

**SOAH DOCKET NO. 453-05-9110.M2
MDR NO. M2-05-1760-01**

ZURICH AMERICAN INSURANCE CO.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
	§	
VALLEY TOTAL HEALTHCARE	§	
SYSTEM,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Zurich American Insurance Company (Carrier) challenges an order by an independent review organization (IRO) that four individual counseling sessions and eight sessions of biofeedback should be pre-authorized to treat the compensable low back injury of an injured worker, ___ (Claimant). The Administrative Law Judge (ALJ) concludes that the proposed treatment is not reasonable or medically necessary. Therefore, Provider’s request for pre-authorization of the proposed treatment is denied.

I. PROCEDURAL HISTORY, NOTICE, JURISDICTION

Sidney S. Fernald, D.C., of Valley Total Healthcare System (Provider), requested pre-authorization for four sessions of individual therapy and eight sessions of biofeedback for Claimant, based on a recommendation by a licensed professional counselor who conducted a psychological evaluation on Claimant. Carrier denied the request as medically unnecessary. Provider appealed the denial under the medical dispute resolution procedures of the Texas Workers’ Compensation Commission (Commission),¹ which referred the dispute to an IRO. The IRO recommended that the requested treatment should be pre-authorized. Carrier contested the IRO recommendation, which culminated in a hearing before the State Office of Administrative Hearings (SOAH).

ALJ Sharon Cloninger convened the hearing on November 30, 2005. Carrier appeared at the hearing through Steven Tipton, attorney. Provider appeared through its Chief Compliance Officer,

¹ Effective September 1, 2005, the functions of the Commission were transferred to the Texas Department of Insurance, Division of Workers’ Compensation.

Nick Kempisty. Notice and jurisdiction were not disputed and are addressed in the Findings of Fact and Conclusions of Law. Carrier offered one exhibit, which was admitted, and called a witness. Provider offered one exhibit, which was admitted. The hearing concluded November 30, 2005.

II. OVERRULING OBJECTION REGARDING BURDEN OF PROOF

Although Carrier requested the hearing before SOAH, Carrier objected to being the party with the burden of proof, arguing that Provider, as “the party seeking relief,” has the burden of proof. The ALJ overrules the objection and finds that Carrier has the burden of proof, as set out in the Conclusions of Law.

III. DISCUSSION

A. Background

Claimant suffered a compensable injury to his lower back on ____, while lifting boxes at work. That same month, he began seeing and continues to be treated by Provider. Claimant’s treatment has included physical therapy, exercise therapy, stretching, hot and cold applications, topical analgesics, acupuncture, injections. He underwent surgery for a herniated disc on June 20, 2002.

Provider referred Claimant for a psychological evaluation on February 18, 2005, following long-term treatment for the compensable injury and continuing reports of pain. Claimant had no mental health difficulties or interventions prior to his date of injury. The evaluation concluded with a diagnosis of Chronic Pain Disorder with both psychological features and general medical conditions. Claimant’s scores on both the Beck Depression Inventory (BDI) and Beck Anxiety Inventory (BAI) conducted during the psychological evaluation fell within the mild-to-moderate range. The evaluator recommended that Claimant undergo the disputed services.

B. Evidence and Argument

Carrier offered one exhibit, which was admitted, and called one witness. Provider offered one exhibit, which was admitted. Carrier called Krista Jordan, Ph.D., a practicing psychologist, as an expert witness. Dr. Jordan testified that:

- Claimant was injured nearly four years ago, entering the tertiary phase of care about six months after the date of injury. Dr. Jordan said the consensus in the medical literature is that patients in the tertiary phase of care do not benefit from single-discipline interventions such as individual counseling and biofeedback.
- Claimant's psychological evaluation shows symptoms and scores for depression and anxiety in the mild-to-moderate range, not serious enough to warrant the requested chronic care. Dr. Jordan suggested that an interdisciplinary program such as work hardening would be more appropriate, with counseling in group sessions.
- The records do not show Claimant to have been experiencing psychological symptoms prior to his February 2005 psychological evaluation. He has no psycho-social overlay directly interfering with his recovery.
- Claimant does not exhibit any Waddell signs, which show symptom magnification when a patient is not mentally engaged in rehabilitation.
- Claimant's maximum effort on his March 2002 functional capacity evaluation indicates he has no psycho-social overlay.
- The medical records show Claimant has been totally compliant with the treatment protocol, rather than being lethargic, fearful, or resistant due to depression or anxiety.
- At no time during the course of Claimant's treatment has he been prescribed medication for depression or anxiety, indicating to Dr. Jordan that Claimant did not suffer from depression from January 2002 through February 2005.

- The medical records do not mention that Claimant had a sad or depressed affect, or was inhibited during rehabilitation due to fear. Dr. Jordan said in her experience of treating thousands of injured workers, it is not typical for psycho-social issues to surface more than about a year after a date of injury.
- Claimant does not need the intensity of one-on-one counseling; a group setting would be adequate to address his mild-to-moderate depression and anxiety.
- Claimant's pain levels of 3 out of 10 (the highest) and 4 out of 10 are as low as can be expected for a chronic pain patient. Treatment should focus on restoring function at this point, because pain levels are not likely to drop any further.
- Claimant suffers from mild-to-moderate intermittent daytime fatigue 20-30 percent of the time, and from sleep deprivation, conditions which do not cause clinical depression in most people.

Carrier argued the following in support of its position that the requested treatment should not be pre-authorized:

- Clinical findings do not support that Claimant is undergoing any significant chronic pain which would lead to a psychological component requiring the requested treatment.
- Provider's request for pre-authorization for psychotherapy and biofeedback is based on a recommendation by a licensed professional counselor; Claimant has not been evaluated by a psychiatrist.
- Claimant has not been prescribed medication for depression or anxiety.
- The medical literature does not support biofeedback as a treatment for chronic low back pain.

Provider argued the following in support of its position that the requested treatment should be pre-authorized:

- Biofeedback is an appropriate treatment for low back pain.
- Claimant's June 2002 surgery, his daytime fatigue, and his lack of sleep could produce psycho-social overlay.
- Depression is not mentioned in Claimant's medical records prior to his psychological

evaluation, because Provider is a chiropractor, and is not qualified to identify depression or prescribe anti-depressants.

C. Analysis and Conclusion

Carrier proved that pre-authorization for the requested treatment should be denied. The ALJ found Dr. Jordan's testimony persuasive that individual counseling and biofeedback sessions are not medically necessary to treat Claimant's compensable injury, based on Claimant's pain level of 3 or 4, mild-to-moderate depression and anxiety, compliance with his treatment program, and the fact that biofeedback for chronic low back pain is not supported in the medical literature. Therefore, the Provider's request for pre-authorization should be denied.

IV. FINDINGS OF FACT

1. Claimant suffered a compensable injury to his lower back while lifting boxes at work on ____.
2. At the time of Claimant's injury, his employer held workers' compensation insurance coverage through Zurich American Insurance Company (Carrier).
3. Claimant began seeing Sidney S. Fernald, D.C., at Valley Total Healthcare System (Provider) in January 2002.
4. Claimant's diagnoses are lumbar intervertebral disc syndrome and chronic pain disorder.
5. On June 20, 2002, Humberto Tijerina, M.D., performed a decompressive lumbar laminectomy L5-S1, right and diskectomy and foraminotomy and fat graft on Claimant.
6. In addition to the June 2002 surgery, Claimant's treatment has included use of an EMS unit for home pain control, ultrasound, myofascial release, cryotherapy, moist heat, physical therapy, therapeutic exercises, neuromuscular re-education, kinetic exercises, acupuncture, and pain medication.
7. Because of Claimant's continuing low back pain, Provider referred him for a psychological evaluation on February 18, 2005.
8. On February 28, 2005, Scott Persinger, LCSW, performed a psychological evaluation on Claimant, and concluded the following:
 - (a) Claimant has learned to effectively cope with and tolerate his pain.
 - (b) Claimant has had no previous mental health treatment.
 - (c) Claimant shows signs of depression in his mood, interest, sleep, appetite, feeling of worthlessness, concentration, irritability, sadness, and hopelessness. His Beck Depression Inventory score of 16 shows mild depression.
 - (d) Claimant shows signs of anxiety with worry, restlessness, fatigue, concentration, irritability, sleep, frustration, muscle tension, nervousness, and appetite. His Beck

Anxiety Inventory score of 16 shows moderate anxiety.

- (e) Claimant has chronic pain syndrome, with a moderate level of pain at 3 out of 10, present 100 percent of the time.
 - (f) Claimant has a good work history, good family support, and no problems prior to his date of injury.
 - (g) Mr. Persinger recommended four sessions of individual counseling and eight sessions of biofeedback to decrease Claimant's symptoms of pain, depression, anxiety related to his compensable injury.
9. On March 9, 2005, Fergus Dowling, LPT with the Provider's Work Hardening Department, evaluated Claimant's functional status and found:
- (a) He put forth moderate effort within his pain tolerance throughout the evaluation.
 - (b) He demonstrated good worker traits and the ability to do a light level of work.
 - (c) There was good correlation between Claimant's pain rating of 4 and observable behavior during testing.
 - (d) Claimant had good body mechanics.
 - (e) Claimant's material handling and gross coordination were good.
10. Claimant has not had any psychiatric care in the past, has not been evaluated by a psychiatrist, and is not taking psychotropic medication.
11. Provider requested pre-authorization for four individual counseling sessions and eight sessions of biofeedback to treat Claimant's compensable injury.
12. On April 6, 2005, and again on April 20, 2005, Carrier denied pre-authorization for the requested procedure as not medically necessary.
13. Following an Independent Review Organization's conclusion that the proposed individual counseling sessions and sessions of biofeedback should be pre-authorized, Carrier requested a hearing before SOAH.
14. Notice of the hearing was mailed to the parties on August 29, 2005. The notice 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.
15. Administrative Law Judge (ALJ) Sharon Cloninger convened and closed the hearing on November 30, 2005. Carrier appeared through Steven Tipton, attorney. Provider appeared through its Chief Compliance Officer, Nick Kempisty.
16. Individual counseling will not cure or relieve Claimant's mild-to-moderate levels of depression and anxiety, promote his recovery, or enhance his ability to return to or retain employment.

17. While biofeedback can be used for pain intervention and relaxation, it is not an effective treatment for chronic low back pain, so it will not cure or relieve Claimant's chronic low back pain, promote his recovery, or enhance his ability to return to or retain employment.

V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding pursuant to § 413.031(k) of the Act 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 party seeking relief, Carrier bears the burden of proof in this matter. 28 TEX. ADMIN. CODE (TAC) §§ 148.1(10), 148.14(a), and 148.3(a).
4. Carrier proved that the requested treatment is not medically necessary pursuant to TEX. LAB. CODE ANN. § 408.021(a).
5. Based on the foregoing Findings and Conclusions, pre-authorization for the requested individual counseling sessions and biofeedback should be denied.

ORDER

IT IS ORDERED that Provider's request for pre-authorization for four individual counseling sessions and eight sessions of biofeedback to treat Claimant's compensable back injury is denied.

SIGNED December 6, 2005.

**SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**