

SOAH 453-03-2742.M5
MDR Tracking No. M5-03-0838-01

CENTRAL DALLAS REHAB	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
TRANSCONTINENTAL	§	
INSURANCE COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Central Dallas Rehab (Central) appealed independent review organization (IRO) decisions that work hardening program and physical therapy programs provided to an injured worker (Claimant) were medically unnecessary. Transcontinental Insurance Company (Transcontinental) had denied the claim. This decision concludes that Central failed to carry its burden of proving that the services were medically necessary.

I. PROCEDURAL HISTORY

A hearing convened in this case on January 28, 2004, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH), Austin, Texas. Central appeared and was represented by its counsel, Scott C. Hilliard. Transcontinental appeared and was represented by its counsel, James M. Loughlin. The parties were given until February 2, 2004, to file SOAH decisions in support their positions. The record closed on that date.

As there were no issues concerning notice or jurisdiction, those matters are set forth in the fact findings and legal conclusions without further discussion here.

II. DISCUSSION

1. Background

The Claimant, a ___-year-old male, sustained an at-work lower back injury on ___, while lifting a pipe. He was diagnosed with lumbar sprain and underwent approximately two months of medical treatment without improvement before presenting for treatment to Central. A magnetic resonance imaging (MRI) of his lumbar spine revealed the following:

Diffuse reduction in the AP dimension of the canal suggesting congenitally shortened pedicles. At the L4-L5 level, there is broad-based annular disc protrusion including bilateral foraminal disc protrusion. There is also facet arthropathy and ligamentum flavum hypertrophy. The combination of findings produces markedly severe trefoil central spinal stenosis. The AP dimension of the canal is reduced to only 4 mm at and just below the level of the interspace.

There was also a disc bulge at L3-L4. An electromyogram revealed prolonged bilateral dermatosensory latency at S1.

The Claimant first presented to Central in September 2001, with pain in his lumbar region and lower extremities, lumbar spine weakness, reduced range of motion, and paresthesia (abnormal sensory feelings).

The disputed services consist of work hardening sessions and office visits from November 21, 2001, through December 17, 2001, and physical therapy sessions from February 19, 2002, through May 30, 2002.

Employees have a right to necessary health treatment under TEX. LABOR CODE ANN. (Labor Code) §§ 408.021 and 401.011. Section 408.021(a) provides, “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.” Section 401.011(19) of the Labor Code provides that health care includes “all reasonable and necessary medical . . . services.”

As Appellant, Central has the burden of proof.¹

2. Discussion

a.) Work Hardening

For two basic reasons, the ALJ concludes the work hardening program was not medically necessary. Regarding the first, Transcontinental’s expert witness, Samuel Bierner, M.D.,² testified persuasively that the Claimant’s conditions, as shown by the MRI, prevent substantial improvement from a work hardening program. He explained that many of the Claimant’s debilitating conditions pre-existed his injury, including a congenitally narrow spinal canal at L4-L5 that was only about forty percent of normal size. There were also complications from arthropathy.

Dr. Bierner’s testimony was supported by other experts. David Payne, D.C., provided a peer review for Transcontinental on November 26, 2001. After reviewing the Claimant’s MRI, he concluded that work hardening would likely be a “total failure.”³ The peer review doctor, a chiropractor, concluded the work hardening was not indicated because there had been no clinical improvement in the Claimant’s condition from the beginning of treatment with Central to the onset of the work hardening program.⁴ The peer review doctor for the February-May 2002 physical therapy said, “The patient’s pre-existing spinal stenosis and degenerative changes would not have responded to chiropractic treatment.”⁵ A March 28, 2002, designated doctor examination by Robert

¹ 1 TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148(h).

² Dr. Bierner is board certified in physical medicine, rehabilitation and electrodiagnostic medicine. He has a masters degree in rehabilitation medicine and did a fellowship in neurology at the National Institute of Health.

³ Ex. 1 at 30.

⁴Ex. 1 at 5.

⁵Ex. 5 at 2.

Silva, M.D., concluded that the Claimant's condition was not likely to improve without further medical intervention such as steroid injections.⁶

Central's expert Ted Krejci, D.C.,⁷ testified that the work hardening was indicated and that the Claimant did improve. Another Central physician, Laurent Pelletier, D.C., argued strongly that the program was successful. He cited significant increases in the Claimant's strength and range of motion.⁸

The ALJ believes that the stronger evidence supports Transcontinental's position. The opinions of a variety of doctors, including the IRO, that the work hardening program was not likely to be successful appears to be supported by the fact that the program failed to accomplish its primary goal of increasing the Claimant's work capacity level. The first functional capacity evaluation (FCE) on November 1, 2001, concluded that the Claimant could work at either a sedentary or light level, whereas the last FCE on December 14, 2001, reflected his work capacity as sedentary only.⁹

The second reason for concluding the work hardening program was not necessary is that the Central doctor who prescribed the program ignored the normal protocol of referring the Claimant for a surgical consultation before proceeding with the program. Virtually every expert, including Dr. Krejci, Dr. Bierner, and Transcontinental's two peer review doctors,¹⁰ indicated the referral should have occurred before other treatment was considered. The second IRO opinion, concerning disputed physical therapy services, said the Claimant should have been treated by a neurosurgeon.¹¹

Central argued there was no harm in not in not seeking a consultation before the work hardening program because when a consultation did occur in February 2002, the referral doctor did not recommend surgery and the Claimant declined the referral doctor's recommendation of facet injections.¹² Central's assertion is essentially speculative. Whether the Claimant would have also refused a facet injection in November 2001 is not known.

b.) Physical Therapy

The ALJ concludes the physical therapy services from February 19, 2002, through May 30, 2002, were medically unnecessary.

Dr. Krejci testified the physical therapy was necessary, although he conceded there were too many passive modalities. He pointed out that the Claimant was ready to return to work after the

⁶Ex. 4 at 364.

⁷Dr. Krejci is a 1999 graduate of the Parker School of Chiropractic. He performs maximum medical improvement examinations for the Commission.

⁸Ex. 1 at 25.

⁹Ex. 1 at 73, 125.

¹⁰Ex. 1 at 28, 30.

¹¹Ex. 5 at 2.

¹²Ex. 1 at 62. The referral doctor was James Laughlin, D.O.

therapy and contended this fact shows the treatments worked and were beneficial. He cited medical consultations dated April 30, 2002, and May 31, 2002, from Crawford Slain, M.D., that said the

Claimant should continue with physical rehabilitation.¹³ Central pointed out that the Claimant's range of motion was virtually normal on April 23, 2002, after more than two months of physical therapy.¹⁴

The ALJ acknowledges that the Claimant's condition improved and he eventually returned to work, but the ALJ is not convinced that this was the result of the physical therapy, particularly in light of the fact that most of it was passive therapy provided more than half a year post injury.¹⁵ The ALJ concludes the preponderant evidence shows the physical therapy was unnecessary. Dr. Bierner's testimony was convincing that the services were unneeded because they were essentially a repetition of failed treatments that preceded the work hardening program and were to a large extent a repetition of the failed work hardening program. He said there was not a good reason shown to repeat the same treatments and testified convincingly that passive modalities have not been shown to be efficacious after the acute phase following an injury.

The IRO doctor's opinion was essentially the same as Dr. Bierner's. He said there was no reason indicated for a second course of treatment when the same treatment had failed earlier. He pointed out that the Claimant's condition had "plateaued" as of February 2002, and further physical therapy treatment was not indicated.

Overall, the ALJ concludes that the physical therapy services at issue, the great majority of which appear to be passive, were not reasonably required by the Claimant's injury.

III. FINDINGS OF FACT

1. The Claimant, a ___ year-old male, sustained an at-work injury to his lower back on ___, while lifting a pipe.
2. The Claimant was diagnosed with lumbar sprain and underwent approximately two months of medical treatment without improvement before presenting for treatment to Central.
3. A magnetic resonance imaging (MRI) of the Claimant's lumbar spine revealed the following:

Diffuse reduction in the AP dimension of the canal suggesting congenitally shortened pedicles. At the L4-L5 level, there is broad-based annular disc protrusion including bilateral foraminal disc protrusion. There is also facet arthropathy and ligamentum flavum hypertrophy. The combination of findings produces markedly severe trefoil central spinal stenosis. The AP dimension of the canal is reduced to only 4 mm at and just below the level of the interspace.

¹³Ex. 3 at 10B11.

¹⁴Ex. 2 at 19.

¹⁵Ex. 3 at 3-6.

4. There was a disc bulge at L3-L4.
5. An electromyogram revealed prolonged bilateral dermatosensory latency at S1.
6. The Claimant also had complications from arthropathy.
7. Many of the Claimant's debilitating conditions pre-existed his injury, including a congenitally narrow spinal canal at L4-L5 that was only about forty percent of normal size.
8. The Claimant first presented to Central Dallas Rehab (Central) in September 2001, with pain in his lumbar region and lower extremities, lumbar spine weakness, reduced range of motion, and paresthesia (abnormal sensory feelings).
9. The Claimant underwent a work hardening program at Central, including office visits, from November 21, 2001, through December 17, 2001.
10. The Central doctor who prescribed the work hardening program ignored the normal protocol of referring the Claimant to a neurology or orthopedic specialist before proceeding with the program.
11. A referral should have occurred before other treatment was considered.
12. There had been no clinical improvement in the Claimant's condition from the beginning of treatment with Central to the onset of the work hardening program.
13. The Claimant's conditions as shown by the MRI prevent substantial improvement from a work hardening program.
14. The first functional capacity evaluation (FCE) on November 1, 2001, concluded that the Claimant could work at either a sedentary or light level, whereas the last FCE on December 14, 2001, reflected his work capacity as sedentary only.
15. The work hardening program was not shown to be reasonably required by the nature of the Claimant's injury.
16. The Claimant underwent physical therapy from February 19, 2002, through May 30, 2002.
17. The physical therapy was essentially a repetition of failed treatments that preceded the work hardening program and were to a large extent a repetition of the failed work hardening program.
18. Most of the physical therapy modalities were passive.
19. Passive modalities have not been shown to be efficacious after the acute phase following an injury.
20. The physical therapy was not shown to be reasonably required by the nature of the Claimant's injury.

21. All parties received not less than ten days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
22. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN §§2001.051 and 2001.052.
3. Central has the burden of proof. 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TEX. ADMIN. CODE § 148.21(h).
4. Central failed to prove that its claim for a work hardening program and physical therapy sessions provided to the Claimant were medically necessary. TEX. LAB. CODE ANN. ' 408.021.
5. Central's claim should be denied.

ORDER

IT IS THEREFORE ORDERED that Central Dallas Rehab's claim against Transcontinental Insurance Company for work hardening from November 21, 2001, through December 17, 2001, and physical therapy from February 19, 2002, through May 30, 2002, provided to the Claimant be, and the same is hereby, denied.

SIGNED March 26, 2004.

**JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**