

**STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 W 15TH STREET, SUITE 502
AUSTIN, TEXAS 78701**

**DOCKET NO. 453-03-2915.M2
M2-03-0658-01**

STAT 2000	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
LIBERTY MUTUAL INSURANCE COMPANY	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

STAT 2000 appealed the decision of the Texas Workers' Compensation Commission's (Commission) designee, an independent review organization (IRO), which denied preauthorization for the purchase of a neuromuscular stimulator for Claimant. After considering the evidence and arguments, the undersigned Administrative Law Judge (ALJ) finds that STAT 2000 has not shown, by a preponderance of the evidence, that the requested medical care is reasonable and necessary treatment for Claimant's compensable injury. Therefore, the ALJ does not authorize the requested treatment.

I. DISCUSSION

Claimant suffered a compensable, work-related injury to his upper and lower back on _____, when a microwave that he was installing fell on him. Claimant sought treatment from Dr. Ramon Rosales, Jr., D.C., who prescribed physical therapy and medications.¹ Nonetheless, Claimant continued to experience pain and muscle spasms. In September of 2002, Dr. Rosales prescribed the use of a BMR NT2000 Neuromuscular Stimulator for the Claimant to reduce muscle spasms and provide pain relief. Claimant reported a relief of his symptoms as a result of using the BMR NT2000.

On December 12, 2002, Dr. Rosales wrote a letter requesting approval for the purchase of the neuromuscular stimulator for Claimant's home use. In his letter, Dr. Rosales reported that Claimant reported a decrease in his pain and muscle spasms after 15 days of treatment. Claimant's pain and spasm level continued to decrease over 30 days of treatment with the neuromuscular stimulator, according to Dr. Rosales.² STAT 2000, as the supplier of the item, requested preauthorization from Liberty Mutual Insurance Company (Carrier), Claimant's workers' compensation insurance carrier.

¹ The medical records do not indicate what medications were prescribed for Claimant. It appears from the IRO decision that Claimant may have also received some epidural steroid injections that were somewhat successful.

² Dr. Rosales' letter does not mention whether the patient achieved increased muscle re-education or strengthening.

On January 2, 2003, Carrier denied preauthorization, relying on the opinion of a physician advisor, David Quinn, D.C., who concluded that “the efficacy of passive pain modulation devices has not been established. Clinical records from Dr. Rosales appeared suggestive of mechanical spine dysfunction without evidence of neurological compromise. The file was absent of data suggesting this case was especially difficult and/or that there were complicating issues to recovery.”³

On January 9, 2003, STAT 2000 requested reconsideration, and the Carrier again denied preauthorization for the neuromuscular stimulator, citing to another physician advisor’s determination that the item was not medically necessary because “the documentation does not indicate that this claimant has chronic or intractable pain nor does it indicate that this case is particularly complicated necessitating long-term use of passive modalities. Furthermore, studies have shown that the long-term use of passive modalities tends to foster chronicity and a dependence on provider driven care”

STAT 2000 then appealed to the Commission, and the matter was referred to an IRO for determination. The IRO denied preauthorization, stating “passive treatment at this stage is inappropriate for a patient with this diagnosis and the only treatment that this patient could expect to benefit from would be an active program of some form of exercise.” STAT 2000 requested a hearing, resulting in this proceeding at the State Office of Administrative Hearings.

After reviewing the evidence, the ALJ finds that STAT 2000 has not met its burden of proving by a preponderance of the evidence that a neuromuscular stimulator is medically necessary treatment for Claimant’s compensable injury. The evidence presented by STAT 2000 to show medical necessity consists of: (1) a letter dated December 12, 2002, from Dr. Rosales requesting approval for the purchase of the BMR NT2000; (2) Dr. Rosales’ prescription to purchase the BMR NT2000; (3) a 45-day assessment of the Claimant after using the BMR NT2000; (4) the SOAP notes from Claimant’s medical files; and (5) manufacturer information on the BMR NT 2000.

1. Letter of December 12, 2002.

In his letter of December 12, 2002, Dr. Rosales describes his rationale for the purchase request. Carrier’s Exhibit 3, pp. A12-13. He states that “A[t]he prognosis for the patient, with the use of this muscle stimulator was anticipated as good. Without the device, a prognosis of poor. The expected outcomes were reduced muscle spasms, pain relief and increased ROM. This treatment was intended to reduce the use of pain medications by reducing is (sic) pain and spasms.”

Dr. Rosales’ letter provides little information about why the purchase of the BMR NT2000 is necessary. For example, Dr. Rosales fails to specify how long Claimant should use the machine, i.e., for the rest of his life, two years, three months, etc., whether a reduction in pain and spasms will continue to occur or whether Claimant should receive maximum benefit at a particular point in time, whether and how the pain and muscle spasms were truly debilitating to Claimant, or whether there are other courses of treatment that have been considered, but rejected, for Claimant’s specific condition. Dr. Rosales does not elaborate on why he believes the prognosis for the patient, without using the muscle stimulator, was poor. Although Dr. Rosales asserts that Claimant’s pain and spasm

³ Dr. Quinn’s report indicated that he attempted on two occasions to contact Dr. Rosales by telephone to discuss the medical necessity of the neuromuscular stimulator, but his calls were not returned.

levels decreased as a result of using the muscle stimulator, there is no indication of how long the relief lasted. It appears from the record that Claimant's pain has remained at a constant level of 4 out of 10, despite using the neuromuscular stimulator. Consequently, the ALJ concludes that the BMR NT2000 provides only temporary relief of Claimant's symptoms. Nothing in the record discusses how to assist Claimant with long-term relief of his symptoms, such as a pain management program.

Most importantly, Dr. Rosales' letter does not provide a clear rationale of why he believes the BMR NT2000 will continue to benefit Claimant. There is nothing in the letter which describes the impact upon Claimant if the neuromuscular stimulator is not approved for purchase. The letter is conclusory in nature and simply does not provide enough information to reliably conclude that the neuromuscular stimulator is medically necessary for Claimant.

2. Prescription for the BMR NT2000.

Dr. Rosales' prescription for the BMR NT2000 states that the stimulator is needed to relieve pain, reduce muscle spasms and re-educate and strengthen the muscle. Carrier's Exhibit 3, p. A14. The prescription indicates that Claimant has a diagnosis of displacement of intervertebral disc, cervicgia, nonallopathic lesions, cervical regions, and muscle spasm. The prescription is on a pre-printed STAT 2000 prescription form for a BMR NT2000, on which the physician can enter the necessary identifying information about the patient, physician, and patient's diagnosis. The physician then "checks off" the appropriate box(es) indicating whether the equipment is to be purchased or rented, expected length of use, indications for the stimulator⁴, supporting supplies, and electrode garments. The prescription does not itself describe why the BMR NT2000 is medically necessary other than the check-off boxes in the section detailing indications for use. The prescription in this case does not establish medical necessity for purchase of the BMR NT2000.

3. The 45-day assessment.

On December 2, 2003, an interviewer named Glenda⁵ conducted an interview of Claimant by telephone to document his use of the unit, improvements in his condition, changes in medications, and whether the Claimant wanted the unit for continued use. Carrier's Exhibit 3, p. A20. STAT 2000's name is printed at the top of the page. There was no evidence specifically identifying Glenda as an employee of STAT 2000, although it appears from the document that this is a probable scenario.

The "assessment" notes that Claimant reported a great improvement in his pain and muscle spasms, as well as an increase in his activities of daily living and range of motion. Claimant reportedly said that he was sleeping better since using the unit and was taking fewer medications. Upon being asked whether he wanted the unit for continued use, Claimant responded affirmatively. The ALJ does not find the "assessment," performed by a representative of the unit's supplier, to be reliable. The assessment, on its face, appears designed for the purpose of soliciting positive responses from patients in order to demonstrate that further use of the BMR NT2000 is required. To

⁴ The indications for use are increase range of motion, muscle re-education and strengthen, relief of pain, reduce muscle spasms, prevent disuse atrophy, and reduction of edema.

⁵ No last name is noted on the assessment.

what extent the “assessment” affected Dr. Rosales’ decision to prescribe the unit for purchase is not known from the record. However, the assessment was performed on December 2, 2002, and the prescription was written on December 12, 2002. The close timing of the two indicates that there may well have been some connection. When the purchase of medical equipment seems driven by the supplier of the equipment, as opposed to the treating physician, any showing of medical necessity becomes compromised.

4. The SOAP notes.

The SOAP notes are dated from September 19, 2002, through December 27, 2002, indicating weekly visits. All the notes indicate that Claimant consistently experienced a pain level of 4 out of 10 prior to treatment and that he was improving slowly. On all occasions, Claimant received joint mobilization therapy and on most occasions, he also received myofascial release. There is nothing in the SOAP notes that details medical necessity for the BMR NT 2000.

5. The BMR NT2000 manufacturer information.

The manufacturer information describing the BMR NT2000, Carrier’s Exhibit 3, pp. A37-40, provides the following indications for usage: (1) relaxation of muscle spasm; (2) prevention or retardation of muscle atrophy; (3) muscle re-education; (4) increase local blood circulation; (5) immediate post-surgical stimulation of calf muscles to prevent deep vein thrombosis; and (6) maintaining or increasing range of motion. Of the six indications for usage, Dr. Rosales prescribed the neuromuscular stimulator for two conditions, muscle spasm relaxation and muscle re-education. While it appears that Claimant did receive relief from his muscle spasms by using the neuromuscular stimulator, there is no evidence that Claimant needed muscle re-education or that it occurred. Consequently, at most, STAT 2000 has demonstrated that Claimant had muscle spasms which were relieved by using the BMR NT2000. However, the record does not contain evidence justifying its purchase for long-term use.

In contrast to Dr. Rosales’ opinion, the physician advisors and IRO reviewer note that the use of the BMR NT2000 does not seem indicated by Claimant’s diagnosis or other documentation in the record. One reviewer notes that there is no indication of muscle dis-use or atrophy which could require the continued use of a neuromuscular stimulator. Another reviewer notes that Claimant does not suffer from a peripheral nerve injury that might justify the use of such a device.⁶ The reviewers note that Claimant does not seem to show any ongoing progress throughout the use of the equipment because his pain level remains constant. At least one reviewer raised the possibility that Claimant has come to rely upon a passive medical device for treatment when other treatments might be more appropriate. STAT 2000 asserts that the BMR NT2000 is being used to treat Claimant’s chronic, intractable pain; however, the medical documentation submitted in this case makes no mention of chronic, intractable pain. The ALJ is aware that, in other cases, approval has been given for the purchase of the BMR NT2000. The ALJ does not make a global finding that the device does not provide appropriate and necessary medical care, under the right circumstances. The ALJ notes that the reviewers have presented some conclusory objections to the use of a muscular stimulator in general. However, the ALJ agrees with the reviewers that there is insufficient documentation in the

⁶ Carrier supplemented the record with the written opinion of Dr. N.F. Tsourmas. As Provider correctly notes, Dr. Tsourmas’ opinion is unsworn. However, Provider does not object to the admissibility of the opinion and it is admitted into evidence.

record to support the purchase of this unit for Claimant's lifetime use.

For the foregoing reasons, the ALJ concludes that the requested neuromuscular stimulator is not reasonable and necessary medical treatment for Claimant's compensable injury and should not be authorized. In support of this determination, the ALJ makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Claimant sustained a compensable, work-related injury on_____.
2. Liberty Mutual Insurance Company (Carrier) is the insurance carrier providing workers' compensation insurance coverage for Claimant.
3. As a result of the compensable injury, Claimant suffered pain and muscle spasms in his upper and lower back.
4. Claimant was treated by Dr. Ramon Rosales who prescribed physical therapy and medications. Claimant's pain and muscle spasms persisted.
5. Six months after the injury and to relieve the continuing pain and muscle spasms, Claimant began using a neuromuscular stimulator. Dr. Rosales prescribed the purchase of the BMR NT2000 (NT 2000) neuromuscular stimulator for Claimant. STAT 2000, as the supplier of the item, requested preauthorization from Carrier.
6. Carrier denied preauthorization, maintaining that the requested treatment was not medically necessary and appropriate treatment for Claimant's compensable injury.
7. STAT 2000 requested medical dispute resolution through the Texas Workers' Compensation Commission. The Commission referred the matter to an Independent Review Organization (IRO) for determination.
8. The IRO reviewed the dispute and issued a decision on March 24, 2003, finding that the requested treatment was not medically necessary and denying the requested preauthorization.
9. On March 25, 2003, STAT 2000 requested a hearing before the State Office of Administrative Hearings (SOAH).
10. Notice of the hearing in this case was mailed to the parties on April 29, 2003. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted. In the notice, the Commission's staff indicated that it would not participate in the hearing.
11. The hearing was held on July 8, 2003, with Administrative Law Judge Suzanne Formby Marshall presiding. STAT 2000 appeared through its representative, Randy Burgett. Carrier appeared through its attorney, Charlotte Salter. The hearing was adjourned and the record

remained open in order to allow Carrier to submit the testimony of Dr. N.F. Tsourmas by letter and to allow STAT 2000 an opportunity to respond to Dr. Tsourmas' statements. The record closed on July 15, 2003.

12. The NT2000 is not medically reasonable and necessary treatment for Claimant's compensable injury, in that:
 - a. Claimant's pain level has remained constant despite using the stimulator, with Claimant reporting a level of 4 out of 10 from October through December, 2002;
 2. There is no evidence that continued use of the NT2000 is necessary to further reduce Claimant's muscle spasms;
 3. Claimant's medication level has not been reduced as a result of the NT2000 because he takes only one medication;
 4. Claimant's medical condition does not involve a peripheral nerve injury that awaits re-innervation or muscle atrophy;
 5. Claimant's physician has not considered and tried other options for medical treatment;
 6. There is no objective medical documentation that use of the NT2000 has improved or relieved the effects of Claimant's compensable injury;
 7. Claimant's self-reports of improvement, given over the telephone to an interviewer from STAT 2000, the supplier of the NT2000 unit, are not sufficient to establish medical necessity.
 8. There is no reliable medical evidence that the NT2000 is necessary to continue to provide Claimant with relief from pain and spasms.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE ' 413.031.
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. '413.031 and TEX. GOV'T CODE ANN. ch. 2003.
3. STAT 2000 timely filed its 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 " 2001.051 and 2001.052 and 28 TAC ' 148.4.
5. STAT 2000 had the burden of proof on its appeal by a preponderance of the evidence, pursuant to TEX. LAB. CODE ANN. ' 413.031 and 28 TAC '148.21(h).

6. Under TEX. LABOR CODE ' 408.021(a), 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.
7. Under 28 TAC ' 134.600(h), durable medical equipment costing more than \$500 must be preauthorized, dependent on a showing of medical necessity.
8. STAT 2000 did not establish, by a preponderance of the evidence, that the prescribed neuromuscular stimulator is medically reasonable and necessary for treating Claimant's compensable injury.
9. Based on the above Findings of Fact and Conclusions of Law, STAT 2000's appeal should be denied, and the request for preauthorization should not be granted.

ORDER

It is ORDERED that the request for preauthorization for the purchase of the BMR NT2000 neuromuscular stimulator for Claimant is denied.

Signed this 14th day of August, 2003.

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