proven that care through Dr. Klein is superior to the offered care through Dr. Schmitz at this time. Certainly, it is possible that Dr. Klein will evaluate claimant, determine that surgical intervention is required, and recommend claimant be evaluated and treated by Dr. Schmitz. I will neither suggest that as a referral chain, nor deny it as a reasonable option under the current evidentiary record. However, it is important and reasonable under these circumstances to have Dr. Klein utilize his historical knowledge of claimant's situation to assess her current difficulties and recommend further treatment.

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).

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 v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. 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 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. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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 19, 1988).

Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating

physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision June 17, 1986).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, Iowa Industrial Commissioner Reports 207 (1981).

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."

In this case, I found that there has been an authorized physician referral chain that has proceeded through and from Dr. Klein out to a surgeon (Dr. Gachiani), back to Dr. Klein, then out to a primary care physician (Dr. Lange) and now back to Dr. Klein from Dr. Lange. As noted, this referral chain between authorized physicians does not require the permission of the employer or insurance carrier. Having reached this finding, I conclude that the referral from Dr. Lange to Dr. Klein should govern and that it is appropriate to order care to be returned to Dr. Klein.

Additionally, I found that claimant has proven the care sought through Dr. Klein is superior to the care being offered by defendants through Dr. Schmitz. There is no evidence in this record to demonstrate that a surgical referral is the preferred option in this case. Instead, the only evidence of a referral is from Dr. Lange referring claimant back to Dr. Klein.

Dr. Klein has prior knowledge and has provided care to claimant, including invasive procedures, the stimulator trial, and medication management after placement of the stimulator. Dr. Klein appears to be the physician through whom the initial stimulator was determined to be appropriate, trialed, and from whom a referral was made for implantation. Once implanted, care returned to Dr. Klein. Dr. Klein has superior knowledge of claimant's medical history.

By contrast, Dr. Schmitz has no prior history of claimant. Claimant has never met or been treated by Dr. Schmitz. There is no evidence in the record that a spinal surgeon is required at this juncture. Therefore, having found that the care sought through Dr. Klein is superior at this juncture of the treatment, I conclude that claimant has proven entitlement to an order directing care to be routed back to Dr. Klein for further evaluation and treatment. However, such an order should not be interpreted to be, nor is it intended to be, a limit on what Dr. Klein can or should recommend for treatment moving forward. Moving forward, Dr. Klein's medical recommendations and judgement should direct claimant's care, much as it did prior to and subsequent to the initial placement of the spinal cord stimulator.

ORDER

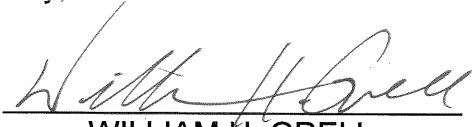
THEREFORE, IT IS ORDERED:

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

Within seven (7) days of the entry of this decision, defendants shall contact Dr. Klein's office, seek the earliest evaluation date available for Dr. Klein, and shall authorize and pay for said evaluation.

Dr. Klein is and remains the authorized physician for claimant's spinal cord stimulator and his recommendations or referrals for future care, if any, should be honored and promptly authorized.

Signed and filed this 18th day of May, 2018.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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