

SOAH DOCKET NUMBER # 453-04-5363.M2R

AMERICAN HOME ASSURANCE COMPANY, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
v.		OF
BEHAVIORAL HEALTHCARE ASSOCIATES, Respondent		ADMINISTRATIVE HEARINGS

DECISION AND ORDER

American Home Assurance Company (Petitioner) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through the Texas Medical Foundation, an Independent Review Organization (IRO), approving the preauthorization request of Behavioral Healthcare Associates (Respondent) for psychological testing and biofeedback.¹

Following a hearing and consideration of the evidence, the Administrative Law Judge (ALJ) finds that Petitioner met its burden to show that the requested services are not medically necessary and should not be preauthorized.

I. JURISDICTION, NOTICE, AND VENUE

There were no contested issues of jurisdiction, notice or venue. Those issues are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

¹ The decision by the IRO is deemed to be a Commission Decision and Order. Respondent filed a motion to remand this case to the Commission's Medical Review Division (MRD) because it claimed that the Findings and Decision were based on an erroneous TWCC 60 request for dispute resolution. According to the assertions in the motion to remand, Carrier had preauthorized psychological evaluation and testing, but denied Respondent's request for four sessions of health and behavior intervention services. Respondent requested that the matter involving the health and behavior intervention services be remanded back to the MRD for determination. Respondent did not cite to any authority that would support a remand, nor did Respondent file a cross-appeal of the Findings and Decision. Carrier objected to remand on the grounds that remand was not authorized by the Commission's rules or statute. The motion to remand was denied at hearing. For purpose of this decision, the ALJ considers that the disputed services encompass psychological testing, evaluation and health and behavior intervention services because the evidence supporting these services was before the MRD and IRO at the time of the Findings and Decision. Carrier did not object to consideration of all the services.

II. STATEMENT OF THE CASE

Administrative Law Judge Suzanne Formby Marshall convened a hearing in this case on June 3, 2004, at the State Office of Administrative Hearings (SOAH), William Clements State Office Building, Austin, Texas. Petitioner appeared through its attorney, Peter McCaulay. Respondent did not appear or participate at the hearing. Petitioner called Dr. Melissa Tonn's as a witness and submitted medical records which were admitted into evidence. The record closed the same day.

III. DISCUSSION

1. Background and Evidence

Claimant is a Bosnian refugee who speaks little, if any, English. On ____, Claimant injured his back as he was lifting cases of oil, while employed by ____. The next day, he was treated by Bruce Elliston, M.D., at Concentra Health Services in Dallas, Texas, who diagnosed Claimant with a lumbar strain. Claimant received an epidural steroid injection and prescriptions for pain medication and an anti-inflammatory. On January 20, 2003, Claimant returned to Dr. Elliston, complaining of severe pain. Dr. Elliston ordered an MRI which revealed acute fractures at T12 and L3. He referred Claimant to Dr. Samuel Bierner of HealthSouth for further evaluation and care.

In the course of treating Claimant, Dr. Bierner diagnosed him with osteopenia (a condition that results in weakening of the bones), probably resulting from a metabolic disorder, such as toxic thyroid condition. This diagnosis was in addition to Claimant's fractures and lumbar strain. While under Dr. Bierner's care, several preauthorization requests were made for physical therapy, aquatic therapy and the purchase of a thoracolumbar brace on behalf of Claimant. These requests were denied by Carrier. Dr. Bierner expressed frustration over Carrier's actions and noted that the failure to approve these requests would have a negative effect on Claimant's condition.

In September of 2003, Dr. Bierner recommended that Claimant be evaluated for participation in a "functional restoration-type pain management program," noting that Claimant demonstrated numerous pain behaviors and he "was not making much progress in improving his activity at home." Carrier's Ex. 2, p. 81. Dr. Bierner also expressed frustration over Claimant's failure to manage his thyroid condition by failing to obtain prescribed medications, thereby creating a medical emergency which hindered Claimant's other care. Further, Dr. Bierner noted that communication with Claimant was an ongoing problem, as Claimant's daughter, who acted as a translator, did not attend each visit. Further, Dr. Bierner had concerns with the accuracy of the daughter's translation when she did attend.

A mental health evaluation of Claimant was conducted by Dr. Tom Mayer on October 17, 2003. According to Dr. Mayer, Claimant's repeated reports of increased pain levels, depression, and increased feelings of insecurity and inadequacy affected his ability to recover from his injury. at 84. Dr. Mayer detailed the complexities involved in treating Claimant, *i.e.*, two compensable injuries;

the difficulty in determining what conditions were attributable to which injury; osteopenia; Claimant's exaggerated reports of pain; and the Carrier's resistance to authorizing treatment. *Id.* at 89-92. Dr. Mayer concluded that Claimant would benefit from participation in a pain program, but observed that "this patient will be extremely difficult to treat with a cultural and language barrier and the extreme inhibition of function with extremely low physical abilities due to *fear-avoidance*." *Id.*

On October 28, 2003, Dr. Mayer prepared a letter to Dr. Bierner noting that Claimant had extensive psychological complications, but was not cooperative in seeking assistance with obtaining the services of a translator, who was necessary in order to communicate with Claimant. Noting that he believed Dr. Bierner had referred Claimant to a work hardening program, Dr. Mayer referred Claimant back to Dr. Bierner for further care. *Id.* at 101. Claimant was eventually given a 5% whole person impairment rating by Dr. Bierner. *Id.* at 112.

Dr. Bierner referred Claimant to Respondent for a psychological assessment, including an evaluation of whether Claimant was a suitable candidate for a chronic pain management program. The evaluation was performed by Respondent on November 13, 2003. *Id.* at 102-103. Respondent concluded that "further psychological assessment, including psychological testing and a psychophysiological profile assessment" was medically necessary to establish the degree of "injury-relatedness between the emotional symptoms and the work-related injury" and to formulate an appropriate treatment plan. *Id.* at 103. Apparently, at some later point, Respondent requested approval for four sessions of health and behavioral interventions, although the records submitted by Carrier do not contain the request or supporting documentation.²

The IRO decision found that psychological testing and biofeedback were necessary to treat Claimant's condition because "the psychological testing will help guide the treatment program with regards to physical medicine treatments, medications, and counseling by enhancing the success rate of the treatment program." There was no other specific reference to biofeedback or the health and behavioral interventions in the decision.

Dr. Melissa Tonn's testified for Carrier. Dr. Tonn's is board certified in occupational medicine and pain medicine. She reviewed Claimant's medical records, including the requests for preauthorization and supporting documents. In Dr. Tonn's opinion, psychological testing, biofeedback, and behavioral therapy is not medically necessary at this time to treat the Claimant. As noted by Dr. Tonn's, there are communication difficulties associated with the treatment of Claimant which have not been addressed by Respondent. Dr. Tonn's noted that this is a complicated case due to Claimant's two compensable injuries involving his back. Dr. Tonn's testified that Claimant continues to complain of severe pain involving his hips and extensive aches and pains, including his neck. She said that these complaints were not explained by his injury in January 2003.

² Some of this information is probably contained within the documents submitted by Respondent that were provided to the IRO; however, because of Respondent's failure to participate in the hearing and to move for their admission into evidence, the documents were not admitted into evidence and may not be considered by the ALJ.

Further, Dr. Tonn's noted that Claimant's other medical conditions, osteopenia and thyroid disorder, complicate Claimant's medical treatment and remain to be satisfactorily addressed. Dr. Tonn's asserted that the lack of a meaningful opportunity for evaluation and treatment of these medical conditions makes it difficult to determine what could be causing Claimant's psychological dysfunction. She testified that thyroid disease is associated with psychological dysfunction and that the medical records indicated that Claimant appeared to be anxious and irritable. In her opinion, authorizing four sessions of behavioral therapy is akin to "putting the cart before the horse" because Claimant's underlying medical conditions have not been adequately evaluated. Additionally, a comprehensive treatment plan has not been developed for Claimant which takes into account the multiple issues of concern regarding his condition.

After Carrier denied preauthorization, Behavioral Healthcare Associates requested that this matter be referred by the Commission for a medical dispute review (MDR) by an Independent Review Organization (IRO). On April 14, 2004, the IRO issued its Independent Review Decision (IRD) finding that "psychological testing and biofeedback were medically necessary to treat this patient's condition."

On April 15, 2004, AHAC requested an appeal, and the matter was referred to SOAH for a contested case hearing.

2. Analysis

Under Texas law, 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 statute provides that

the purposes for which health care is to be rendered to a claimant include any 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.

This is a difficult case. It is obvious from the evidence introduced at hearing that Claimant is virtually incapacitated due to his medical (and perhaps even psychological) conditions. In this case, Respondent's failure to appear at the hearing and introduce evidence supporting the need for the requested services is unfortunate. The only evidence in the record is the recommendation for further testing. There is no evidence describing the health and behavioral interventions, or otherwise indicating how they are designed to help change the complications that appear to have hindered Claimant's recovery and treatment, *i.e.*, his medical condition, communication issues, and lack of compliance. Instead, based upon the testimony of Dr. Tonn's and the written communications from Dr. Mayer, the ALJ finds that these complications will likely hinder the effectiveness of the interventions, even if they were approved.

Claimant has had a great deal of difficulty in the past with communication and requires the assistance of a translator to communicate with any of his physicians. There is no evidence that Claimant or Respondent has addressed this need in order for the psychological services to be effectively received by Claimant. Claimant's daughter is not always available to translate for her

father and her accuracy in translating has been called into question by Dr. Bierner. Without a translator, Claimant will not be able to participate in detailed discussions with Respondent's staff. Consequently, even if the services were approved, they would not result in meaningful treatment if this issue is not addressed in advance.

Further, Claimant has demonstrated that he has not been compliant with requests made of him by his doctors, such as to obtain definitive medical care for his thyroid condition, to obtain the services of a translator, and to perform home exercises. Claimant's overall lack of compliance and initiative in participating in his medical care are significant issues which mitigate against approving psychological services. These may be the very issues the psychological services are designed to address. However, because there is no evidence in this case from Respondent, the ALJ cannot say that Respondent has put in place an infrastructure supporting its care that would cure or relieve the effects naturally resulting from the compensable injury, promote recovery, or enhance the ability of the employee to return to or retain employment, given Claimant's present condition.

The ALJ concludes that the psychological testing, biofeedback and health and behavioral services are not medically necessary at this time and should not be preauthorized.

IV. FINDINGS OF FACT

1. On___, Claimant injured his back while lifting a case of oil in a work-related accident.
2. Claimant had a previous work-related injury in___, involving injury to his back.
3. Claimant is a Bosnian refugee who lives in Dallas. He speaks very little English.
4. Claimant sought treatment from Dr. Bruce Elliston from Concentra Medical Center in Dallas, Texas, on January 15, 2004. He was diagnosed with a lumbar strain and given an injection and medications to assist with the pain and inflammation.
5. Claimant's daughter frequently accompanied him to his medical visits and acted as a translator.
6. While under Dr. Elliston's care, Claimant complained of excessive pain.
7. Dr. Elliston referred Claimant for an MRI which revealed lumbar fractures.
8. Dr. Ellison referred Claimant to Dr. Samuel Bierner for further evaluation and treatment.

9. Dr. Bierner diagnosed Claimant as having a thyroid condition and osteopenia, which causes weakening of the bones. These conditions have not been fully evaluated and treated and complicate Claimant's medical care.
10. Claimant has not been compliant with Dr. Bierner's instructions to obtain ongoing medical care for his thyroid condition. Claimant has frequently run out of medication necessary to treat his thyroid condition, requiring immediate medical attention.
11. Claimant has received physical therapy and aquatic therapy, but was not compliant with home exercise programs.
12. Claimant's lack of compliance with home exercise programs and obtaining ongoing, consistent medical care (including medications) for his thyroid condition negatively affects the ability of his physicians to treat him.
13. Claimant continues to complain of excessive pain.
14. Claimant's language skills have hampered the ability of his caregivers to discuss his treatment and provide meaningful psychological assistance to him.
15. Dr. Samuel Bierner referred Claimant to Behavioral Healthcare Associates (Respondent) for psychological evaluation.
16. On March 4, 2003, Respondent recommended that Claimant receive psychological testing, biofeedback and health and behavioral intervention services.
17. There is no evidence that a translator would be available to assist Claimant and Respondent during all the psychological services.
18. There is no evidence describing the health and behavioral intervention services or how they will address Claimant's medical and/or psychological condition.
19. Carrier denied the request for preauthorization of the services in Finding of Fact No. 16 on the basis that they were not medically necessary.
20. Respondent requested that the Texas Workers' Compensation Commission (TWCC) refer the case for a medical dispute review (MDR) by an Independent Review Organization (IRO).
21. On April 14, 2004, the IRO issued its decision finding that psychological testing and biofeedback were medically necessary.

22. The IRO decision is deemed a Decision and order of the Texas Worker's Compensation Commission (Commision).
23. On April 15, 2004, American Home Assurance Company (Petitioner) timely requested a hearing to contest the Commisison's decision.
24. By letter dated May 6, 2004, the Commission issued a notice of hearing.
25. A hearing was convened at the State Office of Administrative Hearings on June 3, 2004. Peter McCaulay appeared and represented Petitioner. Respondent did not appear or otherwise participate at the hearing. The record closed following adjournment of the hearing.
26. The psychological testing, biofeedback, and health and behavior interventions are not medically necessary.

V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE § 413.031; TEX. GOV'T CODE ch. 2003.
2. Petitioner timely requested a hearing in this matter, pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
3. The Commission provided adequate and timely notice of the hearing to the parties under the provisions of the Administrative Procedure Act. TEX. GOV'T CODE § 2001.052.
4. 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).
5. Petitioner has the burden of proof in this matter. 28 TAC §148.21(h).

6. Petitioner proved by a preponderance of the evidence that the preauthorization of psychological testing, biofeedback and behavioral health services was not medically necessary.

ORDER

IT IS ORDERED that Petitioner American Home Assurance Company's request for relief is GRANTED and psychological testing, biofeedback, or behavioral health services is not authorized.

SIGNED June 23, 2004.

**SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**