

**DOCKET NO. 453-05-9319.M2
MDR NO. M2-05-2198-01**

**ARVO NEIDRE,
PETITIONER**

V.

**TEXAS ASSOCIATION OF SCHOOL
BOARD RISK MANAGEMENT FUND,
RESPONDENT**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Arvo Neidre, M.D. (Provider or Dr. Neidre) challenged the decision of an Independent Review Organization (IRO) denying preauthorization of a discogram for workers' compensation insurance claimant, ___ (Claimant). The IRO found that the requested procedure was not medically necessary. This decision finds that, based on the evidence presented during the hearing, the requested procedure should not be preauthorized.

I. NOTICE AND PROCEDURAL HISTORY

Administrative Law Judge (ALJ) Tommy L. Broyles held the hearing on this matter on October 31, 2005. Both Carrier and Provider were represented at the hearing and filed closing arguments on or before November 14, 2005, the day the record closed. Proper notice of the hearing was provided as set out in the findings of fact and conclusions of law.

II. BACKGROUND

The evidence reveals that, on ____, Claimant suffered a compensable injury to his back. He was provided with a variety of medical care including physical therapy; bed rest; numerous medications including anti-inflammatories, muscle relaxants and analgesics; epidural steroid injections; and the following six lumbar spine surgeries after numerous diagnostic procedures including discogram:

- May 15, 1992: L4-5 laser disk decompression;
- September 23, 1992: L4-5 paraspinal extra foraminal disc excision;
- April 26, 1993: a bilateral L4 laminectomy, bilateral L4-5 microdiscectomy, bilateral L4-5 posterior lumbar interbody fusion, bilateral L4-5 segmental fixation with BAK prostheses, left iliac crest bone graft, and repair of incidental durotomy;
- September 1999: laminectomy at L3-4 with segmental fixation using pedicle screws and the VSP plates at L3, L4, and L5 bilaterally with posterolateral fusion using local bone graft;
- January 25, 2000: exploration of spinal fusion with removal of BAK cages anteriorly with anterior interbody fusion at L4-5 using stackable corpectomy cages with bone graft from the left iliac crest; and
- May 19, 2004: exploration of spinal fusion with removal of posterior spinal instrumentation.

The medical care, including surgeries, failed to provide long-term pain relief. On June 21, 2005, Claimant underwent a lumbar myelogram with post-myelogram CT scan. Provider determined that Claimant had stenosis at the L2-3 level and degenerative changes at the L5-S1 level, and now proposes to have a discogram at the L2-L3 and L5-S1 levels to determine the source of pain. After reviewing the myelogram, Provider reported that the fusions between L3 and L5 are solid.

III. DISCUSSION

Provider argues that prior to surgery, a surgeon is entitled to obtain as much information about each patient's anatomic condition as is reasonable and that the discogram in this case is reasonable. Dr. Neidre testified that he is Claimant's treating physician and that he needs a discogram at the L2-3 and L5-S1 levels in order to obtain the information necessary to recommend an appropriate course of treatment for Claimant. At the L2-3 level, Dr. Neidre stated that he may recommend surgery, including an interbody fusion. At this level, the discogram would help determine the extent or type of surgery to be performed.¹ At the L5-S1 level, Dr. Neidre indicated the discogram was needed to determine the integrity of the disc so that appropriate recommendations for treatment may be made, including surgery.

Responding to Carrier's claims of psychological issues, Provider notes that these issues are evidenced in the records from 1993-1998, and not from more recent evaluations. Provider argues that he has seen and evaluated Claimant since this time and has observed no evidence of any psychological issues. Given the lack of any evidence suggesting present psychological issues, Provider insists this issue does not present Claimant as a poor candidate for surgical intervention.

Carrier suggests there are two components of a discogram: (1) to evaluate radiographically the extent of disc damage and (2) to characterize any pain response on disc injection to see if it re-creates the patient's typical pain. Carrier notes that in a letter dated July 7, 2005, Provider indicated that his rationale for the requested procedure was to determine how many levels of surgery were necessary. In his request for preauthorization, Provider indicated that surgery was necessary at L2-3, but he was unsure whether it should also be performed at L5-S1. Provider explained, "if provocative discography indicates that the L5-S1 level is involved as well as L2-3, it would mean having to do

¹ Provider's brief also suggested that a discogram at this level was necessary to determine if surgery was necessary at L2-3. However, Dr. Neidre's notes do not indicate as much, suggesting that the decision to perform surgery at L2-3 had already been made.

both levels at one sitting. If the pain provocation of L5-S1 is not positive, that level could be left alone, leaving (Claimant) with a much smaller operation.” Thus, Carrier concludes Provider is relying only on the second component of a discogram, to characterize any pain response on disc injection to see if the L5-S1 level is a pain contributor.

Carrier is concerned about this for two reasons. First, since surgery is already planned for L2-3, Carrier questions why a discogram is medically necessary for that level. Second, Carrier argues that a discogram to characterize pain response is inappropriate in this instance because of Claimant’s psychological issues. Nick F. Tsourmas, M.D., testified that Claimant’s psychological profile made him a poor candidate for discography. In 1993, Claimant complained of severe tearfulness, depression, and anxiety. He was referred for a psychological evaluation which found that psychological factors are likely contributing to his continued experience of back pain. More specifically, the evaluating psychologist noted that Claimant’s psycho-social pain inventory exceeded the cut-off beyond which individuals typically fail to make favorable subjective responses to surgical intervention for chronic pain problems. He continued that in addition to the depression, Claimant appeared to be markedly pre-occupied with somatic complaints and gave him a less than ten-percent likelihood of making favorable subjective responses to traditional interventions for chronic pain problems.

Carrier also notes that after the psychological profile, another physician examined Claimant and found evidence of manual work beyond that which Claimant reported he could perform. The physician noted, “Interestingly enough, (Claimant) had grease or petroleum products under the fingernails and fairly heavy calluses on his hands and various nicks and abrasions on the hands possibly indicating significant manual work with his hands and arms.” Still another physician performed an impairment evaluation and found that Claimant was unable to work but not because of the injury, per se. Rather, the physician found Claimant was unable to work “primarily because of his perception that he is not able to work, his Attention Deficit Disorder and hyperactivity, his significant

somatization, and his perceived pain in his back.” Finally, another treating physician noted that Claimant clearly stated to him that he wanted to “play out his disability and get on social security disability.” This physician opined that Claimant’s attitude for the 24 to 36 months he had seen him appeared to be directed toward those goals.

Dr. Tsourmas testified that the pain component of discography is subjective and relies upon a patient to accurately report his pain. For this reason, he indicated that someone with psychological overlay and somatization is not a good candidate for discography and noted that several studies have found the same. Because of Claimant’s psychological history and Provider’s intent to rely solely on the pain response component of a discography, Carrier argues the procedure is not medically reasonable or necessary.

IV. ALJ’s DECISION

Based on a review of the record, the ALJ concludes that the requested procedure is not medically necessary. Claimant has a significant history of psychological findings suggesting psychosomatic pain responses. Dr. Neidre argued that these findings were several years in the past and opined that Claimant’s psychological issues had resolved. But Dr. Tsourmas testified that without treatment, psycho-somatic complaints tend to get worse over time and do not spontaneously resolve. On this point, the ALJ finds the testimony of Dr. Tsourmas to be more credible.

Further, Dr. Neidre’s arguments are not supported by the medical records. The records indicate Claimant simply changed physicians when faced with psychological issues rather than addressing the issues through therapy. On cross-examination, Dr. Neidre admitted that he was unaware of the psychological issues, had only examined Claimant for the first time less than four months prior to proposing the discogram, and had performed no psychometric testing. Moreover, the six failed surgeries validate past psychological findings suggesting that Claimant would fail to make favorable subjective responses to surgical intervention for his chronic pain problems. The psychological testing and failed surgeries are the best evidence regarding Claimant’s psychological

state and persuade the ALJ to find that any subjective pain responses offered by Claimant would be unreliable. For these same reasons, the ALJ concludes that further surgical intervention is unwarranted. Because the discogram is only sought in relation to whether and where surgery is warranted, a discogram is therefore medically unnecessary. Accordingly, the ALJ concludes that Provider failed to prove the discogram is medically necessary.

V. FINDINGS OF FACT

1. On ____, Claimant suffered a compensable injury to his back.
2. At the time of Claimant's injury, his workers' compensation insurance was provided by Texas Association of School Board Risk Management Fund (Carrier.)
3. Claimant's treating physician is Arvo Neidre, M.D. (provider) and he sought preauthorization for a discogram at levels L2-3 and L5-S1.
4. Carrier denied the request for preauthorization.
5. Provider requested medical dispute resolution at the Texas Workers' Compensation Commission, which referred the matter to an Independent Review Organization (IRO).
6. The IRO denied preauthorization for the discogram.
7. Provider timely requested a hearing before the State Office of Administrative Hearings (SOAH).
8. Notice of the SOAH hearing was sent to the parties on September 6, 2005. The notice informed the parties of the date, time, and location of the hearing; 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 October 31, 2005. Claimant and Carrier appeared and participated in the hearing.
10. Closing briefs were filed and the record closed on November 14, 2005.
11. Claimant has undergone extensive care, including six surgeries, without significant pain relief.

12. Claimant suffers from significant pain somatization and other psychological disorders.
13. Patients with significant psychological overlays are not good candidates for discograms when relying on the pain identification component of the procedure.
14. The purpose of the requested discogram is to determine whether surgery is necessary at the L5-S1 level based on pain identification.
15. Claimant desires to play out his disability to get social security disability.
16. A discogram would not provide additional information regarding Claimant's condition that would allow a physician to determine whether to operate at the L5-S1 or any level.
17. A discogram is not medically necessary treatment for Claimant's compensable injury.

VI. 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, Provider has the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.14(a).
4. Provider failed to establish that the discogram is medically necessary treatment for Claimant's compensable injury. TEX. LAB. CODE ANN. § 408.021.
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 Provider for preauthorization of a discogram is denied.

SIGNED December 2, 2005.

**TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**