

AVNER R. GRIVER, M.D.,  
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,  
Respondent

ADMINISTRATIVE HEARINGS

### DECISION AND ORDER

Avner R. Griver, M.D. (Petitioner) appeals the decision of Independent Review, Inc., an independent review organization (IRO), denying preauthorization for a requested discogram. The IRO determined, based on the medical documentation submitted for review, that the requested procedure was not medically necessary to treat the Claimant's condition. The Administrative Law Judge (ALJ) finds that the request for preauthorization should be granted because the requested treatment is medically necessary.

#### I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

On May 27, 2003, ALJ Suzanne Formby Marshall convened the hearing in this matter at the State Office of Administrative Hearing's hearing facility in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. Petitioner appeared *pro se* via telephone. The Insurance Company of the State of Pennsylvania (Carrier) was represented by Steven Tipton, attorney. The hearing was adjourned and re-convened on June 11, 2003, in order for Carrier to provide copies of medical articles to the Petitioner that the Carrier wished to introduce into evidence. At the hearing on June 11, 2003, Carrier was represented by Roy Leatherberry, in the place of Mr. Tipton who had a scheduling conflict. Notice and jurisdiction were not contested and will be addressed in the findings of fact and conclusions of law. The record was closed on June 11, 2003.

#### II. DISCUSSION

##### 1. Background

The Claimant, who is a 37-year old male, suffered head and upper back trauma from an injury on his job on \_\_\_\_\_. Claimant had previously suffered a lumbar injury and received an L5-S1 lumbar fusion in an unrelated incident. The trauma to Claimant's back during the \_\_\_\_\_ injury caused a fragmentation of the fusion mass. This was confirmed by a CT scan on May 14, 2003. Claimant's medical condition requires a re-fusion at the L5-S1 level to repair the damage. Claimant also has a disk herniation at L4-5 and complains of persistent low back pain.

Due to the pain Claimant is experiencing, Petitioner seeks preauthorization for a discogram<sup>1</sup> to determine the source of the Claimant's pain and whether there is a need for a surgical intervention.

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<sup>1</sup> A discogram is an x-ray photograph of an intervertebral disc made after injection of a radiopaque substance. Merriam Webster's Medical Dictionary (1995), at page 181.

Carrier has approved a one level fusion at L5-S1, but has denied a two-level fusion,<sup>2</sup> and claims that, consequently, there is no medical necessity for the discogram. Carrier claims that the request for a discogram is a collateral attack on its determination that a two-level fusion is not necessary. Lastly, Carrier asserts that an MRI would be a more appropriate diagnostic tool than a discogram.

## 2. Medical Records

The documentary evidence consisted of the documents reviewed by the IRO (Petitioner's Ex. 1 and Carrier's Ex. 1), and several medical articles provided by both parties. Additionally, Dr. Griver presented testimony.<sup>3</sup>

The medical records contain copies of two requests for preauthorization of a discogram and the determinations made by Carrier's reviewing physicians. On November 6, 2002, a pre-authorization request was submitted for a discogram at L2, 3, L3, 4, and L4, 5, with anesthesia and a CT scan to follow. Pet. Ex. 1, p. 10. That request was reviewed by Dr. R. Winans on behalf of the Carrier, who concluded that the discogram would not provide any information about whether Claimant's pain would be relieved with surgery at that level. Dr. Winans asserted that more information would be obtained with anesthetic injection at the time of the discography, which was not planned, and that other avenues of treatment besides surgery or discography were available. Carrier's Ex. 1, p. 3.<sup>4</sup>

On November 13, 2002, a second physician, Dr. R. Allen, reviewed the pre-authorization request on behalf of the Carrier. Dr. Allen also agreed that the requested discogram was unnecessary, citing to the subjective nature of a discogram and the controversy regarding the efficacy of the test in accurately predicting the levels of spinal pain generators. Dr. Allen noted that "the long term effectiveness of procedures performed based on results of discograms is not documented by high quality, long term clinical studies." Carrier's Ex. 1, p. 1.

Petitioner filed a request for Medical Dispute Resolution. It appears that the request was faxed to the Commission's office on November 18, 2002. Carrier's Exhibit 1, pp. 8-9.

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<sup>2</sup> On December 19, 2002, Carrier denied a pre-authorization request for a four-day inpatient stay to perform a two-level fusion at L5-S1 and L4-5. Dr. Villarreal, the reviewing physician, noted that the "myelogram did not show underfilling of the nerve root at L4-5 and the claimant has not had any failed attempts with injections to support the necessity of the request." Pet. Ex. 1, p. 4.

<sup>3</sup> The ALJ notes that the records contain little information describing the need for the discogram. The only substantive information about Claimant and his condition is contained within the IRO decision. The inclusion of medical records discussing the need for the discogram in light of Claimant's specific medical condition would have been of assistance to the ALJ (and, most probably, to the IRO). Petitioner, Claimant's treating physician, provided testimony in this case establishing medical necessity. If the ALJ had to rely only upon the documents submitted to the IRO, she would have found, as did the reviewing physicians, that no medical necessity was established in the documentation.

<sup>4</sup> Although the Carrier's exhibit indicated that the pre-authorization request was made on November 4, 2002, the difference in dates of the pre-authorization request is not important.

### 3. Testimony of Dr. Griver

The record does not indicate when Dr. Griver became Claimant's treating physician. From the records admitted into evidence, it appears that Dr. Griver is a diplomate of the American Board of Physical Medicine and Rehabilitation and a Diplomate of the American Board of Pain Medicine. Dr. Griver testified that he was a member of the North American Spine Society.<sup>5</sup>

Dr. Griver testified that it is necessary to determine if the Claimant's ongoing pain is a function of the disintegrated fusion that was previously performed or if it is coming from adjacent areas. He stated that the discogram is prudent and medically necessary to determine whether other discs are causing the pain and, if so, whether a surgical solution is necessary. According to Dr. Griver, if the discogram shows that other discs are causing the pain and surgery is required, it is more prudent medical treatment to operate only once on the Claimant, as opposed to forcing him to undergo multiple surgeries. If the discogram does not reveal problems with the adjacent disks, then the fusion will occur only at the L5-S1 level, as preauthorized.

Dr. Griver testified that the purpose of a discogram is to: (1) establish whether there are structural problems in the disk (an anatomy determination) and (2) determine whether a specific disk is causing the patient's pain (a provocation of pain determination). Because it is already known that Claimant has a herniated disk at L4-5, Dr. Griver wants to determine whether it is the L4-5 disk that is causing Claimant's pain. If the pain is from nerves irritated by the herniation, Dr. Griver testified that a discectomy may be required.

In response to cross-examination about whether an MRI would be a more appropriate diagnostic tool in this case, Dr. Griver testified that an MRI would only confirm what is already known, i.e., that Claimant has a previous back fusion that is fragmented and that he also has a herniated disk at the L4-5 level. In Claimant's situation, Dr. Griver contends that a discogram, and not an MRI, will provide necessary information in order to treat Claimant's condition.<sup>6</sup> Further, Dr. Griver said that in order to reduce the chances of a false-positive result in the discogram, he would use placebo levels to ensure that the reports of pain were accurate. In response to the IRO's conclusion that a mechanical evaluation using the McKenzie principles would be a more appropriate diagnostic tool, Dr. Griver said that he disagreed with the reviewer and that range of motion tests had already been performed by Claimant. Dr. Griver did not agree that a mechanical evaluation would provide useful diagnostic information in this case.

### 4. Medical Articles

The majority of the hearing involved questioning and discussion between the Carrier's attorney and Dr. Griver concerning the medical literature regarding the use of discography. The use

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<sup>5</sup> According to Petitioner's Exhibit 2, the North American Spine Society is a nonprofit multi-disciplinary medical association made up of 3,000 physicians, research scientists and spine care professionals who promote education, research and treatment of patients with spinal disorders.

<sup>6</sup> According to Dr. Griver, if the general population aged in their thirties was given an MRI, the MRI would show that approximately 50% of them had disk abnormalities. Dr. Griver testified that to plan a surgery based only upon an MRI abnormality would not be advisable.

of discography has been criticized due to the number of false-positive results and the influence of psychological factors on the test results.<sup>7</sup> Additionally, there is support for the use of MRI (magnetic resonance imaging) instead of discography because an MRI is non-invasive, provides useful information, and is less expensive.

In reviewing the articles submitted by the parties, it appears that there currently is no treatment standard for diagnosing discogenic low-back pain. Consequently, the use of discography is one option that can be considered by the treating physician. The medical articles contain references to numerous medical studies involving intractable back pain and the use of discography. From the articles, the ALJ concludes that the use of discography may be inappropriate in some circumstances. However, none of the articles addressed the situation that presents itself in this case.

The medical literature does not indicate that in a situation involving a failed back surgery and a herniated disc at L4-5, the use of a discography is medically inappropriate.

The articles seem to caution against the use of discography without first considering other options. There is evidence that other options have been tried, without success. Dr. Griver said that Claimant has worn a back brace for over six months and has undergone epidural steroid injections. However, Claimant continues to report persistent back pain. Given that Claimant must undergo at least one back surgery to repair the damaged fusion, it appears that it is medically prudent to determine whether other areas are contributing to Claimant's pain prior to that surgery. The ALJ finds that the treating physician is entitled to make his best medical judgment of the necessary medical treatment for Claimant. Carrier did not contradict Dr. Griver's medical judgment with that of any other physician who had examined Claimant. Further, the medical articles received into evidence do not establish that a discogram is inappropriate under the facts of this case. Consequently, the ALJ gives greater weight to the evidence and testimony presented by Dr. Griver as Claimant's treating physician and finds that the discogram is medically reasonable and necessary.<sup>8</sup>

### III. CONCLUSION

The burden is on the Petitioner to show medical necessity for the requested procedure. Dr. Griver is the Claimant's treating physician and has examined Claimant. Dr. Griver testified that additional diagnostic testing is medically necessary to determine the source of Claimant's pain and whether the Claimant needs surgical intervention beyond the L5-S1 re-fusion. The evidence supports preauthorization of the requested procedure.

### IV. FINDINGS OF FACT

1. On \_\_\_\_, the Claimant sustained an on-the-job injury to his head and upper back.
2. At the time of the Claimant's injury, the Insurance Company of the State of Pennsylvania (Carrier) provided workers' compensation insurance to the Claimant's employer.

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<sup>7</sup> Carrier's Exhibit 2, Daniel Resnick, M.D., David Malone, M.D., and Timothy Ryken, M.D., *Guidelines for the Use of Discography for the Diagnosis of Painful Degenerative Lumbar Disc Disease*, NEUROSURGICAL FOCUS 13(2) (2002).

<sup>8</sup> The ALJ does not conclude that the discogram is a collateral attack on the decision by the Carrier in December to deny a two-level fusion because it is premature to conclude that a two-level fusion is necessary. The discogram should provide important information for both the Petitioner and Carrier to review in determining whether a two-level fusion is required.

3. Prior to March 2, 2002, Claimant suffered a back injury requiring a fusion at the L5-S1 level.
4. The fusion referred to in Finding of Fact No. 3 has fragmented due to the trauma from Claimant's compensable injury and must be repaired.
5. Claimant also suffers from a disk herniation at the L4-5 level.
6. As part of his medical treatment, Claimant has worn a back brace for over six months and received epidural steroid injections. However, he continues to experience low back pain.
7. Avner R. Griver, M.D. (Petitioner), Claimant's treating physician, recommends performing a discogram to determine the source of the Claimant's ongoing pain.
8. A discogram is a diagnostic procedure that determines whether specific discs or the areas adjacent to the discs are the source of pain.
9. A positive discogram will indicate whether additional surgical intervention is necessary to treat the Claimant's ongoing pain.
10. Petitioner will perform the discogram if it is found to be medically necessary; however, Petitioner will not perform the fusion surgery.
11. The Carrier denied the Petitioner's request for preauthorization of a discogram with anesthesia and a CT scan.
12. The Petitioner requested medical dispute resolution services from the Texas Workers' Compensation Commission's Medical Review Division.
13. On March 5, 2003, Independent Review, Inc., an independent review organization (IRO) certified by the Texas Department of Insurance, issued its decision denying preauthorization on the grounds that other forms of diagnostic evaluation had not been exhausted, such as the mechanical examination principles of McKenzie, and the Claimant could continue wearing a back brace and allow normal healing to occur.
14. On March 9, 2003, Petitioner filed a request for hearing to contest the denial of preauthorization of the requested services.
15. The Commission sent notice of the hearing to the parties on April 15, 2002. The hearing notice informed the parties of the matter to be determined, the right to appear and be represented by counsel, the time and place of the hearing, and the statutes and rules involved.
16. The hearing on the merits convened on May 27, 2003 and June 11, 2003, before the undersigned Administrative Law Judge. Petitioner appeared by telephone and represented himself. Respondent appeared through Steven Tipton and Roy Leatherberry, attorneys.

## 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. 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. §§ 402.073 and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
3. Petitioner timely filed notice of appeal, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
4. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. ch. 2001 and 28 TAC § 148.4(b).
5. Petitioner had the burden of proving the case by a preponderance of the evidence, pursuant to 28 TAC § 148.21(h) and (i), and 1 TAC § 155.41.
6. As provided by TEX. LAB. CODE ANN. § 413.014 and 28 TAC § 134.600(h)(1), preauthorization is required for all non-emergency hospitalizations.
7. Based on Findings of Fact Nos. 3 - 9, the requested medical procedure is medically necessary.
8. Based on Findings of Fact Nos. 3 - 9, and Conclusions of Law Nos. 5 and 7, Claimant is entitled to preauthorization for the medically necessary treatment.

### **ORDER**

**IT IS, THEREFORE, ORDERED** that Respondent, Insurance Company of the State of Pennsylvania, pay the reasonable and necessary cost of providing the Claimant the requested discogram with anesthesia and a CT scan.

**SIGNED this 7<sup>TH</sup> day of July 2003.**

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**SUZANNE FORMBY MARSHALL**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**