

**SOAH DOCKET NO. 453-03-0973.M2
[MDR TRACKING NO. M2-02-0995-01]**

_____, § **BEFORE THE**
Petitioner §
§
§
§
VS. § **STATE OFFICE OF**
§
§
TEXAS WORKERS' COMPENSATION §
COMMISSION, and §
_____, §
Respondents § **ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

_____ (Claimant) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) through the Texas Medical Foundation acting as an Independent Review Organization (IRO). The IRO determined that the requested procedure, a cervical discogram at C4-7, was not medically necessary.

This decision finds, based on the record in this case, that the cervical discogram is not medically reasonable and necessary and should not be preauthorized.

I. JURISDICTION, NOTICE AND VENUE

There were no contested issues of jurisdiction, notice, or venue. Therefore, those issues are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

II. PROCEDURAL HISTORY

Claimant sustained a compensable workers' compensation back injury on _____. Claimant's doctor requested preauthorization for a C4-7 discogram and _____ (Carrier) denied the request for preauthorization. On August 13, 2002, the IRO determined that the diskogram was not medically necessary and denied preauthorization. Claimant timely requested a hearing.

A hearing in this matter was convened on December 2, 2002, at the Hearings Facility of the State Office of Administrative Hearings, William P. Clements Office Building, Fourth Floor, 300

West 15th Street, Austin, Texas, with Administrative Law Judge (ALJ) Stephen J. Pacey presiding. Ombudsman Juan Mireles assisted Claimant, and Carrier was represented by Dean Pappas. Commission waived its appearance. The parties were allowed a week to file additional documents, and the record was closed December 9, 2002.

III. DISCUSSION

No expert testified at the hearing, therefore the evidence only consists of documentary evidence concerning Claimant's injury and the history of its diagnosis and treatment thus far. Claimant testified concerning her injury.

1. History of Claimant's Injury

_____ was injured on _____, when the chair on which she intended to sit was unintentionally moved causing her to fall on her buttocks and left side. Claimant complained of pain in her neck, low back, right shoulder and right arm and she was seen by several physicians. Studies included x-rays, an MRI, and an Electromyography (EMG). The treatments included chiropractic manipulation, medications and trigger point injection. After the treatments, Claimant continued to complain of chronic pain and upper extremity weakness and tenderness with radicular pain.

2. Doctor's Opinions

1. Report of Lamar P. Collie III, M.D.

Evidence of Claimant's early treatments and disputes are scarce. Dr. Collie's report indicated that Claimant was initially evaluated by Dr. Aguirre, and subsequently seen by her physician Dr. Ochoa. Dr. Ochoa felt that Claimant had a trigger point and Claimant received an injection into this trigger point. Claimant did not improve with the trigger point injection or the physical therapy that she initially attended. Dr. Collie's report indicated that Claimant was referred to Dr. Patrick Palmer, an orthopedic surgeon, who treated her for the residuals of cubital tunnel syndrome.

Subsequently, Claimant was referred for evaluation by Dr. William Sanders and she was also seen by Drs. Aguirre, Thangada, Palmer, Sanders, Stolow and Salvador P. Baylan.

In 2000, there must have been conflicting diagnoses because at that time, the Commission referred Claimant to Dr. Collie for an independent evaluation.¹ Dr. Collie, who had many years of

¹ The Commission gives presumptive weight to the opinion of the designated doctor, who in this case is Dr.

experience treating orthopedic/musculoskeletal conditions caused by trauma, found that Claimant's injuries from the three foot fall should have been completely resolved within a year. Dr. Collie wrote in his report the following:

The fact that she has continued to have symptoms now two and a half years after the original trauma, indicates a significant degree of symptom magnification and persistence, presumably for some type of secondary gain. I do not think that the biomechanics of a three foot fall would produce the plethora of symptoms described by this young woman. I do not think that she is seriously injured.

Dr. Collie concluded that Claimant had reached maximum medical improvement with no impairment.

Subsequent to Dr. Collie's determination, a Benefit Contested Case hearing, based on a report by E. C. Almaguer, M. D., held that the injury extended to and included cubital tunnel syndrome in her right elbow, plus subsequent surgery for the right carpal tunnel. As a result of this decision, the Commission requested Dr. Collie to reconsider his impairment rating based on the additional body parts. In an October 30, 2002 report, Dr. Collie disagreed with Dr. Almaguer's report citing a note from Dr. Sanders, a hand specialist, that indicated that he was unable to come up with a definitive diagnosis. Dr. Collie's report indicated: "Based on my examination and the review of the records, as well as multiple previous other examining physicians, there is no evidence that this woman sustained a significant injury to her upper extremities." He found no reason to change his impairment rating.

2. Reports of Frank J. Garcia, M.D., and Salvador P. Baylan, M.D., P.A.

On January 15, 2002, Claimant was examined by Frank J. Garcia, M. D., an orthopedic surgeon. Dr. Garcia recommended a discogram of the C4/5, 5/6 and 6/7 in order to determine the true source of Claimant's discomfort. At this time, Claimant was also treated by Salvador P. Baylan, M. D., P. A., who is board certified in physical therapy and rehabilitation. Dr. Baylan recommended, pursuant to Dr. Garcia's request, that Claimant have an MRI performed on her lower back. The MRI was performed on April 8, 2002 and revealed that Claimant had pathology at L4-L5. Dr. Baylan's report also indicated that Claimant had a scar on her right elbow as a result of an operation to the ulnar nerve.

Collie; however, at SOAH, in a hearing *de novo*, the opinion is not given presumptive weight.

William Robbins, D.O.,² requested preauthorization to perform a discogram on the C4-7 levels of Claimant's spine. On March 14, 2002, Timothy Fahey, D.C. of Medical Audit Consultants, Inc. denied preauthorization on the basis that discograms are unable to distinguish discogenic pain from other pain generators and is questionable in its usefulness to evaluate possible surgical discopathy. Dr. Garcia appealed this decision and on May 6, 2002, Dr. Fahey and Robert Joyner, M.D., again denied the preauthorization. After the two denials by Medical Audit Consultants, Claimant filed a medical dispute with the Commission who referred the dispute to IRO. On August 13, 2002, the board certified orthopedic surgeon, who conducted the review for the IRO, concluded that the documentation was insufficient to indicate that a cervical discogram at C4-7 is medically necessary.

3. Post IRO

On August 21, 2002, Enrique C. Almaguer, a plastic surgeon, reviewed Dr. Baylan's Electrodiagnostic Study Report conducted on July 12, 2002, and concluded that the testing indicated signs of nerve irritation in the cervical innervated muscles of the right flexor forearm, C6-8. Dr. Baylan's impression of his own test was that the findings were suggestive of an old right ulnar nerve neuropathy. He further noted that there were no acute changes noted and there was no other evidence of entrapment neuropathy in the electrodiagnostic testing.

On September 6, 2002, a hearing officer for Commission, Alan C. Ernst, concluded in a contested case that Claimant's impairment was zero percent. On November 13, 2002, the appeals panel concurred with the hearings officer decision that Claimant had no impairment. Both of these decisions were based on Dr. Collie's evaluation that was given presumptive weight.

4. Summary

A review of the documentary evidence reveals reports of three doctors-Dr. Baylan, Dr. Garcia, and Dr. Almaguer-whose reports indicated that Claimant needed a discogram to diagnose Claimant's discomfort. It also reveals reports of three doctors, Dr. Collie, Dr. Joyner, and the orthopedic surgeon who was the IRO reviewer, whose reports indicate that a discogram was not

² There is no other mention of Dr. Robbins in the documentation. Apparently Dr. Garcia asked him to file the request for preauthorization because he is the doctor who would perform it.

medically necessary. In addition to these reports, the Appeals Panel decision affirming the hearing officer's decision that Claimant had no impairment.

Claimant has the burden of proof in this case, so a review of her doctor's reports is necessary. Dr. Garcia was most emphatic that a discogram of the C4-7 levels was absolutely necessary in order to determine the cause of her right arm pain. His reports indicated that without the discogram, it was impossible to determine the proper treatment. Dr. Almaguer's reports indicated that a discogram of the C6-8 and T1 levels was necessary to determine the cause of Claimant's pain. Dr. Baylan determined that the L4 and L5 levels were damaged and that Claimant's tests showed an old right ulnar neuropathy. It is apparent that Claimant's own doctors disagree on the levels on which the discogram must be performed. In addition, Dr. Almaguer is a plastic surgeon, not an orthopedic surgeon.

The doctors concurring with Carrier's position, Dr. Collie and the IRO reviewer, have no apparent reason to be biased. Dr. Collie was appointed by Commission to perform an independent evaluation, and the IRO physician has no reason for bias. Claimant argued that Dr. Collie never opined that a discogram was not necessary. Dr. Collie concluded Claimant was not impaired and has reached maximum medical improvement, and it is obvious that he would not have concurred that further testing was necessary. The IRO reviewed most of the reports presented in this hearing and determined a discogram was not medically necessary. The Appeals Panel held that Claimant had reached maximum medical improvement and had no impairment.

Because of the inconsistencies in Claimant's doctors' reports and the independence of Carrier's doctors' reports, it appears to the ALJ that the doctors' reports supporting Carrier's position are more reliable than those supporting Claimant's position. In addition, the requested testing is four and one-half years post injury, which seems an inordinate amount of time to be testing to determine the cause of Claimant's pain. For these reasons, the ALJ concludes that the Claimant did not prove her case by a preponderance of the evidence, and her request for preauthorization for a discogram is denied.

IV. FINDINGS OF FACT

1. On _____, Claimant suffered an injury to the lower back and neck that was a compensable injury under the Texas Workers' Compensation Act ("the Act").
2. Following her injury, and despite treatment, Claimant experienced pain in her lower back and buttocks area.
3. From 1998 to 2000, Claimant saw nine different doctors.

4. In 2000, the Texas Worker's Compensation Commission (Commission), appointed Lamar P. Collie III, M.D. as the designated doctor to perform an independent evaluation on Claimant.
5. On November 2, 2000, Dr. Collie concluded that Claimant had reached maximum medical improvement and had no impairment.
6. On September 20, 2001, Commission determined that Claimant's injury extended to and included cubital tunnel syndrome in her right elbow and recommended surgery for right carpal tunnel syndrome.
7. In April 2001, Claimant underwent carpal tunnel release, and in November, she underwent a cubital tunnel release.
8. On October 23, 2001, Commission requested that Dr. Collie review his impairment rating considering the elbow injury.
9. Dr. Collie responded that his zero percent impairment rating would remain unchanged and that he found no evidence that Claimant had sustained a significant injury to her upper extremities.
10. In January 2002, Frank J. Garcia, M.D., examined Claimant and determined that Claimant should undergo a C4-7 discogram to determine the source of her right extremity pain.
11. The doctors recommending a discogram, Drs. Garcia, Baylan and Almaguer were not consistent in the area in which the discogram should be performed. Dr. Garcia recommended a C4-7 discogram while Dr. Almaguer recommended a C6-8 and T1 discogram and Dr. Baylan found pathology at L4-5.
12. The discogram requests were over four years post injury.
13. In early 2002, Dr. Baylan and William W. Robbins, D.O. both requested preauthorization to perform a discogram on Claimant.
14. Medical Audit Consultants denied both requests for preauthorization.
15. The Medical Review Division (MRD) of Commission received a request for a dispute resolution review, and MRD assigned the review to Texas Medical Foundation as the independent review organization.

16. On August 9, 2002, IRO denied preauthorization on the basis that Claimant is not a good surgical candidate and without adequate documentation to the contrary, a cervical discogram at C4-7 is not medically necessary.
17. In addition, the IRO concluded that Claimant has chronic pain syndrome.
18. On or about August 19, 2002, the Commission received a timely request for a hearing on this matter from the Claimant.
19. The Commission mailed notice of the hearing's setting to the parties on November 3, 2002.
20. On November 24, 2002, Commission's Appeals Panel determined that Claimant had reached maximum medical improvement and had zero percent impairment.
21. A hearing in this matter was convened on December 2, 2002, at the Hearings Facility of the State Office of Administrative Hearings, William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas, with Administrative Law Judge (ALJ) Stephen J. Pacey presiding. Carrier appeared through its attorney, Dean G. Pappas, and Claimant was assisted by ombudsman Juan Mireles. The record was opened on December 2, 2002, and closed on December 9, 2002.

V. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. §413.031.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and SOAH's procedural rules at 1 TAC Ch. 155.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Claimant, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC '

148.21(h).

6. Based upon the foregoing Findings of Fact, the discogram requested for Claimant's diagnosis and treatment does not represent an element of health care medically necessary under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, the decision of the Independent Review Organization is affirmed; preauthorization for the requested discogram should be denied.

ORDER

IT IS THEREFORE ORDERED that preauthorization for a discogram be, and the same is hereby, denied.

SIGNED this 8th day of January, 2002.

**STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**