

SOAH DOCKET NO. 453-03-2031.M2
MDR TRACKING NO. M2-03-0271-01

GEORGE FREY, M.D.,
PETITIONER

V.

AMERICAN HOME ASSURANCE
COMPANY,
RESPONDENT

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. DISCUSSION

George Frey, M.D. (Petitioner) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through MAXIMUS, an Independent Review Organization (IRO). The Commission's Order denied Petitioner's preauthorization request for a lumbar discogram with CT scan for his patient, _____ (Patient). The Commission determined that the thoracic and lumbar MRI was not medically necessary within the meaning of Section 408.021 and 401.011(19) of the Texas Workers' Compensation Act, TEX. LABOR CODE ANN. § 401 et. seq. (the Act).

This decision grants the requested preauthorization for a lumbar discogram with CT scan.

A one-day hearing convened April 17, 2003. Petitioner appeared by telephone. Patient appeared by telephone and through Commission Ombudsman Luz Loza. Steven M. Tipton represented American Home Assurance Company (Respondent). There were no contested issues of notice or jurisdiction.

Patient, a 60-year-old female, was a flight attendant when she sustained a work related injury on _____, in Tokyo, Japan, while attempting to stow her luggage for preflight preparation. Petitioner experienced pain in her mid and low back and her buttocks. After conservative treatment, Dr. Courtney Brown performed a posterior spinal fusion with segmental pedicle screw instrumentation L2-L4 with decompressive laminectomies at L3-L4. Patient's discs were not removed or fused across with a posterolateral fusion. Patient failed to improve following the surgery and continues to experience significant pain including central low back pain. Petitioner examined Patient on July 23, 2002, and diagnosed her with "persistent discogenic low back pain L2-L4, left femoral cutaneous neuralgia paresthetica, iliotibial band syndrome secondary to above."

Petitioner requested a lumbar discogram with CT scan for Patient, and Respondent's preauthorization review and internal appeal process determined that the procedure was not medically necessary. The Respondent's decisions stated (1) discography has no practical value in the clinical management of Patient, (2) the diagnostic testing will not be of value in Patient's treatment, (3) the clinical utility of lumbar discography remains controversial in the assessment of chronic low back pain, and (4) further surgery is unlikely given no objective signs of spinal instability.

By letter dated December 4, 2002, the IRO concluded that a lumbar discogram with CT scan was not medically necessary for the diagnosis and treatment of the Patient's condition. The IRO decision states that there is no documentation of any instability or adjunct segment degeneration and that it is unlikely that the etiology of the pain will be determined by discography. The IRO decision also states that the discogram procedure produces a "significant incidence of false positive results."

Petitioner acknowledges that discography remains controversial but notes that spine surgeons use it on a regular basis for clinical assessment and that it is invaluable in evaluating persons such as the Patient. Petitioner further notes the Patient (1) did not have diagnostic testing prior to her previous surgery, (2) the pain generator remains, (3) the pain generator must be identified, and (4) junctional instability must be ruled out.

The requested procedure is a diagnostic tool and not a therapeutic procedure. Dye is placed into the disks in an attempt to simulate the pain the individual is experiencing. If the resulting pain is similar, then the injected disc is identified as a pain generator.

Petitioner had the burden of proof in this proceeding. Pursuant to the Act, an employee who has sustained a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Under the Act, the employee is specifically entitled to health care 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.

In this instance, Petitioner did put forth evidence as to why a lumbar discogram with CT scan is necessary for the treatment of the pain Patient is experiencing. It is undisputed that Patient suffered an injury to her back and that Patient's back pain never fully resolved even after passive treatment and surgery. No other diagnostic options exist. The alternatives are to continue with the current ineffective treatment or to operate without the possible benefit of additional information. While the requested diagnostic procedure is not guaranteed to locate the pain generators, it provides the only reasonable alternative for attempting to identify the cause of the pain. The ALJ finds that the record supports preauthorization for the requested lumbar discogram with CT scan. The requested lumbar discogram with CT scan is medically necessary.

II. FINDINGS OF FACT

1. _____ (Patient), a 60-year-old female, was a flight attendant when she sustained a work related injury on _____, in Tokyo, Japan, while attempting to stow her luggage for preflight preparation.
2. Patient experienced pain in her mid and low back and her buttocks.
3. After conservative treatment, Dr. Courtney Brown performed a posterior spinal fusion with segmental pedicle screw instrumentation L2-L4 with decompressive laminectomies at L3-L4. Patient's discs were not removed or fused across with a posterolateral fusion.

4. Patient failed to improve following the surgery and continues to experience significant pain including central low back pain.
5. George Frey, M.D. (Petitioner) examined Patient on July 23, 2002, and his diagnosis was persistent discogenic low back pain at levels L2-L4, left femoral cutaneous neuralgia parasthetica and iliotibial band syndrome.
6. Petitioner requested a lumbar discogram with CT scan for Patient.
7. American Home Assurance Company's (Respondent) preauthorization review and internal appeal process determined that the procedure was not medically necessary.
8. By letter dated December 4, 2002, MAXIMUS, an Independent Review Organization (IRO), concluded that a lumbar discogram with CT scan is not medically necessary for the diagnosis and treatment of the Patient's condition.
9. While aspects of discography remain controversial, spine surgeons use it on a regular basis for clinical assessment.
10. Patient did not have diagnostic testing prior to her previous surgery and the pain generator remains.
11. No other diagnostic options exist.
12. The alternatives to a discography are to continue with the current ineffective treatment or to operate without the possible benefit of additional information.
13. While the requested diagnostic procedure is not guaranteed to locate the pain generators, it provides the only reasonable alternative for attempting to identify the cause of the pain.
14. A lumbar discogram with CT scans is needed to properly evaluate Patient.
15. The requested lumbar discogram with CT scan is medically necessary.
16. Petitioner timely requested a hearing to contest the IRO decision of December 4, 2002.
17. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).
18. By letter dated February 10, 2003, the Commission issued a notice of hearing.
19. The Ombudsman's February 21, 2003 request for a continuance was granted on February 26, 2003.
20. A one-day hearing was convened by Administrative Law Judge Howard S. Seitzman on April 17, 2003, in the hearing rooms of the State Office of Administrative Hearings.

21. Petitioner appeared by telephone. Patient appeared by telephone with the assistance of Commission Ombudsman Luz Loza and Steven M. Tipton represented Respondent.
22. There were no contested issues of notice or jurisdiction.

III. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation 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 TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T. CODE ANN. ch. 2003.
3. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
5. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i).
6. An employee who has sustained 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 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. LAB. CODE ANN. § 408.021(a).
7. Pursuant to TEX. LAB. CODE ANN. § 413.014, for a carrier to be liable for certain services and supplies, the service must be preauthorized by the carrier or by order of the Commission.
8. All non-emergency hospitalizations require preauthorization. TEX. LAB. CODE ANN. § 413.014 and 28 TAC 134.600(h)(1).
9. The requested lumbar discogram with CT scan is medically necessary.

ORDER

THEREFORE IT IS ORDERED that Petitioner Dr. George Frey's request for lumbar discogram with CT scan is **GRANTED**.

SIGNED this 14th day of May 2003.

HOWARD S. SEITZMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS