

SOAH DOCKET NO. 453-05-2762.M5
MR NO. M5-04-2235-01

REHAB 2112,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	OF
V.	§	
	§	
FIDELITY & GUARANTY INSURANCE	§	ADMINISTRATIVE HEARINGS
COMPANY,	§	
Respondent	§	

DECISION AND ORDER

This case is an appeal by Rehab 2112 (Provider) from a decision of an independent review organization (IRO) on behalf of the Texas Workers' Compensation Commission¹ in a dispute regarding medical necessity for work hardening treatments and a functional capacity evaluation (FCE). The IRO found that the Fidelity & Guaranty Insurance Company (Carrier) properly denied reimbursement for work hardening services provided to ___(Claimant) from June 18 through 26, 2003. Provider appealed on the basis that these services were medically necessary, within the meaning of §§ 408.021 and 401.011(19) of the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. ch. 401 *et seq.* The Administrative Law Judge (ALJ) finds that Provider should be not be reimbursed for the disputed services.

I. STATEMENT OF THE CASE

The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2005. No party challenged jurisdiction or venue. ALJ Lilo D. Pomerleau convened the hearing in this docket on August 15, 2005, at SOAH facilities in the William P. Clements Building, 300 W. 15th Street, Austin, Texas. Provider was represented by Robert B. Kubieki. Carrier was represented by Steven Tipton. The record closed that same day.

Claimant was a van driver for a company that transports patients confined to wheel chairs. On___, Claimant, a 30-year-old, was injured while driving the van, which was struck from behind

¹ Effective September 1, 2005, the functions of the Commission have been transferred to the newly created Division of Workers' Compensation at the Texas Department of Insurance.

by

another vehicle. He injured his back, neck, chest, and left shoulder, knee, and ankle. Claimant began seeing Mark A. Rayshell, D.C., on February 10, 2003.² On June 6, 2003, Claimant underwent a functional capacity evaluation (FCE) to assess the need for work hardening. The FCE found (1) restrictions in the cervical spine extension and lumbar spine flexion; (2) range of motion limitations in left shoulder, left knee, and left ankle; and (3) limited endurance. At issue are subsequent work hardening sessions and an FCE provided during the period June 18 through 26, 2003.³ Provider was CARF certified and not required to obtain preauthorization for work hardening.

II. THE EVIDENCE AND ARGUMENTS

A. Provider

Provider submitted into evidence medical records and argument previously submitted to the IRO. Michelle Ivey, D.C., Provider's Executive Director, testified on behalf of Provider. Dr. Ivey did not examine Claimant; however, as a supervisor of the clinic's work hardening program, she participated in case management meetings concerning Claimant. Dr. Ivey testified that Claimant's range of motion restrictions and endurance limitations would make it difficult for Claimant to perform his job, which consisted of climbing in and out of his vehicle and loading clients' wheelchairs.

² Provider's Ex. 1 at 189.

³ Based on the MRD decision, only a portion of the work hardening sessions and one FCE was at issue in this case.

The initial FCE, dated June 6, 2003, indicated the following primary rehabilitation goals: improve endurance and range of motion, the latter in the cervical and lumbar spine, left shoulder, and left ankle. Dr. Ivey agreed that Claimant's left ankle had limited range of motion due to a previous fracture; she stated that the work hardening program focused on Claimant's knee, back, and neck. The initial FCE reported that Claimant's long term goal was to live without pain.⁴

Provider argues that Claimant met the entry level requirements of a work hardening program, including the need for psychological counseling. Moreover, Claimant improved as a result of the work hardening treatments. As noted in Provider's MDR request dated March 17, 2004, Claimant's range of motion in the upper and lower extremities, after the work hardening program, was within normal limits, with the exception of the left ankle.⁵

B. Carrier

Carrier also submitted into evidence medical records and argument previously submitted to the IRO. Additionally, Bill W. Timberlake, D.C., testified on behalf of Carrier. Dr. Timberlake testified that Claimant's lack of cervical extension, a five percent impairment in his left shoulder's range of motion, and a deficit in endurance were not sufficient grounds for work hardening.

⁴ Provider's Ex. 1 at 125-126. In paperwork filled out by Claimant, he listed two program goals: to lose 30 pounds and build up his endurance. Provider's Ex. 1 at 152.

⁵ The stated need for work hardening in that document was Claimant's decreased cervical extension, left shoulder abduction, and left knee flexion. Provider's Ex. 1 at 3-4.

In reviewing Claimant's history, Dr. Timberlake noted that Claimant had no range of motion problems when he was first examined after the accident. He testified that Claimant presented as overweight⁶ and in a sedentary job. Dr. Timberlake stated that Claimant would naturally recover from the sprain, strains, and contusions initially received from the accident and indicated that the improvement shown in the series of FCEs taken before, during, and after the work hardening program could be explained a part of the natural recovery process.⁷ Dr. Timberlake testified that Claimant could have continued to improve in a less intensive setting, such as a home exercise program. He concluded that there was no need for a multi-disciplinary program.

III. ANALYSIS

At issue is whether Provider showed by a preponderance of evidence that the disputed services were reasonable and necessary. Provider failed to meet that burden.

Claimant was injured on____. He received chiropractic treatment for approximately four months. On May 15, 2003, a designated doctor found some deviance from Claimant's shoulder's range of motion and awarded him a five percent impairment rating in his upper extremity. Claimant showed no neuromuscular sensory deficit and no objective motor deficit in his cervical and lumbar spine and upper and lower extremities. There was no ratable impairment for his left shoulder, knee, or ankle. Approximately three weeks later, Claimant underwent a FCE to determine his eligibility for participation in a work hardening program.

⁶ Claimant was six feet, eight inches tall and weighed 380 pounds. Provider's Ex. 1 at 127, Initial FCE.

⁷ Provider's Ex. 1 at 152.

The record evidence concerning the rationale and goals for the work program was scanty and inconsistent. The initial FCE, the testimony of Dr. Ivey (who did not examine Claimant before or after the work hardening program), the interim and final FCEs, and Provider's MDR request referenced different program goals. Dr. Ivey testified that the work hardening program was designed chiefly to increase cervical extension and endurance. But the initial FCE included references to deficits in Claimant's left shoulder, lumbar spine, and left ankle. However, the limited range of motion in Claimant's left ankle was consistent with a previous injury, and Dr. Ivey agreed that the program was not designed to treat Claimant's left ankle. The written portion of the interim and final FCEs and Provider's MDR request did not address any changes after treatment in Claimant's left shoulder, although the interim FCE showed increases his shoulder abduction range of motion. (Specifically, Claimant's shoulder abduction changed from 77 percent to 99 percent.) In the initial FCE, the lumbar back was found to be 85 percent normal in flexion (the only lumbar impairment noted), yet the goal of the program was to improve range of motion to above 85 percent. Presumably, Provider did not heavily weight Claimant's need for a six-week program based on Claimant's lumbar restrictions. Finally, Claimant made no significant improvement in endurance: he retained a "poor" rating.⁸

Unfortunately, the daily notes were not detailed enough to provide additional clarity as to the treatment plan, and the treating doctor did not testify.

Under § 408.021 of the Act, an injured worker is entitled to "health care reasonably required" to relieve the effects of the injury or to enhance the ability to continue working. However, care that provides only superficial or illusory improvement or relief at inordinate cost is not "reasonably" required. Provider's main support for the work hardening program was based on the FCEs. But the initial FCE's conclusory statement that Claimant was a "good candidate" was not supported in that document or by Claimant's physical condition at the time of the work hardening program. Whether the work hardening program was designed to treat chiefly Claimant's cervical extension and endurance, or those limitations plus limited range of motion in Claimant's left shoulder and lumbar spine, Claimant's relatively minor injury and sedentary job did not support the necessity or need for a six-week work hardening program consisting of seven hours a day, five days a week. Moreover,

⁸ Provider's Ex. 1 at 3, MDR Request.

the initial FCE was at odds with the findings of the designated doctor, which gave no impairment rating

for Claimant's cervical and lumbar spine. The ALJ concludes that Provider failed to meet its burden of proving that the services at issue were reasonable and necessary.

IV. FINDINGS OF FACT

1. On ____, Claimant __ was injured on the job while he was driving a van, which was struck from behind. He complained of pain in his back, neck, chest, and left shoulder, knee, and ankle.
2. Fidelity & Guaranty Insurance Company (Carrier) was the workers' compensation insurance carrier for Claimant' employer at the time of Claimant's compensable injury.
3. Shortly after the accident, Mark Rayshell, D.C., a doctor with Rehab 2112 (Provider) was Claimant's treating doctor.
4. Claimant received chiropractic treatments from Provider for approximately four months after his injury.
5. On June 6, 2003, Provider performed a functional capacity evaluation (FCE) on Claimant, finding that Claimant had restrictions in the cervical spine extension and lumbar spine flexion; range of motion limitations in left shoulder, left knee, and left ankle; and limited endurance.
6. From June 18 through 26, 2003, Claimant attended Provider's work hardening program and under went a FCE for the injury noted in Finding of Fact No. 1.
7. Carrier denied the reimbursement for the work hardening services and the FCE provided to Claimant from June 18 through 26, 2003.
8. Provider made a timely request to the Texas Workers' Compensation Commission (Commission), now known as the Texas Department of Insurance, Division of Workers' Compensation, for medical dispute resolution with respect to the requested reimbursement.
9. The independent review organization (IRO) to which the Commission referred the dispute issued a decision on May 25, 2004, and concluded that the work hardening program and the FCE were not medically necessary.
10. The Commission's Medical Review Division reviewed and concurred with the IRO's decision in a decision dated October 22, 2004, in dispute resolution Docket No. M5-04-2235-01.
11. Provider requested in a timely manner a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the MRD decision regarding reimbursement.

12. The Commission mailed notice of the hearing's setting to the parties at their addresses on December 14, 2004.
13. On August 15, 2005, Lilo D. Pomerleau, an Administrative Law Judge with SOAH, convened a hearing in this matter at the William P. Clements Building, 300 W. 15th Street, Austin, Texas. Provider was represented by Robert B. Kubieki. Carrier was represented by Steven Tipton. The record closed that same day.
14. All parties received not less than 10 days notice of the time, place, and nature of the hearing; the legal authority and justification under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
15. On May 15, 2003, Claimant had some deviance in the range of motion in his left shoulder, and he was awarded a five percent impairment rating. Claimant had no deficits in his cervical and lumbar spine.
16. Claimant's left ankle had limited range of motion due to a previous fracture, and Provider did not treat Claimant for the previous ankle injury.
17. There was insufficient support for the finding in the initial FCE, dated June 6, 2003, that Claimant was a "good candidate" for a multi-disciplinary work hardening program based on his physical and mental condition
18. The nature and extent of Claimant's injury did not justify a multi-disciplinary work hardening program.
19. Provider was CARF certified at the time it provided the disputed services.
20. Work hardening and a FCE provided from June 18 through 26, 2003, were not shown to be necessary or reasonable.

V. CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. § 413.031.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and SOAH's rules, 1 TEX. ADMIN. CODE § 155.1 *et seq.*
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

5. Provider bore the burden of proving the disputed services provided from June 18 through 26, 2003, were medically necessary pursuant to 28 TEX. ADMIN. CODE § 148.14 and 1 TEX. ADMIN. CODE § 155.41(b).
6. Based upon the foregoing Findings of Fact, Provider failed to prove that work hardening services and an FCE provided from June 18 through 26, 2003, were elements of health care medically necessary under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, Provider is not entitled to reimbursement for work hardening services and an FCE provided from June 18 through 26, 2003.

ORDER

IT IS THEREFORE, ORDERED that the claim of Rehab 2112, seeking reimbursement for work hardening services and an FCE provided from June 18 through 26, 2003, is denied, and no reimbursement is ordered.

SIGNED October 14, 2005.

**LILO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**