STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Suite 502
Austin, Texas 78701

DOCKET NO. 453-02-3523.M2

POSITIVE PAIN MANAGEMENT	§	**BEFORE THE STATE OFFICE**
V.	§	**OF**
AMCOMP ASSURANCE CORP.	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

The claimant in this case has a compensable back injury. The carrier, AMCOMP Assurance Corporation (AAC), denied pre-authorization for a chronic pain management program for the claimant. At issue is whether a chronic pain management program is reasonable and necessary to treat this claimant's compensable injury.

The Administrative Law Judge (ALJ) concludes that the chronic pain management program should be pre-authorized.

I. Jurisdiction, Notice, and Procedural History

The Texas Workers' Compensation Commission (the Commission) has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act). TEX. LAB. CODE ANN. ch. 401 *et seq*. The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(d); TEX. GOV'T CODE ANN. ch. 2003.

Independent Review, Inc., the independent review organization (IRO) assigned by the Commission to review this dispute, issued its decision denying pre-authorization on May 23, 2002. The provider, Positive Pain Management (PPM), requested a hearing. Proper and timely notice of the hearing was issued July 10, 2002. The hearing was convened August 6, 2002, with ALJ Shannon Kilgore presiding. Peter Rogers appeared by telephone for PPM, and Peter Macaulay appeared on behalf of AAC. The hearing was adjourned, and the record closed, the same day.

II. General Factual Background

The claimant in this case sustained a compensable spinal injury on_____. He was an emergency medical technician, and was injured trying to move an extremely heavy patient. Carrier's Exhibit 2. He was treated initially with muscle relaxants and analgesics. *Id.* He had an MRI of the lumbar spine on December 28, 2000, which showed disc protrusion at L5-S1 displacing the S-1 nerve root and mild dessication at L3-4 and L4-5. PPM Exhibit 3, pp. 30-31. Lower left extremity nerve conduction

studies were normal. *Id.,* pp. 28-29. Discography produced concordant pain at L3-4 and L4-5. On June 4, 2001, the claimant underwent a nucleoplasty at L4-5, and on October 15, 2001, he had a nucleoplasty at L3-4. *Id.*, pp. 25-27, 32-34. He also participated in aquatics therapy in 2001. *Id.*, pp. 25-27.

Following the nucleoplasty procedures, the claimant continued to have back pain. *Id.*, pp. 19-21. Kenneth Alo, M.D., who had performed the nucleoplasty operations and was also the medical director at PPM, referred the claimant to PPM for a psychiatric evaluation to determine his suitability for a chronic pain management program. *Id.*, pp. 1-5, 15. Ron Ziegler, Ph.D., of PPM evaluated the claimant in November 2001 and concluded that he was having difficulty coping with his pain. *Id.*, pp. 1-5. Dr. Ziegler's report states that the claimant rated his pain as averaging four to five on a scale of one to ten, that he had poor coping skills, that the pain was the primary focus of his life, and that it was having a disruptive effect on his home life. *Id.* The report states his level of functioning was 45% below the level he was experiencing before the start of his pain. *Id.* Dr. Ziegler determined that the claimant's GAF, or global assessment of function, was 55. *Id.* He recommended that the claimant participate in a chronic pain management program. *Id.*, p. 5.

PPM sought pre-authorization for chronic pain management treatment consisting of physical rehabilitation, individual psychotherapy, group therapy, EMG biofeedback training, and medication management, to last for 20 days, eight hours per day. *Id.*, pp. 6-13. The cost of the program would be $24,000.00. Carrier's Exhibit 3. AAC denied preauthorization, saying that the proposed program was not medically necessary. Carrier's Exhibit 4. *See also* Carrier's Exhibit 5.

The IRO issued its report on May 23, 2002, agreeing with the decision of AAC. Carrier's Exhibit 1. The Medical Case Review included with the IRO decision stated:

> [T]here is no indication of a chronic pain situation and there is no indication that an intensive 20-day session of chronic pain management is reasonable and necessary to treat the compensable injury. Moreover, a home exercise program emphasizing spine mobility, flexibility, and overall fitness would be indicated, but, based on the materials provided, I do not see the need for the 20-day program.
>
> The screening criteria utilized were generally accepted medical guidelines, medical literature, and other nationally accepted criteria.

Carrier's Exhibit 1.[1]

A designated doctor, Dr. Martin Bloom, examined the claimant on June 24, 2002. Carrier's Exhibit 2. He noted that the claimant still complained of pain. *Id.* Dr. Bloom stated that the claimant is at MMI (maximum medical improvement), and gave him an impairment rating of 0%. *Id.* The treating doctor, Jim Baker, M.D., disagreed with both the certification of MMI and the impairment rating. *Id.*, p. 7.

III. Burden of Proof

The Commission's rules state that an IRO decision carries "presumptive weight." 28 TEX. ADMIN. CODE § 133.308(v). AAC argues that this means not only does the party who lost before the IRO have the burden of proof, but in order to prevail that party must show that the IRO decision was contrary to the great weight of the evidence. In other words, the carrier asserts that § 133.308(v) establishes a heightened standard of proof where IRO decisions are being appealed. In support of this argument, the carrier cited to §§ 408.122 and 408.125 of the Labor Code. Section 408.122 concerns the weight to be given to the report of a designated doctor in determining whether a claimant has reached MMI. Section 408.125 concerns the weight to be given to the report of a designated doctor in determining a claimant's impairment rating. Both of these sections provide that the designated doctor's report be given "presumptive weight," and both go on to say that the doctor's report is determinative unless the great weight of the medical evidence is to the contrary. PPM did not dispute the carrier's interpretation of the standard of proof.

This is the first time this ALJ has had to apply § 133.308(v), which on its face is not entirely clear.

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[1] The Medical Case Review stated that the claimant had a lumbar strain associated with his compensable injury. It also noted that the nucleoplasty procedures related to the L3-4 and L4-5 levels, which the MRI showed to be the sites of dessication – a degenerative, rather than an acute, process. Carrier's Exhibit 1. It is not clear to the ALJ the degree to which the nucleoplasty operations may have been related to any preexisting degenerative condition. It is clear from the record, however, that the claimant was asymptomatic prior to the_____, incident, and he has experienced back pain ever since. AAC has not argued that the requested chronic pain management program, or any treatment undergone by the claimant to date for his back pain, is unrelated to the compensable injury.

Since the term "presumptive weight" is not defined in this context, it is difficult to know just what the Commission intended by the phrase. Even if the Commission intended to alter the standard of proof in medical necessity cases, the provider in the instant case has met the heightened standard.

IV. Discussion

Is the proposed chronic pain management program reasonable and necessary to treat the claimant's compensable injury?

1. Applicable law

Section 408.021(a) of the Texas Workers's Compensation Act (Act) 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. The employee is specifically entitled to health care that:

(1) cures or relieves the effects naturally resulting from the compensable injury;
(2) promotes recovery; or
(3) enhances the ability of the employee to return to or retain employment.

Section 401.011(19) of the Act defines "health care" to include "all reasonable and necessary medical ... services."

With respect to chronic pain, the Medical Fee Guideline provides:

1. Chronic pain syndrome is defined as any set of verbal or nonverbal behaviors that:

   a. involves the complaint of enduring pain;

   b. differs significantly from the injured worker's premorbid status;

   c. has not responded to previous appropriate medical, surgical, and/or injection treatments;

   d. interferes with the injured worker's physical, psychological, social, and/or vocational functioning.

2. Entrance/admission criteria shall enable the program to admit persons:

   a. who are likely to benefit from this program design;

   b. whose symptoms meet the above description of chronic pain syndrome; and

> c. whose medical, psychological, or other conditions do not prohibit participation in the program.

1996 Medical Fee Guideline, p. 40. *See also* 30 TEX. ADMIN. CODE § 134.201(Commission's rule adopting the Medical Fee Guideline by reference).

In addition, the Commission's Mental Health Treatment Guideline, though abolished effective January 1, 2002, was in effect during the fall of 2001, when the request for pre-authorization was made in this case. That guideline includes fairly specific criteria for referral to chronic pain management programs, including: a GAF rating of 40-90 with any psychosocial stressor rating, the patient has not responded to primary or secondary stages of outpatient physical therapy and/or mental health treatment within a reasonable time, the patient exhibits pain behavior or functional limitations disruptive to activities of daily living, the patient is facing significant and permanent loss of functioning that will require major readjustments, the patient's pain has persisted well beyond the expected tissue healing time, and the patient is judged at risk of developing an excessively disabled lifestyle and remaining off work. *See* 28 TEX. ADMIN. CODE § 134.1000(i)(3)(B)(West 2002) (abolished by statute effective January 1, 2002).

2. *Discussion*

The IRO's decision is quite summary. It asserts that the claimant had been doing "reasonably well," but does not spell out what that phrase means or how it can be reconciled with his reports of continuing pain. Carrier's Exhibit 1. It engages in almost no analysis before asserting that "there is no indication of a chronic pain situation."[2] *Id*. The ALJ finds that the IRO's conclusion is contrary to the great weight of the medical evidence.[3]

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[2] PPM seemed to argue that the IRO decision is *per se* invalid because the IRO doctor did not specifically identify the source of the screening criteria he used in arriving at his conclusion, as required by 28 TEX. ADMIN. CODE § 133.308(o)(1)(B). The ALJ does not find it necessary to reach this issue, since there are some fairly specific factors set out in the Medical Fee Guideline and Mental Health Treatment Guideline relating to admission to chronic pain management programs, and the ALJ can judge the evidence and the IRO's decision in light of those factors. That the IRO decision does not go into much detail about the analysis that led to its conclusion, including the factors employed, certainly makes it a less persuasive decision.

[3] Since this case was reviewed by an IRO, the Commission did not prepare a "certified record" as has been its practice in cases reviewed by the Commission's Medical Review Division. However, the parties in this case were both well represented, and they offered a number of exhibits, including medical records. The ALJ therefore had a reasonably complete body of medical evidence against which to compare the conclusion of the IRO.

The record shows that:

g the claimant's pain began with a traumatic incident on_____, in which he attempted to move a man weighing over 300 pounds (PPM Exhibit 3, p. 22; Carrier's Exhibit 2);

g over a year following the claimant's injury, he still reports pain (PPM Ex. 3, pp. 1-5, 17, 19-21; Carrier's Exhibit 2);

g the claimant's back pain could reasonably have been expected to have resolved in six to eight months following the _____incident (testimony of Arash Sarabi, D.C.);

g Dr. Ziegler's report[4] states that the claimant reported pain as averaging four to five on a scale of ten, that the claimant feels the pain controls his life, that the claimant finds his daily life and family relationships altered by the pain, that he fears re-injury, that his level of functioning is 45% below the level he was experiencing before the start of his pain, and that he experiences intermittent bouts of depression (PPM Exhibit 3, pp. 1-5);

g Dr. Ziegler found the claimant to have a GAF score of 55 (PPM Exhibit 3, pp. 1-5);

g Dr. Ziegler found the claimant to have poor coping skills (PPM Exhibit 3, pp. 1-5);

g Dr. Ziegler judged the claimant to be at risk of developing an excessively disabled lifestyle and remaining off work (PPM Exhibit 3, pp. 6-8);

g the claimant has had medication, surgery, and physical therapy to address his back pain, with only limited success (PPM Exhibit 3);

g Dr. Bloom found that the claimant has chronic lower back pain (Carrier Ex. 2); and

g the claimant's present physician, Dr. Jim Baker, stated that he disagreed with Dr. Bloom's determination that the claimant is at MMI and has a 0% impairment rating.

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[4] AAC argues that the opinions and reports of Dr. Alo and Dr. Ziegler should be given little weight, since they work for PPM and therefore might stand to gain from pre-authorization of chronic pain management programs to be administered by PPM. The ALJ is mindful of those kinds of factors relating to credibility. However, Dr. Ziegler's report in particular seems thorough and balanced, and largely reports what the claimant told him about his pain and its role in his life.

The claimant meets all of the factors listed in the Medical Fee Guideline for chronic pain syndrome. He complains of enduring pain that is quite different from his asymptomatic pre-accident status. Prior interventions have failed to alleviate his pain. His pain dominates his life and interferes with his physical, psychological, social, and vocational functioning.

Further, the record shows that the claimant meets the criteria for chronic pain management established in the Mental Health Treatment Guideline. He was given a GAF rating of 55 (although the documentation is unclear about any psychosocial stressor rating), he has not responded to primary or secondary stages of outpatient physical therapy and/or mental health treatment within a reasonable time, he exhibits pain behavior or functional limitations disruptive to activities of daily living, he is facing significant and permanent loss of functioning that will require major readjustments, his pain has persisted beyond the expected tissue healing time, and he has been judged at risk of developing an excessively disabled lifestyle and remaining off work *See* PPM Exhibit 3, pp. 6-8.

The provider has shown that the IRO decision is not supported by the preponderance of the evidence. Further, the record strongly indicates that the IRO decision goes against the great weight of the medical evidence.

3. *Conclusion*

The requested chronic pain management program should be pre-authorized.

V. Findings of Fact

1. The workers' compensation claimant in this case sustained a compensable back injury on _____, while trying to lift a person weighing over 300 pounds.

2. The claimant was treated initially with muscle relaxants and analgesics.

3. The claimant had an MRI of the lumbar spine on December 28, 2000, which showed disc protrusion at L5-S1 displacing the S-1 nerve root and mild dessication at L3-4 and L4-5. Lower left extremity nerve conduction studies were normal. Discography produced concordant pain at L3-4 and L4-5.

4. On June 4, 2001, the claimant underwent a nucleoplasty at L4-5, and on October 15, 2001, he had a nucleoplasty at L3-4. He also participated in aquatics therapy in 2001.

5. Following the nucleoplasty procedures, the claimant continued to have back pain.

6. Dr. Kenneth Alo, M.D., who had performed the nucleoplasty operations and was also the medical director at Positive Pain Management (PPM), referred the claimant to PPM for a psychiatric evaluation to determine his suitability for a chronic pain management program.

7. Ron Ziegler, Ph.D., of PPM evaluated the claimant in November 2001. Dr. Ziegler found claimant's coping skills to be limited, and recommended participation in a chronic pain management program.

8. PPM sought pre-authorization for chronic pain management treatment consisting of physical rehabilitation, individual psychotherapy, group therapy, EMG biofeedback training, and medication management, to last for 20 days, eight hours per day.

9. The carrier, AMCOMP Assurance Corporation, denied preauthorization, saying that the proposed program was not medically necessary.

10. The independent review organization (IRO) issued its report on May 23, 2002, agreeing with the decision of AAC.

11. PPM requested a hearing.

12. Notice of the hearing was issued on July 10, 2002.

13. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

14. The hearing was convened August 6, 2002, with ALJ Shannon Kilgore presiding. The record closed the same day.

15. The claimant has chronic lower back pain.

16. The claimant experiences pain averaging four to five on a scale of ten, feels that the pain controls his life, finds his daily life and family relationships altered by the pain, fears re-injury, and experiences intermittent bouts of depression. The claimant's GAF, or global assessment of function, has been determined to be 55, which is a significant score.

17. Prior interventions have failed to alleviate the claimant's pain.

18. The claimant's pain dominates his life and interferes with his physical, psychological, social, and vocational functioning.

19. The claimant has not responded to primary or secondary stages of outpatient physical therapy and/or mental health treatment within a reasonable time.

20. The claimant exhibits pain behavior or functional limitations disruptive to activities of daily living.

21. The claimant is facing significant and permanent loss of functioning that will require major physical, vocational, and psychological readjustment.

22. The claimant's pain has persisted well beyond the expected tissue healing time.

23. The claimant has been judged at risk of developing an excessively disabled lifestyle and remaining off work.

VI. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to § 413.031 of the Texas Workers' Compensation Act (the Act). *See* TEX. LAB. CODE ch. 401 *et seq.*

2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order in this case. TEX. LAB. CODE § 413.031(d); TEX. GOV'T CODE ch. 2003.

3. Adequate and timely notice of the hearing was provided in accordance with the Texas Administrative Procedure Act. TEX. GOV'T CODE § 2001.052.

4. 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. TEX. LAB. CODE § 408.021(a).

5. A chronic pain management treatment program requires pre-authorization. 28 TEX. ADMIN. CODE § 134.600(h)(15).

6. The IRO decision carries "presumptive weight" in this matter. 28 TEX. ADMIN. CODE § 133.308(v).

7. The claimant meets the criteria for chronic pain and admission to a chronic pain management program established in the 1996 Medical Fee Guideline, adopted by reference in the Commission's rules, 30 TEX. ADMIN. CODE § 134.201, and in the Mental Health Treatment Guideline. 28 TEX. ADMIN. CODE § 134.1000(I)(3)(B)(West 2002) (abolished by statute effective January 1, 2002).

8. PPM met its burden to show that the proposed chronic pain management program is medically necessary health care for the claimant.

ORDER

IT IS, THEREFORE, ORDERED that AMCOMP Assurance Corporation pre-authorize the requested chronic pain management program to treat the claimant's chronic low back pain.

Signed this 29th of August, 2002.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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Shannon Kilgore
Administrative Law Judge