

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 March 25, 2010, to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that a therapeutic pool is not reasonably required health care for the compensable injury of _____?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by LB, ombudsman.
Respondent/Carrier appeared and was represented by WS, attorney.

BACKGROUND INFORMATION

Claimant sustained a compensable injury on _____ and has undergone multiple surgeries as a result of this injury. Claimant has been diagnosed with spinal compression fractures and osteoarthritis. Claimant has also been diagnosed with quadriparesis secondary to cervical degenerative disc disease and multiple surgical operations, chronic pain syndrome, esophageal erosion resulting from medication use, osteoporosis, and reactive depression. Claimant is essentially wheel chair bound as a result of these conditions. Claimant's treating doctor has recommended a therapeutic pool for aquatic therapy for the compensable injury. Claimant's doctor noted that daily aquatic therapy would be of great benefit to the Claimant in improving the Claimant's muscle spasm and stiffness. Claimant's doctor indicated that a home pool would make the most sense medically given his limited function and extreme difficulty traveling for appointments. The request for a pool was denied by the Carrier and referred to an IRO.

The IRO reviewer, board certified in physical medicine, rehabilitation and pain management, determined that the proposed therapeutic pool was not medically necessary. The IRO reviewer acknowledged that the Claimant was a functional quadriparetic and that he obviously suffers from neck and back symptoms. The IRO reviewer noted that the Claimant was in a pool program seven years ago and that the Official Disability Guidelines (ODG) addresses more of the acute or subacute issues of exercise and aquatic therapy for the neck and low back. The IRO reviewer cited the ODG that states, "While a home exercise program is of course recommended, more elaborate personal care where outcomes are not monitored by a health professional, such as gym memberships or advanced home exercise equipment may not be covered under this guideline..." The IRO reviewer noted that this would apply and that exercise without a therapist present in a home pool would be in this category. The IRO reviewer concluded that, since the exercise would not be covered, then the construction of a pool would not be covered.

Texas Labor Code Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence based medicine or, if evidence based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence based medicine if that evidence is available. Evidence based medicine is further defined in Texas Labor Code Section 401.011 (18a) to be the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines. The Commissioner of the Division of Workers' compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308 (t), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

The IRO referenced exercise (neck section), aquatic therapy (low back), and exercise (low back) sections of the ODG. Excerpts from the pertinent sections of the ODG are as follows:

Exercise - neck: Recommended. Low stress aerobic activities and stretching exercises can be initiated at home and supported by a physical therapy provider, to avoid debilitation and further restriction of motion, and further benefits are available when combined with strength training. (Rosenfeld, 2000) (Bigos, 1999) (Ylinen-JAMA, 2003) (de Jager, 2004) In this recent RCT, both strength and endurance training, including a 12-month home exercise program, substantially decreased perceived neck pain and disability, and there was a clear dose-response relationship, with declines in neck pain and disability correlating positively with the amount of specific training. (Nikander, 2006) For mechanical disorders of the neck, therapeutic exercises have demonstrated clinically significant benefits in terms of pain, functional restoration, and patient global assessment scales. If exercise is prescribed a therapeutic tool, some documentation of progress should be expected. While a home exercise program is of course recommended, more elaborate personal care where outcomes are not monitored by a health professional, such as gym memberships or advanced home exercise equipment, may not be covered under this guideline.

Exercise - low back: Recommended for treatment and for prevention. There is strong evidence that exercise reduces disability duration in employees with low back pain. In acute back pain, exercise therapy may be effective, whereas in subacute back pain, exercises with a graded activity program, and in chronic back pain, intensive exercising, should be recommended. Exercise programs aimed at improving general endurance (aerobic fitness) and muscular strength (especially of the back and abdomen) have been shown to benefit patients with acute low back problems. So far, it appears that the key to success in the treatment of LBP is physical activity in any form, rather than through any specific activity. One of the problems with exercise, however, is that it is seldom defined in various research studies and its efficacy is seldom reported in any change in status, other than subjective complaints. If exercise is prescribed a therapeutic tool, some documentation of progress should be expected. While a home exercise program is of course recommended, more elaborate personal care where outcomes are not monitored by a health professional, such as gym memberships or advanced home exercise equipment may not be covered under this guideline, although temporary transitional exercise programs may be appropriate for patients who need more supervision.

Aquatic Therapy: Recommended as an optional form of exercise therapy, where available, as an alternative to land-based physical therapy. Aquatic therapy (including swimming) can minimize the effects of gravity, so it is specifically recommended where reduced weight bearing is desirable, for example extreme obesity. There may be advantages to weightless running in back pain recovery. (Ariyoshi, 1999) (Burns, 2001) This RCT concluded that water-based exercises produced better improvement in disability and quality of life of patients with CLBP than land-based exercise, but in both groups, statistically significant improvements were detected in all outcome measures. The aquatic exercise program consisted of 20 sessions, 5 x per week for 4 weeks in a swimming pool, and the land-based exercise was a home-based program demonstrated by a physical therapist on one occasion and then given written advice. (Dundar, 2009)

The Claimant's wife testified that she and (Claimant) live in (City), TX which is approximately 60 miles from downtown (City), TX. (Claimant's Wife) testified they relocated to this area to keep from being put in a network by the insurance carrier. (Claimant's Wife) testified that she was not aware of any aquatic facilities near their home and it takes her at least 10 minutes just to get out of their subdivision. Dr. W, a board certified rheumatologist, testified that daily trips to a facility for aquatic therapy would negate any benefits of the therapy in that travel causes pain which increases hypertension and the risk of additional fractures. Dr. W testified that the Claimant is unable to perform any land-based physical therapy due to his spine condition. Dr. W testified that the Claimant meets the ODG requirements for aquatic therapy for 30 minutes per day with supervision in a heated pool. Dr. W suggested that a trained therapist supervise the initial therapy then subsequent therapy sessions could be conducted by the Claimant's wife or the live-in health care giver, Mr. S.

Dr. J, a board certified orthopedic surgeon, testified that the Claimant functions as a paraplegic and that aquatic therapy would be beneficial for improving his pain and functional ability. Dr. J recommended a harness for getting in and out of the pool and possibly a trial of aquatic therapy to determine the benefit. Dr. J testified that the Claimant has not had any therapy since 2002 and has become extremely deconditioned. Dr. J recommended daily exercise but not necessarily supervised by a professional. Dr. J testified that the Claimant is unable to travel unassisted and,

from a convenience perspective, daily therapy would be more beneficial without travelling to a facility.

Dr. B, a board certified orthopedic surgeon, testified that the Claimant did require a safe environment for joint motion and that aquatic therapy would be appropriate. Dr. B testified that a “gravity-less” environment would benefit the Claimant; however, a therapeutic heated pool was “way excessive and over-the-top.” Dr. B suggested a Jacuzzi tub with appropriate supervision to perform exercises. The Claimant’s doctors testified that the Claimant needed more than just a whirlpool in order to perform the appropriate exercises.

The ODG recommends aquatic therapy as an optional form of exercise therapy, where available, as an alternative to land-based physical therapy. Aquatic therapy (including swimming) can minimize the effects of gravity, so it is specifically recommended where reduced weight bearing is desirable. Drs. W, J and B seem to agree that gravity-less therapy is appropriate for the Claimant and that it would be beneficial for his pain relief and conditioning. However, the recommendation is for a therapeutic pool. The Claimant has not undergone any therapy, land-based or aquatic, since 2002. The doctors have not prescribed a trial period of aquatic therapy supervised by a trained therapist to determine the effectiveness of such therapy on a daily basis. The doctors have testified that long-distance travel would negate positive affects of the therapy, however, the evidence was insufficient to establish that there is not a viable facility accessible in the area where the Claimant resides. In fact, the Carrier provided documentation verifying that there is a facility in the (City) area which may be accessible for the Claimant. While the ODG provides recommendations for the necessity of aquatic therapy, the request in this case is for approval of a therapeutic pool not whether the aqua therapy is reasonable and necessary. The Claimant must show not that the aqua therapy is health care reasonably required, but rather that such therapy is not reasonably available without the installation of the requested pool. Proof of that fact does not rest with ODG, other evidence-based medicine or standards of practice in the medical community. The Claimant failed to establish that the requested aqua therapy was not reasonably available to accommodate the Claimant. Based on the evidence presented, the Claimant failed to provide evidence based medicine sufficient to contradict the determination of the IRO and the evidence presented is not contrary to the decision of the IRO that a therapeutic pool is not reasonable and necessary health care for the compensable injury of _____.

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. Claimant sustained a compensable injury on _____, while the employee of (Self-Insured), Employer.
2. Carrier delivered to Claimant 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 Claimant failed to prove that a therapeutic pool is reasonable and necessary health care treatment for the Claimant's compensable injury of _____.

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 IRO that a therapeutic pool is not reasonably required medical care for the compensable injury of _____.

DECISION

Claimant is not entitled to a therapeutic pool for the compensable injury of _____.

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 (**SELF-INSURED**) and the name and address of its registered agent for service of process is

CT C S
(STREET ADDRESS)
(CITY), TX (ZIP CODE)

Signed this 21st day of April, 2010.

CAROL A. FOUGERAT
Hearing Officer