SOAH DOCKET NOS. 453-05-0210.M5 and 453-05-0522.M5
MR NOS. M5-04-2527-01 and M5-04-3325-01

___,	**§**	**BEFORE THE STATE OFFICE**
Petitioner	**§**	
	§	
V.	**§**	**OF**
	§	
ACE INSURANCE COMPANY	**§**	**ADMINISTRATIVE HEARINGS**
OF TEXAS,	**§**	
Respondent	**§**	

DECISION AND ORDER

This proceeding concerns appeals from two decisions by Independent Review Organizations (IROs) that were joined for hearing at the State Office of Administrative Hearings (SOAH). At issue in both cases is the medical necessity of two prescription medications, Mobisyl cream and Naproxen, that Petitioner, Claimant ___, purchased. Respondent, Ace Insurance Company of Texas (Carrier), contended that the IRO decisions should be upheld because the prescription medications were not medically necessary. In this Decision and Order, the Administrative Law Judge (ALJ) finds the medications at issue constituted reasonable and medically necessary treatment for one of Claimant=s compensable injuries, and therefore, Claimant is entitled to reimbursement in the sum of $145.93.

I. REASONS FOR DECISION

A. Background Facts

Claimant worked as a machine operator in a ___ plant for an unspecified number of years; during that employment, he suffered four or five compensable injuries, including a ___ repetitive motion injury to his right hand, a ___ right knee injury, and a low back injury. When the plant closed in June 1998, Claimant applied for Social Security disability benefits, which were granted.[1] He has not worked since the plant closed.

[1] Claimant testified that he does not know the medical basis on which the Social Security Administration has

The treatments at issue in these proceedings comprise prescription Naproxen and Mobisyl cream Claimant purchased between October 3, 2003, and February 18, 2004, to treat pain and swelling he contends result from the ___ repetitive motion injury to his right hand and the ___ right knee injury.[2] Carrier denied reimbursement for these medications on the basis that they were not reasonable and medically necessary.

Claimant had polio when he was a baby and has, all his life, walked with a right leg limp because of extensive atrophy in the right leg. (Resp. Ex. B, tab G.). The doctors whose medical opinions are in evidence disagree as to whether the pain and swelling Claimant experiences result from one or more of his compensable injuries, from the residual effects of his polio, or both.

B. The ___Hand Injury (SOAH Docket No. 453-05-0210.M5)

The record contains little evidence regarding this injury. Claimant testified that he experiences pain and swelling in his right hand, and the Naproxen and the Mobisyl cream relieve the pain and reduce the swelling. However, he presented no medical evidence, *e.g.*, a doctor=s statement, indicating that the medications were prescribed to relieve the effects of this hand injury. An IRO doctor opined that the medications may constitute Amaintenance treatment or treatment for ordinary disease of life,@ but the IRO doctor concluded they did not constitute medically necessary treatment for this injury.[3] (Resp. Ex. A, tab D.)

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declared him disabled. However, Brian C. Buck, M.D., who performed a Required Medical Examination of Claimant on May 12, 2004, reported the medical records reflect that the basis for Claimant=s disability determination was postpolio syndrome. (Resp. Ex. B, tab G.)

[2] Claimant offered into evidence receipts for prescription medications purchased on other dates too. However, by Claimant=s own admission, those prescriptions relate to injuries not at issue in these proceedings. Therefore, the ALJ did not consider them.

[3] Claimant filed four separate disputes with the Commission=s Medical Review Division (MRD) in which Claimant sought reimbursement for the same prescription medications. He apparently filed identical documentation in connection with each dispute, presumably on the theory that a decision maker would conclude the medications at issue were prescribed for *one or more* of his four or five separate injuries. Only two of Claimant=s requests for Medical Dispute Resolution were filed timely, and those two matters are the subject of these proceedings. The ALJ originally convened the hearing in these two joined matters on April 5, 2005, but Claimant requested a continuance so that he and a Texas Workers= Compensation Commission ombudsman could sort through the medical records and organize the evidence in a coherent manner. To accommodate Claimant, the ALJ granted the continuance and ordered Claimant to prefile a chart or table identifying each claim, the date of injury to which each claim relates, the injured body part for which the treatment or service was provided, and the name of the prescribing doctor. Claimant did not comply with the order, but instead, prefiled a sheaf of documents, including documents relating to injuries not at issue in these cases.

As the petitioner, Claimant had the burden or proof in this proceeding. Based on the sparse evidence presented regarding his June 1, 1994 hand injury, the ALJ was unable to determine whether the medications at issue were medically necessary to treat the symptoms of the injury.

C. The ___ Right Knee Injury (SOAH Docket No. 453-05-0522.M5)

Claimant sustained a fracture of the right knee when he fell in his workplace. X-rays taken at the time of the injury indicated a non-displaced tibial plateau fracture. (Resp. Ex. B, tab D.) Claimant returned to work approximately six months after the injury but has used a cane for walking since then. (Resp. Ex. B, tab G; Claimant=s testimony.) According to his treating doctor, Robert E. Urrea, M.D., Claimant developed post-traumatic arthritis with chondromalacia of the right knee as a result of this injury; Dr. Urrea believes Claimant=s right knee pain comes from his chondromalacia, not his polio.[4] (Pet. Ex. 1, p. 17.) Claimant continues to have pain and swelling in the knee. When the pain becomes acute, Dr. Urrea treats him with injections. Dr. Urrea also prescribed the Mobisyl cream and Naproxen at issue here.[5] According to Claimant, these medications reduce the swelling and alleviate some of the pain in his knee. Claimant has been offered surgery for his knee, which he has declined because he fears complications from his polio.

Brian C. Buck, M.D. performed a Required Medical Examination of Claimant on May 12, 2004, and concluded that Claimant=s right knee pain is due to age-related degenerative changes of the knee, not to the ___ compensable knee injury. On August 5, 2004, an IRO doctor similarly concluded that claimant=s right knee pain and swelling are not due to his ___ injury. The IRO doctor attributed Claimant=s symptoms to his polio, chronic weakness of the lower extremities, and degenerative arthritis. (Resp. Ex. B, tab D.) On September 13, 2003, however, a peer reviewer for Carrier, Charles E. Graham, M.D., opined that the arthritis in Claimant=s right knee is likely due

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Respondent waived objection to the sheaf of documents Petitioner prefiled, and therefore, the ALJ admitted them into evidence despite Petitioner=s failure to comply with the ALJ=s prehearing order.

[4] Chondromalacia is defined as softening of the articular cartilage. Dorland=s *Illustrated Medical Dictionary* p. 321 (28th ed. 1994).

[5] In a letter dated March 4, 2005, Dr. Urrea stated that Claimant=s right knee pain is due to his November 7, 1994 right knee injury, and Claimant requires both injections and medications for his knee pain. Dr. Urrea did not, however, identify the medications Claimant requires. (Pet. Ex. 1, p. 17.)

partly to the polio and partly to the fracture. (Resp. Ex. B, tab F.) Notwithstanding that assessment, Dr. Graham concluded that neither prescription medication at issue was medically necessary, because Claimant has reached Maximum Medical Improvement (MMI); the drugs are not restorative or curative, but instead, constitute maintenance treatment; Naproxen is available over the counter (OTC) in the form of Aleve; and the Mobisyl cream Aprobably@ has a placebo effect. (Resp. Ex. B, tab F.)

The ALJ believes Dr. Graham misconstrued the law when he concluded that Naproxen was not medically necessary because it constitutes maintenance treatment and is available OTC. 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 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. [Emphasis added.] TEX. LABOR CODE ANN. '408.021(a). Claimant testified that the medications at issue relieve his knee pain and swelling. The fact that Naproxen contains the same active ingredient as Aleve is irrelevant. Carrier conceded at the hearing that nothing in the Workers= Compensation Act excludes OTC medications from coverage, as long as a doctor prescribes them and they are medically necessary. The evidence here is undisputed that Claimant=s treating doctor, Dr. Urrea, prescribed the medications at issue.

Both Dr. Urrea and Dr. Graham believe the pain and swelling in Claimant=s right knee are due, at least in part, to his compensable knee injury. Another physician, Sergio P. Pacheco, M.D., who has treated Claimant for his low back injury (admittedly not at issue in these proceedings), observed that it is Avery hard@ to distinguish between symptoms that arise from an injury and symptoms that result from normal wear and tear. Dr. Pacheco noted, however, Ain all fairness I think [Claimant] requires his symptomatic treatment.@ (Resp. Ex. B, tab I.)

The question of whether the disputed medications were medically necessary was a close one. Considering the record as a whole, however, the ALJ concludes Claimant met his burden of proof. Accordingly, she finds Claimant is entitled to reimbursement in the sum of $145.93, for the following prescription medications:

Naproxen: October 3, 2003, $26.99; December 16, 2003, $16.29; February 18, 2004, $10.00; and October 3, 2004, $26.99.

Mobisyl cream: October 3, 2003, $19.59; December 16, 2003, $6.89; February 18, 2004, $19.59; and October 3, 2004, $19.59.

Claimant is not, however, entitled to reimbursement for prescription medications he purchased on any other dates, because, by his own admission, those medications were purchased to treat the symptoms of injuries not at issue in these proceedings.

II. FINDINGS OF FACT

1. Claimant worked as a machine operator in a ___ plant for an unspecified number of years; during that employment, he suffered four or five compensable injuries, including a repetitive motion injury to his right hand, a right knee injury, and a low back injury.

2. When the plant closed in June 1998, Claimant applied for Social Security disability benefits, which were granted.

3. Claimant has not worked since the plant closed.

4. Claimant had polio when he was a baby and has, all his life, walked with a right leg limp because of extensive atrophy in the right leg.

5. Claimant has postpolio syndrome.

6. Claimant suffered a compensable repetitive motion injury to his right hand; ___, is the date that has been assigned to this injury.

7. On ___, Claimant suffered a compensable injury to his right knee. The injury was diagnosed as a non-displaced tibial plateau fracture.

8. At the time Claimant sustained the compensable injuries described in Findings of Fact Nos. 6 and 7, Respondent, Ace Insurance Company of Texas (Carrier), was the workers' compensation insurance carrier for Claimant's employer.

9. Claimant developed post-traumatic arthritis with chondromalacia of the right knee as a result of the right knee injury.

10. Claimant continues to have pain and swelling in the right knee as a result, at least in part, of the chondromalacia.

11. When claimant's right knee pain becomes acute, Dr. Urrea treats him with injections.

12. Dr. Urrea has also prescribed Mobisyl cream and Naproxen to relieve the swelling and pain in Claimant's right knee.

13. The Naproxen and Mobisyl cream reduce the swelling and alleviate some of the pain in Claimant's right knee.

14. Claimant sought reimbursement from Respondent for the Naproxen and Mobisyl cream prescriptions set forth below:

> Naproxen: October 3, 2003, $26.99; December 16, 2003, $16.29; February 18, 2004, $10.00; and October 3, 2004, $26.99.
>
> Mobisyl cream: October 3, 2003, $19.59; December 16, 2003, $6.89; February 18, 2004, $19.59; and October 3, 2004, $19.59.

15. Respondent denied reimbursement on the basis that the medications listed in Finding of Fact No. 14 were not reasonable and medically necessary.

16. The prescription medications listed in Finding of Fact No. 14 constituted reasonable and medically necessary treatment to relieve the effects of Claimant's right knee injury.

17. Following Carrier's denial of reimbursement for the disputed prescription medications, Claimant filed a timely request with the Texas Workers' Compensation Commission (the Commission) for medical dispute resolution.

18. The Commission, acting through two Independent Review Organizations (IROs), found that the disputed prescription medications were not medically necessary.

19. Claimant timely requested a hearing before the State Office of Administrative Hearings (SOAH) regarding the medical necessity of the prescription medications at issue. SOAH assigned Docket Nos. 453-005-0210.M5 and 453-05-0522.M5 to these disputes.

20. Notice of the hearing was sent to the parties in SOAH Docket No. 453-05-0210.M5 on September 16, 2004.

21. Notice of the hearing was sent to the parties in SOAH Docket No. 453-05-0522.M5 on September 23, 2004.

22. The notices 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.

23. On March 30, 2005, the dockets were joined for hearing at SOAH.

24. On June 16, 2005, the Administrative Law Judge Renee M. Rusch convened the hearing in these matters at SOAH's hearings facility in the William P. Clements Building in Austin, Texas. Respondent Carrier appeared through its representative, Javier Gonzalez. Claimant ___. appeared by telephone with the assistance of interpreter Tomas Leon. Juan Mireles, a representative of the Commission's Office of Ombudsman Services, assisted Claimant.

After the taking of evidence, the hearing was recessed. The ALJ reconvened the hearing on June 29, 2005, for the taking of oral argument. The hearing was adjourned and the record closed on June 29, 2005.

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. LABOR CODE ANN. §§ 402.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.

2. The parties received adequate and timely notice of the hearing in accordance with GOV'T CODE §§ 2001.051 and 2001.052.

3. The Carrier had the burden of proof by a preponderance of the evidence in this matter. 28 TEX. ADMIN. CODE § 148.21 (h) and (I); 1 TEX. ADMIN. CODE § 155.41.

4. 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 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. LABOR CODE ANN. §408.021(a).

5. Health care includes all reasonable and necessary medical services. TEX. LABOR CODE § 401.011(19).

6. The Texas Workers= Compensation Act does not exclude from the definition of health care prescription medications that are also available over the counter, if a health care provider prescribes the medications and they are medically necessary. *See, e.g.,* TEX. LABOR CODE ANN. ' 401.011.

7. Based on the foregoing Findings of Fact and Conclusions of Law, Claimant is entitled to reimbursement in the sum of $145.93 for the following prescription medications:

   Naproxen: October 3, 2003, $26.99; December 16, 2003, $16.29; February 18, 2004, $10.00; and October 3, 2004, $26.99.

   Mobisyl cream: October 3, 2003, $19.59; December 16, 2003, $6.89; February 18, 2004, $19.59; and October 3, 2004, $19.59.

8. With the exception of the prescription medications identified in Conclusion of Law No. 7, Claimant is not entitled to reimbursement for any other prescription medications for which he submitted receipts in these proceedings.

ORDER

IT IS ORDERED that Ace Insurance Company of Texas pay Claimant ___ a total of $145.93 for the prescription medications in dispute in this proceeding.

SIGNED July 1, 2005.

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RENEE M. RUSCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS