

**DOCKET NO. 453-03-2985.M2  
[MDR TRACKING NO. M2-03-0312-01]**

**M. LEWIS FRAZIER, M.D.,**  
*Petitioner*

**VS.**

**ZURICH AMERICAN INSURANCE  
COMPANY, Respondent**

**§ BEFORE THE STATE OFFICE  
§ OF  
§ ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

A 36-year-old workers' compensation claimant suffered a work-related injury on \_\_\_\_\_, when her employer had workers' compensation coverage with the Carrier, Zurich American Insurance Company. Her physician, M. Lewis Frazier, M.D. (Petitioner), requested preauthorization for a discogram. The Carrier denied the request, and the independent review organization (IRO) reviewer found the test was not medically necessary. This decision agrees with the IRO and denies the request.

**I. Procedural History**

The hearing on this appeal was held July 16, 2003, before the undersigned administrative law judge (ALJ). Petitioner appeared *pro se*, and attorney Steven M. Tipton represented the Carrier. All other matters concerning notice and jurisdiction are addressed in the findings of fact and conclusions of law.

**II. Evidence**

Petitioner was the only witness at the hearing, and the Carrier 's packet of documents was the only exhibit.

**Petitioner**

The claimant had a discogram on February 26, 2002, that reflected abnormal findings at L3-L4; she underwent an IDET<sup>1</sup> procedure on April 10, 2002. The IDET was not effective in reducing her pain, which presently is severe.

A second discogram is necessary, in Petitioner 's opinion, to determine whether the disc that was treated with IDET is the one causing her current pain. He said the claimant presently has only three options -- to learn to live with pain, to have a fusion, or to receive another IDET procedure. A second discogram is consistent with North American Spine Guidelines protocol, Petitioner testified.

---

<sup>1</sup>Intra-discal, electro-thermal.

In medical records, Petitioner noted the claimant ‘s chronic opiate dependence and his plan to wean her to lower doses of pain-relieving narcotics.<sup>2</sup>

## IRO

The February 7, 2001, MRI showed a focal far-left lateral disc bulge protrusion at and behind the left neural foramen, which measured as much as three millimeters in “AP dimension.” There was a mild degree of left neural foraminal narrowing but no central spinal stenosis or herniation.<sup>3</sup> Based on this MRI and a bone scan, the IRO reviewer found that there was no clear support for discography in determining the nature and origin of the claimant ‘s pain. Consequently, the reviewer determined a discogram was not medically necessary.

From the record, it is not clear whether the IRO reviewer realized the claimant had already had one discogram. However, the Carrier ‘s documents, admitted as Exhibit 1, were submitted to the IRO. On pages 16 and 17, the claimant is described as being post-IDET and as having elected to proceed with a discogram.

## Carrier ‘s Peer Reviewer

In a report dated June 27, 2002, William E. Blair, Jr., M.D.,<sup>4</sup> outlined his opinions about a February 1, 2002, discogram request.<sup>5</sup> Apparently, he was not aware that the claimant had already undergone one discogram and an IDET.

---

<sup>2</sup>Ex. 1, p. 11.

<sup>3</sup>Ex. 1, p. 16.

<sup>4</sup>Dr. Blair is a fellow of the American Academy of Orthopedic Surgeons and President-Elect of the American Academy of Evaluating Disability Physicians.

<sup>5</sup>Ex. 1, pp. 3-10.

Dr. Blair believed the claimant most likely sustained a nonspecific, soft-tissue injury to her gluteus maximum and buttocks which did not aggravate or accelerate any underlying condition. He thought a discogram was entirely contraindicated because the claimant exhibited chronic pain behavior and delayed recovery syndrome, was not an appropriate surgical candidate, had chronic opioid dependency, and had no evidence of an acute structural deficiency. Further, Dr. Blair believed an IDET procedure would "most likely become a forerunner of severe and debilitating circumstances to follow."<sup>6</sup>

### Medical History

The claimant was diagnosed as having left sacroiliac joint dysfunction on October 23, 2000. She attended physical therapy sessions to work on muscle spasms and joint stabilization. By November 13, 2000, the claimant was being monitored for low back pain, but her physician indicated that her symptoms were resolving. On December 28, 2000, the physician mentioned the claimant's lumbar extension pain and wanted to rule out a spondylolysis. A subsequent bone scan revealed a mild focal uptake in the anterior lumbar zone at approximately L3.

Another physician who saw the claimant on September 14, 2001, noted a minimal antalgic gait favoring the left lower extremity. That physician thought the claimant would benefit from a rehabilitation program with very aggressive stretching and strengthening that focused predominately on the hip musculature and the extensor musculature of the lumbar spine.

---

<sup>6</sup>Ex. 1, p. 7.

## Disability Evaluation

On July 15, 2002, Churchill Evaluation Centers performed the claimant's disability evaluation and determined she had reached MMI with a five percent, whole-person impairment based on a lumbar injury without radiculopathy.<sup>7</sup> The disability evaluator noted that the claimant was post-IDET. He also said, "Dr. Frazier suggested a provocative discography, and she elected to proceed with that, although she understood a positive result would lead to either IDET or fusion consideration, and she was eager to pursue that."<sup>8</sup>

On July 15, 2002, Churchill Evaluation Centers performed the claimant's disability evaluation and determined she had reached MMI with a five percent, whole-person impairment based on a lumbar injury without radiculopathy.<sup>9</sup> The disability evaluator noted that the claimant was post-IDET. He also said, "Dr. Frazier suggested a provocative discography, and she elected to proceed with that, although she understood a positive result would lead to either IDET or fusion consideration, and she was eager to pursue that."<sup>10</sup>

During the disability examination, the claimant had normal gait and was able to walk on her toes and heels. There was no evidence of muscular weakness as tested by extension and flexion in her lower extremities. On straight-leg raising in the sitting position and the supine position, the claimant had left-side pain only in the mid-back and the buttocks. She had a markedly positive Waddell 's sign on the axial rotation of the skull and said her pain was excruciating.

The disability evaluator cites an investigative report that indicated the claimant was able to drive to local stores and make purchases. At one time while she was in the car, her right shoe came off, and the claimant bent at her waist to put on the shoe.

## **III. Applicable Law**

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 cures or relieves the effects naturally resulting from the injury, promotes recovery; or enhances the ability to return to or retain employment.<sup>11</sup>

---

<sup>7</sup>Ex. 1, p. 17.

<sup>8</sup>Ex. 1, pp. 16-17.

<sup>9</sup>Ex. 1, p. 17.

<sup>10</sup>Ex. 1, pp. 16-17.

<sup>11</sup>TEX. LAB. CODE ANN. §408.021.

Certain categories of health care, including a discogram, require preauthorization, which is dependent upon a prospective showing of medical necessity.<sup>12</sup> In an appeal from an IRO prospective necessity review, the IRO decision has presumptive weight,<sup>13</sup> and Petitioner bore the burden of proof in this proceeding.<sup>14</sup>

#### **IV. Analysis**

Based on the evidence, the ALJ sees two possibilities for this case -- to remand it to the IRO for clarification about whether the IRO reviewer realized this was a request for a second discogram or to render a decision based on lack of evidence to support a second discogram. Given the fact that the IRO reviewer had the disability evaluation and that evaluation referred to the claimant as being post-IDET and having elected to proceed with a discogram, the ALJ believes the latter option is more appropriate.

The evidence does not support Petitioner ‘s claim that a second discogram is necessary. Even though the peer reviewer, Dr. Blair, did not know this was a second discogram request, he thought a discogram was entirely contraindicated, based on several factors which continue to be applicable. The disability evaluator determined that the claimant had reached MMI with a five percent, whole-person impairment rating based on a lumbar injury without radiculopathy.

A positive discogram, according to the disability evaluator, could lead to IDET or fusion. There was no evidence indicating that a fusion is appropriate for her, and the first IDET provided no lasting relief; actually, her pain may have become worse. Apparently, the first discogram did not properly indicate the pain source, so it seems more appropriate to pursue other treatment options than to repeat what was not successful. Therefore, the ALJ denies the preauthorization request.

#### **V. Findings of Fact**

---

<sup>12</sup>TEX. LAB. CODE ANN. §413.014 and 28 TEX. ADMIN. CODE (TAC) §134.600(h)(7).

<sup>13</sup>28 TAC §133.308(v).

<sup>14</sup>28 TAC §148.21(h).

1. A 36-year-old workers' compensation claimant suffered a work-related injury on \_\_\_\_\_, when her employer had workers' compensation coverage with the Carrier, Zurich American Insurance Company.
2. The claimant's physician, M. Lewis Frazier, M.D. (Petitioner), requested preauthorization for a discogram.
3. The Carrier denied the preauthorization request, the independent review organization reviewer found the test was not medically necessary, and the Petitioner appealed.
4. All parties received not less than ten-days notice of the hearing on the appeal.
5. 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 would be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
6. Both Petitioner and the Carrier were represented at the July 16, 2003, hearing.
7. The claimant had a discogram on February 26, 2002, that reflected abnormal findings at L3-L4; she underwent an intra-discal, electro-thermal (IDET) procedure on April 10, 2002.
8. The IDET was not effective in reducing her pain, which presently is severe.
9. As reflected in an MRI, the claimant has a focal far-left lateral disc bulge protrusion at and behind the left neural foramen, which measured as much as three millimeters. She has a mild degree of left neural foraminal narrowing but no central spinal stenosis or herniation.
10. Based on a bone scan, the claimant has a mild focal uptake in the anterior lumbar zone at approximately L3.
11. No evidence indicates a dysfunction at any other level than the one previously indicated in discography, L3-L4.
12. The claimant has reached MMI with a five percent, whole-person impairment based on a lumbar injury without radiculopathy.
13. As reflected in a 2002 disability evaluation, the claimant has normal gait and is able to walk on her toes and heels.
14. The claimant has no evidence of muscular weakness as tested by extension and flexion in her lower extremities.

15. A discogram is contraindicated because the claimant has exhibited chronic pain behavior and delayed recovery syndrome, is not an appropriate surgical candidate, has had chronic opioid dependency, and has no evidence of an acute structural deficiency.

## **VI. Conclusions of Law**

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented, pursuant to the Texas Workers' Compensation Act, TEX. LABOR CODE ANN. §413.031 (the Act).
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Act, §413.031(k) and TEX. GOV 'T CODE ANN. ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV 'T CODE ANN. §2001.052.
4. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV 'T CODE ANN. ch. 2001.
5. Based upon the foregoing findings of fact, a discogram is not medically necessary health care as contemplated in §408.021 of the Act.
6. The request for preauthorization should be denied. TEX. LAB. CODE ANN. §413.014 and 28 TEX. ADMIN. CODE §134.600(h)(7).

## **ORDER**

**IT IS, THEREFORE, ORDERED** that the discogram preauthorization request filed by M. Lewis Frazier, M.D., on behalf of his patient, a workers' compensation claimant, is denied.

**Signed August 19, 2003.**

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

---

**SARAH G. RAMOS**  
**Administrative Law Judge**