BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD D. UEKER,

Claimant,

vs.

ASSOCIATED MILK PRODUCERS, INC.,

Employer,

and

ARGONAUT INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

MAR 08 2017

WORKERS COMPENSATION

File No. 5058320

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 17A and 85. The expedited procedure of rule 876 IAC 4.48, the "alternate medical care" rule, is requested by claimant, Richard D. Ueker. Claimant filed a petition on February 23, 2017. He alleged at paragraph 5 of his petition:

> Reason for dissatisfaction and relief sought: Employer/Insurer have failed to provide adequate treatment through Dr. Teresa Gurin, M.D., through failure to provide adequate medication and proper medical care.

Defendants filed an answer on March 2, 2017. Defendants admit the occurrence of a work injury on August 8, 1996 and do not dispute liability for the condition sought to be treated by this proceeding.

The alternative medical care claim came on for hearing on March 7, 2017. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed February 16, 2015 by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be by petition for judicial review under Iowa Code section 17A.19.

The evidentiary record consists of claimant's exhibit A, defendants' exhibits 1 through 9, and the testimony of the claimant.

ISSUE

The issue presented for resolution is whether claimant is entitled to alternate medical care in the form of changing authorized pain management providers.

FINDINGS OF FACT

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

Claimant suffered an admitted work related injury to his low back on August 8, 1996. Claimant resides in Manly, Iowa, a town located approximately 10 miles from Mason City, Iowa. Following the work injury, claimant received initial treatment and surgery with Dr. Beck in Mason City. Claimant ultimately required additional treatment and his care was transferred to Des Moines Orthopedic Surgeons (DMOS). At DMOS, claimant was treated by surgeon, Lynn Nelson, M.D., and anesthesiologist, Kenneth Pollack, M.D. Claimant's extended course of treatment included two fusion surgeries by Dr. Nelson and implantation of a spinal cord stimulator by Dr. Pollack. (Claimant's testimony)

Claimant continued to receive care with Dr. Pollack into the year 2013. On March 28, 2013, claimant was evaluated by Dr. Pollack. Dr. Pollack opined claimant was receiving a fair therapeutic response to the current medication regimen, described as chronic high dose opioid treatment. Medications included Opana extended release, Opana immediate relief, baclofen, Cymbalta, gabapentin and Lidoderm patches. Dr. Pollack refilled claimant's medications and recommended continued stimulator use. He also recommended an epidural steroid injection trial. In the event symptoms did not improve, Dr. Pollack indicated he would recommend a new CT of claimant's lumbar spine. (Exhibit 1, page 1) Claimant testified he was satisfied with Dr. Pollack as a physician, his symptoms were adequately controlled under Dr. Pollack's care, and he believed the two were working toward a long-term plan to manage his symptoms. (Claimant's testimony)

At this time, claimant testified he understood that discussions took place between defendant-insurance carrier and Dr. Pollack regarding claimant's medication regimen. Thereafter, claimant's care was transferred to physiatrist, Teresa Gurin, M.D., in Minneapolis, Minnesota. Claimant testified the distance from his home to Minneapolis is approximately 150 miles one-way, roughly equivalent to the distance to Des Moines. Due to his use of opioid medications, claimant is prohibited from driving to such appointments and must solicit a friend or neighbor to transport him. (Claimant's testimony)

At the referral of defendants, on September 24, 2013, claimant presented to Dr. Gurin for examination. Dr. Gurin opined claimant demonstrated opiate dependence and noted red flags potentially indicative of misuse or unsafe behavior. Dr. Gurin

opined claimant's Opana use was unsafe and recommended tapering of the medication, to eventually be replaced by Suboxone. Claimant completed an opiate agreement and agreed to refrain from alcohol and not expose himself to marijuana. Dr. Gurin noted an instant urinalysis was negative for marijuana. (Ex. 2)

Claimant continued to periodically follow up with Dr. Gurin for medication management. The instant urinalysis results from claimant's October 29, 2013 appointment were positive for marijuana. (Ex. 3) At an appointment on December 3, 2013, claimant informed Dr. Gurin that he had given up his "support group," as members smoked marijuana. He denied personal use of marijuana and reported only second-hand exposure. (Ex. 4, p. 1) An instant urinalysis was positive for marijuana; claimant denied use or exposure to any users. Dr. Gurin continued the process of tapering from Opana. (Ex. 4, pp. 1-2)

Due to the nature of claimant's medication use, claimant continued regular appointments with Dr. Gurin. The instant urinalysis results from May 10, 2016 were positive for marijuana. (Ex. 5) On August 9, 2016, claimant informed Dr. Gurin that he did not use marijuana and believes "friends are maybe putting liquid marijuana" in his drinks. Claimant vehemently denied "knowingly" using marijuana. Claimant requested an increase in his opioid medications; Dr. Gurin declined. (Ex. 6)

Dr. Gurin's notes from claimant's September 1, 2016 appointment indicate claimant's instant urinalysis was positive for THC. She further indicated the confirmatory urinalysis tests from the samples of June 7, 2016, July 5, 2016 and August 9, 2016 were positive for cannabinoids. Dr. Gurin imposed a more regular tapering process from opiates. (Ex. 7)

Claimant returned to Dr. Gurin on October 20, 2016. Dr. Gurin noted the confirmatory urinalysis from the September 1, 2016 appointment was positive for cannabinoids. She again imposed a more regular tapering process with respect to opiates. Claimant insisted he did not use marijuana and expressed belief his "neighbors are sneaking it into his pop in his fridge." Dr. Gurin noted claimant also "complain[ed] no one believes him." (Ex. 8)

At an appointment on January 3, 2017, Dr. Gurin informed claimant the confirmatory urinalysis was again positive for cannabinoids. Dr. Gurin imposed a "more aggressive taper of opiates" given use of "street drugs." Dr. Gurin noted her other treatment option with respect to claimant would be to "cut him off as he is using street drugs;" however, she declined to take such a drastic step due to the discomfort it would cause claimant. Dr. Gurin noted she would continue tapering claimant's opioids for so long as he continued to use street drugs. She noted claimant was insistent in denying use of marijuana and became "very upset" regarding the taper in his opiates. Claimant expressed belief he should remain at a certain level of opiates and indicated he would not return. Dr. Gurin noted claimant left briskly, walking with a normal pace and rarely

using his cane. She described his motion on exit as "dramatic improvement" from prior behavior, including "excessive dramatic pain behavior." (Ex. 9)

Claimant admitted he became upset with Dr. Gurin during this appointment. He testified he became angry when Dr. Gurin reduced his medication dosages beyond a previously-agreed level. (Claimant's testimony)

During hearing, claimant testified the positive urinalysis results were caused by former friends "spiking" his soda. Claimant testified he suspected this behavior and confronted the individuals in early February 2017. He testified the individuals admitted to spiking his drinks as a joke. Claimant testified he ceased friendships with these individuals. (Claimant's testimony)

Claimant returned to Dr. Gurin for evaluation on February 28, 2017. Claimant testified his urinalysis did not show the presence of marijuana. (Claimant's testimony) Dr. Gurin's written records were not included in evidence for review.

Claimant testified he has raised multiple objections to defendant-insurance company regarding Dr. Gurin's care. He expressed continued displeasure with her treatment plan and with her perceived lack of acknowledgement for claimant's feelings and complaints. Claimant also testified he lacks trust in Dr. Gurin, as she has reduced his medications below a previously-agreed level. Claimant testified Dr. Gurin repeatedly reduced his medications and as a result, he experiences more severe pain and limitations in activities. He testified that under Dr. Pollack's care, he was capable of being more active and engaging in daily activities; he now experiences difficulty moving and ambulates with a cane. (Claimant's testimony)

Claimant is a diabetic and receives treatment of this condition with Dr. Mark Johnson. Claimant testified uncontrolled pain and stress impacts his ability to successfully control his diabetes. As a result, claimant testified he discussed his claim with Dr. Johnson, who recommended claimant contact Erin Peterson, D.O. Dr. Peterson is a physiatrist with Mercy North Iowa in Mason City. Dr. Peterson has reportedly agreed to review claimant's medical records; following review, Dr. Peterson will determine if she is interested in treating claimant. Claimant acknowledges he has not been examined or treated by Dr. Peterson and she has not agreed to accept claimant as a patient. However, he is hopeful a transfer of care can be made to Dr. Peterson, as he trusts the judgment of Dr. Johnson.

Claimant filed the instant petition for alternate medical care on February 23, 2017. Claimant submitted an affidavit attached to his petition and which was admitted for consideration as Exhibit A. By this affidavit, claimant requested his care be transferred back to Dr. Pollack, whose care provided better control of claimant's pain. Claimant also stated he did not believe Dr. Gurin's care was adequately helpful, that Dr. Gurin was not responsive to his complaints, and that it was difficult for claimant to travel the distance to Minneapolis for care. (Ex. A) At the time of telephonic hearing,

claimant requested authorization of a medical provider located at a more reasonable geographic distance from his home in Manly, Iowa. He did not request to return to Dr. Pollack and instead, suggested physiatrist, Erin Peterson, D.O.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

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).

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 1975).

Alternate care included alternate physicians when there is a breakdown in a physician/patient relationship. Seibert v. State of Iowa, File No. 938579 (September 14, 1994); Nueone v. John Morrell & Co., File No. 1022976 (January 27, 1994); Williams v. High Rise Const., File No. 1025415 (February 24, 1993); Wallech v. FDL, File No. 1020245 (September 3, 1992) (aff'd Dist Ct June 21, 1993).
"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

At the time of filing of his application for alternate medical care, claimant expressed desire to transfer his care to Dr. Pollack. At evidentiary hearing, claimant essentially withdrew his request for care with Dr. Pollack and instead, requested designation of a local pain management physician. During hearing, claimant expressed dissatisfaction with Dr. Gurin generally, but his request for relief was based in locating a more geographically-appropriate physician on the grounds that care with Dr. Gurin is unduly inconvenient.

I find merit in claimant's argument. Given the frequency with which claimant is required to attend appointments and his inability to drive while utilizing opiate medications, I find designation of a provider 150 miles from claimant's home inappropriate and unreasonable. However, defendants were not sufficiently alerted to claimant's dissatisfaction on the basis of geographical location of the provider. Claimant received care in Des Moines from approximately 1998 to 2013 and Minneapolis from 2013 to the present. Each location is a similar distance from claimant's residence. I therefore find defendants have thus far, not behaved unreasonably in directing claimant's medical care.

As defendants were not provided with sufficient time to investigate and consider transferring care to a more appropriately-located provider, I do not believe it is appropriate to remove defendants' right to direct claimant's medical care. Provided with appropriate notice, defendants may voluntarily designate a physician located nearer to claimant's home. However, it should be noted that such a task may not realistically be an easy one, given claimant's protracted course of care and positive urinalysis results. Any potential providers will likely seek to review claimant's treatment records prior to accepting him as a patient, a process which takes time. Claimant suggested Dr. Peterson as a provider; however, an attempt to immediately transfer claimant's care to Dr. Peterson would be inappropriate, as Dr. Peterson has not yet agreed to accept claimant as a patient. It is also important to note that claimant's care would not be well-served by discontinuing treatment with Dr. Gurin prior to location of an alternate physician.

The basis of claimant's argument with respect to alternate care is a request for designation of an appropriately qualified, local physician to treat his ongoing complaints. However, this basis for dissatisfaction with claimant's care was not conveyed to defendants with sufficient notice so as to allow defendants to consider and investigate other treatment providers who are located in claimant's geographical area. Defendants

have provided claimant ongoing pain management and have not denied any specifically requested treatment. Although I find Dr. Gurin's geographical location is inappropriate given the frequency of appointments and claimant's limitation on driving, I do not believe removing defendants' right to direct care is warranted at this juncture. As defendants have now been made aware of this basis of claimant's dissatisfaction, it is appropriate and reasonable to allow defendants the opportunity to consider claimant's request for care prior to entering a ruling impacting defendants' authority in claimant's care.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is denied at this time.

Signed and filed this 8th day of March, 2017.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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