

FEDERAL INSURANCE COMPANY,	'	BEFORE THE STATE OFFICE
Petitioner	'	
	'	
V.	'	OF
	'	
RS MEDICAL,	'	
Respondent	'	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. DISCUSSION

Federal Insurance Company (FIC) requested a hearing to contest an independent review organization (IRO) determination that preauthorization of a RS 4i Sequential Stimulator (RS 4i Stimulator) for indefinite use by an injured worker (Claimant) should be approved. This decision concludes the RS 4i Stimulator is not medically necessary for the nature of Claimants injury.

A hearing convened on September 13, 2004, before Administrative Law Judge (ALJ) Tommy L. Broyles at the State Office of Administrative Hearings, Austin, Texas. Patrick K. Cougill represented RS Medical. Tommy W. Lueders represented Federal Insurance Company (FIC). The parties adopted the testimony from Susan Keesee, RS Medicals Insurance Relations Manager, and Leonard Hershkowitz, M.D., as discussed in SOAH dockets 453-04-1018.M2 and 453-04-1189.M2. Additional evidence was taken from Claimant. There were no contested issues of notice or jurisdiction. The record closed on the date of the hearing.

A. Background

Claimant sustained an at-work injury to her lower back on ____, when she slipped on some water. Her diagnosis was a mild compression fracture and no surgery was recommended. A variety of conservative care modalities were attempted. Claimant was prescribed the RS 4i Stimulator and found it efficacious. FIC did not contest the efficacy of the RS 4i Stimulator for use during the acute phase of her injury. The only issue in this proceeding is whether the device is reasonable and medically necessary for the Claimant as of the date of the hearing.¹

¹ The ALJ adopts the reasoning in SOAH Docket No. 453-03-4229.M2, MDR No. M2-03-1308-01; *RS Medical v. City of El Paso* (January 6, 2004), that the issue of medical necessity is present need, as of the date of the hearing, rather than

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

As Appellant, FIC has the burden of proof.²

B. Testimony and Contentions

1. RS Medical

Ms. Kessee testified that the interferential current portion of the RS 4i Stimulator is a unique modality that is different from other types of electrotherapy.³ It involves simultaneous two-medium-frequency electrical signals into the body that cross, or interfere, with one another. She said this causes a pulsing wave that very effectively reduces pain. According to Ms. Kessee, medium interferential frequency minimizes skin resistance and allows much deeper penetration. This distinguishes it from a TENS unit, which is a low-frequency device that meets significant skin resistance. She said the device has three pain-relief mechanisms compared to a TENS unit, which has only one.

According to Ms. Kessee, the Philadelphia Panel Physical Therapy Study (Philadelphia study), reviewed TENS devices, not interferential devices. Ms. Kessee cited a study by Anthony Yeung entitled, AEffect of Sequential Elective Surface Stimulation on Medication Utilization Following Selective Endoscopic Discectomy, in the *Journal of Minimally Invasive Spinal*

past need, as of the date of the prescription.

2 1 TEX. ADMIN. CODE (TAC) ' 155.41; 28 TAC ' 148(h).

3 Ms. Kessee was not shown to be a medical expert.

Technology. Dr. Yeung concluded there was significantly reduced drug consumption by patients using the RS 4i Stimulator after minimally invasive back procedures.

Claimant testified that the RS 4i Stimulator reduces her pain from ten to zero, on a ten point scale. She uses the device three times per day and is pain free for three to four hours after using it. Several reports in the evidentiary record verify that Claimant has regularly used the RS 4i Stimulator. She continues to take hydrocodeine but testified that she has reduced the amount from ten to four pills per day because of the RS 4i Stimulator.

2. FIC

Leonard Hershkowitz, M.D., a board-certified neurologist, testified that the interferential current is like two TENS units set to interfere with one another. He acknowledged that the unit Ais said to give a deeper penetration than a TENS unit alone. He indicated the RS 4i Stimulator is a passive modality that is legitimately used in the acute phase, or first six to eight weeks, following an injury or at the latest in the subacute phase.

Dr. Hershkowitz agreed with other reviewers opinions that the device is inappropriate for use by Claimant more than two and one-half years after an injury. He said although he would always factor in patient statements about care, he would also need objective evidence on how a device is working. He explained there is a well-recognized, large placebo effect that patients may receive from treatments that actually have no objective value. He said he would expect to see, in written progress notes, such objective measures as an analog pain scale, what a patient could do by using the device, or medication reductions. He referred to this as evidence-based medicine, and cited it as the medical standard for determining medical necessity.

Dr. Hershkowitzs concern is an absence of medical records for the Claimant demonstrating the efficacy of the device. He said he has not seen adequate information to conclude it is medically necessary at this stage of his injury, but agreed that if it does relieve pain, it could be appropriate.

Dr. Herskowitz referred to the Philadelphia study, which concluded that devices such as electrical stimulators are not helpful after the acute phase of an injury. He agreed that the study did not mention the interferential modality, but said the RS 4i Stimulator is similar to a TENS unit, which was discussed. He has not seen any studies or other evidence to recommend electrical stimulation after the acute phase.

Carrier further argues that Claimants testimony did not prove she receives a real benefit from the RS 4i Stimularor. Rather, Carrier argues that any pain relief she is receiving is from a placebo effect. The treating notes from Claimants medical doctors indicate that the compression fracture would have healed years ago, and Carrier points out that these doctors could find no objective evidence suggesting where Claimants pain is generated.

C. Analysis

The ALJ concludes that the RS 4i Stimulator is not medically necessary. The ALJ agrees with FIC that Claimant has evidence of pain magnification and inconsistent testimony regarding the efficacy of the device. If she receives the benefits suggested, she should be capable of employment and household chores. Further, she remains on narcotics even three years after the injury. Ultimately, the ALJ simply does not find Claimants testimony to be credible.

Further, Mark Parker, M.D., examined Claimant and found on January 18, 2002, that all objective tests were normal. He noted that he had no explanation for her continued pain. Dr. Parker further found that Claimant had reached maximum benefit and was able to return to work without specific restrictions. Accordingly, the ALJ concludes all injury and pain associated with the compensable injury has resolved and that the RS 4i Stimulator is not reasonable medical care for Claimants present condition.

II. FINDINGS OF FACT

1. Claimant sustained an at-work injury to her lower back on ____.
2. Claimants diagnosis was a mild compression fracture.

3. Claimant was prescribed the RS 4i Stimulator for chronic pain.
4. FIC denied RS Medicals claim and an independent review organization overturned the denial.
5. It is undisputed that FIC requested a hearing not later than the twentieth day after receiving notice of the IRO decision.
6. FIC did not contest the efficacy of the RS 4i Stimulator for use during the acute phase of an injury.
7. In January 2002, Dr. Parker found no objective bases for Claimants pain and noted that she had reached maximum benefit from pain pills and a muscle stimulator.
8. The RS 4i Stimulator is not shown to be reasonably required by the nature of the Claimants injury.
9. All parties received not less than ten days notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
10. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

III. CONCLUSIONS OF LAW

1. 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.
2. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) ' ' 102.7 and 148.3.
3. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
4. FIC has the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC ' ' 148.21(h); 1 TAC ' 155.41(b).
5. The only issue in this proceeding is whether the device is reasonable and medically necessary for the Claimant as of the date of the hearing. 28 TAC ' 134.600.
6. FIC proved that the RS 4i Stimulator is not medically necessary for Claimants compensable injury. TEX. LAB. CODE ANN. ' 408.021(a).

7. FIC should not have to provide the RS 4i Stimulator to Claimant.

ORDER

IT IS THEREFORE ORDERED that FICs request for relief is **GRANTED** and FIC is not ordered to provide the RS Medical RS-4i Stimulator for Claimant.

SIGNED October 7, 2004.

**TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**