

DOCKET NO. 453-03-1585.M2
[MDR TRACKING NO. M2-03-0188-01]

_____,
Petitioner

V.

**TEXAS WORKERS' COMPENSATION
COMMISSION and CONTINENTAL
CASUALTY COMPANY,**
Respondents

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case is an appeal by _____ (Petitioner) from a decision by an Independent Review Organization (IRO) in a preauthorization dispute initiated before the Texas Workers' Compensation Commission (Commission). The IRO ordered denial of preauthorization for an intrathecal morphine pump, which Dr. Kenneth Alo had requested in the treatment of Petitioner, a claimant diagnosed with a compensable injury to his back.

Petitioner challenged the IRO's decision on the basis that the requested treatment was mandated under §§ 408.021 and 401.011(19) of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ch. 401 *et seq.*

This decision affirms that of the IRO in the case, finding that the requested pump is medically unnecessary and supporting Respondent's denial of preauthorization for the procedure.

I. JURISDICTION AND VENUE

The Commission has jurisdiction over this matter pursuant to § 413.031 of the Act. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003. No party challenged jurisdiction or venue.

II. STATEMENT OF THE CASE

The hearing in this docket was convened on June 19, 2003, at SOAH facilities in Austin, Texas. Administrative Law Judge (ALJ) Wendy K. L. Harvel presided. The Commission did not appear at the hearing. Continental Casualty Company (Respondent) was represented by James Loughlin, Attorney. Petitioner appeared personally and was assisted by Barton Levy with the Commission's Ombudsman's Office. After presentation of evidence and argument, the hearing was adjourned, and the record closed the same day.

The record developed at the hearing revealed that, on _____, Petitioner suffered a compensable injury to his back, producing significant chronic pain in the lower back and lower extremities. Petitioner has had three surgeries to his lower back: in December 1997, he had a fusion of the L4 and L5 vertebrae; in September 1999, he had a fusion of the L2 and L3 vertebrae; in June 2000, he had implants installed in his spine. In addition to the surgeries, he has been in pain management programs, including at least one with Dr. Ziegler, a psychologist; he has had approximately 12 spinal injections, and has undergone physical therapy. Currently, he takes morphine, Neurontin, Topomax, Remeron, Adoxophan, Ditropan, Ambien, Viagra, Detrol, and an antacid. He testified that he is in constant pain on a scale of approximately 8.5 out of 10.

Petitioner began consultation with Dr. Alo (a Board-certified anesthesiologist and pain management specialist). Dr. Alo concluded that Petitioner's pain could be reduced by the insertion of an intrathecal morphine pump. A trial of the pump was conducted at a hospital in an inpatient setting, and Petitioner's pain was reduced from 8.5 to 6.5. Dr. Alo submitted to Respondent a request for preauthorization of the pump. Respondent denied the request and determined that before the request could be granted, Respondent needed to have a psychological evaluation, specifically an MMPI-2 exam.

Following the initial denial, Petitioner appealed Carrier's decision. The Commission referred the decision to an IRO. The IRO issued a decision on November 22, 2002, declaring its agreement with Respondent's determination that the pump was medically unnecessary. Specifically, the IRO stated that adequate psychological screening needed to be done before a pump was implanted (an MMPI-2 with proper interpretation).¹ Petitioner appealed the IRO's decision to SOAH. While the appeal was pending, Petitioner went to Dr. Ziegler, the same psychologist who had performed psychological evaluations on Petitioner before. Dr. Ziegler administered the MMPI-2 to Petitioner and as a result of the examination, stated that Petitioner was an appropriate candidate for the morphine pump.

III. THE PARTIES' EVIDENCE AND ARGUMENTS

A. Petitioner

Petitioner urged that his burden of proof in this matter has been satisfied by his testimony of the level of pain he was in, and the relief he felt during the pump trial. He also pointed to Dr. Alo's conclusion that he needed the pump, and Dr. Ziegler's conclusion that he is an appropriate candidate. Petitioner presented no witnesses other than himself.

Petitioner argued that Respondent's basic position in this case—*i.e.*, that the morphine pump would not be effective because his pain was not significantly decreased during the trial, and because of the psychological components of his pain, was incorrect. He testified that he obtained relief from the morphine pump, and he further testified that the morphine pump remains his last option for

¹ Ex. 1 at 357-58.

relieving his pain since all other options have been tried.

B. Respondent

Respondent argued that the morphine pump is inappropriate both psychologically and medically. Dr. Krista Jordan, a psychologist, and Dr. Neil Blauzbern, an anesthesiologist, testified for Respondent. Dr. Jordan testified that Dr. Ziegler had improperly scored and interpreted the MMPI-2. She reviewed the raw data (Petitioner's answers) and determined that he is not a good candidate for a morphine pump. She also testified that Petitioner's pain has psychological and iatrogenic components, neither of which will be assisted with the morphine pump.

Dr. Blauzbern maintains a practice in chronic pain management. He testified that the morphine pump was designed for terminal patients in intractable pain, and that it has never been studied for use in chronic pain patients. He testified that he also believes Petitioner is not a candidate for the morphine pump because Petitioner had an unsuccessful trial of the morphine pump. Petitioner's pain was reduced from an 8.5 to a 6.5 during the trial. Dr. Blauzbern testified that the drop in pain was not significant, and was something that would be seen with a placebo as well. He asserted that a physician would want to see a much more significant drop in pain before determining that the morphine pump would be a possible solution. He further testified that Petitioner was kept in the hospital for the two days of the trial, and the trial should have been conducted over a longer period of time while the Petitioner was engaged in his normal activities. Additionally, Dr. Blauzbern testified that the risks associated with the morphine pump are significant. Those risks include not only the surgical risks, but the malfunctioning of the device, risks from the medication, and a type of tumor that can form on the spinal cord and cause paralysis. Because it appeared from the testing done that Petitioner would not be an appropriate candidate for the pump, Dr. Blauzbern indicated that in Petitioner's case, the risks outweighed any potential benefit.

IV. ANALYSIS

Much of the documentary evidence submitted in this case relates to Petitioner's psychological condition, suggesting a dispute over whether that condition represents a practical barrier to the success of an invasive physical procedure such as the implantation of the morphine pump or over the extent to which that condition may have skewed the treating physician's analysis of the physical need for the pump. Dr. Jordan testified that she rescored Petitioner's MMPI-2 using a machine, instead of scoring it by hand, as Dr. Ziegler did, and achieved more accurate scores. Her testimony was convincing. Dr. Jordan is board certified in clinical psychology. She routinely performs evaluations for patients facing surgery, and as part of that work administers and interprets the MMPI-2. She testified that Dr. Ziegler did not score all of the different scales on the instrument, and did not score all of the validity scales to determine whether the test was valid. She further testified that Dr. Ziegler misinterpreted certain scales. She believes, based on Dr. Ziegler's scoring techniques, that he has not kept up with advances in the MMPI-2 for at least ten years. After rescoring Petitioner's MMPI-2, she determined that Petitioner has a tendency toward physical preoccupation, meaning that his psychological problems tend to have physical manifestations. In addition, his scores indicated defensiveness, in other words, he was answering test questions hoping to achieve a desired outcome. She further concluded that Petitioner is not an appropriate candidate for the pump because three out of four scales predict that he would have a bad outcome based on his

psychological profile. Dr. Jordan was not the only professional to indicate concern that certain treatments for Petitioner were unnecessary due to his personality. At the beginning of Petitioner's care, a number of peer reviews indicated that no surgical intervention was necessary because of the possibility of a poor outcome. Numerous medical professionals have, throughout Petitioner's medical history, expressed concern that continued medical and surgical intervention for Petitioner's condition has reinforced his disability.

The ALJ finds Dr. Jordan's testimony convincing. Her testimony established that Petitioner is simply not a good candidate for a morphine pump. Combined with Dr. Blauzbern's testimony of the significant risks associated with the pump, and of the anticipated lack of success, the ALJ finds that an intrathecal morphine pump is not medically necessary because it will not alleviate Petitioner's pain. The ALJ has great sympathy for the pain with which Petitioner must live, and does not doubt that Petitioner believes the morphine pump will improve his condition. Respondent presented, however, a notably more persuasive case, supporting its contention that Petitioner is not an appropriate candidate for the implantation of a morphine pump.

The ALJ thus concludes that Petitioner has failed to discharge his burden to demonstrate that the IRO was incorrect in deeming the requested treatment to be medically unnecessary.

V. CONCLUSION

The ALJ finds that, under the record provided in this case, the requested intrathecal morphine pump should not be preauthorized, and agrees with the IRO's determination.

VI. FINDINGS OF FACT

1. On _____, Petitioner _____ suffered an injury to his back that subsequently caused him persistent pain and that constituted a compensable injury under the Texas Worker's Compensation Act. TEX. LAB. CODE ANN. ch. 401 *et seq.*
2. Petitioner underwent several spinal surgeries, including two fusion surgeries and an implantation. However, Petitioner thereafter continued to suffer significant pain.
3. Dr. Kenneth Alo prescribed an intrathecal morphine pump to help relieve Petitioner's pain.
4. Dr. Alo subsequently requested preauthorization from Petitioner's insurance carrier, Continental Casualty Company (Respondent), for the intrathecal morphine pump.
5. In a letter dated March 12, 2002, Respondent denied the preauthorization request on the basis that the proposed procedure was medically unnecessary.
6. Thereafter, Petitioner made a timely request to the Texas Workers' Compensation Commission (Commission) for medical dispute resolution with respect to the requested

procedure. The Commission referred the dispute to an Independent Review Organization (IRO).

7. The IRO issued a decision on November 22, 2002, approving Respondent's prior denial of preauthorization on the basis that the requested procedure was medically unnecessary, specifically stating that adequate psychological testing should be done before the pump was implanted.
8. Petitioner requested in timely manner a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the IRO decision regarding preauthorization.
9. The Commission mailed notice of the hearing's setting to the parties at their addresses on January 6, 2003.
10. A hearing in this matter was convened on June 19, 2003, in Austin, Texas. The staff of the Commission did not participate in the hearing. All other parties participated.
11. Intrathecal morphine pumps were designed for terminal patients in intractable pain, and have not been tested on chronic pain patients.
12. Petitioner underwent a trial with the intrathecal morphine pump, which was not successful.
13. Dr. Ziegler, Petitioner's psychologist, improperly scored and interpreted the MMPI-2 instrument given to Petitioner to determine whether he was an appropriate candidate for the intrathecal morphine pump.
14. Petitioner's correctly interpreted score on the MMPI-2 indicates that he is not a good candidate psychologically for the implantation of a morphine pump.

VII. 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. LAB. CODE ANN. § 413.031.
2. 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 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 the Commission's rules, 28 TEX. ADMIN. CODE § 133.305(g) and §§ 148.001-148.028.

4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 .
5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TEX. ADMIN. CODE § 148.21(h).
6. Based upon the foregoing Findings of Fact, the intrathecal morphine pump requested by Dr. Kenneth Alo for Petitioner's 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 Findings and Decision of the Independent Review Organization, issued in this matter on November 22, 2002, are affirmed; preauthorization for the requested intrathecal morphine pump is denied.

ORDER

IT IS THEREFORE, ORDERED that preauthorization for an intrathecal morphine pump, requested by Dr. Kenneth Alo for the treatment of Petitioner_____, to be paid for by Respondent Continental Casualty Company, be, and the same is, hereby denied.

SIGNED this 25th day of June, 2003.

WENDY K . L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS