

SOAH DOCKET NO. 453-05-8280.M2
TWCC MR NO. M2-05-1810-01

—,	§	BEFORE THE STATE OFFICE
Petitioner	§	
V.	§	OF
INDEMNITY INSURANCE COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Claimant filed this petition challenging the decision of an Independent Review Organization (IRO) denying preauthorization of a discogram. The IRO upheld the decision of Indemnity Insurance Company (Carrier) to deny the requested procedure on the basis that it was not medically necessary. Based on the evidence presented during the hearing, the Administrative Law Judge (ALJ) finds that Claimant failed to meet his burden of proving the procedure is medically necessary.

I. NOTICE AND PROCEDURAL HISTORY

ALJ Stephen J. Pacey held the hearing on this matter on November 8, 2005. Carrier was represented by Laurie S. Gallagher, attorney. Claimant appeared *pro se* with the assistance of Juan Mireles, Ombudsman for the Texas Workers' Compensation Commission (Commission). Proper notice of the hearing was provided as set out in the findings of fact and conclusions of law.

As a preliminary matter, Carrier filed a motion to dismiss asserting that Claimant had previously filed for preauthorization and reconsideration of Carrier's denial of preauthorization. Subsequently, Claimant filed for preauthorization in the instant case without indicating a substantial change in Claimant's condition. Carrier's statement of law¹ is correct; however, in this case there are

¹ 28 TEX. ADMIN. CODE §134.600(G)(4).

insufficient facts on which to base such a decision. Neither the past nor the present requests for preauthorization were produced to support the motion, and without any documentation, Carrier's motion to dismiss is denied.

II. DISCUSSION

The evidence reveals that Claimant suffered a compensable injury to his back on _____. He was provided with conservative care, but received little to no pain relief. Currently, Claimant complains of back pain radiating down his legs. An MRI was conducted on September 5, 2003. Vidya Kamath, M.D., a radiologist, interpreted the MRI as being normal. He reported that Claimant had normal vertebral alignment, no focal disc herniation, the conus medullaris at normal level, nerve roots exit neural foramina normally, and no evidence of vertebral compression. Dr. Kamath's interpretation was that the MRI showed no abnormality.²

On June 1, 2004, Ronald Devere, M.D., conducted an electromyography (EMG) to determine whether Claimant had radiculopathy. The EMG reports the status of nerve functions. He opined that the EMG portrayed a normal study of the left lower extremity and lumbar paraspinal muscles. Dr. Devere reported that "[there] was no electrical evidence for left lumbar radiculopathy."³

Gerardo Zavala, M.D., a neurosurgeon and Claimant's treating physician, testified for Claimant. Dr. Zavala testified that the radiculopathy was caused by an internal disc disruption. He said that the discogram was necessary to identify the source generating Claimant's pain. According to Dr. Zavala, once the location of the disruption was identified, he would perform a fusion on Claimant's spine.

Robert G. Winans, M.D., testified for Carrier. According to Dr. Winans, the MRI revealed no bulging disc, no compression, and the disc dehydration was normal with aging. Dr. Winans

² Carrier's Exhibit 1 at page 24.

³ Carrier's Exhibit 1 at page 26.

asserted that the EMG was the ‘gold standard’ in identifying the presence of radiculopathy. He opined that the EMG revealed no radiculopathy. Dr. Winans said that further invasive imaging studies such as discography do not appear warranted to evaluate essentially normal discs.

III. ALJ’S DECISION

Based on a careful review of the record, the ALJ concludes that Claimant has not met his burden of showing that the requested procedure is medically necessary. This decision is based on discrepancies between Claimant’s medical records and testimony, and Claimant’s failure to prove the necessity of a discogram to determine his pain generator.

A careful review of the Dr. Zavala’s medical records and Dr. Zavala’s testimony reveals discrepancies. After the MRI, Dr. Zavala in his February 17, 2004 request for preauthorization for an epidural steroid injection (ESI) and facet block, diagnosed Claimant with a bulging disk at L5-S1.⁴ In his March 25, 2004 request for preauthorization for a second ESI, Dr. Zavala diagnosed Claimant with a protruding disk.⁵ At the hearing, Dr. Zavala testified Claimant has an internal disc disruption. According to Dr. Kamath, the radiologist who interpreted the MRI, Dr. Winans, and Charles F. Xeller, M.D., who conducted an independent medical evaluation, the MRI was normal and did not indicate a bulging disc, a protruding disk, or internal disc disruption. Dr. Zavala’s different diagnoses and his variance from the opinions of other physicians are troubling. While there may be reasonable explanations for these apparent contradictions, they are not presented in the evidentiary record.

Beyond the contradictions, there is simply no objective evidence that Claimant has radiculopathy caused by a disc injury. His MRI was evaluated as normal and his EMG revealed no signs of radiculopathy. Dr. Winans testified that the EMG is the “gold standard”, and he said that a

⁴ Carrier’s Exhibit 1 at page 76.

⁵ Carrier’s Exhibit 1 at page 81.

discogram is unnecessary because the EMG showed no electrical evidence for left lumbar radiculopathy. Since there is no objective support for complaints made, the ALJ concludes that Claimant failed to meet his burden of proving the discogram is medically necessary.

IV. FINDINGS OF FACT

1. On ____, ____ (Claimant) suffered a compensable injury to his lower back.
2. At the time of Claimant's injury, his employer had workers' compensation insurance through Indemnity Insurance Company (Carrier).
3. Claimant seeks preauthorization for a discogram.
4. Carrier denied the request for preauthorization.
5. Claimant requested medical dispute resolution at the Texas Workers' Compensation Commission, which referred the matter to an Independent Review Organization (IRO).
6. The IRO found that the requested discogram should not be preauthorized.
7. Claimant timely requested a hearing before the State Office of Administrative Hearings (SOAH).
8. Notice of the SOAH hearing was sent to the parties on August 3, 2005. The notice informed the parties of the date, time, and location of the hearing, a statement of the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
9. The SOAH hearing convened and closed on November 8, 2005. Claimant with the assistance of Juan Mireles, ombudsman, and Carrier appeared and participated in the hearing.
10. Claimant's back appeared to be normal on an MRI conducted September 5, 2003.
11. An EMG performed June 1, 2004, reflected no radiculopathy.
12. The medical records of Dr. Zavala have internal inconsistencies and sometimes conflict with his testimony.
13. There is no objective evidence that Claimant has other than normal discs.

14. The requested discogram was not proven to be medically necessary treatment for Claimant's compensable injury.

V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. As the petitioner, Claimant has the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.14(a).
4. Claimant failed to establish that the requested discogram is medically necessary treatment for his compensable injury.
5. The requested preauthorization of a discogram should be denied. TEX. LAB. CODE ANN. §408.021.

ORDER

IT IS ORDERED that the request submitted by Claimant ___ for preauthorization of a discogram is denied.

SIGNED December 7, 2005.

**STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**