

RS MEDICAL,
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

AMCOMP ASSURANCE
CORPORATION,
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 Medical Review of Texas, 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 10, 2003, before Administrative Law Judge (ALJ) Howard S. Seitzman. Patrick K. Cougill represented Petitioner. Dan C. Kelley represented AMCOMP Assurance Company (Respondent). Susan Keesee, Petitioner's Insurance Relations Manager, testified for Petitioner. Brad M. Hayes, D.C., 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 ____. He was taken to an emergency room, treated and released. He was seen by a Carlos Rosas and then requested a new treating doctor. Louis Patino, D.C., saw Claimant on January 31, 2003, and diagnosed him with cervical/brachial syndrome, lumbar radiculitis, and muscle spasm. Mariano Salinas, M.D., examined Claimant on February 26, 2003, and diagnosed fractures of the 9th and 10th ribs, neck pain and back pain. On April 23, 2003, Ihsan Shanti, M.D., examined Claimant. He noted that, according to Kevin E. Legendre, M.D., a February 26, 2003 MRI of the lumbar spine revealed a multi-level disk² pathology at L2-3, L3-4 and L4-5 levels. He recommended bilateral epidural lumbar steroid injections and selected nerve root blocks at the bilateral L3 and L5 levels.

A May 9, 2003 electrodiagnostic study was interpreted by Vanessa S. Godwin, M.D., as showing very mild right peroneal motor neuropathy and very mild right and left tibial motor neuropathy. Lower extremity somatosensory evoked potentials were normal.

A May 21, 2003 examination by Dr. Shanti revealed rather severe pain, 7-8/10, with occasional numbness and tingling. Although Respondent had denied previously requested lumbar epidural steroid injections to L3 and L5, Dr. Shanti indicated he would request reconsideration.

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

2 Sometimes spelled disc.

Claimant's prescriptions for Flexeril and Vioxx were refilled.

On June 23, 2003, Ruben D. Pechero, M.D., reviewed an MRI of the lumbar spine and noted right and left posterolateral disc herniation. On June 4, 2003, Dr. Shanti performed a transforaminal epidural lumbar block at L3 and at L5 for lumbar radiculopathy with nerve root dysfunction. On June 11, 2003, Dr. Shanti examined Claimant. Claimant reported a 50-60% reduction in lumbar and lower extremity pain. Dr. Shanti recommended a second lumbar epidural steroid injection because Claimant's "radicular-type pain" was unresponsive to physical therapy, rehabilitation and medication for more than four weeks.

On March 21, 2003, Dr. Patino prescribed an RS Medical RS-4i interferential and muscle stimulator for a two-month period to relieve pain, relax muscle spasms and improve muscle condition. On May 14, 2003, Dr. Patino prescribed the RS-4i for indefinite use. On May 22, 2003, Respondent denied Dr. Patino's request for indefinite use and Respondent denied the reconsideration on May 29, 2003.

The medical records in evidence are somewhat minimal and neither Claimant nor any of the treating professionals testified. Claimant's use of the device can be evaluated from the RS-4i's onboard data collection system.³ Between March 23, 2003, and March 31, 2003, Claimant used the RS-4i on four days with two treatments on one day and single treatments on the other three days. Treatments were 15 minutes on each occasion. Between April 2, 2003, and April 30, 2003, Claimant used the RS-4i once per day on 14 days and twice per day on five days. Each treatment lasted 15 minutes. From May 1, 2003, through May 30, 2003, Claimant used the RS-4i on 17 days. He used the device once per day on 13 days, twice per day on three days and three times per day on one occasion. Treatment times ranged from 14 minutes per treatment to 45 minutes per treatment. From June 2, 2003, through June 26, 2003, Claimant used the RS-4i on 12 days. On two of those days, he used it twice per day and the balance of the time it was used once per day. Treatment times ranged from 15 minutes to 45 minutes per treatment. Average time of treatment was 24 minutes on each occasion it was used. Claimant was polled by Petitioner on April 24, 2003, and he reported that he was using the RS-4i twice a day and that the device had helped "a little bit."

A May 14, 2003 clinic note from Dr. Patino reports that Claimant is using the RS-4i at home, is experiencing decreased pain and spasms and is becoming less dependent on medication. Dr. Patino reported Claimant had improved functioning and, though in pain, was improving.⁴ On December 8, 2003, Dr. Patino reaffirmed his opinion that the RS-4i was beneficial to Claimant and that Claimant's continued use of the device was medically necessary.

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. Patino 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.⁵

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

4 The clinic note appears to be on a form prepared by RS Medical.

5 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 RS Medical v. City of El Paso* (January 6, 2004).

Dr. Hays testified about the general efficacy of the RS-4i. That portion of his testimony, for the reasons stated earlier, is not germane and is, therefore, not discussed. Dr. Hayes prescribes and uses interferential current for treatment in his office. As to evidence specific to Claimant, Dr. Hayes found no objective evidence in the medical records of the device having a positive or lasting impact.

Petitioner had the burden of proof in this proceeding. The evidence shows Claimant experiences pain and muscle spasms as a result of a work-related injury. Claimant used the RS Medical RS-4i interferential and muscle stimulator on a regular basis, but it was not shown Claimant obtains relief from pain as evidenced by the severe pain reported in May 2003 and the need for injections in June 2003. In April 2003, Claimant reported the device provided only minimal relief. There is no credible evidence Claimant has decreased his reliance on pain medications.

Petitioner did not prove that preauthorization for the continued use of an RS Medical RS-4i interferential and muscle stimulator 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. After seeing a treating professional, Claimant requested a new treating doctor.
3. Louis Patino, D.C., saw Claimant on January 31, 2003, and diagnosed him with cervical/brachial syndrome, lumbar radiculitis, and muscle spasm.
4. Mariano Salinas, M.D., examined Claimant on February 26, 2003, and diagnosed fractures of the 9th and 10th ribs, neck pain and back pain.
5. A February 26, 2003 MRI of the lumbar spine, interpreted by Kevin E. Legendre, M.D., revealed multi-level disk pathology at the L2-3, L3-4 and L4-5 levels.
6. On April 23, 2003, Ihsan Shanti, M.D., examined Claimant and recommended bilateral epidural lumbar steroid injections and selected nerve root blocks at the bilateral L3 and L5 levels.
7. A May 9, 2003 electrodiagnostic study was interpreted by Vanessa S. Godwin, M.D., as showing very mild right peroneal motor neuropathy and very mild right and left tibial motor neuropathy. Lower extremity somatosensory evoked potentials were normal.
8. A May 21, 2003 examination by Dr. Shanti revealed rather severe pain, 7-8/10, with occasional numbness and tingling. Claimant's prescriptions for Flexeril and Vioxx were refilled.
9. Although AMCOMP Assurance Company (Respondent) had denied previously requested lumbar epidural steroid injections to L3 and L5, Dr. Shanti requested reconsideration.
10. On June 4, 2003, Dr. Shanti performed a transforaminal epidural lumbar block at L3 and at L5 for lumbar radiculopathy with nerve root dysfunction.

11. On June 11, 2003, Claimant reported a 50-60% reduction in lumbar and lower extremity pain.
12. Claimant's radicular-type pain was unresponsive to physical therapy, rehabilitation and medication for more than four weeks.
13. On June 23, 2003, Ruben D. Pechero, M.D., reviewed an MRI of the lumbar spine and noted right and left posterolateral disc herniation.
14. On March 21, 2003, Dr. Patino prescribed an RS Medical RS-4i interferential and muscle stimulator for a two-month period to relieve pain, relax muscle spasms and improve muscle condition.
15. On May 14, 2003, Dr. Patino prescribed the RS-4i for indefinite use.
16. Usage reports were obtained from the RS-4i's onboard data collection system.
17. Between March 23, 2003, and March 31, 2003, Claimant used the RS-4i on four days with two treatments on one day and single treatments on the other three days. Treatments were 15 minutes on each occasion.
18. Between April 2, 2003, and April 30, 2003, Claimant used the RS-4i once per day on 14 days and twice per day on five days. Each treatment lasted 15 minutes.
19. From May 1, 2003, through May 30, 2003, Claimant used the RS-4i on 17 days. He used the device once per day on 13 days, twice per day on three days and three times per day on one occasion. Treatment times ranged from 14 minutes per treatment to 45 minutes per treatment.
20. From June 2, 2003, through June 26, 2003, Claimant used the RS-4i on 12 days. On two of those days, he used it twice per day and the balance of the time it was used once per day. Treatment times ranged from 15 minutes to 45 minutes per treatment. Average time of treatment was 24 minutes on each occasion it was used.
21. Claimant was polled by Petitioner on April 24, 2003, and he reported that he was using the RS-4i twice a day and that the device had helped minimally.
22. On May 14, 2003, Claimant reported using the RS-4i at home, experiencing decreased pain and spasms and becoming less dependent on medication.
23. On December 8, 2003, Dr. Patino reaffirmed his opinion that the RS-4i was beneficial to Claimant and that Claimant's continued use of the device was medically necessary.
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. Patino prescribed the RS Medical RS-4i for FDA approved indications.

26. On May 22, 2003, Respondent denied as not medically necessary Dr. Patino's request for indefinite use of the RS-4i.
27. On May 29, 2003, Respondent upheld its May 22, 2003 denial.
28. RS Medical (Petitioner) seeks preauthorization for Claimant's purchase of an RS Medical RS-4i interferential and muscle stimulator for indefinite use by Claimant.
29. By letter dated July 24, 2003, Medical Review of Texas, 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.
30. Petitioner timely requested a hearing to contest the Commission's decision.
31. By letter dated August 29, 2003, the Commission issued a notice of hearing.
32. Administrative Law Judge Howard S. Seitzman convened a hearing on December 10, 2003, in the hearing rooms of the State Office of Administrative Hearing. The record closed following adjournment of the hearing.
33. Patrick K. Cougill represented Petitioner. Dan. C. Kelley represented Respondent.

III. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (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. The IRO decision is deemed a Decision and Order of the Commission.
4. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
5. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
6. 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).
7. 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).

8. 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**