BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY L. NEWCOMB,	FILED	
Claimant,	MAY 10 2018	File No. 5052805
vs.	WORKERS COMPENSATION	ALTERNATE MEDICAL
JOHN DEERE DAVENPORT WORKS,		CARE DECISION
Employer, Self-Insured, Defendant.		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, Tammy Newcomb. Claimant appeared personally and through attorney, Jerry Soper. Defendant appeared through its attorney, Troy Howell.

The alternate medical care claim came on for hearing on May 10, 2018. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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 record consists of Claimant's Exhibits 1 through 7 and Defense Exhibits A through F, which were received without objection. The defendant does not dispute liability for claimant's September 2014, low back injury.

In her petition, claimant seeks two forms of alternate medical care. She seeks a functional capacity evaluation (FCE) which she alleges was prescribed by her authorized treating physician. She also sought water therapy, which she also alleges was prescribed by the authorized treating physician's office. Prior to hearing, defendant denied that the water therapy is causally connected to claimant's low back condition. Prior to going on the record, this was discussed with the parties. Since the defendant denied liability for the condition for which claimant sought treatment, the hearing was limited to claimant's request for a functional capacity evaluation (FCE).

ISSUE

The issue presented for resolution is whether the claimant is entitled to an FCE.

FINDINGS OF FACT

This file is well-known to the agency. Ms. Newcomb has filed at least six alternate medical care petitions since 2015. Most recently, I granted alternate medical care in March 2017.

Ms. Newcomb suffered an injury to her low back which has resulted in substantial treatment since September 2014. In 2017, she had a spinal cord stimulator implanted in her lumbar spine to help her manage her pain. Her authorized treating physician is Sanjay Sundar, M.D. In November 2017, her working diagnosis was lumbar post laminectomy syndrome. (Claimant's Exhibit 1, page 1) In February 2018, Dr. Sundar's office (Stephanie McWhirier, ARNP) documented the following:

> Tammy suffers from pain related to post laminectomy syndrome in her lumbar spine. She received some benefit with her existing spinal cord stimulator. . . . She has failed greater than 6 weeks of conservative measures such as rest, ice, heat, anti-inflammatories on her pain medications as well as stretching exercises.

(Cl. Ex. 2, p. 7) She was given an injection at this visit.

In March 2018, she followed up with Dr. Sundar complaining of bilateral knee pain. Dr. Sundar clearly stated that the knee pain was unrelated to the work injury. (Defense Ex. C)

In April 2018, Dr. Sundar provided permanent medical restrictions and released claimant from his care. (Cl. Ex. 3) The restrictions are fairly restrictive. "Patient is not to lift greater than 30lbs rarely, 20lbs occasionally and may lift 10lbs frequently. She should be allowed to change positions frequently and may not tolerate long periods of standing or sitting greater than 2 hours." (Cl. Ex. 3, p. 8) He also restricted her from climbing, kneeling or bending. He allowed her to operate heavy machinery so long as the spinal cord stimulator is turned off. (Cl. Ex. 3, p. 8) Deere has not sought to return claimant to work under these restrictions. When claimant received these restrictions, she had questions and sought a visit with Dr. Sundar. She ended up seeing a nurse practitioner. Claimant testified that when she raised concerns about the restrictions, she was informed the restrictions were primarily to protect the stimulator, which Dr. Sundar confirmed in a letter to claimant. (Def. Ex. C)

Claimant testified that she is not capable of performing work within the restrictions provided by Dr. Sundar. She has indicated she is deconditioned and has difficulty doing any lifting. Claimant further testified that the nurse practitioner

suggested an FCE, as well as some physical therapy to help her get stronger. On April 12, 2018, Dr. Sundar wrote a letter to claimant summarizing her medical situation and specifically telling her he had no more treatment to offer her. He stood by his permanent restrictions and added, "[t]hat being said, you have every right to request a functional capacity evaluation for a more objective view on things." (Def. Ex. C) He also told her that the restrictions he recommended are "primarily based on protecting the stimulator system from lead fracture or migration." (Def. Ex. C) On April 16, 2018, Dr. Sundar signed two Order Requisition Reports, one prescribing an FCE with Midwest PT, and the other prescribing water therapy. (Cl. Exs. 4, 5)

The defendant refused to authorize this treatment. (Cl. Exs. 6, 7)

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. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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. Id. 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 statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

The issue presented is whether an FCE is "treatment" under the Iowa Workers' Compensation Act. Defendant cites four agency cases in support of this legal proposition. In Cozzolino v. Economy Coating Systems, Inc., File No. 1235934 (Alt Care Decision, April 2001), another deputy held that a "functional capacity evaluation is not medical treatment. It is more in the nature of vocational treatment, since it is designed to determine what an injured person may safely do." I disagree. While I agree with the defendant that this case stands for the proposition that an FCE is not medical treatment, I simply disagree with the legal conclusion. Deciding what an injured person may safely do (or not do), in my opinion, falls squarely within the definition of treatment under section 85.27.

In this case, however, the authorized treating physician backtracked, or at least equivocated, on the medical necessity of this form of medical treatment. It is the claimant's burden to prove her need for alternate care.

Dr. Sundar wrote directly to the claimant on April 12, 2018, and explained how he arrived at his restrictions and told her the reasons she did not really need an FCE. (Def. Ex. C) He added that she has "every right to request a functional capacity evaluation for a more objective view on things." (Def. Ex. C) Four days later he signed an Order Requisition Report, which is essentially a prescription, ordering the FCE. Defendant contends Dr. Sundar only did this at claimant's request for the FCE. The claimant contends that the FCE was actually suggested by a nurse practitioner in Dr. Sundar's office. I have no doubt this is true as it seems unlikely to me that claimant thought of the FCE on her own. Nevertheless, on May 2, 2018, Dr. Sundar quite clearly opined that the FCE was "not necessary for purposes of medical care, treatment or diagnosis." (Def. Ex. A, p. 2) It is, quite clearly, Dr. Sundar's opinion that the restrictions he has recommended are adequate and the FCE is not truly necessary.

Since Ms. Newcomb's alternate medical care claim is based upon the opinion of Dr. Sundar, and Dr. Sundar does not believe the FCE is actually necessary, her claim fails.

The claimant has other legal options to obtain an FCE in this scenario.

As set forth above, the claimant also sought alternate medical care for water therapy. She contends this is related to deconditioning related to her back condition. The defendant denies this.

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 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.
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> . . . .
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> 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.
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> . . . .
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> Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, 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 & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

Thus, the claimant's petition seeking medical treatment must be dismissed because the defendant refuses to accept liability for the condition for which claimant seeks treatment. The defendant thereby loses its right to control the medical care claimant seeks in this proceeding and the claimant is free to choose that care on her own. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

As a result of the denial of liability for the condition sought to be treated in this proceeding, claimant may obtain reasonable medical care from any provider for this treatment but at claimant's expense and seek reimbursement for such care using regular claim proceedings before this agency.

Since liability for this portion of the claim has been denied, this portion of claimant's claim is dismissed.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care, as it relates to the FCE, is DENIED.

IT IS FURTHER ORDERED that the claimant's claim for water therapy should be and is hereby dismissed without prejudice.

IT IS FURTHER ORDERED that if claimant seeks to recover the charges incurred in obtaining the care for which defendant denies liability, defendant is barred from asserting lack of authorization as a defense for those charges.

Signed and filed this 10th day of May, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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