

_____,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
	§	
ZURICH AMERICAN	§	
INSURANCE COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Injured worker _____ (Petitioner) challenges the denial of preauthorization by Zurich American Insurance Company (Respondent) for a surgical transposition of Petitioner’s right ulnar nerve at the elbow. Respondent denied the procedure as not medically necessary. The Administrative Law Judge (ALJ) concludes that while surgical intervention might one day prove medically necessary, more conservative treatment regimens have not been attempted to treat what the evidence suggests is a mild case of cubital tunnel syndrome. Consequently, the proposed surgery is denied.

I. STATEMENT OF THE CASE

Administrative Law Judge (ALJ) Gary Elkins convened and closed a hearing on March 24, 2004. Petitioner appeared at the hearing *pro se*. Respondent appeared and was represented by Attorney Charles Finch. Notice and jurisdiction, which were not disputed, are addressed in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Background

On _____, Petitioner suffered a compensable injury to his right shoulder and right elbow when he struggled to maintain control of 50-60 pound box that had slipped from his grasp. For evaluation, diagnosis, and treatment of both his shoulder and elbow injuries, Petitioner saw myriad health care professionals, including medical doctors and chiropractors. Much of Petitioner’s treatment consisted of chiropractic care, but Petitioner also participated in work conditioning. The scope of this proceeding is limited to the elbow injury.

In April 2003, based on February 2003 electro-myelogram (EMG) and nerve conduction velocity (NCV) studies of Petitioner’s right arm, Thomas Alost, M.D., recommended Petitioner undergo an ulnar nerve transposition at his right elbow. Respondent denied Dr. Alost’s requested preauthorization for the procedure, concluding that further evaluation and conservative treatment should be provided before the requested surgery can be deemed medically necessary. Following the conclusion of an Independent Review Organization that the proposed surgery was not shown to be medically necessary, Petitioner requested a hearing before SOAH, which culminated in this Decision and Order.

B. Evidence and Argument

Petitioner offered the following in support of his position that the surgical procedure was medically necessary:

Even though he had previously undergone surgery to his right elbow in 1985, he had no problems with his arm until his injury in September 2000, as evidenced by the absence of visits to the doctor during that period.

The February 2003 EMG and NCV suggested he was suffering from nerve entrapment (cubital tunnel syndrome) in his right elbow.

Respondent's expert witness, Orthopaedic Surgeon Don Johnson, testified that the surgical procedure was not warranted for the following reasons:

Few physical findings exist relating to Petitioner's elbow. Electro-physiological findings reflect no changes to muscles served by the involved nerves.

Any existing nerve entrapment was determined by testing to be mild.

The documentary evidence fails to reflect that conservative approaches to treating Petitioner's elbow were attempted.

Unless Petitioner has had an opportunity for conservative treatment and the treatment fails, surgical intervention is not supported. A conservative, non-operative program should be used, employing splinting the elbow and using an elbow pad; administering anti-inflammatory medication and a high dose of vitamin B-6; and avoidance of activities that could cause inflammation.

Notwithstanding Petitioner's mild case of cubital tunnel syndrome, not everyone with cubital tunnel syndrome requires surgery.

Dr. Johnson also pointed out that he had attempted to consult with Dr. Alost to obtain information he deemed important in arriving at his conclusion about the proposed surgery.

C. Analysis and Conclusion

Preauthorization should be denied. The ALJ agrees with Respondent that despite the many contacts between Petitioner and myriad healthcare professionals, few physical findings support the need for the proposed ulnar nerve transposition of Petitioner's right elbow. The February 2003 report of Brian August, M.D., supports this conclusion. Although Dr. Alost relies on Dr. August's report in deciding to proceed with surgery, Dr. August's diagnosis and impression fall short of a firm conclusion that ulnar nerve entrapment was a cause Petitioner's elbow problems:

Right ulnar nerve entrapment at the elbow, mild in nature, although I suspect the underlying problem as probably a peripheral neuropathy.

Note: We need to check 2 other extremities to confirm or disconfirm this but all sensory distal latencies tested in the upper extremity were prolonged.
(Exhibit 1 at 113)

The qualified nature of Dr. August's impressions and diagnosis, combined with the existence of firm diagnoses of other maladies such as degenerative arthritis related to a prior injury, and the lack of conservative treatment focused on Petitioner's elbow strongly suggest that the proposed surgery, while not proven to be unnecessary, would be premature at this time.

Furthermore, the record does not indicate whether two other extremities were checked as proposed by Dr. August in an effort to confirm his impression of nerve entrapment at the elbow. Should Petitioner undergo conservative treatment as proposed by Dr. Thompson and still fail to improve, surgery might be warranted following additional testing consistent with Dr. August's evaluation.

Accordingly, the proposed surgery is denied.

III. FINDINGS OF FACT

1. Petitioner, an injured worker, suffered a compensable injury to his right elbow on _____.
2. At the time of Claimant's injury, his employer held workers' compensation insurance coverage through Texas Mutual Insurance Company (Respondent).
3. Following his injury, Petitioner saw myriad health care professionals, including medical doctors and chiropractors, for evaluation, diagnosis, and treatment of both his shoulder and elbow.
4. In May 2003, based on February 2003 electro-myelogram (EMG) and nerve conduction velocity NCV studies of Petitioner's right arm, Thomas Alost, M.D., recommended Petitioner undergo an ulnar nerve transposition at his right elbow.
5. Respondent denied preauthorization for the procedure as not medically necessary.
6. Following an Independent Review Organization's conclusion that the proposed surgery was not shown to be medically necessary, Petitioner requested a hearing before SOAH.
7. Notice of the hearing was mailed to the parties November 17, 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.
8. Administrative Law Judge (ALJ) Gary Elkins convened and closed a hearing on March 24, 2004. Petitioner appeared at the hearing *pro se*. Respondent appeared and was represented by Attorney Charles Finch.
9. On October 5, 19, and 26, 2000, and November 6, 2000, Petitioner exhibited no swelling in his right arm and a full range of motion at the right elbow. His grip strength was strong and equal bilaterally.

10. On the dates reflected in Finding 9, Petitioner was diagnosed with a right upper extremity strain.
11. A November 20, 2000, MRI of Petitioner's right elbow revealed findings consistent with a partial tear involving the distal bicep tendon.
12. On September 16, 2002, Petitioner exhibited intermittent crepitation in the right elbow.
13. An x-ray of Petitioner's right elbow following his compensable injury revealed significant osteoarthritic changes to the humeral radial joint.
14. Any cubital tunnel syndrome experienced by Petitioner is mild.
15. Petitioner has not received conservative, non-invasive treatment for cubital tunnel syndrome.\

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding pursuant to §413.031(k) of the Act 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. §§2001.051 and 2001.052.
3. As Petitioner, Liberty Mutual Insurance Company bears the burden of proof in this matter. 28 TEX. ADMIN. CODE (TAC) §148.21(h).
4. Petitioner failed to prove that surgical transposition of his right ulnar nerve at the elbow is medically necessary, as contemplated by TEX. LAB. CODE ANN. §408.021.
5. Based on the foregoing Findings and Conclusions, preauthorization for the proposed surgical procedure should be denied.

ORDER

IT IS ORDERED that preauthorization for a surgical transposition of Petitioner's right ulnar nerve is denied.

Signed April 22, 2004.

**GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**