

RS MEDICAL, Petitioner	§ § § § § § §	BEFORE THE STATE OFFICE
VS	§ § § §	OF
TASB RISK MANAGEMENT FUND, Respondent	§ § §	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. DISCUSSION

RS Medical (Petitioner) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through MAXIMUS, an Independent Review Organization (IRO), denying the preauthorization request of Petitioner for the purchase an interferential and muscle stimulator for indefinite use by ___ (Claimant).¹

This decision denies the relief sought by Petitioner.

A hearing convened on December 8, 2003, before Administrative Law Judge (ALJ) Howard S. Seitzman. Patrick K. Cougill represented Petitioner. Jane Lipscomb Stone represented TASB Risk Management Fund (Respondent). Susan Keese, Petitioner's Insurance Relations Manager, and Mark Barhorst, M.D., testified for Petitioner. Samuel M. Bierner, M.D., testified for Respondent. There were no contested issues of notice or jurisdiction. The record closed following adjournment of the hearing.

Claimant sustained a work-related injury on or about ___, to her neck and right arm. Claimant underwent X-rays on ___. J. Michael Graham, M.D., examined Claimant on February 2, 1999, and he diagnosed Claimant with a cervical sprain and a mild cervical radiculopathy as a result of the injury. On March 19, 1999, Dr. Graham again examined Claimant and because she showed no improvement, he recommended a myelogram and a CT scan. Following the March 24, 1999 diagnostic procedures, Dr. Graham diagnosed a disc² herniation C6-7, below the previous cervical fusion. An upper extremity EMG by Nancy Washburn, D.O., confirmed a right lower cervical radiculopathy. In May 1999, Claimant began physical therapy but the sessions did not resolve or improve her symptoms. She continued conservative treatment at the urging of Dr. Graham. By July 20, 1999, Dr. Graham concluded the conservative therapy had failed and recommended a repeat anterior cervical discectomy and fusion.

An August 30, 1999 second spinal surgical opinion by Will E. Moorehead, M.D., reported pain spreading to Claimant's right and left wrists as well. Dr. Moorehead recommended further diagnostic studies and blocking of selective nerve roots. While he felt Claimant would require

1 The decision by the IRO is deemed to be a Commission Decision and Order.

2 Sometimes spelled disk.

surgery, he disagreed with the procedure recommended by Dr. Graham. A September 27, 1999 second spinal surgery opinion by Roy B. Smith, M.D., diagnosed a herniated nucleus pulposus with radicular pain into the upper extremities and concurred with the surgical procedure proposed by Dr. Graham. Claimant underwent surgery with Dr. Graham on October 27, 1999. The surgery included a removal of anterior spinal instrumentation C4-6, anterior cervical interbody arthrodesis C6-7, and anterior cervical instrumentation C6-7.

Following a May 23, 2000 visit, Dr. Graham concluded that Claimant while feeling better after surgery, still had back and leg pain and diagnosed her with mild lumbar and cervical radiculopathy. By June 27, 2000, Dr. Graham concluded Claimant had chronic pain and he recommended a pain management specialist.

Janet A. Strickland, M.D., conducted an Impairment Rating and Functional Capacity Evaluation on September 13, 2000, and assigned Claimant a 19% whole person impairment rating. On September 18, 2000, Dr. Graham remarked that Claimant's condition was unchanged and recommended a pain management specialist.

Dr. Barhost, a pain management specialist, examined Claimant on October 24, 2000. Claimant followed a medication-based course of treatment with Dr. Barhorst. In September 2001, he also recommended aquatic physical therapy. This combined course of treatment continued into 2003. On December 18, 2002, Donald H. Nowlin, M.D., conducted an Independent Medical Examination (IME) and issued a report on January 6, 2003. He concluded Claimant's pain was likely caused by an unstable C6-7 interspace and he recommended high-resolution CT scan of that level. He also concluded pain management should cease pending determination of the status of the C6-7 fusion.

On December 23, 2002, Dr. Barhorst prescribed an RS Medical RS-4i interferential and muscle stimulator for a two-month period. On March 6, 2003, Dr. Barhorst prescribed an RS Medical RS-4i interferential and muscle stimulator for indefinite use to reduce pain and muscle spasms and to restore muscle function.

A March 21, 2003 CT scan of the cervical spine revealed no cause for the radicular pain. Dr. Barhorst believed Claimant's symptoms were indicative of a C7 nerve root irritation. Both Dr. Barhorst and Dr. Graham agreed that a myelogram might indicate what, if anything, was irritating the nerve. There is no evidence in the record that the myelogram was performed.

The RS Medical RS-4i interferential and muscle stimulator is a class II medical device approved by the United States Food and Drug Administration (FDA) for specified indications. The general efficacy of the device is not an issue so long as the device is prescribed and used for the indications approved by the FDA. Dr. Barhorst prescribed the RS Medical RS-4i for FDA approved indications. Therefore, the only issue in this proceeding is whether the device is reasonable and medically necessary for Claimant as of the date of the hearing.³

The RS-4i has an onboard data collection system. For the period from December 23, 2002 through December 31, 2002, Claimant used the RS-4i once a day on seven occasions, twice a day on one occasion and three times a day on one occasion. Between January 1, 2003, and

³ The ALJ adopts the reasoning of ALJ Norman that the issue of medical necessity is present need, as of the date of the hearing, and not past need, as of the date of the prescription. SOAH Docket No. 453-03-4229.M2, MDR No. M2-03-1308-01; *RS Medical v. City of El Paso* (January 6, 2004).

January 26, 2003, Claimant used the RS-4i on every day but two. During this period, Claimant used the RS-4i once a day on nine occasions, twice a day on ten occasions and three times a day on five occasions.

Dr. Barhorst testified the RS-4i reduced the muscle tightness in Claimant's neck and upper back. On September 30, 2003, Dr. Barhorst reviewed the Claimant's use of the device from January 2003 through September 2003.⁴ From January through April 2003, he noted fairly heavy usage in January and slightly declining use into April. The usage reports for April through June exhibited "a generalized decreasing trend of use of the deep muscle stimulator that actually correlates fairly closely with the improvement in her symptoms after her IDET⁵ procedure."⁶ On June 18, 2003, Dr. Barhorst observed that the foraminal injection at C6-7 provided excellent relief of the radiating symptoms into her arms and that the neck pain was much reduced.

The July through September 2003 RS-4i data shows "further resolution in her utilization pattern." Dr. Barhorst testified that because Claimant's cervical problem is a permanent problem, he expected Claimant would use the RS-4i for the balance of her life. However, Dr. Barhorst's medical progress notes report that his September 30, 2003 review of the RS-4i data shows that during September 2003, she only utilized the RS-4i on one occasion. Dr. Barhorst's medical notes conclude that this implies Claimant's symptoms are much improved after the IDET procedure and that Claimant is "nearing the point where the deep muscle stimulator device could be stopped or its usage taken to a p.r.n. status."⁷ On September 16, 2003, Dr. Barhorst recorded that Claimant's cervical radicular symptoms remain in remission.

Dr. Bierner, a physician who specializes in physical medicine and electrodiagnostic medicine, acknowledged that he is familiar with the device and has, in fact, prescribed the RS Medical RS-4i interferential and muscle stimulator for certain of his patients with chronic pain.⁸ He testified that Claimant is likely to experience chronic pain with three adjacent level fusions.⁹ He testified, however, that the medical records correlate her use of the RS-4i to treat pain related to her noncompensable lumbar pain as opposed to her cervical pain. He also testified that there appears to be a strong correlation of her pain to the Prednisone¹⁰ Claimant takes for a skin disease.

Petitioner had the burden of proof in this proceeding. The evidence shows Claimant used the RS Medical RS-4i interferential and muscle stimulator and that it contributed to the relief of her pain and muscle tightness. However, during September 2003, Claimant used the device only once during the month. Dr. Barhorst concluded Claimant's lack of use indicated the RS-4i might no

4 Petitioner allowed Claimant to retain and use the RS-4i pending resolution of the dispute.

5 Intradiscal electrothermal (IDET) annuloplasty.

6 Dr. Barhorst testified the May 2003 IDET procedure was for Claimant's lumbar problem and that, as of the date of the hearing, the procedure was not indicated for cervical lesions. The lumbar pain is from degenerative disc disease and was not caused by the compensable cervical injury.

7 *Pro re nata*, means as the occasion arises or when necessary.

8 Dr. Bierner defines chronic pain as pain that persists for three to six months or more.

9 Claimant had two levels, C4-5 and C5-6, fused prior to the C6-7 fusion for the work-related injury.

10 A synthetic corticosteroid used for suppressing the immune system and inflammation.

longer be needed. It appears that Claimant's pain and muscle tightness is sufficiently relieved so that her usage of the RS-4i has declined to a point where it is virtually nonexistent.

Petitioner failed to prove that the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant is reasonable and medically necessary as of the date of the hearing.

II. FINDINGS OF FACT

1. ____ (Claimant), sustained a work related injury on or about ____.
2. Claimant experienced pain in her neck and right arm as a result of her work-related injury.
3. Claimant was diagnosed with a cervical sprain and a mild cervical radiculopathy as a result of the injury.
4. Following March 24, 1999 diagnostic procedures, J. Michael Graham, M.D., diagnosed a disc herniation C6-7, below the previous cervical fusion.
5. An upper extremity EMG by Nancy Washburn, D.O., confirmed a right lower cervical radiculopathy.
6. In May 1999, Claimant began physical therapy but the sessions did not resolve or improve her symptoms.
7. Claimant continued conservative treatments at the urging of Dr. Graham but by July 20, 1999, it was determined that conservative therapy had failed and a repeat anterior cervical discectomy and fusion was recommended.
8. Will E. Moorehead, M.D. disagreed with Dr. Graham's recommendation, but a September 27, 1999 second spinal surgery opinion by Roy B. Smith, M.D., diagnosed a herniated nucleus pulposus with radicular pain into the upper extremities and concurred with the surgical procedure proposed by Dr. Graham.
9. Claimant underwent surgery with Dr. Graham on October 27, 1999.
10. Claimant, while feeling better after surgery, still had back and leg pain and was diagnosed with mild lumbar and cervical radiculopathy.
11. By June 27, 2000, Dr. Graham concluded Claimant had chronic pain and recommended a pain management specialist.
12. On September 18, 2000, Claimant's condition was unchanged.
13. Mark Barhorst, M.D., a pain management specialist, examined Claimant on October 24, 2000.
14. Claimant followed a medication-based course of treatment with Dr. Barhorst.

15. The medication-based course of treatment was combined with aquatic therapy and continued into 2003.
16. On December 18, 2002, Donald H. Nowlin, M.D., conducted an Independent Medical Examination (IME) and issued a report on January 6, 2003. He concluded Claimant's pain was likely caused by an unstable C6-7 interspace and he recommended a high-resolution CT scan of that level.
17. On December 23, 2002, Dr. Barhorst prescribed an RS Medical RS-4i interferential and muscle stimulator for a two-month period.
18. On March 6, 2003, Dr. Barhorst prescribed an RS Medical RS-4i interferential and muscle stimulator for indefinite use to reduce pain and muscle spasms and to restore muscle function.
19. A March 21, 2003 CT scan of the cervical spine revealed no cause for the radicular pain.
20. Dr. Barhorst maintained his belief that Claimant's symptoms were indicative of a C7 nerve root irritation.
21. Both Dr. Barhorst and Dr. Graham agreed that a myelogram might indicate what, if anything, was irritating the nerve.
22. There is no evidence in the record that the myelogram was performed.
23. Claimant's pain is chronic.
24. The RS Medical RS-4i interferential and muscle stimulator is a class II medical device approved by the United States Food and Drug Administration (FDA) for specified indications.
25. Dr. Barhorst prescribed the RS Medical RS-4i for FDA approved indications.
26. The RS-4i onboard data collection system provided detailed usage reports.
27. For the period from January through April 2003, Claimant exhibited fairly heavy usage in January but usage slightly declined into April.
28. The usage reports for April through June exhibited a generalized decreasing trend of use of the RS-4i.
29. The decline in usage correlates fairly closely with the improvement in Claimant's symptoms after her intradiscal electrothermal (IDET) annuloplasty procedure.
30. The May 2003 IDET procedure was for Claimant's lumbar problem because, as of the date of the hearing, the procedure was not indicated for cervical lesions.
31. The July through September 2003 RS-4i data showed a continuing decrease in Claimant's utilization pattern.

32. During September 2003, Claimant only utilized the RS-4i on one occasion.
33. On or about April 16, 2003, TASB Risk Management Fund (Respondent) denied Claimant's preauthorization request for purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use.
34. On or about April 25, 2003, Respondent denied Claimant's request for reconsideration of the preauthorization request.
35. RS Medical (Petitioner) seeks preauthorization for Claimant's purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant.
36. Respondent contends that the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant is not medically necessary.
37. By letter dated July 3, 2003, MAXIMUS, an Independent Review Organization (IRO), denied the preauthorization request of Petitioner for the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant.
38. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).
39. Petitioner timely requested a hearing to contest the Commission's decision.
40. By letter dated August 15, 2003, the Commission issued a notice of hearing.
41. Administrative Law Judge Howard S. Seitzman convened a hearing on December 8, 2003, in the hearing rooms of the State Office of Administrative Hearing. The record closed following adjournment of the hearing.
42. Patrick K. Cougill represented Petitioner. Jane Lipscomb Stone represented Respondent.

III. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in 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. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.

5. An employee who has sustained 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 compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).
6. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41(b).
7. The purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant is not medically necessary.

ORDER

THEREFORE IT IS ORDERED that Petitioner RS Medical's request for relief is **DENIED** and the preauthorization of the purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by ___ is **DENIED**.

SIGNED February 6, 2004.

HOWARD S. SEITZMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS