

MEDICAL CONTESTED CASE HEARING NO 12005
M6-11-33230-01

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 July 13, 2011 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the IRO that the claimant is not entitled to two Phonak hearing aid systems, remote control; Phonak Icom, Dry & Store appliance & annual supply of batteries for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Claimant/Petitioner appeared and was assisted by DB, ombudsman.
Carrier/Respondent appeared and was represented by JB, adjuster.

BACKGROUND INFORMATION

Claimant sustained a compensable hearing loss injury on (Date of Injury). On September 23, 2004 he had mild to severe sensorineural hearing loss in the right ear and a mild to moderately severe loss in the left ear. Claimant was originally fitted with two behind the ear audio hearing aids (Phonak Perseo 211 dAZ with remote control and batteries) in January 2005. His previous set of hearing aids was stolen and Claimant expressed significant difficulty understanding speech and normal conversation. On January 28, 2011 an audiogram revealed significant decreased bilateral hearing loss that was mild to severe sensorineural loss. Word discrimination was decreased from 92% to 68% on the left side. Dr. B, on the advice of JE, audiologist, prescribed two digital 1 Phonak Perseo 23 dAZ in the canal hearing aids with a remote control along with Phonak iCom for conductivity to communication devices and an annual supply of batteries.

Claimant's request for new hearing aids was denied by the Carrier due to lack of documentation as to what happened to the equipment issued in 2005 and why this specific high end technology equipment was requested. The reconsideration request was also denied due to lack of documentation from the requesting physician as to why the specific model was requested. Claimant requested review by an independent review organization (IRO). The IRO issued a decision on March 14, 2011 upholding the Carrier's denial. The IRO Reviewer determined that even though hearing aids may be appropriate for Claimant, the specific type requested was not

substantiated by the submitted history or documentation. Specifically the IRO decision stated that there was no evidence of Claimant's lifestyle or involvement in specific activities to determine the medical necessity of the high level equipment versus standard hearing aids. Claimant appealed that decision to this medical contested case hearing.

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 (22-a) 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 (18-a) 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 and 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. 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 is 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."

With regard to hearing aids, the ODG, in the Head Chapter, states as follows:

“Hearing aids are recommended for any of the following: (1) Conductive hearing loss unresponsive to medical or surgical interventions. (Conductive hearing loss involves the outer and middle ear and is due to mechanical or physical blockage of sound. Usually, conductive hearing loss can be corrected medically or surgically.) (2) Sensorineural hearing loss. (Sensorineural or "nerve" hearing loss

involves damage to the inner ear or the 8th cranial nerve. It can be caused by aging, prenatal or birth-related problems, viral or bacterial infections, heredity, trauma, exposure to loud noises, the use of certain drugs, fluid buildup in the middle ear, or a benign tumor in the inner ear.) or (3) Mixed hearing loss (conductive hearing loss coupled with sensorineural hearing loss). (Cigna, 2006) (Chisolm, 2007)”

The ODG recommends hearing aids for nerve damage type hearing loss and Claimant's hearing loss is of this type. For the Claimant to prevail, he must provide evidence based medicine showing that the new style of hearing aids are recommended over the standard ones.

Dr. B testified that based upon his medical experience the requested hearing aid replacements/upgrade are medically necessary. Dr. B stated that it is customary in his practice to rely upon the advice of an audiologist as to the specific equipment, and the audiologist is the one that keeps up with the current audiometric literature. Dr. B explained the medical advances in hearing aid technology, stating that analog hearing aids are now outdated with digital hearing aids being the current standard of care. Dr. B even stated that Claimant's original hearing aids are no longer available. The decision of the IRO did not dispute Claimant's need for hearing aids, just the specific type requested. Dr. B failed to offer evidence of credible scientific studies or medical literature establishing the need for the proposed hearing aids. Nor did Dr. B establish that there is no evidence based medical evidence regarding the need, or lack thereof, for the proposed hearing aids. Claimant has failed to provide evidence based medical evidence to overcome the decision of the IRO.

The preponderance of the evidence is not contrary to the decision of the IRO that the Claimant is not entitled to two Phonak hearing aid systems, remote control; Phonak Icom, Dry & Store appliance & annual supply of batteries for the compensable injury of (Date of Injury).

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 (Date of Injury) Claimant was the employee of (Employer), Employer.
 - C. On (Date of Injury), Employer provided workers' compensation insurance with Commerce & Industry Insurance Company, Carrier.

- D. On (Date of Injury) Claimant sustained a compensable injury.
- E. The IRO decision found that Claimant was not entitled to two Phonak hearing aid systems, remote control; Phonak Icom, Dry & Store appliance & annual supply of batteries for the compensable injury of (Date of Injury).
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. Claimant failed to provide evidence based medicine contrary to the IRO decision.
 4. Two Phonak hearing aid systems, remote control; Phonak Icom, Dry & Store appliance & annual supply of batteries is not health care reasonably required for the compensable injury of (Date of Injury).

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 the Claimant is not entitled to two Phonak hearing aid systems, remote control; Phonak Icom, Dry & Store appliance & annual supply of batteries for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to two Phonak hearing aid systems, remote control; Phonak Icom, Dry & Store appliance & annual supply of batteries for the compensable injury of (Date of Injury).

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 **COMMERCE & INDUSTRY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TX 78701-3218**

Signed this 1st day of August, 2011.

Judy L.Ney
Hearing Officer