

SOAH DOCKET NO. 454-06-0897.P1
DWC NO.

ASSOCIATION CASUALTY INSURANCE COMPANY, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
v.	§	
	§	OF
TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION AND BILL WELDON, D.O., Respondents	§	
	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Association Casualty Insurance Company (Carrier) challenges a medical interlocutory order (MIO) issued by the Texas Workers' Compensation Commission, now the Texas Department of Insurance, Division of Workers' Compensation (Division), requiring it to pay for certain office visits and medications over a ninety-day period. This decision concludes that Carrier did not carry its burden of proving the treatments were medically unnecessary. As a result, Carrier should not be reimbursed for payments it has made for those services.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The MIO was issued on December 19, 2005, pursuant to the Division's Prospective Review of Medical Care (PRM) rules at 28 TEX. ADMIN. CODE (TAC) § 133.650. The Carrier filed a timely hearing request. After proper and timely notice and after two continuances, the hearing convened on November 13, 2006, at the State Office of Administrative Hearings (SOAH), before the undersigned Administrative Law Judge (ALJ). On November 15, 2006, the record closed after

Carrier's submission of a written brief. Carrier and the Division were represented by counsel, who appeared in person. Bill Weldon, D.O., participated *pro se*, by telephone.

SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 402.073(b) and 413.055 and TEX. GOV'T CODE ANN. ch. 2003.

II. DISCUSSION

A. Background

The injured worker (Claimant) injured his left knee on _____, while carrying bags of trash as part of his maintenance-work duties. He underwent surgery in February 2001 and June 2002. His pain has continued, however. His diagnosis is internal derangement of the left knee. After first seeing Claimant on a consultation basis in December 2003, Dr. Weldon became his primary care physician in December 2005, and is still his treating physician.

Dr. Weldon submitted a PRM request, after Carrier denied the claim, for the following care over a 90-day period: three office visits; Celebrex, 200 mg., two times a day, total 180 tablets; Elavil, 25mg., one to two times a day, total 180 tablets; and Lyrica, 75 mg., three times a day, total 270 tablets. A prospective review medical examination (PRME) doctor found the care to be medically necessary to treat Claimant's compensable injury. After Carrier continued to deny payment, the Commission issued the MIO order. Carrier requested a hearing before SOAH.

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides: "An employee who sustains 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: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment." Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

The Carrier has the burden of proof in this proceeding.¹

B. Analysis

For two basic reasons, the ALJ finds that Carrier did not prove the requested care was medically unnecessary. First, Carrier relies on an opinion from Charles F. Xeller, M.D., to carry its burden of proof. Dr. Xeller concluded on September 8, 2006,² that Claimant should take over-the-counter anti-inflammatory drugs, unless his stomach becomes upset, in which case Celebrex would be appropriate. He opined that Claimant was taking Elavil and Lyrica for reflex sympathetic dystrophy but, because he could see no evidence of that malady, he concluded those medications were not indicated. However, six weeks earlier, on July 24, 2006, after what appears to have been an extensive examination, Dr. Xeller stated the following opinion:³

He [Claimant] lists his current medications as Celebrex, Amitriptyline and Lyrica.

As for ongoing treatment in this individual, he would benefit from an anti-inflammatory medication. The Celebrex would be appropriate. after a course of

¹ TEX. LAB. CODE ANN. §413.055, 28 TEX. ADMIN. CODE (TAC) §148.14(a).

² Ex. 1.

³ *Id*

long-term use of Lyrica and his Elavil medication, which is the Amitriptyline. I see no signs of RSD.⁴

I am going to obtain an x-ray, and then I will issue another report.

The ALJ could find no explanation in the record of why Dr. Xeller appeared to change his opinion on the efficacy of the three disputed medications. On this basis alone, Carrier did not carry its burden of proving the medications were medically unnecessary.

The second basis for the ALJ's finding is Dr. Weldon's testimony,⁵ which persuasively showed the care was necessary.⁶ Dr. Weldon testified that Dr. Xeller appeared to agree with the requested medications in his July report.

Dr. Weldon testified the Celebrex was necessary because it is an anti-inflammatory drug that, if successful, reduces swelling, inflammation, soreness, and stiffness in the affected area. He concluded Celebrex was the best medication for Claimant because it is much safer than over-the-

⁴ Presumably, "RSD" means reflex sympathetic dystrophy.

⁵ Carrier reasserted an objection to Dr. Weldon's testimony because he was not identified as a testifying expert in response to Carrier's discovery. However, Dr. Weldon was identified as an expert when the hearing convened on November 1, 2006. (The ALJ continued the hearing until November 13, 2006, because Dr. Weldon did not receive documents that would be presented at the hearing.) The ALJ asked Carrier on November 1 if it wanted a continuance because Dr. Weldon had not been identified as an expert. Carrier said it did not. The ALJ concluded it was preferable to offer a continuance, to remedy discovery non-compliance, than to impose a sanction that would likely have a death-penalty effect. On the basis of these factors and the fact that Carrier was informed on November 1, 2006, that Dr. Weldon would testify as an expert, Carrier's continued objection to Dr. Weldon's testimony is overruled.

⁶ Carrier objected, on the basis of 28 TAC § 134.650(h)(5), to the Division's tender at the hearing of the PRM request, the PRME doctor's opinion, and other records reviewed by the PRME doctor. The cited rule provides that the Division will not file a copy of those materials with SOAH. The ALJ overruled this objection based on TEX. GOV'T CODE ANN. § 2003.050, which provides, "... the procedural rules of the state agency on behalf of which the hearing is conducted govern procedural matters that relate to the hearing only to the extent that the chief administrative law judge's rules adopt the agency's procedural rules by reference." SOAH has not adopted § 134.650(h)(5). Carrier reasserted his objection in its post-hearing brief. The ALJ has determined not to change his ruling, but has also concluded not to consider the objected to materials. They are primarily cumulative of other evidence.

counter anti-inflammatory drugs, which can cause severe stomach problems, including internal bleeding. He said problems with Celebrex are about one-third as common as with over-the-counter drugs. Although he acknowledged not trying over-the-counter drugs with Claimant, he nonetheless believed Celebrex was best for his condition.

Dr. Weldon agreed with Dr. Xeller that there is nothing in the records diagnostic of reflex sympathetic dystrophy and that Elavil and Lyrica can be used to treat that condition. He said he prescribed the drugs for other purposes, however. Elavil is a tri-cyclic anti-depressant that has two basic effects. It improves the mood and functionality of chronic pain patients.⁷ It also reduces chronic pain patients' perceptions of their pain, thereby making them more able to deal with pain on an ongoing basis. According to Dr. Weldon, Lyrica is somewhat similar in its effects to Elavil. He said it was actually developed as an anti-seizure medication, but has also been used to reduce peripheral nerve firings in affected injured areas.

Dr. Weldon pointed out that none of the drugs are narcotics. He said Elavil and Lyrica both have pain relieving and pain altering effects for some patients. He believes they are a better alternative than narcotics, which are addictive.

Dr. Weldon maintained his treatment of Claimant has caused a decrease in his pain and has helped him in daily-living activities.

As indicated above, the ALJ concludes that Carrier did not prove the medications and office visits were medically unnecessary. Carrier's evidence consisted primarily of Dr. Xeller's opinions,

⁷ Depression tends to be associated with chronic pain.

which contained unexplained inconsistencies. Moreover, the medications were effective in reducing Claimant's pain and enhancing his ability to perform activities of daily living.

Carrier's argument that Dr. Weldon should have tried over-the-counter drugs, before prescribing Celebrex for Claimant to see if they would cause stomach problems, was unconvincing in view of Dr. Xeller's July 24, 2006 statement that Celebrex was appropriate and the fact that Celebrex is a much safer drug.

Carrier contended in closing that it should prevail because Dr. Weldon failed to follow Division rules in requesting the prospective review process. Documentation for such a request must contain, among other matters, a thorough explanation of the medical necessity for the care being proposed and the basis for the doctor's opinion that the compensable injury is a producing cause of the current medical condition that is the subject of the proposed care.⁸ The ALJ is not persuaded by this argument. The issue at the SOAH hearing is not whether the rule was followed. That appears to be a matter between the provider, the Division, and the PRME doctor, which, it seems, would best be remedied by sending a request back to a provider with instructions to properly complete it. The SOAH hearing is to determine whether the disputed care is medically necessary. The ALJ may not order reimbursement from the subsequent injury fund unless he finds the services to be medically unnecessary.⁹

⁸ 28 TAC § 134.650(c)(1)(D) and (E).

⁹ It should be noted that Dr. Weldon did provide explanations in his PRM request. Part 18 of the Division form required a thorough explanation of medical necessity. Dr. Weldon wrote, "Patient is recovering from injury to L knee which requires ongoing treatment with Celebrex for pain & inflammation. Elevii for sleep which is severely disturbed due to pain, and Lyrica for nerve pain related to musculoskeletal injury to L knee. Diagnosis code: 717.9, V45.89." In response to Part 19, requiring a basis for his opinion that the compensable injury is a producing cause of the current medical condition, Dr. Weldon wrote, "Medical records and diagnostic evidence which support that the injured worker's knee injury is related to work injury date."

III. FINDINGS OF FACT

1. The injured worker (Claimant) injured his left knee on _____, while carrying bags of trash as part of his maintenance-work duties.
2. Claimant underwent surgery in February 2001 and June 2002, but his pain has continued.
3. Claimant's diagnosis is internal derangement of the left knee.
4. Claimant first saw Dr. Weldon, on a consultation basis, in December 2003.
5. Dr. Weldon became Claimant's primary care physician in December 2005, and is still his treating physician.
6. Dr. Weldon submitted his prospective review of medical necessity request, after Carrier had denied his requested care, for the following care over a 90-day period: three office visits; Celebrex, 200 mg., two times a day, total 180 tablets; Elavil, 25mg., one to two times a day, total 180 tablets; and Lyrica, 75 mg., three times a day, total 270 tablets (disputed care).
7. A prospective review medical examination doctor found the disputed care to be medically necessary to treat Claimant's compensable injury.
8. After Carrier continued to deny payment for the disputed care, the Commission issued a medical interlocutory order directing Carrier to pay for the care.
9. Carrier requested a hearing before SOAH.
10. Celebrex is an anti-inflammatory medication that, if successful, reduces swelling, inflammation, soreness, and stiffness in the affected area.
11. Celebrex is much safer than over-the-counter anti-inflammatory drugs, which can cause severe stomach problems, including internal bleeding.
12. Problems with Celebrex are about one-third as common as with over-the-counter drugs.
13. Depression tends to be associated with chronic pain.

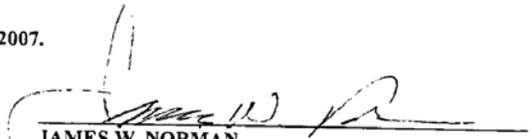
4. Carrier failed to prove that the disputed care was medically unnecessary. TEX. LAB. CODE ANN. §408.021.

ORDER

IT IS THEREFORE, ORDERED that the Association Casualty Insurance Company request, under 28 TEX. ADMIN. CODE § 134.650, to be reimbursed for payments to Bill Weldon, D.O. for the disputed care be, and the same is hereby, denied.

IT IS ORDERED FURTHER that Association Casualty Insurance Company failed to prove that the disputed care was medically unnecessary.

SIGNED January 5, 2007.



JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS