DOCKET NO. 453-03-4352.M2
MDR Tracking No.: M2-03-1231-01

___,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
VS.	§	**OF**
	§	
TEXAS A&M UNIVERSITY	§	
SYSTEM,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

The Texas A&M University System (A&M) denied preauthorization for a provocative lumbar discogram with fluoroscopy as medically unnecessary. An Independent Review Organization (IRO) concluded that A&M's denial was correct. The injured worker ___ (Claimant or Petitioner), has appealed the IRO's decision. The Administrative Law Judge (ALJ) determines that the requested discogram is reasonable and necessary and should be preauthorized.

I. DISCUSSION

A. Background Facts

___ is a 44-year-old woman who, at the time of her injury on ___, was employed as a custodian with A&M. On the day of her injury she fell down a flight of stairs while carrying a bucket of wax. She felt pain in her shoulder, lower back, and right leg. At her initial visit to her treating doctor, J. Suarez, D.C., he noted visible bruising on the lower back, left gluteal area, and right hip.[1] While the shoulder pain resolved, Claimant's lower back and right leg pain persisted. She has reported that pain and weakness in her leg have impaired her ability to walk.[2]

Claimant underwent chiropractic care and some work conditioning, but her pain continued. In July 2002 she was released to return to work with restrictions,[3] but she testified she had to stop work again in November 2002. She has had epidural steroidal and piriformis injections that offered only limited relief.

Objective tests thus far have failed to pinpoint a source of pain and weakness. Claimant presently walks with crutches, requires assistance in many daily activities, and takes pain medications and muscle relaxants.

Claimant's other medical conditions include obesity, high blood pressure, and diabetes.

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[1] Pet. Ex. 1 at 20.

[2] At times she reports pain in other areas of her body as well, (*see, e.g.*, Pet. Ex. 1 at 14), but the request for a discogram seems to relate to the lower back and right leg pain only.

[3] Pet. Ex. 1 at 23-24. Her improvement at that time may have been due to recent epidural steroidal injections. Pet. Ex. 1 at 48.

2. Procedural History

Ryan N. Potter, M.D., an anesthesiologist and pain management practitioner, made four requests for pre-authorization for discography on behalf of Claimant in 2002 and 2003. Based on the recommendation of Medical Business Management Systems (MBMS), a medical cost containment company, A&M denied the requests on the grounds that the requested procedure is not reasonable and necessary. Claimant requested dispute resolution. An Independent Review Organization (IRO) agreed with A&M's adverse determination. Claimant requested a hearing to review the IRO's decision.

The hearing was convened on September 16, 2003, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. ___ appeared by telephone and was assisted by Ms. Luz Loza of the Texas Workers' Compensation Commission's Office of Ombudsman Services, who appeared in person. Mr. Bradley D. McClellan, Assistant Attorney General, appeared for A&M. The hearing adjourned, and the record closed, the same day.

C. Applicable Law

The Texas Labor Code contains the Texas Workers' Compensation Act (Act) and provides the relevant statutory requirements regarding compensable treatment for workers' compensation claims.[4] In particular, the Act provides in pertinent part that:

> (1) 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:
>
> (1) cures or relieves the effects naturally resulting from the compensable injury;
>
> (2) promotes recovery; or
>
> (3) enhances the ability of the employee to return to or retain employment.
>
> * * *

Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.[5]

The rules of the Texas Workers' Compensation Commission (Commission) require that discograms be pre-authorized.[6]

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[4] TEX. LAB. CODE § 408.021

[5] TEX. LAB. CODE § 401.011(19).

[6] 28 Texas Administrative Code (TAC§134.600(h).

D. Burden of Proof

Under the Commission's rules, an IRO decision is deemed a Commission decision and order.[7] The burden of proof in this case is on Claimant to prove by a preponderance of the evidence that the procedure she seeks is a reasonable and necessary medical treatment.[8]

E. IRO Decision

In its report issued on July 1, 2003, the IRO agreed with A&M's determination to deny preauthorization. The report states:

> The reviewer does not find that the provocative discogram is indicated. The patient has evidence of symptom magnification. She has a predominance of leg pain with complete absence of any objective evidence of neural compression. She has a normal MRI, normal myelogram and CT scan and a normal EMG and nerve conduction studies. She has no indication for a IDET procedure or s [sic] spinal fusion. Therefore, there is no indication for doing this subjective invasive procedure.[9]

6. General Description of the Evidence

The evidence in this case consists of medical records, including several reports of evaluations of Claimant's condition. In addition, the following witnesses testified:

- Dr. Suarez, Claimant's treating doctor;
- Claimant; and
- Joyce Maxam, R.N., an MBMS employee.

7. Objective Diagnostic Tests

Nerve conduction studies were largely normal, though apparently inconclusive in one respect.[10] MRI tests were also fairly normal, showing at most a posterior bulge of the annulus at L4-5 without any evident nerve involvement.[11] A myelogram with a CT scan performed at the same time also showed nothing but the mild bulge at L4-5.[12]

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[7] 28 TAC § 133.308(p)(5).

[8] 28 TAC § 148.21(h), (i). *See also* 28 TAC § 133.308 (p)(5), (w); Tex. Labor Code § 413.031(a).

[9] Pet. Ex. 1 at 6.

[10] Pet. Ex. 1 at 34-37. These tests are discussed further below.

[11] An MRI report said, in connection with the bulge, that there was no "nerve root displacement or compromise of the neural foramen." Pet. Ex. 1 at 39. *See also* Pet. Ex. 1 at 31-32, 40.

[12] Pet Ex. 1 at 38-39.

H. Expert Opinions

Kareh. It appears from the record that Claimant saw Victor Kareh, M.D., a neurosurgeon, at least once or twice in 2002. After the lumbar myelogram and CT scan were normal, Dr. Kareh stated, "I could not appreciate any impingement of the nerve roots. I told the patient that from the neurosurgery standpoint I cannot help her with an operation."[13]

Potter. Dr. Potter, Claimant's pain management practitioner, sought pre-authorization for a discogram in an effort to locate the source of Claimant's pain, such as a possible annular tear that could be causing chemical radiculitis.[14]

Bahamón. Juan E. Bahamón, M.D., a neurologist, examined Claimant and issued a report on March 12, 2003.[15] He noted that Claimant had a very histrionic gait that is "not possible physiologically." He further stated, "This neurological examination shows no signs of any lumbosacral radiculopathies, spinal cord compromise or any peripheral neuropathies . . . I believe that this patient has soft tissue injuries. I am suspecting a certain degree of symptom magnification."

Dr. Bahamón went on to say that he was not making any specific suggestions related to her neurological condition. He indicated her treating doctors should consider aggressive job-hardening, limitation of narcotic analgesics, and encouragement to return to work.

Lenderman. Lawrence L. Lenderman, M.D., an orthopaedic surgeon in San Antonio, saw Claimant and issued a report on April 11, 2003.[16] His impression was that she was suffering from a herniation at L4-5 or from piriformis syndrome. He recommended a discogram at L4-5 and L5-S1.

Vaughn. Don Vaughn, D.C., is the practitioner who administered the nerve studies to Claimant (in February 2002).[17] At that time Dr. Vaughn noted a "technically difficult tibial motor nerve." Overall, however, he interpreted the results of the testing as "essentially near normal."

In May 2003, Dr. Vaughn re-assessed Claimant after being informed by Dr. Suarez that objective testing and conservative treatment had failed to alleviate her symptoms. Dr. Vaughn noted in his report to Dr. Suarez that "[c]onsultation with the claimant and conversations with you confirm that [Claimant] is a hard worker" who "does want to get well." His May 2003 report states that he was taking another look at Claimant's situation to "see if I could pinpoint some clues that might help you and the other doctors" in treating her. Dr. Vaughn noted that on examination Claimant displayed differences in her seated blood pressure measurements from one side to the other, as well as a marked difference in vibration sensation perception when the right ankle was compared to the left. He further noted a "very specific neuralgia-type pain pattern in the right lower extremity." Dr. Vaughn noted that his nerve conduction studies the previous year included a technically difficult tibial nerve assessment.

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[13] Pet. Ex. 1 at 60-61.

[14] Pet. Ex. 1 at 46-55.

[15] Pet. Ex. 1 at 44-45.

[16] Pet. Ex. 1 at 41-42.

[17] Pet. Ex. 1 at 34-37.

After examining Claimant, talking to Dr. Suarez, reviewing medical records, and re-visiting the nerve conduction studies, Dr. Vaughn concluded that there is likely some neuropathology. He recommended a specific neurologically oriented treatment (not administered by himself) and then discography if necessary.

Vanderweide. On June 20, 2003, David G. Vanderweide, M.D., issued a report to MBMS following a review of Claimant's records.[18] He referred to her "unwitnessed, unverifiable" and "alleged" injury. He noted that her diagnostic tests have been negative and that her diabetes, hypertension, and "body habitus" predispose her to deconditioning and poor endurance and would tend to prolong her recovery. He believed she had a soft tissue injury that should have resolved within weeks of the triggering event. He expressed puzzlement that the epidural steroids and piriformis injections offered her some temporary relief; he suggested that such a reaction would not tend to suggest a discogenic problem. He stated she is not a surgical candidate, that she had "significant secondary issues" that need to be evaluated, and concluded that "all diagnostic studies or medical treatment after July of 2002 have been unreasonable and unnecessary."

Mohabeer. Ajay J. Mohabeer, M.D., a pain management practitioner, examined Claimant and issued a report of his findings on July 31, 2003.[19] Dr. Mohabeer described very extreme pain behavior B severe reactions to palpation B that inhibited the examination. He clearly believed that Claimant's reports of pain and weakness were greatly out of sync with her physical condition. The tone of his report is highly skeptical throughout. His impression was:

> Rather complex sets of symptomatology. Strong component of nonphysiological and nonorganic pain complaints. Chronic pain syndrome of indeterminable etiology . . . [N]ear-falling behavior similar to that typically observed in classic histrionic musculoskeletal pathology. Relatedness undeterminable. Patient's complaints unyielding to extensive treatment and investigation.

He noted, "[T]he patient and her friend do get pretty defensive when I suggested that perhaps a loss of weight could help in the pain management." He concluded that a discogram would be of "no value whatsoever," adding that even if the procedure were to find an annular tear and lead to surgery, "this will compound the situation and increase her pain complaints and increase her disability." He assigned Claimant an impairment rating of 0%.

Suarez. Dr. Suarez, a chiropractor, is Claimant's treating doctor. He testified that he has treated Claimant for about one year and a half B since just after her accident. He testified that he believes she has some kind of nerve compression. He pointed out that obesity is not her primary problem, since she was working fine prior to the accident.

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[18] A&M Ex. 5.

[19] Pet. Ex. 1 at 14-17.

I. Other Testimony

Claimant testified that she requires help in many activities of her daily life. There are a number of statements by claimant in the record that she wants to recover and return to a normal, productive life.[20] She also stated that no doctor had spoken to her about performing surgery.

Ms. Joyce Maxam testified that Dr. Potter had submitted a request for discogram four times (never, after the first request, submitting any information that had not been provided initially), and the request was denied each time. She also testified that a discogram is a diagnostic procedure in which dye is injected into the spinal column. She noted that the procedure is used to identify the source of a patient's pain, usually with patients who have been identified as candidates for surgery.

J. ALJ's Analysis and Recommendation

This is a close case. The doctors who have seen Claimant or reviewed her records are divided with respect to whether a discogram is reasonable and necessary. For the following reasons, the ALJ concludes that the preponderance of the evidence indicates the discogram should be pre-authorized.

The reports of Drs. Bahamón, Mohabeer and Vanderweide all reflect considerable concern that Claimant's self-reported symptoms are suspect B *i.e.*, that she is a malingerer, or has other reasons for exaggerated perceptions or reports of pain. Dr. Mohabeer's report reveals a sometimes irritated attitude toward Claimant that undercuts its value as objective medical opinion. Dr. Mohabeer went so far as to assert with certainty that even if a discogram were performed and indeed showed an annular tear, any resulting surgery would be unsuccessful and Claimant's disability would be worsened. Such an unsupportably certain prognostication diminishes the doctor's credibility. Dr. Vanderweide, who did not examine Claimant, showed a puzzlingly suspicious attitude, even seeming to suggest that Claimant had suffered no initial injury at all; he referred to Claimant's "alleged" injury in an "unwitnessed, unverifiable" accident.[21] Likewise, the IRO decision's first listed reason for deciding against pre-authorization was "evidence of symptom magnification." However, the doctors who know Claimant best B Drs. Suarez and Potter B believe there is a physical reason for her pain.[22] Dr. Vaughn several times referred to Claimant as a "reliable evaluee."[23] Further, she has seen other doctors (*e.g.*, Drs. Kareh and Lenderman) who made no mention of any suspected malingering or symptom magnification. Her return to work from July to November 2002 indicates that she was trying to resume her normal activities. Finally, that Claimant may have secondary issues affecting her perceptions of pain (and perhaps requiring treatment themselves) does not mean that she does not have real pain for which there is a physical cause. The first reason for the IRO's decision is not supported by the preponderance of the evidence.

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[20] *See* Pet. Ex. 1 at 9, 10.

[21] The ALJ also notes that Dr. Bahamón had said that Claimant had a "very histrionic gait." Dr. Vanderweide reported that Dr. Bahamón had described *Claimant* as very histrionic.

[22] The ALJ is relying in part on the opinion of Dr. Suarez not on the question of whether a discogram is medically warranted, but on the question of whether Claimant's demeanor indicates that her reports of symptoms are primarily related to malingering or symptom magnification.

[23] Pet. Ex. 1 at 62-63.

The second, and related, basis of the IRO's decision was the fact that diagnostic tests thus far have not revealed a cause of Claimant's symptoms. Drs. Bahamón, Mohabeer, and Vanderweide, as well as the IRO decision, all referred to, *inter alia*, the normal nerve studies. None of these doctors discussed Dr. Vaughn's re-evaluation of Claimant's condition, and his suggestion that the difficult tibial nerve assessment may be significant in light of Claimant's failure to improve as expected. Further, Ms. Maxam testified that the main purpose of a discogram is to determine the source of pain. Therefore, the failure of objective tests so far to reveal a cause for Claimant's symptoms does not necessarily mean that further testing is not warranted.

At hearing, A&M suggested that Claimant's obesity, diabetes, and hypertension might limit her surgical options. While the ALJ could certainly imagine that this could be the case, the surgeons who saw her B Drs. Kareh and Lenderman B did not mention any concerns of this nature.

The divided expert opinions in this case make a decision difficult. On balance, for the reasons discussed above, the ALJ concludes that the discogram is reasonable and necessary and should be preauthorized.

II. FINDINGS OF FACTS

1. ___ (Claimant) suffered a compensable injury on ___. At the time she was employed as a custodian with Texas A&M University (A&M). On the day of her injury she fell down a flight of stairs while carrying a bucket of wax.

2. She felt pain in her shoulder, lower back, and right leg.

3. At her initial visit to her treating doctor, J. Suarez, D.C., he noted visible bruising on the Claimant's lower back, left gluteal area, and right hip.

4. While the shoulder pain resolved, Claimant's lower back and right leg pain persisted.

5. Claimant underwent chiropractic care and some work conditioning, but her pain continued, accompanied by weakness in her right leg.

6. In July 2002 she was released to return to work with restrictions, but she had to stop work again in November 2002.

7. Claimant has had epidural steroidal and piriformis injections that offered only limited relief.

8. MRI tests were also fairly normal, showing at most a posterior bulge of the annulus at L4-5 without any evident nerve involvement.

9. A myelogram with a CT scan performed at the same time also showed nothing but the mild bulge at L4-5.

10. Don Vaughn, D.C., administered nerve conduction studies to Claimant in February 2002. At that time Dr. Vaughn noted a "technically difficult tibial motor nerve." Overall, however, he interpreted the results of the testing as "essentially near normal."

11. In May 2003 Dr. Vaughn saw Claimant again, reviewed the results of her February 2002 nerve studies and other medical records, spoke to Dr. Suarez, and concluded that Claimant likely has neuropathology.

12. Claimant's pain management specialist, Ryan Potter, M.D., and an orthopaedic surgeon, Lawrence L. Lenderman, M.D., recommend discography.

13. Claimant presently walks with crutches, requires assistance in many daily activities, and takes pain medications and muscle relaxants.

14. Claimant's other medical conditions include obesity, high blood pressure, and diabetes.

15. Ryan N. Potter, M.D., an anesthesiologist and pain management practitioner, made four requests for preauthorization for discography on behalf of Claimant in 2002 and 2003.

16. Based on the recommendation of Medical Business Management Systems, a medical cost containment company, A&M denied the requests on the grounds that the requested procedure is not reasonable and necessary.

17. Claimant requested dispute resolution.

18. An Independent Review Organization (IRO), in a report dated July 1, 2003, agreed with A&M's adverse determination.

19. Claimant requested a hearing to review the IRO's decision.

20. Notice of the hearing was mailed to the parties on August 18, 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.

21. The hearing was convened on September 16, 2003, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. Claimant appeared by telephone and was assisted by Ms. Luz Loza of the Texas Workers' Compensation Commission's Office of Ombudsman Services, who appeared in person. Mr. Bradley D. McClellan, Assistant Attorney General, appeared for A&M. The hearing adjourned, and the record closed, the same day.

22. The doctors who know Claimant best B her treating doctor, J. Suarez, D.C., and Dr. Potter B believe there is a physical cause for her pain.

23. Dr. Vaughn several times referred to Claimant as a "reliable evaluee."

24. Claimant has seen doctors (*e.g.*, Dr. Victor Kareh and Dr. Lenderman) who made no mention of any suspected malingering or symptom magnification.

25. That Claimant may have secondary issues affecting her perceptions of pain (and perhaps requiring treatment themselves) does not mean that she does not have real pain for which there is a physical cause.

26. The purpose of discography is to locate the source of pain.

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(k) and TEX. GOV'T CODE ANN. ch. 2003.

3. Claimant timely filed a notice of appeal as specified in 28 TEX. ADMIN. CODE § 148.3.

4. Proper and timely notice of the hearing was effected in accordance with TEX. GOV'T CODE § 2001.052 and 28 TEX. ADMIN. CODE § 148.4.

5. Under TEX. LABOR CODE § 408.021(a)(1), 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 that cures or relieves the effects naturally resulting from the compensable injury.

6. Under 28 TEX. ADMIN. CODE §133.308(v), in all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight.

7. Claimant carried her burden of proof by showing that the requested discogram is reasonable and necessary to treat her injury.

8. Based on the above Findings of Facts and Conclusions of Law, Claimant's request for preauthorization discogram procedure should be granted.

ORDER

IT IS HEREBY ORDERED THAT preauthorization for the requested provocative lumbar discogram with fluoroscopy is GRANTED.

SIGNED October 13, 2003.

SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS