

NESTOR MARTINEZ, D.C.,
Petitioner

VS.

INSURANCE COMPANY OF THE WEST,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case is a dispute over reimbursement for work hardening services. The amount in dispute is \$6,365. The Administrative Law Judge (ALJ) concludes the evidence does not prove the work hardening program was medically necessary for the Claimant. The ALJ therefore denies reimbursement.

I. Factual and Procedural History

The Claimant, a bricklayer, injured his left arm, shoulder, and elbow in a fall on ____ After some passive physical therapy, he underwent a Functional Capacity Evaluation (FCE) on April 30, 2001. That FCE determined he was performing at a light-medium physical demand level, while the physical demands of his job were heavy.

Nestor Martinez, D.C., the Claimant's health care provider (Provider), requested and received authorization to provide active physical therapy to the Claimant three times a week for four weeks. After that therapy, his condition had improved, but was still not satisfactory. The Provider requested additional physical therapy, which was also authorized. Again there was some improvement, but the Claimant's condition was not satisfactory. An FCE conducted July 11, 2001, found the Claimant was performing at a medium physical demand level. The evaluator believed the Claimant would benefit from continuing with his current physical rehabilitation program.

On July 12, 2001, the Provider requested a third round of physical therapy. The reviewer for Insurance Company of the West (Carrier) denied that request on July 17, 2001, stating, "continued in office rehab not reasonable expected to meet work duties versus more intensive strengthening conditioning program."

On July 26, 2001, the Provider requested reconsideration of that request based on an evaluation conducted by Edward Lewis, M.D. on July 24, 2001. Dr. Lewis had recommended another six weeks of active physical therapy combined with trigger point injections and medication. The request was denied.

At some point, apparently before the work hardening program began, Thomas Bryant, a Licensed Master Social Worker, evaluated the Claimant to determine whether he was an appropriate candidate for work hardening.¹ Mr. Bryant concluded the Claimant was a good candidate for the program.

¹Mr. Bryant's evaluation was not dated.

The Claimant participated in the work hardening program from August 13, 2001 through September 25, 2001. At the end of the program, he was found to perform occasionally at a heavy physical demand level and frequently at a medium-heavy physical demand level.

The Carrier denied reimbursement for the work hardening program. The Provider, on September 3, 2002, filed a Medical Dispute Resolution Request with the Texas Workers' Compensation Commission (the Commission). An Independent Review Organization (IRO) denied the request, after which the Provider requested a hearing before the State Office of Administrative Hearings (SOAH).

The SOAH hearing was held July 2, 2003, before ALJ Henry D. Card. Representatives of the Provider and the Carrier participated in the hearing, which was adjourned the same day.

In accordance with its rules, the Commission did not consider services that were provided more than a year before September 3, 2002, the date on which the Medical Dispute Resolution Request was filed. Therefore, the dates of service in dispute are from September 3, 2001, through September 25, 2001.

Under 28 TEX. ADMIN. CODE (TAC) §148.21(h), the Petitioner has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LAB. CODE ANN. §413.031.

II. Discussion

The parties agree that the Claimant needed further, more aggressive therapy than the course of physical therapy he had twice received. The Carrier contends, however, that only work conditioning was needed, because the Claimant did not exhibit the psychological issues were necessary to justify work hardening. *See* Medicine Ground Rule II. E. As the Carrier points out, neither the July 11th FCE nor Dr. Lewis's July 24, 2001, examination identified any psychological problems the Claimant was having. Neither recommended work hardening. Stephen Tomko, D.C., who reviewed the file for the IRO, found "no verifiable psychological issues reported while progressing through work hardening." Indeed, the Claimant generally is described as motivated and eager to return to work. Gordon B. Strom, Jr., M.D., who also provided an independent review, noted that neither the July 11th or the July 24th evaluations recommended work hardening. He found Mr. Bryant's evaluation to be the sole support for work hardening, and considered that evaluation itself to be unconvincing.

In that evaluation, Mr. Bryant found the Claimant should

receive emotional support and education in the form of individual and group therapy and other appropriate interventions to reduce his isolation and to express his feelings about the injury and the process need to help him heal from this injury.

Farrukh Hamid, M.D., who also reviewed the file for the Carrier on February 22, 2002, found the Claimant had "chronic pain related depression" that was treated with medications. In a letter to the Carrier, Dr. Martinez also referred to a psychological assessment of the Claimant performed November 26, 2001, that found the Claimant to have a pain disorder associated partly with psychological factors. That assessment itself was not in the record.

There is evidence to support either position. The evidence does not convince the ALJ, however, that the Claimant had psychological issues that warranted his participation in the work hardening program. Dr. Hamid's review and the November psychological assessment that was not in the record both took place after the program was completed. Although Mr. Bryant's evaluation recommended work hardening and set out its psychological purposes, it did not discuss the Claimant's mental state in any depth, and did not actually diagnose any psychological problems the Claimant may have been having.

The evidence generally gives the impression that the Claimant was pleasant, well-adjusted, and motivated to recover and return to work. The records of the work hardening program itself do not counteract that impression. On the whole, the ALJ concludes that the evidence does not support the medical necessity of the work hardening program. Therefore, he denies reimbursement.

III. Findings of Fact

1. The Claimant, a bricklayer, injured his left arm, shoulder, and elbow in a fall on ____.
2. After some passive physical therapy, the Claimant underwent an FCE on April 30, 2001.
3. The April 30, 2001, FCE determined the Claimant was performing at a light-medium physical demand level, while the physical demands of his job were heavy.
4. The Provider requested and received authorization to provide active physical therapy to the Claimant three times a week for four weeks. After that therapy, his condition had improved, but was still not satisfactory.
5. The Provider requested additional physical therapy, which was also authorized. Again there was some improvement, but the Claimant's condition was not satisfactory.
6. An FCE conducted July 11, 2001, after the two authorized therapy sessions, found the Claimant was performing at a medium physical demand level.
7. On July 12, 2001, the Provider requested a third round of physical therapy. The reviewer for the Carrier denied that request on July 17, 2001, stating, "continued in office rehab not reasonable expected to meet work duties versus more intensive strengthening conditioning program."
8. On July 26, 2001, the Provider requested reconsideration of its request based on an evaluation conducted by Edward Lewis, M.D. on July 24, 2001. Dr. Lewis had recommended another six weeks of active physical therapy combined with trigger point injections and medication. The request was denied.
9. At some point, apparently before the work hardening program began, Thomas Bryant, a Licensed Master Social Worker, evaluated the Claimant to determine whether he was an appropriate candidate for work hardening. Mr. Bryant concluded the Claimant was a good candidate for the program.

10. The Claimant participated in a work hardening program from August 13, 2001 through September 25, 2001.
11. At the end of the work hardening program, the Claimant was found to perform occasionally at a heavy physical demand level and frequently at a medium-heavy physical demand level.
12. The Carrier denied reimbursement for the work hardening program.
13. The Provider, on September 3, 2002, filed a Medical Dispute Resolution Request with the Commission.
14. An IRO denied the request, after which the Provider filed a timely request for a hearing before SOAH.
15. Notice of the hearing was sent to all parties May 29, 2003.
16. 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.
17. The SOAH hearing was held July 2, 2003, before ALJ Henry D. Card. Representatives of the Provider and the Carrier participated in the hearing, which was adjourned the same day.
18. In accordance with its rules, the Commission did not consider services that were provided more than a year before September 3, 2002, the date on which the Medical Dispute Resolution Request was filed. Therefore, the dates of service in dispute are from September 3, 2001, through September 25, 2001.
19. Neither the July 11th FCE nor the July 24th examination identified psychological issues that were impeding the Claimant's recovery, and neither recommended work hardening.
20. Dr. Hamid's February 2002 review and the November 2001 psychological assessment that was not in the record both took place after the work hardening program was completed.
21. Although Mr. Bryant's evaluation recommended work hardening and set out its psychological purposes, it did not discuss the Claimant's mental state in any depth, and did not actually diagnose any psychological problems the Claimant may have been having.
22. The evidence generally gives the impression that the Claimant was pleasant, well-adjusted, and motivated to recover and return to work. The records of the work hardening program itself do not counteract that impression.
23. The Claimant did not exhibit the psychological issues necessary to justify work hardening.

IV. Conclusions of Law

1. SOAH has jurisdiction over 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.

2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §2001.052.
3. Under 28 TEX. ADMIN. CODE (TAC) §148.21(h), the Petitioner has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LAB. CODE ANN. §413.031.
4. The Provider failed to prove that a work hardening program was medically necessary for the Claimant.
5. The Provider should not be reimbursed for the work hardening services it provided the Claimant from September 3, 2001, through September 25, 2001.

DECISION AND ORDER

Nestor Martinez, D.C.'s request for reimbursement for work hardening services provided the Claimant from September 3, 2001, through September 25, 2001, is **DENIED**.

Signed this 22nd day of August, 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Henry D. Card
Administrative Law Judge