
In the Matter of the Compensation of
THOMAS P. KAPTUR, Claimant
WCB Case Nos. 16-00718, 15-04381, 14-03954, 11-05971
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Poland's order that: (1) declined to award additional temporary disability benefits; and (2) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review the issues are temporary disability, penalties, and attorney fees.¹

We adopt and affirm the ALJ's order with the following supplementation.

Claimant has worked in the pipe-fitting industry for over 40 years. Dr. Esselink has been his primary care physician since April 2010. (Ex. 27). Since that time, she has been treating claimant's bilateral carpal tunnel syndrome (CTS), including prescribing pain medications. (Exs. 51, 52A, 69B, 71A). In July 2011, Dr. Esselink referred claimant to Dr. Sugalski, an orthopedic surgeon, to determine if claimant was a candidate for CTS surgery. (Ex. 44a).

On August 1, 2011, Dr. Sugalski examined claimant, recommended new nerve conduction studies, and opined that claimant likely would require bilateral carpal tunnel release surgery. (Ex. 44). That same day, claimant and Dr. Sugalski completed a Form 827 as a first report of an occupational disease claim for bilateral CTS as a result of his work as a pipefitter. (Ex. 43). Dr. Sugalski also authorized "no work" from August 1, 2011. (*Id.*) In completing the 827 Form, neither claimant nor Dr. Sugalski checked the box for "Notice of change of attending physician." (*Id.*)

¹ Chartis Claims, as the claim administrator for the insurer who was not found responsible for claimant's occupational disease claim in an uncontested portion of the ALJ's order, seeks either its dismissal as a party to this proceeding or affirmance of the "responsibility" portions of the ALJ's order. Because Chartis was a party to the ALJ's order, which has been appealed to the Board, it remains a party on review. *Riley E. Lott*, 42 Van Natta 239 (1990). Nevertheless, because the "responsibility" issue is not disputed on review, Chartis's status as a party on review is "nominal." *Id.* at 240. Consequently, the motion to dismiss is denied.

Because of the longevity of claimant's career, as well as his multiple prior employers/carriers, claim processing activity took several years and, as a result, further diagnostic and surgical treatment for claimant's CTS condition was delayed. During the delay, Dr. Esselink continued as claimant's primary care physician, including monitoring and prescribing pain medications for his CTS symptoms. (Exs. 51, 52A, 69B, 71A).

On June 29, 2015, Dr. Sugalski saw claimant for the second time. (Ex. 89). At that visit, he authorized a full work release and recommended sequential bilateral CTS surgery. (Exs. 89-1, 89A). On July 7, 2015, Dr. Sugalski confirmed in writing that he had assumed the role of attending physician for claimant's CTS condition as of June 29, 2015. (Ex. 90A-1). Dr. Sugalski performed carpal tunnel release surgeries on July 16 and July 30, 2015. (Exs. 91A, 92B).

Claimant requested a hearing, contesting responsibility denials issued by Sedgwick Claims Management (the carrier eventually found responsible for the claim) and Chartis Claims, Inc. In addition, he sought temporary disability benefits, asserting that Dr. Sugalski was his attending physician and had authorized such benefits, effective August 1, 2011. Finally, claimant sought penalties and attorney fees for unreasonable claim processing.

Reasoning that Dr. Sugalski was not claimant's attending physician for his CTS condition until June 29, 2015, the ALJ determined that claimant was not entitled to temporary disability benefits before that date.

On review, claimant contends that Dr. Sugalski has been his attending physician for purposes of his bilateral CTS condition since August 1, 2011, and his time loss authorization at that time entitled him to temporary disability benefits. In doing so, claimant emphasizes that Sedgwick requested Dr. Sugalski's review of Dr. Denekas's medical opinion (which concerned his bilateral CTS condition), and did not request Dr. Esselink's review of that opinion. (Ex. 50). Moreover, claimant observed that Sedgwick provided copies of its claim denials to Dr. Sugalski, but not to Dr. Esselink. (Exs. 49, 54). Finally, claimant asserts that Dr. Esselink was his primary care physician, but was not qualified to (and did not) treat his bilateral CTS condition.

After conducting our review of the record, we are persuaded that Dr. Esselink was claimant's attending physician with primary responsibility for treating claimant's CTS condition, up until June 29, 2015, when Dr. Sugalski

assumed primary responsibility for the condition. Thus, we affirm the ALJ's conclusion that claimant was not entitled to the disputed temporary disability benefits. We reason as follows.

An attending physician may authorize the payment of temporary disability compensation. ORS 656.262(4)(a); ORS 656.245(2)(b)(B). Temporary disability is not due and payable "for any period of time not authorized by the attending physician." ORS 656.262(4)(g). A worker may have only one attending physician at a time. OAR 436-010-0220(1); *Randal M. Wells*, 63 Van Natta 945, 948 (2011). ORS 656.005(12)(b) defines an "attending physician" as "a doctor, physician or physician assistant who is primarily responsible for the treatment of a worker's compensable injury[.]" Whether a physician qualifies as an "attending physician" is a question of fact. *Wells*, 63 Van Natta at 948; *Troy O. West*, 58 Van Natta 2699, 2700 (2006); *Myrna F. Long*, 51 Van Natta 1726, 1727 (1999).

We acknowledge claimant's contention that Sedgwick forwarded copies of its denials and a contrary medical opinion to Dr. Sugalski, which would suggest that it considered Dr. Sugalski to be claimant's "attending physician." See OAR 436-010-0210(a) (regardless of a filing of a Form 827, the facts of the case and actions of the provider determine "attending physician" status). Yet, such claim processing activities are not determinative. Rather, the determination of an "attending physician" is a factual evaluation based on the reviewable record. See *Bobby D. Mitchell*, 61 Van Natta 786, 787 (2009) ("[T]he determination of an attending physician is a question of fact based on the relationship between the claimant and the physician, and, as such, the filing of a particular form is not determinative."); see also *Joseph P. Christensen*, 57 Van Natta 2687 (2005) (the filing of an "827" form was not determinative in analyzing whether a physician was the "attending" physician).

Here, the contemporaneous medical records do not support a conclusion that Dr. Sugalski was claimant's "attending physician" on August 1, 2011, the date that claimant contends his temporary disability benefits should begin. Following that examination, which was on referral from Dr. Esselink (claimant's then "attending physician"), Dr. Sugalski neither examined, monitored, nor treated claimant's CTS condition, until June 29, 2015. (Ex. 89-1). In contrast, during that same period, Dr. Esselink continued to monitor claimant's CTS condition, including prescribing pain medication. (Exs. 51, 52A, 69B, 71A). Moreover, Dr. Esselink confirmed that she was primarily responsible for the treatment of claimant's CTS condition during the disputed period. (Exs. 88A-1, 93-39).

We acknowledge claimant's November 19, 2015 written declaration (as well as his testimony) that, when he completed the Form 827 on August 1, 2011, he had intended to choose Dr. Sugalski as his attending physician and that he did not seek treatment from any other physician for his CTS condition (including Dr. Esselink) between August 1, 2011 and June 29, 2015. (Ex. 96; Tr. 20). However, claimant had earlier testified in a deposition that Dr. Esselink was the physician treating him for his CTS. (Ex. 81-27). At that time, he vaguely recalled Dr. Sugalski's treatment. (Ex. 81-96).

In any event, consideration of the aforementioned evidence does not alter our conclusion that Dr. Esselink was primarily responsible for the treatment of claimant's CTS condition during the disputed period. Our finding is also consistent with Dr. Esselink's expressed understanding that she was primarily responsible for the treatment of claimant's CTS condition during the time in question. Moreover, Dr. Sugalski confirmed that he did not assume primary responsibility for the treatment of claimant's CTS condition until June 29, 2015. (Ex. 90B).

Consequently, as reasoned above, this record establishes that Dr. Esselink was claimant's attending physician for his CTS condition until June 29, 2015. Furthermore, before that date, Dr. Esselink neither authorized nor ratified an authorization of temporary disability benefits for claimant's CTS condition. Thus, on this record, we conclude that no "attending physician" authorized temporary disability benefits before June 29, 2015. Accordingly, we affirm.

ORDER

The ALJ's order dated May 23, 2016 is affirmed.

Entered at Salem, Oregon on November 2, 2016