

**DOCKET NO. 453-03-4027.M2
MDR TRACKING NO. M2-03-1135-01**

**AMERICAN HOME ASSURANCE
COMPANY,
Petitioner**

VS.

**ADVANTAGE HEALTHCARE
SYSTEMS AND ____,
Respondents**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

American Home Assurance Company (AHAC or Carrier) appealed the decision by an Independent Review Organization (IRO) to grant preauthorization for Claimant ___ to receive 30 sessions of chronic pain management services. AHAC disputes the IRO's conclusion that these services are medically necessary. This decision agrees with AHAC and finds that the chronic pain management services are not medically reasonable and necessary for ___. Therefore, AHAC's appeal is granted, the decision of the IRO is set aside, and preauthorization is denied.

I. JURISDICTION & HEARING

There were no challenges to notice or jurisdiction, and those matters are set forth in the findings of fact and conclusions of law without further discussion here.

Administrative Law Judge (ALJ) Thomas H. Walston conducted a hearing in this case on August 26, 2003, at the State Office of Administrative Hearings (SOAH), William P. Clements State Office Building, 300 West 15th Street, Austin, Texas. Attorney Dan C. Kelly appeared on behalf of AHAC. Mr. Nick Kempisty, Chief Compliance Officer for Advantage HealthCare Systems appeared on behalf of the requestor. The hearing concluded and the record closed the same day.

II. DISCUSSION

1. Background

Claimant ___ is a 43-year-old male who is 5'4" tall and weighs approximately 195 pounds. He previously worked as a bakery associate for a ___ store in ___. On ___, ___ injured himself while working at ___ when he slipped and fell while cleaning the floor. After the accident, ___ complained of back pain from the fall and pain in the left forearm and wrist from trying to catch himself.

The following is a summary of ___'s medical records contained in the IRO file:

- February 16, 2002 – X-rays taken at the ___ Hospital of the cervical spine and left forearm were unremarkable. An x-ray of the thoracic spine showed minimal degenerative changes with minimal flattening.
- February 18, 2002 – X-rays taken at the ___ Clinic showed normal bony structures and soft tissue for the lumbar spine. There was some pelvic unleveling and some widening of the L5-S1 disc space, suggesting a possible disc protrusion.
- February 26, 2002 – Electrodiagnostic studies by R.J. Davis, D.O., at A-Medical Advantage Healthcare Systems (Advantage HealthCare). T.F. reported low back pain radiating into both legs, with the left greater than the right. T.F. rated his pain at 8 on a 10-point scale (10 being the worst). He also reported that he was taking therapy that was helping and that he was sleeping much better. The electrodiagnostic studies were generally normal, except for “evidence of bilateral Tibial motor nerve neuropathies and a right Peroneal motor nerve neuropathy that is demyelinating in nature.”
- March 11, 2002 – Seven sonograms of T.F.'s lumbar spine were reviewed by Marvin Goldman, M.D., and Alex Kaliakin, D.C., of the American Institute of Musculoskeletal Diagnostic Ultrasound. It is not clear from the record, but the report from these doctors indicates they are located in Santa Monica, California. The report states that T.F. had lumbar joint inflammation, slight to moderate swelling about the erector spinae muscle, and swelling of the lumbar spine's stabilizing muscles.
- March 12, 2002 – Dr. Davis at Advantage HealthCare saw _____. The patient reported continued low back pain and Dr. Davis recommended an MRI.
- March 15, 2002 – An MRI was performed on T.F. by Tyler Open MRI. Dr. Kent Walker, M.D., interpreted the MRI and gave the following impression: “Mild diffuse disc space dessication without significant posterior protrusions. No canal stenosis is seen. There is, however, bilateral mild to moderate neural foraminal narrowing at L4-5 and L5-S1 secondary to facet arthrosis.”
- March 18, 2002 – A Physical Performance Exam was performed by Advantage HealthCare under the supervision of Dr. Davis. T.F. showed limitations in his range of motion of the lumbar spine and some fatigue during the arm-lift portions of the test.
- April 7, 2002 – X-rays of the lumbar spine taken by ___ Hospital. Harold Smitson, M.D., interpreted the x-rays as follows: “AP and lateral views of the lumbosacral spine show normal interspaces and alignment. No significant degenerative change, or congenital abnormalities are seen. The apophyseal joints are unremarkable. The SI joints are open and lumbar sacral angle within normal limits. IMPRESSION: Unremarkable lumbar spine. Unchanged from previous films.”

- April 17, 2002 – Seven sonograms of T.F.’s lumbar spine were again reviewed by Marvin Goldman, M.D., and Alex Kaliakin, D.C. (American Institute of Musculoskeletal Diagnostic Ultrasound). These showed that the joint inflammation and muscle swelling noted on March 11, 2002, were resolving.
- April 24, 2002 – some reports refer to a Functional Capacity Evaluation being performed on this date, but the actual FCE report for this date is not included in the records.
- May 17, 2002 – Psychological evaluation performed by George Esterly, MS, LPC, of Dallas. Mr. Esterly noted that the evaluation was “intended for the sole purpose of providing information relevant to the individual’s likely response to further treatment for chronic pain.” ___ reported that he had been more depressed and emotional since his injury but put his “current effectiveness at 75-80%.” Yet, ___ also described his pain at “sharp, throbbing, shooting, cramping, aching, burning, heavy, splitting, punishing, cruel, and exhausting . . . to a severe degree.” Mr. Esterly concluded that ___ “seems to be experiencing significant emotional distress due to his work-related injury. . . . He likely copes with psychological pain by converting it into physical pain.” He also recommended six visits of individual counseling for ___.
- May 31, 2002 – Individual counseling session by Mr. Esterly. However, this report is under an Advantage HealthCare letterhead, so Mr. Esterly appears to have some relationship with Advantage HealthCare. In this session, ___ discussed an increase in his smoking and his use of Viagra. He complained that his wife was very occupied taking care of her mother, and he stated that he had increased levels of pain and tenseness. He also worried about his finances, had difficulty sleeping, and seemed to focus on his physical problems.
- June 7, 2002 – Individual counseling session by Mr. Esterly (on Advantage HealthCare letterhead). Complained that ___ was unfair for firing him, but “his major psychological pain is coming through his family.” His wife criticized him for not doing chores and accused him of not really being injured. Also, his stepson got into a fistfight with the ex-husband of a girlfriend and was in trouble with the police. Nevertheless, ___ stated that he had a positive attitude and was ready “to start over again.”
- June 12, 2002 – Advantage HealthCare (Dr. Davis) performed a Functional Capacity Exam. ___ reported low back pain of 3-5 on a scale of 0-10. On physical examination, ___ was entirely normal except for some decrease of range of motion in the low back. Dr. Davis noted that ___ showed an 18% improvement from his last test. He also recommended 6-8 weeks of work hardening with five sessions per week.
- June 14, 2002 – Individual therapy session with Mr. Esterly (on Advantage HealthCare letterhead). ___ was in high spirits. He attempted to return to work but was told he had been fired. He reported his home life boring because his wife was away taking care of her mother, and he stated that his “2000 abdominal surgery has not completely healed.” ___ also said the he was diagnosed with depression in 1997 and that his wife had been diagnosed with “manic-depression.” Finally, ___ stated that he would let his stepson (coming home from jail) work out his own problems, and ___ planned to spend more time fishing and gardening.

- June 21, 2002 – Individual therapy with Mr. Esterly (Advantage HealthCare letterhead). ____ was positive because he had walked and hitch-hiked to a doctor’s appointment to get his knee drained, apparently from a different injury. His stepson and wife wanted to buy ____’s pain medication from him, and his wife had recently undergone colon and bladder surgery. ____ reported that he had mowed the yard of an auto repair shop and he was looking for a lawyer to sue ____ for firing him. It is not clear from the record, but apparently this counseling was being provided in connection with a work hardening program because Mr. Esterly noted: “To continue work hardening.”
- June 25, 2002 – Electrodiagnostic studies of the right and left legs performed by John Pispidikis, D.C., of Advantage HealthCare. Dr. Pispidikis concluded: “There is no evidence of any neuropathies existing at this time.”
- July 12, 2002 – Independent doctor evaluation by Mark C. Race, M.D., of Jacksonville, Texas. This report notes that ____ continued to work about two weeks after his injury, until he came under the care of Dr. Davis. ____ stated that he was in a work hardening program at the time of this evaluation and that he was hoping to find some type of light or sedentary work. He also reported that his low back pain had gotten better and basically was a dull ache instead of a sharp pain. On examination, ____ reported some pain with movement, and Dr. Race noted some muscle tightness in the low back. He also noted that ____ was wearing a back brace and using a TENS unit. But ____ had no signs of sciatica, and he had good strength in the major muscle groups. Dr. Race concluded that ____ had mild to moderate facet arthrosis causing mild to moderate narrowing of the foramina. He recommended that ____ continue taking his anti-inflammatory medication and he presumed ____ to be at maximum medical improvement as of that date (July 12, 2002). Dr. Race also assigned ____ a 5% whole person impairment rating.
- July 16, 2002 – Dr. Davis and Advantage HealthCare performed another Functional Capacity Evaluation. This report states that ____ had completed 14 sessions of work conditioning and that he rated his back pain at 2-4 on a scale of 0-10. Dr. Davis concluded that ____ had shown good improvement in his physical strength, but still could not perform all of his job duties. Therefore, Dr. Davis once again recommended 6-8 weeks of work hardening.
- March 5, 2003 – An unsigned Re-Evaluation Exam by Advantage HealthCare. This report states that ____ complained of low back pain “due to helping moving his mother-in-law.” ____ had limited range of motion and reported tenderness at L-1 and L-2. The assessment was “Exacerbation of low back pain.”

On March 14, 2003, Mr. Esterly and Advantage Healthcare Systems requested pre-authorization for six weeks of Chronic Behavioral Pain Management. The request stated that ____ was being treated for exacerbation of his back pain, but he lacked diagnostic evidence to continue primary or secondary treatment; that he had exhausted all other avenues of treatment; and that he had shown signs of depression, anxiety, and stress related to his injury.

On March 24, 2003, Genex (acting on behalf of AHAC) denied the request for preauthorization. The denial stated that the request was for “Social Services solutions, not as medically reasonable and necessary treatment for any occupational injury from greater than one year ago.” After Advantage Healthcare requested reconsideration, Genex issued a second denial letter, dated April 28, 2003, which added the following:

. . . The review process clarified that the proposed services are focused on issues of “chronic pain syndrome.” As such, the proposed services could not be justified as necessary or appropriate for the claimed occupational injury. This lack of necessity or appropriateness for any injury is indicated by the American Medical Association’s literature, which clarifies that in “chronic pain syndrome,” there is no clear causal link between an index injury and an individual’s symptoms and findings. The submitted documentation clarified that there is insufficient objective basis for attributing the complaints to any occupational injury. Subsequently, it is impossible to credibly claim that the proposed services are necessary and appropriate for a claimed occupational injury. The review process actually revealed evidence that indicates that the proposed treatment lacks credibility for this patient (according to scientific research). Such issues include the documented formal diagnosis of mental illness, the documented depression-related difficulties, the indication of additional mental illnesses that have not yet been worked up diagnostically, and the claims context of presentation. . . .

Advantage Health Care Systems appealed the denial to the IRO (MAXIMUS). The IRO reviewed the clinical history and approved preauthorization with the following basis for decision:

. . . The MAXIMUS physician reviewer explained that despite all treatment the member continues to complain of intense back pain that limits his activities of daily living. The MAXIMUM physician reviewer explained that the psychological evaluation had identified health-related stressors (depression, anxiety, inadequate coping strategies to deal with pain, financial worries and psychological stressors) that are considered to be injury related. The MAXIMUS physician reviewer explained that this patient has exhausted all other treatments for his chronic pain condition. The MAXIMUS physician reviewer further explained that this patient is an optimal candidate for a multidisciplinary, outpatient chronic pain management program. Therefore, the MAXIMUS physician consultant concluded that the requested pain management program times 30 sessions is medically necessary to treat this patient’s condition at this time.

This appeal by AHAC followed.

B. Medical Necessity of Chronic Pain Management Services

1. Carrier’s Arguments and Evidence

The Carrier introduced into evidence several articles about chronic pain management from various journals, and it called Melissa Tonn, M.D., as a witness. Dr. Tonn has practiced medicine

since 1990 and she is board-certified in Occupational Medicine and Pain Management. She graduated from Rice University and the University of Texas Medical Branch at San Antonio. Dr. Tonn serves as an advisor to the Texas Workers' Compensation Commission and she sees patients in Dallas, Hurst, and Houston.

Dr. Tonn has not examined ___ but she has studied all of his available medical records. In her opinion, there is no indication to support chronic pain management services for ___. Dr. Tonn summarized the medical records discussed previously. Based on these records, she testified that ___ no longer has any physical problems from his compensable injury and his psychological problems are related to his personal family problems, not to his injury or any chronic pain. In particular, Dr. Tonn pointed out that ___'s x-rays and MRI were essentially normal for a 42-year-old male smoker. The MRI showed some minor degenerative changes, but Dr. Tonn testified that these are not related to ___'s on-the-job accident. She also stated that the FCEs for ___ showed good strength and were essentially normal except for range of motion, which is an entirely subjective complaint.

Dr. Tonn also stressed that ___'s psychological issues are unrelated to pain or to his injury. Instead, the counseling reports show that ___ had issues with his wife, stepson, Viagra, smoking, being fired from his job, his pending litigation, and other unrelated issues. In addition, these reports state that ___ mowed the yard of an auto repair shop on one occasion and hitch-hiked to a doctor's office for fluid to be drained off his knee from an unrelated injury. Dr. Tonn stated that these show T.F. can do some work, and he has physical problems unrelated to his compensable injury.

Finally, Dr. Tonn noted that ___ has already undergone a multidisciplinary work hardening program and that his most recent flare up of pain was not chronic pain from his compensable injury but resulted from ___ helping move his mother-in-law. In short, Dr. Tonn testified that ___'s current pain issues are not related to his compensable injury and that 30 sessions of chronic pain management will not help ___ return to work.

As noted above, Carrier also offered into evidence several journal articles related to chronic pain management. These articles were:

- *Multidisciplinary Biopsychosocial Rehabilitation for Neck and Shoulder Pain Among Working Age Adults*, 26 Spine 174 (2001).
- *Outcomes of Pain Center Treatment in Washington State Workers' Compensation*, 39 American Journal of Industrial Medicine 227 (2001).
- *Association Between Workers' Compensation and Outcome Following Multidisciplinary Treatment for Chronic Pain: Roles of Mediators and Moderators*, 11 The Clinical Journal of Pain 94 (1995).
- *Relative Cost-Effectiveness of Extensive and Light Multidisciplinary Treatment as Usual for Patients With Chronic Low Back Pain on Long-Term Sick Leave*, 27 Spine 901 (2002).

- *Status of patients with chronic pain 13 years after treatment in a pain management center*, Pain 74, 199 (1998).
- *The Dissatisfied Patient With Chronic Pain*, Pain 4, 367 (1978).
- *Assessing Benefits of the Pain Center: Why Some Patients Regress*, Pain 8, 101 (1980).
- *Prediction of Success From a Multidisciplinary Treatment Program for Chronic Low Back Pain*, 22 Spine 990 (1997).
- *Predicting treatment outcome of chronic back pain patients in a multidisciplinary pain clinic: methodological issues and treatment implications*, Pain 33, 41 (1988).
- *Behavioral Treatment of Chronic Low Back Pain: Clinical Outcome and Individual Differences in Pain Relief*, Pain 11, 221 (1981).

Carrier argues that these articles demonstrate that chronic pain management programs lack credibility because the reported studies generally showed no improvement from such programs. And some of the articles further report a negative relationship between workers' compensation patients and pain management programs. Therefore, based on Dr. Tonn's testimony and these articles, Carrier argues that chronic pain management is not medically reasonable and necessary for ____.

2. Advantage HealthCare Systems' Arguments and Authorities

Advantage HealthCare Systems offered no evidence at hearing, but instead relied on the records contained in the IRO file. In argument, Advantage's representative noted that the Commission's former Mental Health Guidelines provide some guidance on when chronic pain management services are reasonable and necessary, even though the Guidelines have been discontinued. Advantage also states that the gap in services for ____ between July 2002 and March 2003 was due to lack of preauthorization, not due to lack of problems by _____. Finally, Advantage argues that ____'s onset of pain when he moved his mother-in-law shows that ____ is not fit to return to work.

3. ALJ's Analysis

____ appears to have sustained a relatively minor injury, but he has received extensive testing and treatment that seems disproportionate to the seriousness of his injury. He has mild degenerative changes in his low back typical for a man his age, but there is no evidence of nerve compression or nerve root impingement, and there is no suggestion that he is a surgical candidate. Further, there is no evidence that he needs psychological counseling for chronic pain management. Indeed, in July 2002, ____ only rated his back pain at 2-4 on a scale of 0-10 and he made virtually no complaints about pain during his previous psychological counseling sessions. Instead, his psychological problems, if any, related to his family circumstances, smoking, using Viagra, and other

issues unrelated to his compensable injury or problems with chronic pain. Although ___ complained of increased pain in March 2003, that pain resulted from his moving his mother-in-law, not from his compensable injury. Thus, the ALJ agrees with Dr. Tonn that chronic pain management sessions are not medically reasonable or necessary as a result of ___'s compensable injury.

Carrier also relies on the articles discussed previously to argue that chronic pain management programs simply do not work in resolving chronic pain problems or in helping injured workers return

to work. The ALJ has reviewed the articles introduced into evidence by Carrier. While these articles discuss problems that the authors believe exist with chronic pain management programs, none of them advocates a wholesale abandonment of such programs. Instead, they recommend further study or suggest better patient screening and other improvements to the programs. Even the article that concludes a negative correlation exists for workers compensation patients in these programs does not contend that such programs should be discontinued. Further, most of these articles examine groups of patients of varying sizes and whether the programs reduce the patients' pain levels or improve

their ability to return to work when compared to patients who have not gone through these programs. However, the articles do not contend that none of the patients in the programs received any benefits. Instead, they simply use a statistical analysis to evaluate whether the programs as a whole are beneficial. Therefore, these articles do not support an argument that a pain management program is not beneficial for any individual patient, such as ___. Indeed, the articles show that some individual patients apparently are helped by the programs, even though the articles question whether the programs are beneficial overall when compared to other treatment options.

Although the ALJ does not find that the articles cited by Carrier justify denying chronic pain management services to ___, the ALJ does agree with Dr. Tonn that such services are not medically reasonable or necessary for ___ as a result of his compensable injury. Therefore, the ALJ grants Carrier's appeal and reverses the IRO decision to preauthorize chronic pain management services for _____.

III. FINDINGS OF FACT

1. Claimant ___ suffered a compensable injury on ___, when he slipped and fell while cleaning the floor.
2. ___ received extensive conservative treatment, diagnostic studies, and evaluation from several doctors, including R.J. Davis, D.O., of Advantage HealthCare Systems.
3. On March 14, 2003, George Esterly, M.S., L.P.C, also of Advantage HealthCare Systems, requested preauthorization for 30 sessions of chronic pain management services for _____.
4. American Home Assurance Company, the Carrier, denied Mr. Esterly's request.
5. Advantage HealthCare Systems requested medical dispute resolution.
6. The Independent Review Organization (IRO) reversed the Carrier's decision and granted

Advantage HealthCare Systems request for preauthorization.

7. Carrier requested a contested case hearing before the State Office of Administrative Hearings and requested denial of preauthorization for the chronic pain management program.
8. _____ has mild degenerative changes in his low back typical for a man his age (43-years-old), but there is no evidence of nerve compression or nerve root impingement and there is no suggestion that he is a surgical candidate.
9. _____ has psychological problems unrelated to his compensable injury and unrelated to chronic pain.
10. A chronic pain management program for _____ is not medically reasonable or necessary as a result of _____'s compensable injury.
11. ALJ Thomas H. Walston conducted a hearing in this case on August 26, 2003.
12. Advantage HealthCare Systems and the Carrier attended the hearing.
13. All parties received not less than 10 days notice of the time, place, and nature of the hearing; 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.
14. All parties were allowed to respond and present evidence and argument on each issue involved in the case.

IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing, including the authority to issue a decision and order. TEX. LABOR CODE ANN. § 413.031(k).
2. All parties received proper and timely notice of the hearing. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. Carrier has the burden of proof by a preponderance of the evidence.
4. Carrier established by a preponderance of the evidence that a chronic pain management program is not medically reasonable or necessary for the proper treatment of _____. TEX. LABOR CODE ANN. §§ 401.011(19) and 408.021.
5. Carrier's appeal is granted and the decision of the Independent Review Organization is reversed. Carrier is not required to pay for chronic pain management services for _____.

ORDER

IT IS, THEREFORE, ORDERED that American Home Assurance Company's appeal is GRANTED; that the decision of the Independent Review Organization is REVERSED and set aside; and that preauthorization is hereby DENIED for chronic pain management services for Claimant-____, as requested by Advantage HealthCare Systems.

SIGNED September 9, 2003.

**THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**