

**SOAH DOCKET NO. 453-04-1510.M2
TWCC MDR# M2-04-0250-01**

TPCIGA FOR COLONIAL CASUALTY	§	BEFORE THE STATE OFFICE
INSURANCE COMPANY,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
DANIEL B. BURDIN, D.C.,	§	ADMINISTRATIVE HEARINGS
Respondent	§	

DECISION AND ORDER

After an Independent Review Organization (IRO) granted preauthorization for a chronic pain management program, TPCIGA for Colonial Casualty Insurance Company (Carrier) appealed. This decision finds that the Carrier failed to sustain its burden of proving that the program is not medically necessary and preauthorizes the treatment.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding, and these matters are addressed only in the findings of fact and conclusions of law. The appeal hearing was held March 1, 2004, before administrative law judge (ALJ) Kerry D. Sullivan. Attorney Jane Lipscomb Stone represented the Carrier; and attorney Allen T. Craddock represented the Provider, Daniel B. Burdin, D.C. The record closed on March 15, 2004, with the filing of post-hearing briefs.

II. BASIS FOR DECISION

1. Background

The Claimant is a ___ year-old male who sustained a herniated disc in a work-related injury that occurred on ___. On January 23, 2002, he underwent a two-level lumbar decompression discectomy fusion and spinal instrumentation. He continued to experience significant pain and underwent another procedure for removal of the hardware on March 5, 2003. The Claimant has also undergone extensive conservative treatment, including trigger point injections, narcotic pain medication, physical medicine, biofeedback, and individual counseling with a psychotherapist. Nevertheless, he continues to suffer debilitating levels of pain. His treating doctor, Daniel B. Burdin, D.C., now recommends that the Claimant undergo a 30-session chronic pain management program, which the Carrier asserts is medically unnecessary.

The documentary record in this proceeding consists of approximately 400 pages of the Claimant's medical records presented to the IRO. In addition, Dr. Samuel M. Bierner, M.D., testified via telephone on behalf of the Carrier, and Dr. Burdin, who also participated in the hearing by telephone, testified on his own behalf.

2. Regulations

Employees have a right to necessary health treatment under TEX. LABOR CODE ANN, 408.021 and 401.011. Section 408.021(a) provides:

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.

Section 401.011(19) of the Labor Code provides that health care includes all reasonable and necessary medical . . . services.

The Texas Workers' Compensation Commission (Commission) adopted 1996 MFG defines and states entrance criteria for a chronic pain management program as follows:

Chronic Pain Management: A program which provides coordinated, goal-oriented, interdisciplinary team services to reduce pain, improve functioning, and decrease the dependence on the health care system of persons with chronic pain syndrome.

1. Chronic pain syndrome is defined as any set of verbal and/or nonverbal behaviors that:
 1. involves the complaint of enduring pain;
 2. differs significantly from the injured worker ' s premorbid status;
 3. has not responded to previous appropriate medical, surgical, and/or injection treatments; and
 4. interferes with the injured worker ' s physical, psychological, social, and/or vocational functioning.
2. Entrance/admission criteria shall enable the program to admit persons:
 1. who are likely to benefit from this program design;
 - b. whose symptoms meet the above description of chronic pain syndrome; and
 3. whose medical, psychological, or other conditions do not prohibit participation in the program.¹

Components of the program include individual and group psychotherapy, reduction of drug dependence, one-on-one time with the treating doctor, physical therapy, and occupational therapy.²

As the appellant, the Carrier has the burden of proof in this proceeding.³

¹ MFG, Medicine Ground Rules, II.G.

² *Id.*

³ 1 TEX. ADMIN. CODE (TAC) ' 155.41; 28 TAC ' 148(h).

3. Discussion

1. Parties' Evidence and Positions

Carrier witness Dr. Bierner was highly critical of the treatment plan offered by Dr. Burdin and his colleagues at Neuromuscular Institute of Texas. He viewed the Claimant's consistently high self assessment of his pain as unreliable for treatment purposes, based in part on the assessment of another chiropractor that the Claimant was magnifying his symptoms.⁴ Dr. Bierner believed Dr. Burdin should have focused more on the Claimant's ability to function and less on his subjective complaints of pain. His main complaint, however, was that the patient was experiencing depression and should have been treated with anti-depressants rather than the narcotics that he continued to depend upon. He also testified that Dr. Burdin inappropriately referred the Claimant for occupational therapy when the surgeon he consulted recommended physical therapy. He also points out that Dr. Burdin failed to verify the accuracy of the Claimant's statement that he had been fired from work. Dr. Bierner opined that the appropriate steps to take for the Claimant at this point would be anti-depressant medications, a physical therapy program to overcome deconditioning, and continuation of counseling.

Dr. Burdin testified in response that the Claimant met the criteria for the CPM course because he continues to experience significant pain interfering with activities of daily living and because lower levels of care have failed. He noted that the Claimant's continuing back spasms and his EMG results provide objective confirmation of his pain. He viewed the Claimant as motivated and did not believe he was magnifying his symptoms. He defended his decision to refer the Claimant to an occupational therapist rather than a physical therapist because he considers the services provided by the two occupations to be very similar, with occupational therapists having somewhat more training in psychology and in assisting non-athletes such as the Claimant in returning to work. Finally, as a chiropractor, Dr. Burdin cannot prescribe anti-depressant medications to his patients and relied on the Claimant's internal medicine doctor for that decision.

2. ALJ's Analysis

The ALJ finds that the Carrier has failed to prove that the prescribed chronic pain management program is not medically necessary. The Claimant remains at a consistently high level of pain that interferes with his activities of daily life and currently precludes his return to work. Two surgical interventions and extensive conservative care have failed to this point, and the chronic pain management program appears to be in order. The ALJ is unpersuaded by Dr. Bierner's alternative recommended plan to treat the Claimant with anti-depressants, more counseling, and more physical therapy. The Claimant's treating doctor and the counselor who saw the Claimant for eight sessions both believed a Chronic Pain Management program was the next and final logical step in treating the Claimant. In contrast, Dr. Bierner had never seen the Claimant and did not communicate with any of the Claimant's care givers other than to review records. He also assumed that the Claimant had not been prescribed anti-depressant medications, but the counselor's note in the medical records indicates the Claimant was in fact taking Neurontin to treat both pain and depression.⁵

⁴ Carrier Ex. 1, p. 88.

⁵ Ex. R-9, p. 126.

The ALJ is also unpersuaded by Dr. Bierner's assertion that the Claimant should have received physical therapy rather than occupational therapy as part of his conservative care. In part, Dr. Bierner based this opinion on his assessment that the Claimant's surgeon had specifically prescribed physical therapy rather than occupational therapy. In the first place, this issue is only marginally relevant in that both sides agree that the Claimant must be taken as he is now found *i.e.*, that, even if the treatment regime in the past was poor and relied, for instance, too much on narcotics⁶ or included the wrong type of therapy, the Claimant is nevertheless entitled to whatever treatment is now necessary to appropriately treat his compensable injury.

Additionally, the surgeon's suggestion of physical therapy does not appear to have been intended to limit Dr. Burdin's flexibility in terms of the treatment provided. To the contrary, he referred the Claimant back to Dr. Burdin for possibly some physical therapy.⁷ The treatment provided by the occupational therapist appears to have been reasonable and appropriate.⁸ Finally, the ALJ also does not fault Dr. Burdin for accepting the Claimant's word that he was fired from his job.

Based on the foregoing, the ALJ finds that the requested Chronic Pain Management Program should be preauthorized.

III. Findings of Fact

1. On ____, a workers' compensation claimant sustained a herniated disc in a work-related injury.
2. At the time of the accident, Colonial Casualty Insurance Company (the Carrier) was the workers' compensation provider for the Claimant's employer.
3. On January 23, 2002, the Claimant underwent a two-level lumbar decompression discectomy fusion and spinal instrumentation. He continued to experience significant pain and underwent another procedure for removal of the hardware on March 5, 2003.
4. The Claimant has also undergone extensive conservative treatment, including trigger point injections, narcotic pain medication, physical medicine, biofeedback, and individual counseling with a psychotherapist.
5. The Claimant continues to suffer debilitating levels of pain that interfere with his activities of daily living and currently preclude him from returning to the work force.
6. The Claimant's treating doctor, Daniel B. Burdin, D.C., has now requested preauthorization for a 30-session chronic pain management program.
7. The Carrier timely denied the preauthorization request, and the Provider appealed.

⁶ One of the goals of the chronic pain management program would be to reduce dependence on narcotics.

⁷ Ex. R-4, p. 67.

⁸ Despite Dr. Bierner's claim to the contrary, it also appears to have been consistent with the scope of practice for occupational therapy set out in TEX. OCC. CODE ' 454.006(b).

8. In a decision issued November 12, 2003, the Independent Review Organization reviewer (IRO) determined that the requested chronic pain management program is medically necessary and should be preauthorized.
9. The Carrier timely appealed the IRO decision, which the Commission had adopted.
10. The Commission sent notice of the hearing on the appeal to all parties on December 9, 2003.
11. The notice of hearing 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.
12. The hearing was continued to March 1, 2004, at the agreement of the parties. The hearing was conducted on that date.
13. Based on Findings of Fact 3-5, extensive surgical and conservative care has failed to adequately relieve the Claimant ' s pain to this point.
14. Nothing was shown to medically or psychologically prohibit the Claimant from successfully participating in the requested chronic pain management program.
15. The Carrier failed to establish that the requested chronic pain management program is not medically necessary.

IV. Conclusions of Law

1. The State Office of Administrative Hearings 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.
2. The Carrier timely requested a hearing, as specified in 28 TEX. ADMIN. CODE (TAC) ' 148.3.
3. Proper and timely notice of the hearing was provided in accordance with TEX. GOV ' T CODE ANN. ' 2001.052 and 28 TAC ' 148.4.
4. The Carrier had the burden of proof in this matter pursuant to 28 TAC ' 148.21(h).
5. TEX. LAB. CODE ANN. ' 413.014 and 28 TAC ' 134.600 require that CPM programs be preauthorized, dependent on a showing of medical necessity.
6. The Carrier failed to establish that the chronic pain management sessions would not cure or relieve the effects naturally resulting from the Claimant=s injury, promote his recovery, or enhance his ability to return to or retain employment.
7. The Carrier did not establish that the requested chronic pain management is not medically necessary to treat the Claimant ' s injury.

8. Based on the foregoing Findings of Fact and Conclusions of Law, preauthorization for the requested 30 sessions of chronic pain management should be approved, pursuant to TEX. LAB. CODE ANN. ' 413.014 and 28 TAC ' 134.600.

ORDER

It is ORDERED that 30 chronic pain management sessions with Daniel B. Burdin of Neuromuscular Institute of Texas are preauthorized for the Claimant. All other pending motions or requests for relief, if any, not specifically granted herein are denied for want of merit.

Signed April 13, 2004.

**KERRY D. SULLIVAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**