

_____,
Petitioner

V.

TEXAS WORKERS COMPENSATION
COMMISSION AND AMERICAN
PROTECTION INSURANCE COMPANY,
Respondents

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Petitioner, _____,¹ appealed an Independent Review Organization (IRO) reviewer’s decision denying preauthorization for an above-ground swimming pool. The IRO reviewer found and the Carrier argued that the pool was not a reasonable therapy option. This decision finds that the pool is not a medical aid or device and, further, is not reasonable and necessary medical care.

I. Notice, Jurisdiction, and Procedural History

Notice and jurisdiction were not disputed and are discussed only in the findings of fact and conclusions of law.

II. Discussion

A. Background and Testimony

Petitioner suffered a work-related back injury on _____. She was diagnosed as having an L5/S1 annual tear. After conservative care did not relieve her symptoms, she underwent a posterior lumbar fusion on January 10, 2002. A post-surgery CT scan revealed a three- millimeter bulge or protruded disc with mild impingement upon the thecal sac and borderline central spinal stenosis. (Ex. 1, 46.) In a letter dated October 15, 2002, Petitioner’s surgeon said that she would be completely disabled for at least twelve more months.

According to her medical records and testimony, Petitioner now suffers from severe pain and spends most of her time in a wheelchair. She can ambulate with a walker. She received pain management care and attended some physical therapy but had difficulty with non-weight bearing exercises. (Ex. 2, 77.) For the past several months, Petitioner has had an elevated temperature, ranging from 100.1 to 101.2 degrees, and has developed bladder incontinence.

¹The Petitioner represented herself. To protect her confidentiality, only her initials are used in this Decision and Order.

Noting the intensity of her pain, which, at times, is ten on a scale of one to ten, the difficulty she has in traveling, and her incontinence, Petitioner's spine surgeon and physical therapist recommended home aquatic therapy. Indeed, her physical therapist opined that aquatic therapy is the only type of therapy Petitioner can do. (Ex. 1, 29-31). Further, public facilities prohibit persons who are incontinent from using their pools, and until her fever subsides, Petitioner cannot have surgery to correct the incontinence.

Petitioner obtained bids for installation of a five-foot deep, above-ground pool at her home. The pool bid of \$12,690.70 included a heater and other equipment but not ground preparation or leveling. Petitioner also presented a bid for a surrounding deck with a wheelchair ramp, safety gate, and handrails. The total deck bid was \$14,834.58, but Petitioner thought she could manage without the wheelchair ramp and safety gate, for a savings of \$4,320.

Petitioner's therapist told her that if she obtains a pool, he will come to her home every day for two weeks to assist her and will then come once each month to monitor her progress. Petitioner believes her husband could assist with her exercises when her therapist is not there. She said he could adequately protect her from any pool or water-related danger and could maintain the pool.

Prior to Petitioner's fusion, she had no injury-related bladder involvement. (Ex. 2, 213-214; 239.) Consequently, the Carrier argued, it was not responsible for any health care needed because of Petitioner's incontinence. The Carrier noted that it had not denied any request for aquatic therapy but argued against a swimming pool's reasonableness and medical necessity.

B. Legal Standards

For a carrier to be liable for reimbursement, the provider must obtain preauthorization for all durable medical equipment in excess of \$500 per item (either purchase or expected cumulative rental). 28 TEX. ADMIN. CODE § 134.600(h)(11). As the appealing party, Petitioner has the burden of proof. 28 TEX. ADMIN. CODE § 148.21(h).

Pursuant to TEX. LAB. CODE ANN. § 408.021, 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.

Health care is defined as all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. TEX. LAB. CODE ANN. § 401.011(19). This includes a medical or surgical supply, appliance, brace, artificial member, or prosthesis, including training in the use of such items. TEX. LAB. CODE ANN. § 401.011(19)(F). Thus, to constitute health care, the requested pool must be a medical aid or service *and* be "reasonable and necessary."

III. Analysis

In the administrative law judge's (ALJ's) opinion, having a swimming pool does not fall within the Labor Code definition of health care. There was no evidence to contradict the common understanding that a home swimming pool is usually used for recreation. When one speaks of medical devices or aids, a swimming pool does not routinely come to mind, as a TENS unit or wheelchair would be. Granted, aquatic therapy has been helpful for persons with workers' compensation injuries, and Petitioner's medical providers have recommended this type of therapy for her. Nevertheless, while the medical providers' opinions are clear, the law is also clear. To find that a swimming pool was a medical supply, appliance, brace, artificial member, or prosthesis would broaden the definition beyond its plain meaning.

Further, even if a pool could be considered a medical device, the proposed cost weighs against the request's reasonableness. The pool's cost would be significant and paid up front. No evidence in the record indicates that Petitioner's incontinence is expected to be permanent. Apparently, the only impediment to surgery is the fever she has experienced. If she is able to maintain a normal temperature, she could receive surgery to correct the bladder problem, and then, could receive aquatic therapy at a health care facility. Thus, even a short time after a pool is built, Petitioner could become able to receive aquatic therapy in a public facility where she would have supervision from medical professionals.

Therefore, the ALJ finds the pool is not a medical aid or device and is not reasonable and necessary medical care; therefore, the preauthorization request is denied.

IV. Findings Of Fact

1. Petitioner____, sustained a work-related injury on_____.
2. At the time of Petitioner's injury, her employer had workers' compensation insurance with the Carrier, American Protection Insurance Company.
3. As a result of her injury, Petitioner had an L5/S1 annual tear and underwent a posterior lumbar fusion on January 10, 2002.

4. After surgery, Petitioner had a three-millimeter bulge or protruded disc with mild impingement upon the thecal sac and borderline central spinal stenosis.
5. Petitioner is expected to be disabled at least until October 15, 2003.
6. For the past several months, Petitioner has had an elevated temperature, ranging from 100.1 to 101.2 degrees, and has developed bladder incontinence.
7. Petitioner's spine surgeon and physical therapist recommended home aquatic therapy for her.
8. Public swimming facilities prohibit persons who are incontinent from using their pools, and until her fever subsides, Petitioner cannot have surgery to correct the incontinence.
9. With a surrounding deck, a five-foot deep, above-ground pool at Petitioner's home would cost about \$23,200 to \$27,500.
10. A home swimming pool is not commonly understood to be a medical device.
11. Petitioner's incontinence is not expected to be permanent.
12. The only impediment to surgery to correct the incontinence is the fever Petitioner has experienced.
13. If Petitioner is able to maintain a normal temperature, she could receive surgery to correct the bladder problem, and then, could receive aquatic therapy at a health care facility.
14. A board-certified neurological surgeon with an independent review organization (IRO) reviewed Petitioner's request for a home swimming pool and determined that the pool was not medically necessary, and Petitioner timely appealed.
15. Notice of the hearing on the appeal was served on all parties on October 22, 2002.
16. Together, the hearing notice and IRO decision included a statement of the time, place, and nature of the hearing; 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.
17. At the November 25, 2002, hearing, Petitioner represented herself, and Wayne T. Gill represented the Carrier.

V. Conclusions Of Law

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented, pursuant to the Texas Workers' Compensation Act, TEX. LABOR CODE ANN. § 401.001, *et seq.*
2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order. TEX. GOV'T CODE ANN. ch. 2003. and § 413.031(d) of the Act.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TEXAS ADMIN. CODE §148.21(h).
6. A swimming pool is not a medical supply, appliance, brace, artificial member, or prosthesis. The Act § 401.011(19)(F).
7. Based upon the foregoing findings and conclusions, an above-ground swimming pool is not medically necessary health care, as contemplated in TEX. LAB. CODE ANN. §§ 401.011 and 408.021.
8. Petitioner's preauthorization request for a home swimming pool should be denied.

ORDER

IT IS THEREFORE, ORDERED that Petitioner's preauthorization request for a home swimming pool is denied.

SIGNED this 10th day of January 2003.

SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS