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| <b>TEXAS MUTUAL INSURANCE<br/>COMPANY,<br/>Petitioner</b> | § | <b>BEFORE THE STATE OFFICE</b> |
|   | § |                                |
|   | § |                                |
|   | § |                                |
| <b>V.</b>   | § | <b>OF</b>                      |
|   | § |                                |
| <b>SHAHID RASHID, M.D.,<br/>Respondent</b>                | § | <b>ADMINISTRATIVE HEARINGS</b> |

**DECISION AND ORDER**

Claimant \_\_\_ sustained a compensable injury to her back on \_\_\_, when she fell off a ladder, causing pain from her head to her spine and radiating down both legs. After an Independent Review Organization granted preauthorization for a chronic pain management program for Claimant, Texas Mutual Insurance Company appealed and filed a motion for summary disposition in this proceeding. At issue are two separate requests for chronic pain management and whether the second request is barred by the provider’s failure to file a request for reconsideration with the carrier, or the 45-day rule of 28 Tex. Admin. Code (Rule) § 133.308(e), or Rule 134.600(g)(4). This decision finds that the request for chronic pain management program was not sufficiently justified under Rule 134.600(g)(4).

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

Notice was not contested. That issue is addressed in the findings of fact and conclusions of law without further discussion here.

Texas Mutual Insurance Company raised a jurisdictional question that is addressed below.

A prehearing conference was held on January 18, 2005, setting up a deadline for Texas Mutual Insurance Company to file a motion for summary disposition. The motion was filed on February 1, 2005, and a hearing on the motion was held on February 11, 2005, at the State Office of Administrative Hearings, 300 W. 15<sup>th</sup> Street, Austin, Texas, with Administrative Law Judge (ALJ) Katherine L. Smith presiding. Texas Mutual Insurance Company was represented by Tim Riley, an attorney. Respondent Shahid Rashid, M.D. (South Texas Clinic for Pain Management) was represented by Margarita Olivarez. The record closed on February 11, 2005.

**II. DISCUSSION**

**A. Stipulated Facts**

The parties have stipulated to the following facts for the purposes of the motion for summary disposition:

1. On May 13, 2004, Valley Center for Pain and Stress Management submitted an initial request to Texas Mutual Insurance Company (Texas Mutual) for preauthorization of 30 sessions of chronic pain management pursuant to Texas Workers' Compensation Commission Rule 134.600.
2. By correspondence dated May 18, 2004, Texas Mutual denied the request for preauthorization.
3. On May 26, 2004, Respondent, South Texas Clinic for Pain Management (South Texas), submitted to Texas Mutual its initial request for preauthorization of 30 sessions of chronic pain management pursuant to Texas Workers' Compensation Commission Rule 134.600.
4. South Texas was informed by Texas Mutual's preauthorization department that the request would be treated as a request for reconsideration of the May 18, 2004 denial. South Texas did not accept this position.
5. By correspondence dated June 3, 2004, Texas Mutual notified South Texas that it was denying the reconsideration of its denial of preauthorization.
6. By correspondence dated June 3, 2004, Texas Mutual simultaneously notified the claimant, \_\_\_ (Claimant), that it was denying the reconsideration of its denial of preauthorization.
7. On July 12, 2004, the claimant filed a request for medical dispute resolution with the Texas Workers' Compensation Commission based on the June 3, 2004 denial of preauthorization for 30 sessions of chronic pain management.
8. The dispute was assigned MDR tracking number M2-04-1641.
9. On June 11, 2004, South Texas submitted an initial request for preauthorization to Texas Mutual, pursuant to Texas Workers' Compensation Commission Rule 134.600, for four individual counseling sessions to be provided to the claimant.
10. On June 16, 2004, Texas Mutual granted preauthorization for four individual counseling sessions.
11. The sessions were performed on June 24 and July 6, 12 & 19, 2004.
12. On July 30, 2004, South Texas submitted an initial request for preauthorization to Texas Mutual, pursuant to Texas Workers' Compensation Commission Rule 134.600, for 30 sessions of chronic pain management following the claimant's completion of individual psychological counseling sessions with South Texas.
13. By correspondence dated August 4, 2004, Texas Mutual denied the request for preauthorization.
14. On August 16, 2004, Envoy Medical Systems, acting as an Independent Review Organization on behalf of the Texas Workers' Compensation Commission issued a decision in M2-04-1641 agreeing with Texas Mutual's June 3, 2004 denial of preauthorization.

15. The August 16, 2004, decision of Envoy Medical Systems was not appealed to the State Office of Administrative Hearings (SOAH).
16. On September 14, 2004, South Texas filed a request for medical dispute resolution with the Texas Workers' Compensation Commission based on the August 4, 2004 initial denial of preauthorization for 30 sessions of chronic pain management and included Texas Mutual's June 3, 2004, notice to South Texas that it was denying the reconsideration of its denial of preauthorization.
17. An employee at the Texas Workers' Compensation Commission told South Texas to file the request for dispute resolution using the June 3, 2004 denial of reconsideration.
18. The dispute was assigned MDR tracking number M2-05-0105-01.
19. On October 19, 2004, Forte, acting as an Independent Review Organization on behalf of the Texas Workers' Compensation Commission issued a decision in M2-05-0105-01 preauthorizing 10 sessions of a chronic pain management program with consideration for an additional 10 sessions should the claimant be making objective signs of improvement within the program.
20. Forte's preauthorization of 10 sessions of a chronic pain management program in M2-05-0105-01 is the subject of this dispute.

B. Statutes and Rules

An ALJ may dispose of a case by summary disposition if the pleadings, affidavits, materials obtained in discovery, admissions, matters officially noticed, stipulations, or evidence of record show there is no genuine issue as to any material fact and that a party is entitled to a decision in its favor as a matter of law. 1 Tex. Admin. Code § 155.57(a).

Pursuant to the Texas Workers' Compensation Act, 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. LAB. CODE ANN. § 408.021(a).

For a carrier to be liable to reimburse a provider, certain services, including a CPM program, must be preauthorized by the carrier. Rule § 134.600(h). Rule 134.600(g) provides further that:

If the response [to a request for preauthorization] is a denial of preauthorization the requestor or employee may, . . . within 15 working days of receipt of a written denial, request the carrier to reconsider the denial and shall document the reconsideration request.

(2) The carrier shall respond to the request for reconsideration of the denial . . . within five working days . . . .

(3) The requestor or employee may appeal the denial of reconsideration request by filing a dispute in accordance with Texas Labor Code § 413.031 and §§ 133.305, 133.307 and 133.308 of this title . . . .

Rule 133.308(e) provides the following:

Timeliness. A person or entity who fails to timely file a request [for dispute resolution] waives the right to independent review or medical dispute resolution. . . . and timeliness shall be determined as follows:

\* \* \*

(2) A request for prospective necessity dispute resolution shall be considered timely if it is filed with the division no later than the 45<sup>th</sup> day after the carrier denied approval of the party's request for reconsideration of denial of health care that requires preauthorization or concurrent review pursuant to the provisions of Rule §134.600.

Rule 134.600(g)(4) also provides that, "A request for preauthorization for the same health care shall only be resubmitted when the requestor provides objective documentation to support that a substantial change in the employee's medical condition has occurred."

#### C. Motion for Summary Disposition

Texas Mutual argues that South Texas' request for CPM should be denied in this proceeding based on the following arguments.

- Assuming that this request for dispute resolution is from Texas Mutual's August 4, 2004, denial of South Texas' request for preauthorization of July 30, 2004, Texas Mutual argues that this request is barred because South Texas did not file a reconsideration of Texas Mutual's denial of preauthorization.
- Assuming for the sake of argument that the June 3, 2004, denial is the basis for South Texas' request for dispute resolution, Texas Mutual argues that it South Texas' request is barred because it was filed more than 45 days after the denial of reconsideration.
- Texas Mutual also argues that the correctness of the June 3, 2004, denial cannot be the subject of this case because it is already the subject of a final decision.
- Finally, Texas Mutual contends that South Texas' request does not meet the requirements of Rule 134.600(g)(4).

The ALJ finds persuasive Texas Mutual's argument that the 45-day rule bars consideration of South Texas' request for dispute resolution based on the reconsideration denial of June 3, 2005. As the court in *Hospitals v. Continental Casualty Company*, 109 S.W.3d 96, 102-03 (Tex. App.B Austin 2003) found, the defendant carriers had a right to rely on Rule 133.305(a) as a defense to claims

brought more than one year after the dates of service.<sup>1</sup> Furthermore, the 45-day rule clearly warns that failure to timely file a request for dispute resolution waives the right to medical dispute resolution. And more significantly, this proceeding cannot be regarded as a request based on the denial of reconsideration of June 3, 2004, because that preauthorization request has already been the subject of a final Commission decision in M2-04-1641.

More troublesome to the ALJ is Texas Mutual's argument that this request for dispute resolution is barred by South Texas' failure to file a request for reconsideration with Texas Mutual after the denial of August 4, 2004. Although Texas Mutual argues that filing a request for reconsideration is a jurisdictional prerequisite, the prior SOAH decision upon which it relies is not as definitive as Texas Mutual avers. Although the ALJ in SOAH Docket No. 453-03-3346.M2 (July 18, 2003, ALJ Elkins) questioned whether he had jurisdiction because the requestor had failed to file a request for reconsideration, the ALJ made a final decision based on the merits of the case. And unlike the wording of Rule 133.308(e), which clearly warns that failure to file a timely request constitutes a waiver of the right to medical dispute resolution, nowhere is a requestor clearly warned that failure to file a reconsideration bars the right to medical dispute resolution. The use of the permissive "may" in Rule 134.600(g)(1) does not suggest that it is a prerequisite.

The ALJ finds, therefore, that South Texas' failure to file a request for reconsideration does not bar its request for medical dispute resolution. With this ruling the ALJ is not suggesting that a requestor may disregard the rule requiring the filing of a reconsideration with a carrier. In this case the incorrect advice given by the Commission employee provided good cause for South Texas' failure to file a request for reconsideration of the second denial of preauthorization.<sup>2</sup>

The ALJ now looks at the final issueBwhether the second request for preauthorization for 30 sessions of CPM meets the dictates of Rule 134.600(g)(4). Taking the evidence in light most favorable to the non-moving party,<sup>3</sup> the ALJ finds that South Texas has not provided sufficient objective documentation showing that Claimant's medical condition substantially changed justifying the resubmission of its request for CPM.

When denying preauthorization on August 16, 2004, the IRO found that four to eight weeks of adequate antidepressant therapy should be completed, as well as four to six sessions of psychotherapy, because there had not been an adequate trial of aggressive antidepressant therapy. Although the second IRO found that the interventions with psychotherapy and psychotropic medications did not substantially impact Claimant's condition, that finding does not squarely address the issue. In this proceeding the ALJ interprets Rule 134.600(g)(4) to mean that there must be a showing of a substantial worsening of Claimant's condition between the two requests.

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1 The Court was interpreting the former Rule 133.305(a), which is now 133.307(d). Rule 133.307(d), which addresses timeliness in medical fee disputes is virtually identical to Rule 133.308(e)(1) and (2), which addresses timeliness in medical necessity.

2 Moreover, the ALJ notes that the 15-day deadline in Rule 134.600(g)(1), by which a requestor should file a request for reconsideration, also lacks the warning of Rule 133.308(e)(1).

3 *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

Although Dr. Rashid stated in his July 30, 2004, request for services that Claimant's "pain is not subsiding and her physical limitations are not lessening," Claimant went from a pain level of 10 out of 10 on the Treatment Plan Review in the May 26, 2004, request for preauthorization, to a pain level of 6 out of 10 at her last counseling session of July 19, 2004. Although Dr. Rashid asserted that Claimant demonstrated minimal improvement in her goals at the counseling sessions, the progress note from the third counseling session of July 12 indicates that Claimant was demonstrating improvement from the last two sessions," and "feeling somewhat optimistic about her future for the first time since the injury occurred." According to the note, she was also attending physical therapy and reported "less distraction by her pain, and [being] more focused on >feeling better' than she was in previous sessions." She also reported "feeling less depressed at this time" and "feeling more hopeful" because she hoped that the level of physical therapy at which she was participating would help her regain a higher level of physical functioning.<sup>4</sup> Daniel Buentello, D.C., noted on July 26, 2004, that Claimant had improved 40% after completing 12 sessions of passive therapy.<sup>5</sup> And although Claimant was prescribed 50 mgs. of Zoloft on August 20 and September 20, 2004, the second IRO noted in his decision that there is not "much documentation as to the degree of response to this intervention." The ALJ, therefore, finds that South Texas did not provide sufficient justification for the CPM program to meet the requirements of Rule 134.600(g)(4). Therefore, preauthorization for CPM is not warranted and Texas Mutual's appeal should be granted.

### III. FINDINGS OF FACT

1. Claimant \_\_\_ sustained a compensable injury to her back under the Texas Workers' Compensation Act on \_\_\_, when she fell off a ladder, causing pain from her head to her spine and radiating down both legs.
2. On May 13, 2005, Valley Center for Pain and Stress Management submitted an initial request to Texas Mutual Insurance Company (Texas Mutual) for preauthorization of 30 sessions of chronic pain management (CPM) for Claimant.
3. Texas Mutual denied the request on May 18, 2004.
4. On May 26, 2004, South Texas Clinic for Pain Management (South Texas) submitted its initial request for preauthorization to Texas Mutual for 30 sessions of CPM for Claimant.
5. Texas Mutual informed South Texas that it was treating the request for preauthorization as a request for reconsideration of the May 18, 2004, denial. Texas Mutual denied the request for reconsideration on June 3, 2004.
6. Claimant filed a request for medical dispute resolution on July 12, 2004, with the Texas Workers' Compensation Commission (Commission) based on the June 3, 2004, denial. The dispute was assigned MDR tracking number M2-04-1641.

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4 Texas Mutual Exs. D and I submitted with motion for summary disposition.

5 Document filed by South Texas on December 28, 2004.

7. On August 16, 2004, the Commission's Medical Review Division (MRD) issued the decision of its designee, an independent review organization (IRO), in M2-04-1641 agreeing with the June 3, 2004, denial.
8. On June 11, 2004, South Texas submitted an initial request for preauthorization for four individual counseling sessions for Claimant to Texas Mutual.
9. After South Texas provided Claimant with four individual counseling sessions on June 24 and July 6, 12, and 18, 2004, South Texas requested preauthorization of 30 CPM sessions from Texas Mutual on July 30, 2004.
10. Texas Mutual denied the request on August 4, 2004.
11. Upon the advice of an employee at the Commission, South Texas sought medical dispute resolution at the Commission on September 14, 2004, using the June 3, 2004, denial of reconsideration. The dispute was assigned MDR tracking No. M2-05-0105-01.
12. On October 19, 2004, an IRO issued a decision in M2-05-0105-01 preauthorizing 10 sessions of a CPM.
13. Texas Mutual appealed the October 19, 2004, IRO decision on October 29, 2004.
14. The Commission sent notice of the hearing to the parties on December 6, 2004. The hearing notice informed the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the statutes and rules involved; and the matters asserted.
15. Claimant exhibited improvement in her medical condition due to her individual counseling sessions and physical therapy.
16. From May 26, 2004, to July 19, 2004, Claimant's last individual psychological counseling session, Claimant progressed from a pain level of 10 out of 10 to 6 out of 10.
17. Although Claimant was prescribed 50 mgs. of Zoloft, on August 20, 2004, the medical documentation did not indicate her response to the treatment.
18. South Texas failed to provide objective documentation showing that Claimant's medical condition substantially worsened between its second and first requests for preauthorization for 30 sessions of chronic pain management for Claimant.

#### **IV. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to the Texas Workers' Compensation Act. TEX. LAB. CODE ANN. § 413.031.
2. 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. TEX. LAB. CODE ANN. §§ 402.073 and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.

3. Upon Texas Mutual's appeal of the IRO decision, adequate and timely notice of the hearing was provided. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. An ALJ may dispose of a case by summary disposition if the pleadings, affidavits, materials obtained in discovery, admissions, matters officially noticed, stipulations, or evidence of record show there is no genuine issue as to any material fact and a party is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE (TAC) § 155.57(a).
5. For a carrier to be liable to reimburse a provider for a chronic pain management program, the service must be preauthorized. TEX. LABOR CODE ANN. § 413.014 and 28 TAC § 134.600(h).
6. South Texas' failure to file a request for reconsideration with Texas Mutual pursuant to 28 TAC § 134.600(g)(1) does not bar its request for medical dispute resolution.
7. The incorrect advice given by the Commission employee provided good cause for South Texas' failure to file a request for reconsideration of the second denial of preauthorization.
8. Taking the evidence in light most favorable to the non-moving party, South Texas failed to provide sufficient objective documentation under 28 TAC § 134.600(g)(4) showing that Claimant's medical condition had substantially worsened to justify resubmission of the request for chronic pain management.
9. Enrollment in a chronic pain management program was not reasonably required health care for Claimant under TEX. LAB. CODE ANN. § 408.021.
10. Based on the foregoing Findings of Fact and Conclusions of Law, preauthorization for the requested 30 sessions of chronic pain management should not be granted.

### **ORDER**

It is **ORDERED** that the request of South Texas Clinic for Pain Management for preauthorization of a chronic pain management program for Claimant is denied.

**SIGNED March 14, 2004.**

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**KATHERINE L. SMITH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**