BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JEFFREY B. SPROUSE,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1272196
	)	
JOHN L. BRIGGS & CO., INC.,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE (CLAIMANT'S UTILIZATION REVIEW APPEAL)

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on December 21, 2016, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

JOHN D. DANIELLO

ROBERT J. MITCHELL

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael I. Silverman, Attorney for the Employee

Robert H. Richter, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Jeffrey B. Sprouse ("Claimant") was injured in a compensable work accident on August 1, 2005, while he was working for John L. Briggs & Co., Inc. ("Employer"). Employer acknowledged a low back injury. Claimant has commuted all workers' compensation benefits with the exception of medical expenses. Claimant continues to receive pain management care from Dr. Ganesh Balu.

Pursuant to title 19, section 2322F(h) of the Delaware Code, Employer referred Claimant's medical treatment from Dr. Ganesh Balu to Utilization Review ("UR"). More specifically, Employer challenged the continued use of opioid pain medication for Claimant. A UR determination found that the continued opioid use was not in compliance with Delaware's Health Care Practice Guidelines. On July 12, 2016, Claimant filed a Petition to Determine Additional Compensation Due to appeal the UR determination.

A hearing was held on this petition on December 21, 2016. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Ganesh R. Balu, a physiatrist, testified by deposition on behalf of Claimant. He has been providing pain management medical care to Claimant with respect to Claimant's August 2005 work accident. In his opinion, Claimant's current Oxycodone dosage is reasonable treatment which keeps Claimant functional and capable of working.

Dr. Balu confirmed that Claimant had an acute work-related injury for which he sought medical treatment. Conservative treatment by Dr. Freedman had failed and, several years ago, Claimant had come under Dr. Balu's care. Claimant has tried physical therapy and multiple spinal injections. Claimant has been taking routine pain medications to manage his pain and

maintain his work status. He still gets periodic injections once or twice per year. Claimant elected not to undergo surgery. Dr. Balu testified that the current treatment plan is "to manage pain with the least amount of medications and possible injections on an as-needed basis." *Deposition of Dr. Balu*, at 5.

Dr. Balu explained that, when he comes in, Claimant has lower lumbar paraspinal spasm and tenderness. On occasion, he will have a positive straight leg raising test related to pain, but he remains functional. End range of motion is limited but he has no focal neurological deficit. Radicular symptoms come and go with worsening or exacerbations of his back condition. The most recent MRI was taken in 2012 and showed bulging disks at L2-3, L3-4, L4-5 and L5-S1.

Dr. Balu testified that Claimant's current medication regimen consists of Oxycodone (15mg), taking two pills three times per day (or a total of 90mg per day). He is prescribed 180 pills per month. Claimant has been stable on this regimen for many years. The doctor acknowledged that this medication is addictive by nature and so a treating doctor needs to be mindful of the risk/benefit ratio and monitor the medications on a regular basis. In his opinion, the continued prescription of this medication is within the Health Care Practice Guidelines because they provide Claimant with pain relief and allow him to continue to work.

Dr. Balu stated that he has done drug screening of Claimant for several years and Claimant has been mostly compliant. There have been one or two visits when the drug screen was negative for the presence of the medication. For example, the April 12, 2016 drug screen was negative for Oxycodone and Cyclobenzaprine, which would seem contrary to the prescription of 90mg of Oxycodone per day. Dr. Balu stated, however, that Claimant provided an explanation that the doctor found satisfactory. Claimant only has one kidney and he has significant renal failure associated with that. Because of this, certain other medications are not

appropriate for him to take. In his case, it is not safe to give him anti-inflammatory medications. This limits the type of medications that can be used. Also, because of the kidney issue, Claimant sometimes needs peritoneal dialysis, which can make him nauseous or have gastrointestinal upset. This is the explanation for one of the failed drug screens: he had been ill for a few days with throwing up and diarrhea and he had not taken his pain medication.

With respect to weaning medication, Dr. Balu stated that, in some patients, when aberrant behavior has been noticed, he has elected to wean the patient off the medication.[1] However, in Claimant's case, he is stable, working full time, and showing no aberrant behavior. He has not been calling stating that he is running out of pills too early, and there is no evidence that he is abusing the medication. He has been responsible in using the medication. As such, no weaning has been tried even though the dosage is admittedly a little bit more than allowed under the federal guidelines for opiate use. In the doctor's opinion, the present treatment regimen is reasonable and appropriate for Claimant.

Claimant testified that he is a carpenter working out of Local 132. He is forty-six years old. He lives in Laurel, but works in the Washington DC metro area. He does heavy work, such as remodeling grocery stores, although he might also do residential work when commercial work is unavailable.

Claimant stated that some activities will cause his back condition to flare up. For example, he drove 2.5 hours to get to this hearing and is currently very sore. Prolonged sitting causes the back to tighten up and he needs to stand and walk around. He can get back spasms and the back will "lock up" causing him to drop to his knees at times. He has learned to live with it.

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[1] The deposition transcript repeatedly uses the phrase "abhorrent behaviors," but the Board suspects that the doctor's actual word was "aberrant," which more closely describes the conduct he was discussing.

Claimant confirmed that he did discuss possible surgery with his a doctor. He was told that they could try to replace the disks, but he would not be able to climb ladders or pick up stuff afterwards. The same was true with the possibility of fusion surgery. Either way, with surgery he would not be able to do the work he is doing now. Therefore, so long as he can cope with the pain, he is able to keep doing carpentry work. If he does not take his medications, it is hard to get up and walk. Pain shoots down his legs (left more than right).

Claimant stated that he currently takes Oxycodone, Flexeril (Cyclobenzaprine) and Ambien (to help him sleep).[2] He also uses Lidocaine cream with a heating pad.[3] Originally, he was taking Oxycodone at 5mg, then at 10mg and now at 15mg. 180 tablets can cover him for a month. Claimant agreed that he submits to occasional drug screens and he has passed all but two of them. In the Spring of 2016, he had been sick with a "stomach bug" and diarrhea. Anything he ate or drank came out. Because of his kidney condition, he needs to stay hydrated, but he kept throwing up. Because he couldn't keep anything down, he knew when the drug screen was taken that it would come out negative. On the very day of the drug screen (April 12, 2016) he filled out a form ("Narcotic Noncompliance Documentation Record") explaining this.[4] The other failed drug screen was six or seven years ago.

Dr. Jason Brokaw, a pain management doctor, testified by deposition on behalf of Employer. He evaluated Claimant on November 15, 2016, and reviewed pertinent medical

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[2] With regard to all his medications, he checks with his kidney doctor first. Flexeril (a muscle relaxer) is not a concern in the amounts that he takes. The only concern is anti-inflammatory medications. Claimant explained that he was born with only one kidney.

[3] Claimant also takes steroids and medication to help with kidney function. The precise medications get switched around.

[4] Despite Claimant filling out this form on April 12, 2016, Dr. Balu failed to produce the record to Employer until his deposition, taken the day before this hearing. Claimant does not know why Dr. Balu failed to properly produce his records to Employer.

records.[5] In his opinion, Claimant should be detoxified from his opiate medications and his use of non-opiate, non-abusable medication and physical therapy should be increased.

Dr. Brokaw stated that he had previously evaluated Claimant in June of 2008 with respect to the August 2005 work accident. In November of 2016, Claimant reported that, since 2008, his low back problem had slowly worsened and it is easier for it to be aggravated now. Claimant also stated that he was less active and had gained weight. He reported episodes of back spasms a few times per month. His back tightens up in cold weather and he has to be careful when lifting. On occasion, he gets pain in the legs. He stated that he was taking Oxycodone (15mg) and getting 180 pills per month. He varied how many he took per day, depending on how he was feeling, but in general he would take from five to eight pills per day (or between 75mg and 120mg per day). The prescription from Dr. Balu is for a maximum of six per day. Claimant also uses Flexeril, over-the-counter Tylenol and topical creams and heat. Because of a kidney problem, he cannot take anti-inflammatory medications. He is on chronic Prednisone for the kidney. He stated that Dr. Balu also injects his back three to four time per year. He reported that the last time he had formal physical therapy was five years ago. He had seen a spine surgeon, but the doctor did not recommend surgery.

On examination of Claimant on November 15, 2016, Dr. Brokaw noted that Claimant was morbidly obese and demonstrated mild pain behavior. He had tenderness throughout the mid- to lower lumbar muscles. Lumbar range of motion was self-limited. The right knee had some pain and swelling. Decreased reflexes were noted in the legs, but otherwise the neurologic examination was normal.

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[5] Dr. Brokaw's deposition was taken on December 9, 2016, and thus was taken over ten days before Dr. Balu first produced the "Narcotic Noncompliance Documentation Record" that purports to explain Claimant's April 2016 failed drug screen. As such, obviously, Dr. Brokaw had no opportunity to comment on that document.

Dr. Brokaw opined that Claimant's continued use of Oxycodone and other narcotic pain medications was no longer reasonable and necessary. Claimant is taking a high dosage of opiate mediation. His current Oxycodone usage is the equivalent of 135mg of morphine per day. This places Claimant at an increased risk of respiratory depression, overdose and death. In addition, Claimant has been tested for compliance and been found non-complaint on multiple occasions, although this includes occasions when Claimant was found not to have taken his medications (negative for presence in the system) as well as overusing them. In addition, Claimant has other factors, such as his obesity and kidney transplant, which increases the risk of sequelae from excessive opiate medication intake.

In Dr. Brokaw's opinion, Claimant should be detoxified from opiate medication with a gradual withdrawal over a two or three month period, to make sure that Claimant does not go through abrupt withdrawal. Along with this detoxification, other forms of treatment such as non-abusable pain medications, muscle relaxers and aquatic physical therapy should be increased. This will help reduce his pain while reducing his dependence on less safe opiate medication.

With respect to drug screening and Claimant's compliance, Dr. Brokaw noted that Dr. Balu's documentation is insufficient, lacking any quantitative analysis. From 2012 forward, the only actual report that Dr. Brokaw could find was from April of 2016. Otherwise, Dr. Balu references tests in his notes but does not provide them. Dr. Balu's records also do not reflect that he discussed the test results with Claimant. An April 2016 test was negative for medications that Claimant was supposed to be taking on a daily basis, yet Claimant has also admitted that at time over-utilizes the medication, taking more pills per day than prescribed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Medical Expenses

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical "services, medicine and supplies" causally connected with that injury. DEL. CODE ANN. tit. 19, § 2322. However, to assist in assessing what is reasonable or necessary medical treatment for a workers' compensation injury, Delaware adopted Health Care Practice Guidelines. *See* DEL. CODE ANN. tit. 19, § 2322C(1). To determine compliance with the guidelines, an employer may refer treatment for consideration by UR, which then issues a determination. The focus of a UR determination is whether identified treatment is within applicable guidelines. An appeal *de novo* can be taken to the Board from such a determination. DEL. CODE ANN. tit. 19, § 2322F(j).

Unlike the UR determination, the primary issue before the Board is not whether treatment is within the Health Care Practice Guidelines, but whether the treatment is reasonable and necessary. *Meier v. Tunnell Companies LP*, Del. IAB, Hearing No. 1326876, at 3-4 (November 24, 2009)(ORDER). However, treatment by a certified health care provider that conforms with the Health Care Practice Guidelines is "presumed, in the absence of contrary evidence, to be reasonable and necessary." DEL. CODE ANN. tit. 19, § 2322C(6). Thus, when treatment is found by UR to be within the guidelines, on appeal "the burden of proof is on the employer to provide evidence to show that the treatment was not, in fact, reasonable for the particular case in issue." *Meier*, at 6. Conversely, it follows that treatment that does not conform to the guidelines is not presumed to be reasonable and necessary. It is not inappropriate for the Board to reference the Practice Guidelines to help it in determining what constitutes necessary and proper treatment. *See Poole v. State*, 77 A.3d 310, 325 (Del. Super. 2012).

In the present case, the UR determination found that Claimant's continued opioid usage was not in compliance with Delaware's Health Care Practice Guidelines. The burden of proof is therefore on Claimant to show that his current medication regimen is reasonable and necessary. The Board finds that Claimant has not met his burden.

There is no denying that Claimant is on a heavy load of opioid medication, with a prescription of 90mg per day (and, according to Dr. Brokaw, Claimant admitted to sometimes going as high as 120mg on a bad day). Even Dr. Balu admitted that the dosage Claimant is receiving is in excess of the federal guidelines for opiate use. In light of this, Dr. Brokaw's criticism of Dr. Balu's recordkeeping raises serious concerns. Dr. Balu apparently does periodic drug screens, but his files apparently do not usually include the data from those tests for others to review. We know for a fact that Dr. Balu's recordkeeping is so haphazard that a critical document (the Narcotic Noncompliance Documentation Report that Claimant filled out in April of 2016) was not produced by the doctor until December of 2016, over five months after Claimant filed this UR Appeal. Considering the dangers of heavy opioid usage in excess of established guidelines, such a cavalier approach to documentation is unacceptable.

Of greater concern, though, is Dr. Balu's failure to do what he himself states should be done. Claimant testified that he started taking Oxycodone at 5mg per pill, which was then increased to 10mg and then to the current level of 15mg. In other words, the dosage has done nothing but increase over time. He is also prescribed six of these pills per day. Dr. Balu testified that the "current treatment plan" was to manage Claimant's pain with the least amount of medication. Having stated this, though, the doctor went on to admit that he has never tried to wean Claimant from the heavy opioid load simply because the doctor had seen no evidence that Claimant had been abusing the medication. As noted, though, the asserted treatment plan is to

look for the least amount of medication—not to stay at a high level so long as the patient does not abuse it. Long-term opioid usage is not generally endorsed. As the Chronic Pain Treatment Guidelines note:

> Consensus regarding the use of opioids has generally been reached in the field of cancer pain, where nociceptive mechanisms are generally identifiable, expected survival may be short, and symptomatic relief is emphasized more than functional outcomes. In injured workers, by contrast, central and neuropathic mechanisms frequently overshadow nociceptive processes, expected survival is relatively long, and return to a high level of function is a major goal of treatment. Approaches to pain, which were developed in the context of malignant pain, therefore may not be transferable to chronic non-malignant pain.

Chronic Pain Treatment Guidelines, at §6.4.6. In addition, as Dr. Balu himself recognizes, the opioid medication is addictive by its very nature.

As such, the Board agrees with Dr. Brokaw that efforts should be made to wean Claimant from his current high level of opioid usage. This is accordance with the current treatment plan that Dr. Balu professes to follow as well as reasonable in light of the admitted dangers of Claimant remaining on such a high dosage of the opioid medication. At the very least, there is the danger of addiction and in light of Claimant's other health conditions (obesity and only one functioning kidney) strong efforts need to be followed to get Claimant's usage down to a safer level. The Board understands that Claimant cannot take anti-inflammatory medications because of the kidney problem, but anti-inflammatories are not the only non-opioid medications available. In addition, there are also, as Dr. Brokaw suggests, other non-medication treatment alternatives, such as aquatic therapy to help naturally reduce pain. Both doctors noted that, when dealing with opioids, the risk/benefit ratio to the patient always needs to be kept in mind. Considering that Dr. Balu has, by his own admission, not even attempted to wean down

Claimant's opioid usage, the Board accepts Dr. Brokaw's opinion concerning that proper balance over that of Dr. Balu.

The Board emphasizes that a weaning process is required to safely detoxify Claimant. Dr. Brokaw warned against abrupt withdrawal from opioids and the Board agrees. The Board agrees with the weaning program proposed by Dr. Brokaw, which recommends a gradual reduction of dependence on opiate medications, while maintaining pain control by increasing other non-abusable, non-opiate medications and therapy. Dr. Brokaw agreed that Dr. Balu could do this weaning, if he is willing. If Dr. Balu is willing to try it, then the Board cautions the doctor that better recordkeeping is required so that an independent reviewer can determine the reasonableness of these efforts. If Dr. Balu is unwilling to do the weaning process himself, then another doctor or facility should be found to do the process, similarly under the obligation of keeping proper records of that process.

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $10,341.80. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6

(August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney's fees awarded by the Board applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant's attorney. DEL. CODE ANN. tit. 19, § 2320(10)a.

In this case, although the Board has accepted the opinion of Employer's doctor as to how Claimant's treatment should proceed, it remains true that Claimant will continue to receive medical treatment as part of the weaning process, including possibly increased dosages of other medications and the increased use of physical therapy to establish a safer maintenance management program for Claimant. As such, Claimant has received something of an award justifying an attorney's fee. Claimant's counsel submitted an affidavit stating that he spent 16.2 hours in preparation time for this hearing, which itself lasted about 1.25 hours. Claimant's counsel was admitted to the Delaware Bar in 1991 and he is very experienced in workers' compensation law, a specialized area of litigation. His or his firm's initial contact with Claimant was in April of 2009, so Claimant had been represented for well over 7.5 years at the time of the hearing. This case was of average factual complexity and involved no unique or unusual legal issues. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances although naturally he could not work on other cases at the same time as he worked on this one. There is no evidence that accepting Claimant's case precluded counsel from accepting other specific clients. Counsel's fee arrangement with Claimant is on a one-third contingency basis. Counsel does not expect a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that a fee in the amount of $5,000.00 is reasonable in this case and does not exceed thirty percent of the value of the award once the value of non-speculative future and non-monetary benefits that will likely arise from this decision are taken into consideration. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant should undergo a program as proposed by Dr. Brokaw to wean Claimant's dependence on opioid medication. Claimant is awarded an attorney's fee and payment of his medical witness fee.

IT IS SO ORDERED THIS 26th DAY OF APRIL, 2017.

INDUSTRIAL ACCIDENT BOARD

JOHN D. DANIELLO

ROBERT J. MITCHELL

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

OWC Staff

Mailed Date: 4.26.17