

**SOAH DOCKET NO. 453-05-4989.M2
TWCC MR NO. M2-05-0768-01**

TEXAS MUTUAL INSURANCE COMPANY, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V.		
BEHAVIORAL HEALTHCARE ASSOCIATES, Respondent		

DECISION AND ORDER

Texas Mutual Insurance Company (Petitioner) appealed the decision of the Texas Workers' Compensation Commission's (Commission) designee, an independent review organization (IRO) which granted a request by Behavioral Healthcare Associates (Respondent) for preauthorization of a chronic pain management (CPM) program for a workers' compensation claimant (Claimant). Petitioner's denial was based on its finding that the CPM program was not medically necessary healthcare. This decision finds Petitioner failed to prove the CPM program is not medically necessary healthcare for Claimant and preauthorizes four weeks of CPM program treatment for Claimant.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction or venue. Therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion here.

At the hearing on the merits, and subsequently in a letter dated May 2, 2005,¹ Respondent claimed that Behavioral Healthcare Associates was not notified of Petitioner's March 17, 2005, request for appeal of the Medical Review Division (MRD) findings and decision. Petitioner's request

¹ Respondent's letter is attached hereto and incorporated herein by reference as Appendix A.

for appeal, however, reflects that Respondent was copied by fax. Further, Respondent admitted receiving notice of the hearing on the merits and being prepared to proceed. Because there was no showing of prejudice to Respondent made at the hearing,² the undersigned Administrative Law Judge (ALJ) noted, but overruled Respondent's objection, and conducted the hearing on the merits as scheduled.

The hearing in this matter convened May 2, 2005, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas, with Administrative Law Judge (ALJ) Ami Larson presiding. The record was held open until May 3, 2005, to allow Respondent to submit additional information regarding the credentials of its testifying experts.³

At the hearing, Petitioner was represented by counsel Ryan T. Willett. Respondent appeared by Terri Creamer, Ph.D., and was not represented by counsel. The Commission was did not participate in the hearing.

II. DISCUSSION

A. Background Facts

On ____, while lifting on the job, Claimant sustained a back injury compensable under the Texas Workers' Compensation Act (Act). At the time of the compensable injury, Claimant's employer was insured for workers' compensation coverage with Petitioner. Claimant was diagnosed

² Respondent, in the letter dated May 2, 2005 (Appendix A), indicated that, based on its understanding that no appeal of the IRO decision that preauthorized the requested services had been filed, Respondent began treating the patient and had provided a full week of CPM treatment before receiving notice of Petitioner's appeal. Respondent expressed concern that payment for this week of treatment will now be denied by Petitioner. The ALJ does not address this issue because it is not ripe for decision unless and until reimbursement for the week of services provided is sought by Respondent and denied by Petitioner.

³ Respondent's Exhibit 2 consists of the resumes of Terri Creamer, Ph.D., and Sean Kilgore. This exhibit was received via fax on May 3, 2005, and was admitted into evidence as Respondent's Exhibit 2 pursuant to the stipulation of the parties.

with multiple lumbar disc herniations with L5 right radiculopathy and chronic right leg pain which has left him unable to work.

Claimant underwent treatment for more than two years, during which time he received chiropractic care, physical therapy, work conditioning, individual psychotherapy, biofeedback, lumbar surgery,⁴ steroid injections, and various medications. Notwithstanding the treatment provided, Claimant continues to suffer from chronic pain as well as depression and anxiety.

Pre-authorization for an interdisciplinary chronic pain management (CPM) program was requested by provider and denied by carrier on two previous occasions prior to the December 6, 2004, request that was denied on December 10, 2004, and is the subject of this appeal.

B. IRO Decision

The IRO reviewer states, as a basis for the decision that, “the patient has exhausted all other levels/types of care and continues to have significant pain. Every doctor treating him is requesting this chronic pain management program. The requested chronic pain management program is medically necessary due to continuing pain despite multiple treatments over 28 months.”⁵

C. Legal Standards

Petitioner has the burden of proof in this proceeding. 28 TEX. ADMIN. CODE (TAC) §§ 148.21(h) and (i); 1 TAC § 155.41. Pursuant to the Act, 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

⁴ Claimant had back surgery on March 15, 2004.

⁵ Respondent's Exhibit 1, page 8; Carrier's Exhibit 1, page 2.

employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a). Health care includes all reasonable and necessary medical services including a medical appliance or supply. TEX. LAB. CODE ANN. §401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN. § 401.011(31). For a carrier to be liable to reimburse a provider, certain services, including CPM programs, must be preauthorized by the carrier. 28 TAC 134.600(h).

D. Petitioner's Evidence

Petitioner offered numerous documents which were admitted into evidence and consisted of the IRO decision,⁶ Explanation of Benefits forms,⁷ requests for reconsideration,⁸ various reports and medical records regarding Claimant's treatment history and status,⁹ preauthorization requests, responses, and supporting documents¹⁰ and the curriculum vitae of Robert W. Joyner, M.D.¹¹ Also offered by, and admitted into evidence on behalf of Petitioner, were the documents submitted by Petitioner to the IRO or MRD.¹²

Petitioner further presented the expert testimony of Robert Joyner, M.D., who is self-employed and practices primarily as a pain management specialist, but also as an anesthesiologist. Dr. Joyner testified that he is board-certified in both anesthesia and pain management.

⁶ Carrier's Exhibit 1, pages 1-4.

⁷ Carrier's Exhibit 1, pages 5-140.

⁸ Carrier's Exhibit 1, pages 141-200.

⁹ Carrier's Exhibit 1, pages 201-396.

¹⁰ Carrier's Exhibit 1, pages 397-465.

¹¹ Carrier's Exhibit 1, pages 466-469.

¹² Carrier's Exhibit 2.

Regarding the medical necessity of a CPM program for Claimant, Dr. Joyner testified that Claimant has more likely than not already reached maximum medical improvement and has reached a plateau such that he is unlikely to benefit from any further treatment, including CPM. Dr. Joyner went on to state that a CPM program is appropriate only if there is a reasonable likelihood that the patient can improve.

Dr. Joyner testified that a functional capacity evaluation revealed that Claimant is currently at a medium level of work ability and that it is unrealistic to believe that Claimant will be able to progress such that he can return to his prior heavy work level. Dr. Joyner asserted that the requested CPM program is redundant to the treatment that has already been provided to Claimant and that returning Claimant to his prior heavy work level is not only not realistic, but also not recommended due to his current injuries and susceptibility to re-injury due to an underlying degenerative wear and tear problem, which Dr. Joyner opined was likely to have predisposed Claimant to the compensable injury he sustained.

Dr. Joyner reasoned that, since one of the unmet work conditioning goals and consequent justifications for the requested CPM program was to return Claimant to the heavy work load of his current employment,¹³ the CPM program is not medically necessary since that goal is unrealistic and contraindicated in the first place in his opinion.

Similarly, Dr. Joyner testified that the only other unmet work conditioning goal described for Claimant was that of returning him to a normal range of motion. Dr. Joyner stated that this goal was also unrealistic, even with a CPM program since, given Claimant's history of lumbar spine surgery and degenerative conditions, Claimant would always have an abnormal range of motion.

Dr. Joyner testified that although Claimant may meet the criteria for Chronic Pain Syndrome, that fact alone does not mean that he should go through a CPM program when there is no indication that he will improve.

¹³ Respondent's Exhibit 1, page 43.

E. Respondent's Evidence

Respondent offered multiple documents that were admitted into evidence and included the preauthorization request and supporting documents as well as the documents submitted by Respondent to the IRO or MRD.¹⁴

Additionally, Respondent presented the testimony of Sean Kilgore, D.C., who stated that he was a treatment provider for Claimant and had supervised Claimant's work conditioning program from approximately the end of July through August, 2004. He further stated that he did not feel that Claimant had reached maximum improvement and expressed his opinion that Claimant remains in need of a CPM program so that he can overcome his pain and return to work.

Dr. Kilgore testified that Claimant clearly showed improvement during the course of his work conditioning treatment, but that he has improved as much as possible without getting his pain levels under control. Dr. Kilgore stated that all of Claimant's treatment providers, including his surgeon, recommend a CPM program for Claimant and that all other treatment options have been exhausted.

On cross exam, Dr. Kilgore was asked about why Dr. Ozanne, Claimant's surgeon, recommended four weeks of CPM¹⁵ instead of the six weeks being requested by Respondent for preauthorization. Dr. Kilgore answered that he was not sure, but that four weeks used to be protocol and perhaps Dr. Ozanne was basing his recommendation on the prior protocol.

Dr. Kilgore testified that the work conditioning treatment provided to Claimant included stretching, cardio exercises, strength training, work simulation, dexterity exercises, and box lifts, as well as bending, twisting, and lifting exercises with prescribed breaks. Dr. Kilgore indicated that a CPM program would include many of the same exercises, but would incorporate a large

¹⁴ Respondent's Exhibit 2.

¹⁵ Respondent's Exhibit 1, page 46.

psychological component and that all of the CPM treatment would be designed specifically to treat Claimant's pain to allow him to return to work.

In addition to the testimony of Dr. Kilgore, Terri Creamer, Ph.D., also testified on behalf of Respondent. She stated that she has treated Claimant as his therapist and that she provided six psychological counseling sessions and six biofeedback sessions to him. Dr. Creamer testified that she found Claimant to be motivated, cooperative, and compliant, and that he actively used the techniques and strategies taught to him, yet continued to struggle with consistent pain levels as well as depression and anxiety.

Dr. Creamer testified that although Claimant may not be able to return to the heavy physical demands of his current employment, he can be retrained to return to work in a different job if necessary. Dr. Creamer further indicated that there is no way to determine whether Claimant has reached maximum improvement without giving him the chance to try a CPM program to see whether he improves. Dr. Creamer stated that there is a difference of opinion among the treatment providers who recommend a CPM program as to whether four or six weeks is warranted, and that she would like the chance to provide CPM treatment even if only for as little as two weeks in order to allow Claimant the opportunity to improve.

F. Analysis

Petitioner failed to establish by a preponderance of the evidence that a CPM program is not reasonable and medically necessary healthcare for Claimant. The evidence established that Claimant meets the criteria for admission, including long-term pain, failure of various, more conservative treatments including medication, and depression and anxiety associated with chronic pain.

Dr. Joyner's opinion that Claimant did not need a CPM program was based largely on his opinion that Claimant will not be able to return to the heavy physical demands of his current employment and that he will never recover normal range of motion. Even if these assertions are true

it does not mean that Claimant is not entitled to treatment for his chronic pain or that he would not benefit from the intensive psychological and physical components of a CPM program to reduce the disability caused by his current pain levels.

Additionally, Dr. Joyner's assertion that Claimant has reached maximum improvement and would not benefit from further treatment is not supported by the evidence. To the contrary, five of Claimant's treatment providers¹⁶ who, unlike Dr. Joyner, have had contact and experience with Claimant, indicate that he is a good candidate for a CPM program. The evidence presented by his treatment providers further shows that Claimant is compliant, fully cooperative, and highly motivated to improve.

Petitioner failed to meet its burden of proof. The evidence in this matter proved that Claimant meets the admission criteria for a CPM program which is reasonable and medically necessary healthcare for Claimant. Petitioner's appeal should be denied.

III. FINDINGS OF FACT

1. On ____, Claimant sustained a back injury compensable under the Texas Workers' Compensation Act (Act).
2. At the time of the compensable injury, Claimant's employer was insured by Texas Mutual Insurance Company (Petitioner).
3. After Petitioner denied Claimant's request for a chronic pain management (CPM) program based upon an assertion that it was medically unnecessary, Claimant's psychologist, Terri Creamer, Ph.D., on behalf of Behavioral Healthcare Associates, requested that the Texas
4. Workers' Compensation Commission review the denial. That review produced the Independent Review Organization's (IRO) decision, dated February 25, 2005, which granted preauthorization for the CPM program.
5. Petitioner timely appealed the IRO decision.
6. Claimant suffers from depression and anxiety associated with his chronic back pain.

¹⁶ Terri Creamer, Ph. D., Sean Kilgore, D.C., Thomas Havard, D.O., Marsha Miller, D.C., and Stephen Ozanne, M.D., P.A.

7. The following treatments have failed to resolve or sufficiently reduce Claimant's back pain: chiropractic care, physical therapy, work conditioning, individual psychotherapy, biofeedback, lumbar surgery, steroid injections, and medication.
8. Claimant has not been able to return to work due to his continuing pain and depression.
9. Claimant has exhausted all other levels/types of care and continues to experience significant and pain as well as depression.
10. Claimant is highly motivated to return to work and has been cooperative and compliant in his treatment program.
11. Participation in a multidisciplinary program such as a CPM program may benefit Claimant by providing comprehensive and intensive treatment specifically tailored to address his physical and psychological impairment due to chronic pain.
12. A CPM program, because of its intensive and multidisciplinary nature, is not redundant of other treatments that have already been provided to Claimant, but were not successful in alleviating his pain or depression.
13. A CPM program has been consistently recommended for Claimant by his treatment providers since January, 2003.
14. Claimant's surgeon, Stephen Ozanne, M.D., P.A., recommends a four-week CPM program for Claimant.
15. Claimant's psychotherapist, Terri Creamer, Ph.D., feels that Claimant would benefit from participation in a CPM program.
16. There is no evidence to support the need for a six-week CPM program for Claimant as opposed to the four-week program recommended by Dr. Ozanne and referred to in Finding of Fact No. 13 above.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LABOR 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, pursuant to § 413.031(d) 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 the Commission's rules, 28 TEX. ADMIN. CODE (TAC) §§ 133.305 and 133.308.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner had the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41.
6. The IRO had authority to review the parties' positions and issue a decision pursuant to the Commission's rule at 28 TAC §§ 133.305 and 133.308.
7. Pursuant to the Act, 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).
8. Health care includes all reasonable and necessary medical services, including a medical appliance or supply. TEX. LAB. CODE ANN. §401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN. § 401.011(31).
9. For a carrier to be liable to reimburse a provider for a chronic pain management program, the service must be preauthorized. 28 TAC § 134.600(h).
10. A four-week chronic pain management program was shown to be reasonable and medically necessary healthcare for Claimant and should be preauthorized.

ORDER

It is ORDERED that the request of Terri Creamer Ph.D., on behalf of Behavioral Healthcare Associates, for preauthorization of a four-week chronic pain management program for Claimant is granted.

SIGNED June 2, 2005.

**AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**