MEDICAL CONTESTED CASE HEARING NO. 09046
M6-08-15358-01

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A contested case hearing was held on November 5, 2008, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that implantation of an intra-thecal pain pump is not reasonably required health care for the compensable injury of _____?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by SH, ombudsman. Respondent/Carrier appeared and was represented by DP, attorney.

BACKGROUND INFORMATION

Claimant/Petitioner sustained a low back injury while employed as a security guard by (Employer). He has undergone spinal surgery, has had a spinal cord stimulator implanted, and is on narcotic medications for the compensable injury. His treating doctor has requested preauthorization for a trial and permanent implantation of an intra-thecal pain pump to replace some or all of the oral medications taken for pain relief and to circumvent potential damage to Claimant/Petitioner's liver and kidneys from the long term use of narcotic pain medications. Carrier/Respondent denied the request, the reviewing physician also denied the request, and Claimant/Petitioner appealed the denial to the Texas Department of Insurance who appointed (Independent Review Organization). as the Independent Review Organization (IRO). In an opinion dated August 21, 2008, the IRO upheld the denial of the request, stating that Claimant/Petitioner's status appeared to be controlled with the spinal cord stimulator and oral medications and there was insufficient evidence to warrant the addition of an intra-thecal pump to the spinal cord stimulator and oral medications. The IRO reviewer, a D.O. with Physical Medicine and Rehabilitation and Pain Management board certifications, based his opinion on his medical judgment, clinical experience and expertise in accordance with accepted medical standards and the Official Disability Guidelines (ODG). Dr. EG, MD of (Health Care Provider), Claimant/Petitioner's treating doctor and the doctor who requested the intra-thecal pump, authored a letter, dated August 26, 2008, to express his disagreement with the IRO decision and to appeal that decision. The appeal was received by the Division on August 29, 2008.

In a July 29, 2008, letter, Dr. EG wrote that Claimant/Petitioner's spinal cord stimulator doesn't completely relieve his leg pain and the oral medications that he takes have limitations since long-term use "can damage the liver and other organs, where as intra-thecal administration bypasses these organs for the most part with little systemic absorption." Dr. EG also stated that Claimant/Petitioner's oral medications were no longer working well for him. He went on to state

that although a trial of intra-thecal medication could be done with a bolus and 24-hour observation, he believed that information from such a trial would be inadequate.

On August 26, 2008, Dr. EG disagreed with the IRO reviewing physician's statement that Claimant/Petitioner's pain appeared to be controlled by the spinal cord stimulator and oral medications. He expressed surprise that the IRO reviewing physician did not mention any documentation beyond December 12, 2007, and noted that he had seen Claimant/Petitioner three times since then. He stated that Claimant/Petitioner's oral medications, taken for pain not relieved by the spinal cord stimulator, were "becoming more and more ineffective." In another letter, dated October 28, 2008, Dr. EG stated that the intra-thecal pain pump would be an end-stage treatment for the chronic intractable pain. He stated that he anticipated Claimant/Petitioner's pain relief would be at least 50%-70%, although that data would be unavailable until after the trial.

Claimant/Petitioner offered chart notes from Dr. EG into evidence. A chart note of February 26, 2008, stated that he was "doing about the same." A chart note dated May 22, 2008, stated that Claimant/Petitioner felt "pretty good" that week and a third chart note from August 21, 2008, indicated that Claimant/Petitioner was not feeling good that day and complained of pain from his back to his feet with pain and/or numbness in the right heel. Claimant/Petitioner's reported pain levels at each of the foregoing visits was a 5 or 6 out of 10.

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 (Texas Labor Code §408.021). "Health care reasonably required" is defined as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence based medicine or, if evidence based medicine is not available, generally accepted standards of medical practice recognized in the medical community (Texas Labor Code §401.011(22-a)). "Evidence based medicine" means the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines (Texas Labor Code §401.011 (18-a)). Health care providers are directed to provide treatment in accordance with the current edition of the ODG and such treatment is presumed to be reasonably required. (28 Tex. Admin. Code § 137.100 (Rule 137.100).

Use of an intra-thecal pain pump is addressed in the ODG under the heading of "Implantable drug-delivery systems (IDDSs)". In the treatment recommendations for the lumbar spine, the ODG states that an IDDS is recommended only as an end-stage treatment alternative in selected cases of chronic intractable pain and refers the reader to the pain chapter for indications for the treatment. It further states that an IDDS should only be used relatively late in the treatment continuum, when there is little hope for effective management of chronic intractable pain from other therapies and, for most patients, should be used as part of a program to facilitate restoration of function and return to activity, not just for pain reduction. The specific criteria in these cases for use of an IDDS includes the failure of at least 6 months of other conservative treatment modalities, intractable pain secondary to a disease state with objective documentation of pathology, further surgical intervention is not indicated, psychological evaluation unequivocally states that the pain is not psychological in origin, and a temporary trial has been successful prior to permanent implantation as defined by a 50-70% reduction in pain. The pain chapter of the ODG states that trial use of an IDDS should be considered only if the following criteria are met:

1. Documentation, in the medical record, of the failure of 6 months of other conservative treatment modalities (pharmacologic, injection, surgical, psychologic or physical), if appropriate and not contraindicated; and
2. Intractable pain secondary to a disease state with objective documentation of pathology in the medical record (per symptoms, exam and diagnostic testing); and
3. Further surgical intervention or other treatment is not indicated or likely to be effective; and
4. Psychological evaluation has been obtained and evaluation states that the pain is not primarily psychologic in origin, the patient has realistic expectations and that benefit would occur with implantation despite any psychiatric comorbidity; and
5. No contraindication to implantation exist such as sepsis, spinal infection, anticoagulation or coagulopathy.

Claimant/Petitioner's mental status has been evaluated by Dr. AS, PhD and by Dr. AB, MD. Dr. AS stated that he was psychologically cleared for the intra-thecal implant, but did not discuss whether Claimant/Petitioner had realistic expectations for the IDDS of if he would benefit from the IDDS despite any psychiatric comorbidity. Dr. AB stated that, despite Dr. AS's statement that his depression was in remission, Claimant/Petitioner was severely depressed and that objective psychiatric measures were consistent with significant psychopathology. Dr. AB stated that "[f]indings are inconsistent with claimant being a good candidate for any type of interventional procedures" and objective psychiatric measures indicated an undifferentiated somatoform disorder, a relative contraindication to interventional procedures. He concluded that the intra-thecal pump was neither reasonable nor necessary.

In determining the weight to be given to expert testimony, a trier of fact must first determine if the expert is qualified to offer it. The trier of fact must then determine whether the opinion is relevant to the issues at bar and whether it is based upon a solid foundation. An expert's bald assurance of validity is not enough. *See* Black vs. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999); E.I. Du Pont De Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). Evidence is considered in terms of (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; and (7) the experience and skill of the person who applied the technique on the occasion in question. Kelly v. State, 792 S.W.2d 579 (Tex.App.-Fort Worth 1990). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. Black v. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999).

In light of the totality of the evidence, Claimant/Petitioner has failed to prove that the preponderance of the medical evidence is contrary to the IRO determination that other conservative treatment modalities have failed for a period of six months and has failed to provide a psychological evaluation that states that he has realistic expectations of the treatment's results and would benefit from the implantation despite any psychiatric comorbidity. On the contrary, Dr. AB appears to be of the opinion that Claimant/Petitioner's severe depression and somatoform disorder argue against the likelihood of a positive result from the requested procedure. Dr. EG's belief that the continued use of oral medications will ultimately result in organ damage and that a three-day IDDS trial is necessary to determine whether Claimant/Petitioner's chronic pain will

respond to the use of an IDDS does not outweigh the contraindications to the procedure at this time.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   A. Venue is proper in the (City) Satellite Office of the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

   B. Claimant/Petitioner sustained a compensable injury on _____, while an employee of the employer.

   C. Claimant/Petitioner requested pre-authorization for the implantation of an intra-thecal pain pump.

   D. The request for pre-authorization was denied by Carrier/Respondent and Carrier/Respondent's denial of the request was upheld by (Independent Review Organization), the Independent Review Organization selected by the Texas Department of Insurance.

2. Carrier/Respondent delivered to Claimant/Petitioner a single document stating the true corporate name of Carrier/Respondent, and the name and street address of its registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.

3. The medical record does not document a failure of 6 months of other conservative treatment modalities for the treatment of Claimant/Petitioner's chronic pain.

4. A psychological evaluation has not been obtained that states that Claimant/Petitioner's pain is not primarily psychologic in origin and that he has realistic expectations of the outcome of the treatment and would benefit from the implantation despite existing psychiatric comorbidities.

4. Implantation of an intra-thecal pain pump is not reasonably required medical treatment for the compensable injury of _____.

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.

2. Venue is proper in the (City) Field Office.

3. The preponderance of the evidence is not contrary to the decision of IRO that implantation of an intra-thecal pain pump is not reasonably required medical care for the compensable injury of _____.

DECISION

Implantation of an intra-thecal pain pump is not reasonably required medical care for the compensable injury of _____.

ORDER

Carrier/Respondent is not liable for the benefits at issue in this hearing. Claimant/Petitioner remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the insurance carrier is **WESTPORT INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 N. ST. PAUL STREET
DALLAS, TX 75201.

Signed this 6th day of November, 2008.

KENNETH A. HUCHTON
Hearing Officer