

SOAH DOCKET NO. 454-07-0892.P1

CONTINENTAL CASUALTY COMPANY, PETITIONER	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION AND RONALD WASHINGTON, M.D., RESPONDENTS	§	
	§	
	§	
	§	
	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Continental Casualty Company (Carrier) challenges a Medical Interlocutory Order issued by the Texas Department of Insurance, Division of Workers' Compensation (the Division), requiring Carrier to reimburse for medications provided by Co-Respondent Ronald Washington, M.D., to Claimant _____. This decision finds in favor of the Division and Dr. Washington.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

On July 17, 2006, Ronald Washington, M.D., submitted a request for a prospective review for medical care (PRM) involving care not requiring preauthorization. Dr. Washington sought prospective review for the prescription of 4 tablets of Hydrocodone 7.5 milligram daily to control Claimant's chronic pain. Dr. Washington sought approval of a 90-day supply. On August 28, 2006, Jerry William Bane, M.D., issued the PRM report in which he determined that the specific care was medically necessary. On that same day, the Division issued a Medical Interlocutory Order requiring Carrier to reimburse Claimant.

On September 12, 2006, Carrier filed its request for appeal. On November 29, 2006, the Division issued a notice of hearing to be held before the State Office of Administrative Hearings (SOAH) on April 11, 2007. On March 26, 2007, Administrative Law Judge (ALJ) Gary Elkins granted an agreed motion for continuance. On May 10, 2007, ALJ Elkins rescheduled the hearing on the merits to August 13, 2007.

On August 13, 2007, the hearing on the merits was convened as scheduled. Counsel representing the Division was Dean Krohn, and counsel representing Carrier was Shelley D. Gatlin. Although Dr. Washington was a party to the proceeding and was the subject of a motion to appear telephonically, Dr. Washington did not make an appearance in person, by telephone, or by representative. The record closed on August 13, 2007.

SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to 28 TEX. ADMIN. CODE (TAC) § 134.650(h), TEX. LAB. CODE ANN. §§ 402.73(b) and 413.055(c), and TEX. GOV'T CODE ANN. ch. 2003.

II. DISCUSSION

On ____, Claimant was injured in the course of his employment when he fell while climbing stairs. He sustained an injury to his left side, including his neck and shoulder. On January 29, 1996, Claimant was evaluated by Eric Coligado, M.D., who is board certified in physical medicine and rehabilitation. Dr. Coligado identified cervical spondylitic disease and a torn rotator cuff. On February 6, 1996, Scott O. Paschal, M.D., evaluated Claimant following a magnetic resonance imaging (MRI) of his cervical spine and recommended subacromial injections and additional MRIs to diagnose the cause of Claimant's shoulder and cervical spine pain.

On February 16, 1996, Claimant was evaluated by Wayne Drummond, M.D., internist, as a surgical candidate for decompression of an impingement of his left shoulder. On March 4, 1996, the surgery was completed, and Claimant had physical therapy. On May 24, 1996, Dr. Drummond recommended that Claimant be referred to a neurosurgeon to evaluate the need for a decompression of his cervical spine syndrome. On July 3, 1996, Luis A. Mignucci, M.D., a board certified neurosurgeon, recommended an anterior cervical discectomy and fusion (ACDF).

On August 8, 1996, Richard L. Weiner, M.D., examined Claimant to render a second surgical opinion. As part of that examination, Dr. Weiner reported that Claimant had severe neck and left shoulder pain. On September 17, 1996, Dr. Mignucci performed the ACDF at C5-6 and C6-7. On November 20, 1996, Dr. Mignucci reported that Claimant had pain at the site of a lumbar puncture associated with his EMG. On January 8, 1997, Claimant reported to Dr. Mignucci continued shoulder pain, and on February 5, 1997, Claimant reported low back pain.

On March 19, 1997, Dr. Mignucci reported to Dr. Drummond the results of an MRI of Claimant's lumbar spine as showing mild degenerative disease and mild stenosis, neither of which were related to Claimant's ___ injury. In June and July 1997, Claimant underwent work conditioning, during which he continued to have pain in his neck, shoulder, and lower back. In August and September 1997, Claimant underwent work hardening, during which his pain continued. In October 1997, he began reporting difficulty in swallowing.

On March 18, 1998, Dr. Mignucci reported that Claimant was doing well from his surgery but that he continued to have significant low back discomfort. Massage therapy gave him some relief.

On May 11, 1998, Claimant underwent an independent medical examination by M. Shashi Rao, M.D., a family physician. Dr. Rao determined that Claimant had a whole person impairment of 35%. At the time, Claimant was taking Vicodin, Flexeril, and Motrin.

On July 20, 1998, Claimant was seen by Jesse C. Ingram, Ph.D., who reported that Claimant had "sharp, shooting pain in his neck and shoulder area." On July 22, 1998, Dr. Drummond reported that Claimant had a severe radiculopathy. On August 19, 1998, Gregg Diamond, M.D., who is board certified in physical medicine and rehabilitation, performed another medical evaluation and reported Claimant's pain as very severe and constant in nature. On January 29, 1999, Dr. Drummond reported that Claimant had been experiencing marked weakness and deconditioning in his upper extremities. Dr. Drummon recommended a home exercise program and equipment.

On February 23, 1999, Raymond Igou, M.D., an orthopaedic surgeon, reviewed the carrier's appeal of a medical order for physical therapy. Dr. Igou recommended against the physical therapy on the grounds that the therapy was not medically indicated. However, on June 9, 1999, Dr. Mignucci noted that Claimant had persistent low back pain, and he recommended massage therapy. On February 22, 2002, Dr. Drummond assessed Claimant as totally disabled with no possibility of improvement and as unable to return to work.

On April 1, 2002, Dr. Washington began his care of Claimant. He examined Claimant as part of an initial medical report. Dr. Washington reported that Claimant had severe neck and shoulder pain, had lost power in his left arm, and reduced range of motion in his lumbar spine.¹

On May 28, 2002, Jack A. Kern, M.D., evaluated Claimant's medical records for the carrier and concluded that he would need ongoing visits with the treating doctor, and periodic refills of a generic anti-inflammatory medication and a generic non-addicting pain medication. He also recommended "something like Tylenol with Codeine" if Claimant had "lots of difficulty."

Claimant continued to have severe pain. In an October 1, 2002, medical report, Dr. Washington certified that Claimant needed Soma, Ambien, and Valium to relieve his pain and suffering. On April 28, 2003, Dr. Washington certified Claimant's need for Hydrocodone and Neurontin. On September 18, 2003, Dr. Washington certified Claimant's need for Hydrocodone, Neurontin, and Bextra.

On January 6, 2004, Phillip Osborne, M.D., conducted a peer review of Claimant's treatment and concluded that none of the medications were medically necessary. On March 30, 2004, Dr. Washington again prescribed Hydrocodone, Neurontin, and Bextra for Claimant.²

¹ For reasons that are not clear, Dr. Washington referred to Claimant as a female in these materials.

² The typed date of the form is March 30, 2004. Dr. Washington's signed date is March 30, 2003.

At some point in August 2004, the Carrier notified Dr. Washington of its intention to deny further coverage for treatment of Claimant's pain. On August 23, 2004, and February 2, 2005, Dr. Washington sought reconsideration. On May 4, 2005, Dr. Washington issued another medical report in which he prescribed Hydrocodone and Neurontin for Claimant.

On May 6, 2005, Robert E. Holladay, M.D., an orthopedic surgeon, issued a report to the Carrier in which he provided his opinion that Claimant had no objective physical findings to suggest the need for further treatment, although he acknowledged that Claimant would have "ongoing, chronic pain."

On September 12, 2005, the carrier disputed the extent of Claimant's injury and contended that his medical condition as related to his lumbar and lower extremities "do not follow from or relate to the compensable . . . injury on 6-2-95." On September 22, 2005, Dr. Holladay issued an addendum report to his May 6, 2005, report, and he repeated that conclusion. On October 21, 2005, the Carrier notified Dr. Washington that it would terminate coverage for Claimant's prescription for Hydrocodone as of December 22, 2005. On November 7, 2005, Dr. Washington issued a medical report in which he disputed Dr. Holladay's findings and conclusion.

On February 17, 2006, a PRM examination was conducted by Jerry William Bane, M.D. Dr. Bane concluded that the proposed care was medically necessary for treatment of Claimant's condition: "It is my impression that both of these [medications] are necessary[,] and I would recommend continuation of them."

On July 17, 2006, Dr. Washington submitted another PRM request, and on August 28, 2006, Dr. Bane again determined that the specific care was medically necessary. However, Dr. Bane added that Claimant preferred to do without the Hydrocodone and that the medication "may become necessary in the future." On that same day, the Division issued a Medical Interlocutory Order requiring the carrier to reimburse Claimant for 120 tablets of Hydrocodone monthly over a 90 day period.

III. ANALYSIS

The issue in this proceeding was whether there was medical necessity for the prescription of Hydrocodone for Claimant as of the date of the MIO and 90 days thereafter.

Carrier presented the testimony of Samuel Bierner, M.D., board certified in physical medicine and rehabilitation. Dr. Bierner reviewed Claimant's medical file and concluded that Hydrocodone was not medically necessary for the relief of Claimant's pain. As part of that conclusion, he reviewed the medication's potential risks (including male sexual dysfunction and opioid hypersensitivity) and questioned whether Claimant's lumbar pain was the result of his _____, injury.

Under the Division's rules, the PRME physician could have been directed to render an opinion on the issue of whether the compensable injury was a "producing cause of the current medical condition that is the subject of the proposed care."³ However, that was not the issue on which the PRME issued his decision, nor is it the issue to be decided in this proceeding.

Dr. Bierner's testimony addressed both questions, medical necessity and causation. Although they are interrelated issues, they may be considered separately.

The evidence is that Claimant sustained a severe injury eleven years before the issuance of the MIO. During those eleven years, Claimant had two surgical procedures that were designed to relieve his pain. Despite those surgical procedures, Claimant continued to suffer severe pain in his cervical spine and shoulder. He developed problems using his left arm, and his physicians noted that his upper muscular extremities were beginning to atrophy. Claimant was diagnosed as having stenosis and other mild degenerative conditions of later life. In this proceeding, counsel argued the issue of whether Claimant's lower back problems were related to his initial injury, were the product

³ 28 TAC § 134.650(e)(1)(D)(ii).

of his cervical and shoulder problems, and were simply the product of aging. However, whether Claimant's lumbar pain was related to his injury, there was ample evidence that Claimant had ongoing, substantial pain from his non-lumbar conditions.

Additionally, nothing in the evidence reflected Claimant's abuse of his medication, and little in the evidence reflected anything more than Claimant's temporary pain relief without opioid medication.

Claimant's medical records from the multiple physicians reflected his cooperation in their attempts to use other approaches in controlling his pain. These included psychological counseling, work conditioning/hardening, massage, home exercise, and over-the-counter medications. These did little to help and nothing to resolve Claimant's condition. In the end, his treating physicians concluded that his pain was chronic and that maintenance levels of pain medication were the best approach to his care.

The physicians who recommended that Claimant's course of medical treatment continue included at least Dr. Washington, Dr. Kern, Dr. Drummond and Dr. Bane. Although Dr. Bierner raised important and relevant medical facts about Claimant's medical file, that opinion testimony was not a substitute for the opinions of the many physicians who provided treatment.

The Carrier did not carry its burden of proof.⁴ The preponderance of the evidence was that Claimant needed relief from his work-related injuries and that Hydrocodone was medically necessary at least for the period of time relevant to the MIO.

IV. FINDINGS OF FACT

⁴ TEX. LAB. CODE ANN. §§ 413.055, 28 TAC § 148.14(a).

1. On August 28, 2006, the Texas Department of Insurance, Division of Workers' Compensation (Division), issued Medical Interlocutory Orders requiring Continental Casualty Company (Carrier) to reimburse for medications provided by Co-Respondent Ronald Washington, M.D., to Claimant ____.
2. Carrier filed timely requests for hearings.
3. Notices of the hearing were sent November 29, 2006, and May 10, 2007.
4. The notices contained statements of the time, place, and nature of the hearing; statements of the legal authority and jurisdiction under which the hearing was to be held; references to the particular sections of the statutes and rules involved; and short, plain statements of the matters asserted.
5. The hearing was convened August 13, 2007, at the offices of the State Office of Administrative Hearings.
6. Carrier and the Division were represented by counsel, who appeared in person. Dr. Washington did not make an appearance.
7. The hearing was adjourned the same day.
8. Claimant suffered a work-related injury on _____, when he fell from a flight of stairs and injured his spine, shoulder, and neck.
9. Claimant suffered severe pain in his shoulder and back.
10. On March 4, 1996, Claimant had a surgical procedure for decompression of an impingement of his left shoulder.
11. On September 17, 1996, Claimant had an anterior cervical discectomy and fusion.
12. Claimant continued to suffer pain in his spine, shoulder, and neck.
13. In June and July 1997, Claimant went through a program of work conditioning, during which he continued to have pain in his neck, shoulder, and lower back.
14. In August and September 1997, Claimant went through a program of work hardening, during which his pain continued.
15. In October 1997, Claimant began to report difficulty in swallowing.
16. In 1998, Claimant was taking Vicodin, Flexeril, and Motrin to control his pain.

17. Over the years, Claimant unsuccessfully tried to relieve his pain through massage, home exercise, and physical therapy.
18. On February 22, 2002, Claimant was assessed by his treating physician as totally disabled with no possibility of improvement and as unable to return to work
19. On April 1, 2002, Dr. Washington began his treatment of Claimant, finding in his initial examination that Claimant had severe neck and shoulder pain, had lost power in his left arm, and reduced range of motion in his lumbar spine.
20. On May 28, 2002, Jack A. Kern, M.D., evaluated Claimant's medical records for the carrier, concluding that Claimant would need ongoing visits with the treating doctor, periodic refills of a generic anti-inflammatory medication, and either a generic non-addicting pain medication or an opioid-based medication.
21. From 2002 to 2004, Dr. Washington continued to examine Claimant and to prescribe opioid-based medications to control his pain.
22. On January 6, 2004, Phillip Osborne, M.D., conducted a peer review of Claimant's treatment and concluded that none of the medications were medically necessary.
23. On May 6, 2005, Robert E. Holladay, M.D., an orthopedic surgeon, issued a report to the carrier in which he provided his opinion that Claimant had no objective physical findings to suggest the need for further treatment, although he acknowledged that Claimant would have "ongoing, chronic pain."
24. In response to a request from Dr. Washington, on February 17, 2006, a Prospective Review of Medical Care (PRM) examination was conducted by Jerry William Bane, M.D.
25. Dr. Bane concluded that the proposed care was medically necessary for treatment of Claimant's condition: "It is my impression that both of these [medications] are necessary[,] and I would recommend continuation of them."
26. On July 17, 2006, Dr. Washington submitted a PRM request, and on August 28, 2006, Dr. Bane again determined that the specific care was medically necessary.
27. On August 28, 2005, the Division issued a Medical Interlocutory Order (MIO) requiring the carrier to reimburse Claimant for 120 tablets of Hydrocodone monthly over a 90 day period.
28. At the time of the issuance of the MIO, Claimant continued to suffer from chronic pain related to the _____ compensable injury.
29. The medications prescribed by Dr. Washington helped to relieve the pain related to 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 28 TEX. ADMIN. CODE (TAC) § 134.650(h), TEX. LAB. CODE ANN. §§ 402.73(b) and 413.055(c), 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. § 2001.052.
3. Carrier has the burden of proof in this proceeding. TEX. LAB. CODE ANN. § 413.055, 28 TAC § 148.14(a).
4. Carrier did not meet its burden of proving the medications were not medically necessary.
5. Carrier is not due reimbursement for payments provided for the medications at issue.

ORDER

IT IS THEREFORE, ORDERED that Continental Casualty Company shall not be authorized to request reimbursement for payments made for the medications and other medical services at issue in this case.

SIGNED September 11, 2007.

**PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**