

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A contested case hearing was held on September 16, 2008, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the IRO that the claimant is not entitled to 20 sessions of multidisciplinary pain programs for the compensable injury of _____?
2. Does the Division have jurisdiction to determine if Claimant is entitled to 20 sessions of multidisciplinary pain programs under 134.600(o)(4), where Petitioner has requested this same treatment plan once before requesting it under this claim?

PARTIES PRESENT

Claimant appeared and was assisted by KW, ombudsman. Respondent/Carrier appeared and was represented by HDP, attorney. Petitioner/Subclaimant appeared and was assisted by Dr. MW, layperson.

BACKGROUND INFORMATION

Claimant sustained a compensable injury to his left shoulder. He has undergone physical therapy, injections and work hardening. He had diagnostic testing in the form of MRI and EMGs. He has been recommended for surgical intervention by several doctors but this was denied by the Carrier. It was revealed in testimony the surgery was denied because the surgeon would not discuss the case with the Carrier's reviewing doctor. After the surgery was denied, the Claimant's doctors referred him for a multidisciplinary pain management program with the Petitioner. Petitioner requested the program and it was denied by an IRO doctor, who stated these programs are not recommended as little evidence exists for their effectiveness with shoulders. The doctors gave Claimant a trial of Zoloft. That failed. The Petitioner again requested the pain management program, which was again denied. The Petitioner has brought the request for this treatment to this hearing.

Carrier timely and properly brought forth the issue of jurisdiction. Carrier contends the Division does not have jurisdiction to hear this issue pursuant to Rule 134.600(o)(4) because Petitioner requested this same health care program once before. It was denied and Petitioner did not pursue that denial per the Rules for the original request. Carrier contends Petitioner is bringing the request for the same treatment to this hearing and they are unable to show objective clinical documentation to support a substantial change in condition to show entitlement for this treatment as requested a second time before the Division.

Rule 134.600(o)(4) now reads:

- (4) A request for preauthorization for the same health care shall only be resubmitted when the requestor provides objective documentation to support that a substantial change in the employee's medical condition has occurred. The carrier shall review the documentation and determine if a substantial change in the employee's medical condition has occurred.

With regards to the subject-matter jurisdiction issue, the Supreme Court addressed a similar circumstance in University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser when looking at notice in the Tort Claims Act. University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser 140 S.W.3d 351 (Tex. 2004). In that case, The Medical Center contended since they did not get the statutorily required six months notice of the claim, the courts did not have subject-matter jurisdiction to hear the case. The Supreme Court disagreed. They noted the longstanding principle that subject-matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by consent or waiver. Id. p358.

In this case, there is no Legislative intent in the rule to indicate the Division lacks subject-matter jurisdiction due to Petitioner's failure to provide objective documentation to support a substantial change in the Claimant's medical condition. The Division has jurisdiction to hear this case.

As for the merits of the request, the Petitioner requested 20 sessions of multidisciplinary pain programs. This was denied on January 04, 2008. The IRO doctor rendered five reasons why the Claimant would not be entitled to this treatment. First, there were no records submitted from the Date of Injury to January 2006. Second, Claimant's future vocational plans were undecided. Third, Claimant has significant anxiety and depression that did not improve on Zoloft and actually worsened according to Dr. McC's note on October 29, 2007. Fourth, A Designated Doctor examination by Dr. Respass recommended decompressive surgery, as well as two other doctors whose reports were not provided to the IRO. Last, Claimant was already treated by all modalities encompassed in a chronic pain management program including work hardening but as of October 29, 2007, his pain had actually increased. In summary, the IRO doctor states, "This patient's future job status is unclear, his psychiatric issues have not been treated nor improved, surgery recommendations by three separate doctors performing DDEs was not explored, and there was a paucity of records from the first year or so after his injury. Therefore, he is not an appropriate candidate for a [chronic pain management program] at this time."

Per the Official Disability Guidelines, outpatient pain rehabilitation programs may be considered medically necessary when all of the following criteria are met:

- (1) An adequate and thorough evaluation has been made, including baseline functional testing so follow-up with the same test can note functional improvement;
- (2) Previous methods of treating the chronic pain have been unsuccessful and there is an absence of other options likely to result in significant clinical improvement;
- (3) The patient has a significant loss of ability to function independently resulting from the chronic pain;
- (4) The patient is not a candidate where surgery or other treatments would clearly be warranted;

- (5) The patient exhibits motivation to change, and is willing to forgo secondary gains, including disability payments to effect this change; and
- (6) Negative predictors of success have been addressed.

The following variables have been found to be negative predictors of efficacy of treatment with the programs as well as negative predictors of completion of the programs: (1) a negative relationship with the employer/supervisor; (2) poor work adjustment and satisfaction; (3) a negative outlook about future employment; (4) high levels of psychosocial distress (higher pretreatment levels of depression, pain and disability); (5) involvement in financial disability disputes; (6) greater rates of smoking; (7) duration of pre-referral disability time; (8) prevalence of opioid use; and (9) pre-treatment levels of pain. (Linton, 2001) (Bendix, 1998) (McGeary, 2006) (McGeary, 2004) (Gatchel2, 2005)

Additionally, the Official Disability Guidelines note there appears to be little scientific evidence for the effectiveness of multidisciplinary biopsychosocial rehabilitation compared with other rehabilitation facilities for neck and shoulder pain, as opposed to low back pain and generalized pain syndromes. (Karjalainen, 2003)

KW, Ph.D. testified for the Petitioner and in support of the Claimant. Dr. KW addressed each of the criteria and negative predictors of efficacy of the program. He testified he was one of the professionals responsible for the adequate and thorough evaluation made on Claimant, including baseline functional testing so follow-up with the same testing could note functional improvement; that previous methods of treating the chronic pain such as work hardening, physical therapy and injections each alone were unsuccessful but together in a multidisciplinary program they would benefit the Claimant and there was an absence of other options likely to result in significant clinical improvement; that the patient had a significant loss of ability to function independently resulting from the chronic pain; the patient was not a candidate for surgery because the Carrier had denied the surgery requests: the patient exhibited motivation to change and was willing to forgo secondary gains including disability payments to effect this change; and Dr. KW addressed the negative predictors for success. Specifically addressing the precursors, Dr. KW testified Claimant was back to work with his employer so there was obviously no negative relationship with the employer/supervisor, poor work adjustment and satisfaction, or negative outlook about future employment; Claimant's pretreatment levels of depression, pain and disability were not unusual compared to other patients starting the same program; there is no financial disability disputes as income benefits have all been paid and Claimant is back to work; there was no great rate of smoking; duration of pre-referral disability time was not excessive; opioid use was not at a level that was contraindicating to the program; and, while higher rates of pain take longer to treat, people who are struggling more still need the treatment and Claimant's pain levels were not unusual for a person beginning this treatment.

On cross examination, Dr. KW testified he was not sure if Claimant was still a surgical candidate although agreed Dr. McC's last office note in evidence states he would do the surgery free. He also testified he does not know how much Claimant currently smokes. This information was not documented on the initial determination for the treatment requested. Dr. KW also testified he does not know how much Claimant's current opioid doses are and that information also is not documented. Finally, the chronic pain is localized to the left shoulder and not a general pain syndrome. He did testify the occupational goal was not set but indicated this is very difficult to do before the program is begun. Once the program develops, occupational goals are set.

While the IRO report is not very well written, it does include a significant contraindication for the treatment program which is agreed to by all the doctors. That is Claimant is or may be a surgical candidate. The Petitioner is requesting the chronic pain management program because surgery was denied. After the surgery denial, an IRO determination was not requested. While it was denied, this does not mean Claimant is not a surgical candidate. It would indicate Claimant is not a multidisciplinary pain program candidate. Dr. KW did not provide documentation of evidence-based medicine indicating Claimant should undergo a multidisciplinary pain program despite being a surgical candidate. It should be noted Carrier's witness, Dr. O, agreed other doctors indicated Claimant was a surgical candidate. He was the reviewing doctor who tried to reach Claimant's surgeon to discuss the need for surgery. His calls were never returned, so he denied the surgery based upon the nonresponsiveness of the surgeon and questions/concerns about Claimant's examination findings and test results.

The Petitioner failed to offer evidence-based medicine to sufficiently dispute the findings of the IRO doctor. The findings of the IRO doctor are supported by the greater weight of the evidence.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:
 - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. On _____, Claimant was the employee of (Employer).
 - C. On _____, Claimant sustained a compensable injury.
 - D. The Independent Review Organization determined Claimant should not have 20 sessions of multidisciplinary pain program.
2. Carrier delivered to Claimant and Subclaimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. The 20 sessions of multidisciplinary pain programs is not health care reasonably required for the compensable injury of _____.
4. There is no Legislative intent in Rule 134.600(o)(4) to indicate the Division lacks subject-matter jurisdiction due to Petitioner's failure to provide objective documentation to support a substantial change in the Claimant's medical condition.

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of the IRO that Claimant is not entitled to 20 sessions of multidisciplinary pain programs for the compensable injury of _____.
4. The Division has jurisdiction to determine if Claimant is entitled to 20 sessions of multidisciplinary pain programs under 134.600(o)(4), where Petitioner requested the same treatment plan once before requesting it under this claim.

DECISION

Claimant is not entitled to chronic pain management program for the compensable injury of (Date). The Division has jurisdiction to determine if Claimant is entitled to 20 sessions of multidisciplinary pain programs under 134.600(o)(4).

ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL RAY OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TX 78723.**

Signed this 25th day of September, 2008.
KEN WROBEL
Hearing Officer