

**DOCKET NOS. 453-02-3486.M2  
MDR Tracking No. M2-02-0559-01**

**SANJOY SUNDARESAN, M.D.,  
Petitioner**

v.

**LIBERTY MUTUAL INSURANCE  
GROUP,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

**I. Summary**

Dr. Sanjoy Sundaresan, M.D. (Petitioner), sought review of an decision by a reviewer with an independent review organization (IRO) who concluded that a discography examination by Petitioner of \_\_\_\_\_ (Claimant) spine was not medically necessary at this point in Claimant's treatment. Liberty Mutual Insurance Group (Carrier) had declined to preauthorize the examination. Based on the evidence, the administrative law judge (ALJ) holds the Petitioner failed to meet his burden of proof to show that a discogram was medically necessary to treat Claimant's work-related injury at this time, so the discogram is not preauthorized.

The particular facts and reasoning in support of this decision are set forth below in the Discussion and Findings of Fact, and the legal conclusions derived from those facts appear in the Conclusions of Law. The ALJ convened a hearing on these issues on August 5, 2002, and the record closed on August 9, 2002. Dr. Sundaresan represented himself; Shannon P. Butterworth represented the Carrier.

**II. Factual Background**

Claimant was injured on the job on \_\_\_\_\_. Since that date, Claimant has undergone two surgeries, and a variety of conservative treatments, without complete pain relief. The first surgery, on July 19, 2000, was a lumbar laminectomy with disc removal at the L4-L5 level. The second, on April 18, 2001, was a pedicle screw placement at the L4-L5 level. The second surgery was an attempt to relieve Claimant's persistent pain and discomfort arising from his spine injury. Non-surgical treatments have also been attempted, including trigger point injections and epidural steroid injections. Notwithstanding all these treatments, Claimant continued to experience low back pain in 2001 and early 2002.

The discogram Petitioner proposed for Claimant's treatment would be his second. On March 21, 2001, a discography was performed on five levels of Claimant's spine in preparation for the surgery on April 18, 2001.

Petitioner, a neurologist who practices general neurosurgery and spinal reconstructive surgery, has diagnosed Claimant as having failed-back syndrome. He explained that failed-back

syndrome is unexplained and persistent pain which has not responded to standard treatments and surgery, and can be caused by a variety of conditions. As prior treatments had not resolved Claimant's pain, Dr. Sundaresan recommended that Claimant be given a discogram before he recommends further treatment. Dr. Sundaresan explained that because the discogram procedure allows a patient to provide feedback to the tester about the pain, the procedure helps the physician tailor the treatment to the patient. To perform a discogram, the tester lightly sedates the patient, then injects a contrast material into the affected area of the spine. The tester then pressurizes the area to mimic the pain-causing condition. If pressurization causes the patient to feel the pain that would normally be expected in that area, termed concordant pain, the physician is given greater assurance his treatment will be directed to the proper area of the spine. Contrast material is also injected into a non-injured disc as a control for test results. It is considered an invasive procedure.

Dr. Sundaresan acknowledged that the discogram procedure is not universally accepted among physicians as being a necessary test, but also that there are some spine surgeons "who won't operate without [doing] one." He contended that the greater weight of current medical authority supported use of discography under the appropriate circumstances, citing a 1995 position statement of the North American Spine Society endorsing the use of discograms in selected circumstances. Those circumstances he cited include patients who have previously undergone surgery but continue to experience significant pain. He argued that Claimant, having experienced little relief of his pain despite two surgeries and other treatments, was an appropriate candidate for the administration of a discogram. In addition, he contended the presence in the lower back of hardware, *i.e.*, the pedicle screw, made other radiographic testing such as an MRI or a **CT scan (computed tomography)** less reliable.

Dr. Sundaresan did not specify what range of treatments he was considering for Claimant's future treatment although he noted that one of the chief characteristics of patients with failed-back syndrome is the difficulty of predicting outcomes of further procedures or treatments, due to the unexplained failure of standard treatments or procedures.

On an unknown date after February 2002,<sup>1</sup> the Carrier denied Dr. Sundaresan's request for preauthorization of a second discogram on Claimant on the grounds it was not medically necessary. They relied in this regard on two peer reviews, one by Dr. James Crowley, M.D., and one by Dr. Vernon Mark, M.D., both of whom recommended against the second discogram. (Resp. Exhs. Nos. 2 and 3). Dr. Crowley and Dr. Mark are both neurological surgeons. Both reviewing doctors concluded the additional test would be medically unnecessary because the reliability and usefulness of the test as a diagnostic aid was questionable given Claimant's previous back surgeries.

On May 17, 2002, the IRO reviewer issued an opinion which upheld the Carrier's conclusion

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<sup>1</sup> The paucity of the record made by the parties in this case made fixing the dates of the prior events in this case impossible. There is no copy of either the explanation of benefits (EOB) or the original request for preauthorization in the file. Inexplicably, Petitioner did not introduce any of Claimant's medical records into the record of the case at SOAH, notwithstanding the fact he had prefiled them as ordered by the ALJ. As neither party challenged the timeliness of any action by the other, the ALJ will assume that either all actions were timely, or that objection to any untimely action has been waived.

that the test was medically unnecessary. The name of the reviewer is unknown, but the president of the IRO company stated the reviewer was a physician who is board-certified in neurological surgery. (Resp. Exh. 4). The essence of the reviewer's opinion was that he or she also concluded that no new information would be revealed by a second administration of the test, and that a discogram taken after a back surgery involving instrumentation would be less reliable as a diagnostic tool.<sup>2</sup>

### III. Discussion

As an injured worker, Claimant is entitled to all treatment that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LABOR CODE ANN. §§ 408.021 and 408.011(19). It is the Petitioner's burden in this case to show by a preponderance of the evidence that the discography examination would be medically necessary to meet one or more of those objectives for Claimant's compensable injury.<sup>3</sup> TEX. LABOR CODE ANN. § 413.031. Preauthorization of a non-emergency discogram is required. 28 TEX. ADMIN. CODE (TAC) § 34.600 (h)(7).

Notwithstanding his evident struggle to determine the proper care for this patient, the ALJ concludes that Petitioner failed to meet this burden of proof in this case.

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<sup>2</sup> The decision of the IRO reviewer is deemed to be a Commission decision and order. (Resp. Exh. 4, p. 2). Like a decision of the Medical Review Division (MRD), an IRO opinion represents the position of the agency on the claim. However, the opinions of the MRD hearings officer are not evidentiary. In a similar manner, the decision of the IRO reviewer, although presented as a narrative, first-person opinion, is not for purposes of this hearing, evidentiary.

<sup>3</sup> The Commission rule that sets out the procedure for IRO reviews of medical disputes states that an IRO decision has "presumptive weight." 28 TEX. ADMIN. CODE ANN. (TAC) § 133.308 (v). **This term does not appear to be further defined elsewhere in the new rules, and does not on its terms directly address the issue of the petitioning party's burden of proof in a SOAH contested case hearing.**

The ALJ concluded that Petitioner failed to meet his burden of proof because he failed to demonstrate what benefits Claimant would derive from administration of the test at this time. Petitioner did not explain how the information from the second discogram would yield more salient information than the information available from the first discogram. Without accepting the opinions of the North American Spine Society as a standard of care statement, the ALJ notes that Petitioner did not clearly articulate how this particular Claimant's symptoms met the criteria for use of the test that he himself considered definitive. Specifically, Dr. Sundaresen was unable to state that Claimant had disc abnormality, was a fusion candidate or that he was attempting to distinguish between postoperative scarring and recurrent conditions in Claimant's back, all preconditions for use of discography set forth in the article.

Further, Petitioner did not squarely address the concerns raised by the Carrier's reviewing doctors that the difference in readings from a second discography would warrant the invasive procedure. Further, the lack of medical records deprived the ALJ of the ability to put the Petitioner's testimony in context, and independently evaluate his assertions and those of the reviewing physicians.

#### **IV. Findings of Fact**

1. On \_\_\_\_\_, \_\_\_\_\_ (Claimant) suffered a compensable injury to his lower back while on his job.
2. Liberty Mutual Insurance (Carrier) was the workers' compensation insurance carrier for Claimant's employer at the time of his injury.
3. Claimant has undergone conservative treatment for his back injury, include trigger point injections and epidural steroid injections.
4. Claimant has undergone two surgeries for treatment of his back injury. On July 19, 2000, he underwent a lumbar laminectomy. On April 18, 2001, a pedicle screw was placed at the L4-L5 level.
5. On March 21, 2001, in preparation for the pedicle screw placement, discogram was performed on five levels of Claimant's spine.
6. Notwithstanding the conservative treatment, and the two surgeries, Claimant has continued to experience lower back pain and discomfort, attributable to the compensable injury.
7. His treating physician, Dr. Sanjoy Sundaresan, M.D., a neurologist, diagnosed Claimant as having failed-back syndrome. Failed-back syndrome is a diagnosis made when standard treatments, including surgery, fail to improve or cure the back condition, and the exact reason for the continuing problems and pain have not, or can not, be determined.
8. On an unknown date in 2002, Dr. Sundaresan (Petitioner) requested preauthorization to perform a second discogram on Claimant, to assist him ascertain the reason for Claimant's

continuing pain and discomfort, as required by 28 TAC § 134.600(h).

9. On an unknown date in 2002, the Carrier declined to preauthorize payment for the procedure, on the basis it was not medically necessary.
10. Petitioner sought review by an independent review organization (IRO) of the Carrier's denial of preauthorization.
11. On May 17, 2002, the IRO officer concluded the Carrier acted correctly in denying preauthorization, because the discogram was not medically necessary.
12. A discogram involves pressurizing the area of the patient's spine believed to be the source of the pain to mimic the pain-causing condition; the patient then gives the tester feedback on the location and severity of the pain. A discogram is used by physicians to rule out or to confirm injury to specific vertebrae, in order to tailor the treatment to the patient's needs and avoid unnecessary treatments. It is an invasive testing procedure.
13. Physicians differ on the necessity for the routine use of discograms before surgery, or whether they are reliable diagnostic tools after back instrumentation has been inserted or other surgeries performed.
14. Although Petitioner stated generally that the administration of discograms would assist a surgeon tailor the treatment for his patient, there was insufficient medical evidence about its utility in Claimant's case. There was insufficient evidence of particular concerns, such as suspected recurrent disc herniation, the herniation of additional discs, or additional abnormality, to support Petitioner's assertion that a second discogram would be necessary to aid him in determining a course of further treatment to alleviate the symptoms of or cure Claimant's compensable injury.
15. Petitioner did not explain how results from a second discogram would differ in a medically meaningful manner from the first, or present sufficient evidence, based on Claimant's condition as it existed in early 2002, of the utility of the discogram, given the two previous surgeries and the specific elements of failed-back syndrome Claimant presented.
16. On May 29, 2002, the Petitioner filed a request for hearing on the IRO. On July 9, 2002, the Commission issued a notice of hearing which included the date, time, and location of the hearing, and the applicable statutes under which the hearing would be conducted; the notice stated additional facts on the nature of the matters asserted would be issued within 10 days of the hearing.
17. Administrative Law Judge Cassandra Church conducted a hearing on the merits of the case on August 5, 2002; the record closed August 9, 2002. Both parties appeared at the hearing.

## **V. Conclusions of Law**

18. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant to TEX. LABOR CODE § 413.031.
19. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LABOR CODE §§ 402.073 and 413.031(d), and TEX. GOV'T CODE ch. 2003.
20. Petitioner timely filed a notice of appeal, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
21. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. ch. 2001 and 28 TAC § 148.4(b).
22. Petitioner had the burden of proving the case by a preponderance of the evidence, pursuant to 28 TAC § 148.21(h) and (I).
23. Petitioner failed to prove by a preponderance of the evidence that a discogram would be a service reasonably required to relieve the effects of or promote recovery from a compensable injury suffered by Claimant, within the meaning of TEX. LABOR CODE §§ 408.021 and 401.011(19), as Claimant's condition existed in early 2002.
24. Under TEX. LABOR CODE § 413.015 and 28 TAC 134.600, the discogram requested by Petitioner in early 2002, should not be preauthorized..

### **ORDER**

It is hereby ordered that Petitioner Dr. Sanjoy Sundaresan's, M.D., request to perform a discogram on S.B., the Claimant, is denied.

**SIGNED September 9, 2002.**

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**CASSANDRA J. CHURCH**  
**ADMINISTRATIVE LAW JUDGE**