

MEDICAL CONTESTED CASE HEARING NO. 18000

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. For the reasons discussed herein, the Administrative Law Judge determines that Petitioner / Claimant is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury).

STATEMENT OF THE CASE

A medical contested case hearing was held on December 28, 2017, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner / Claimant appeared and was assisted by SB, ombudsman. Respondent / Carrier appeared and was represented by CA, attorney. Employer appeared by and through RH and RP.

EVIDENCE PRESENTED

The following witnesses testified:

For Petitioner / Claimant: None.

For Carrier / Respondent: None.

The following exhibits were admitted into evidence:

Administrative Law Judge's Exhibits ALJ-1 through ALJ-3.

Petitioner / Claimant's Exhibits C-1 through C-7.

Carrier / Respondent's Exhibits CR-A through CR-E.

DISCUSSION

On (Date of Injury), Petitioner / Claimant worked for the employer, (Employer), and sustained an injury to his lower back and right hip. He received medical treatment for his injury and has

been seen by AB, M.D., on several occasions, including for injections to his lower back. Dr. B recommended and requested lumbar surgery in the form of a microdiscectomy at the L4-L5 and L5-S1 levels. Such request underwent utilization review and was denied on May 9, 2017 by KF, M.D., an orthopedic surgeon. Reconsideration was requested and such reconsideration was denied on May 31, 2017 by GW, M.D., a neurological surgeon. Petitioner / Claimant then appealed the denials to an IRO and the IRO reviewer, an orthopedic surgeon, upheld the previous adverse determinations. Consequently, Petitioner / Claimant appealed the IRO decision and this is the reason for the present discussion and decision.

Medical Necessity

An injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. TEX. LAB. CODE §408.021(a). "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, then generally accepted standards of medical practice recognized in the medical community. TEX. LAB. CODE §401.011(22a). Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. "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. TEX. LAB. CODE §401.011(18a). The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. TEX. LAB. CODE §413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with the Texas Labor Code. TEX. LAB. CODE §413.017(1).

In accordance with the above statutory guidance, the Division has adopted treatment guidelines by rule. 28 TEX. ADMIN. CODE §137.100 (Division Rule 137.100). This Rule directs health care providers to provide treatment in accordance with the current edition of the *Official Disability Guidelines* (hereinafter "ODG") and that such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG.

Some of the pertinent provisions of the ODG applicable to this case are as follows, to wit:

Discectomy / laminectomy:

Recommended for indications below.

ODG Indications for Surgery™ -- Discectomy/laminectomy --

Required symptoms/findings; imaging studies; and conservative treatments below:

- I. Symptoms/Findings which confirm presence of radiculopathy. Objective findings on examination need to be present. Straight leg raising test, crossed straight leg raising and reflex exams should correlate with symptoms and imaging.

Findings require ONE of the following:

- A. L3 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral quadriceps weakness/mild atrophy
 - 2. Mild-to-moderate unilateral quadriceps weakness
 - 3. Unilateral hip/thigh/knee pain
- B. L4 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral quadriceps/anterior tibialis weakness/mild atrophy
 - 2. Mild-to-moderate unilateral quadriceps/anterior tibialis weakness
 - 3. Unilateral hip/thigh/knee/medial pain
- C. L5 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral foot/toe/dorsiflexor weakness/mild atrophy
 - 2. Mild-to-moderate foot/toe/dorsiflexor weakness
 - 3. Unilateral hip/lateral thigh/knee pain
- D. S1 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral foot/toe/plantar flexor/hamstring weakness/atrophy
 - 2. Moderate unilateral foot/toe/plantar flexor/hamstring weakness
 - 3. Unilateral buttock/posterior thigh/calf pain

(EMGs are optional to obtain unequivocal evidence of radiculopathy but not necessary if radiculopathy is already clinically obvious.)

- II. Imaging Studies, requiring ONE of the following, for concordance between radicular findings on radiologic evaluation and physical exam findings:
- A. Nerve root compression (L3, L4, L5, or S1)
 - B. Lateral disc rupture
 - C. Lateral recess stenosis

Diagnostic imaging modalities, requiring ONE of the following:

- 1. MR imaging
- 2. CT scanning
- 3. Myelography
- 4. CT myelography and X-Ray

III. Conservative Treatments, requiring ALL of the following:

- A. Activity modification (not bed rest) after patient education (\geq 2 months)
- B. Drug therapy, requiring at least ONE of the following:

1. NSAID drug therapy
 2. Other analgesic therapy
 3. Muscle relaxants
 4. Epidural Steroid Injection (ESI)
- C. Support provider referral, requiring at least ONE of the following (in order of priority):
1. Physical therapy (teach home exercise/stretching)
 2. Manual therapy (chiropractor or massage therapist)
 3. Psychological screening that could affect surgical outcome
 4. Back school (*Fisher, 2004*)

For average hospital LOS after criteria are met, see Hospital length of stay (LOS).

In the instant case, the utilization review doctors (i.e., Dr. F and Dr. W) denied the requested treatment and the IRO reviewer upheld the denial of the requested treatment. The IRO reviewer, who is an orthopedic surgeon, reviewed Petitioner / Claimant's records and opined that the proposed treatment was not indicated as medically necessary based on the clinical data provided and the ODG. The IRO reviewer noted that the records lacked corroborating physical examination findings for the requested treatment and that the ODG criteria had not been met. Thereafter, the IRO reviewer cited the ODG, in upholding the denials of the requested treatment.

When weighing expert testimony, the administrative law judge must first determine whether the doctor rendering an expert opinion is qualified to offer such. In addition, the administrative law judge must determine whether the opinion is relevant to the issues at bar and whether it is based upon a reliable foundation. An expert's bald assurance of validity is not enough. *See Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *E.I. Du Pont De Nemours and Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. *See Black*, 171 F.3d 308. In determining reliability of the evidence, the administrative law judge must consider the evidence 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; (6) the clarity with which the theory or technique can be explained to the trial court; 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) *aff'd*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Additionally, "[a] decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal." *See* Division Rule 133.308 (s). "In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence." *Id.* Evidence-based medical evidence entails the opinion of a qualified expert that is supported by evidence-based medicine, if evidence-based medicine exists.

Accordingly, Petitioner / Claimant, as the party appealing the IRO decision, had the burden of overcoming the IRO decision by a preponderance of evidence-based medical evidence. Although Petitioner / Claimant presented documentary evidence, including his medical records, there was little explanation through the use of evidence-based medical evidence as to how Petitioner / Claimant met the requirements of the ODG for the requested treatment. Petitioner / Claimant also did not establish the necessity of the requested treatment at issue through other evidence-based medical evidence outside of the ODG. As such, evidence-based medical evidence explaining that the requested treatment was medically reasonable and necessary was lacking in this case. Therefore, the preponderance of the evidence is not contrary to the decision of the IRO that Petitioner / Claimant is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury).

The Administrative Law Judge considered all of the evidence admitted. The Findings of Fact and Conclusions of Law are based on an assessment of all of the evidence whether or not the evidence is specifically discussed in this Decision and Order.

FINDINGS OF FACT

1. The parties stipulated to the following facts:
 - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - B. On (Date of Injury), Petitioner / Claimant was an employee of (Employer), the employer.
 - C. On (Date of Injury), employer provided workers' compensation insurance as a self-insurer.
 - D. On (Date of Injury), Petitioner / Claimant sustained a compensable injury in the form of a lumbar sprain/strain, a lumbar disc HNP at L4-L5, a lumbar disc HNP at L5-S1, and a right hip sprain/strain.
 - E. The IRO determined that Petitioner / Claimant is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury).
2. Respondent / Carrier delivered to Petitioner / Claimant a single document stating the true corporate name of Respondent / Carrier, and the name and street address of Respondent / Carrier's registered agent, which document was admitted into evidence as Administrative Law Judge's Exhibit Number 2.
3. Petitioner / Claimant did not present sufficient evidence-based medical evidence to overcome the decision of the IRO that he is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury).

4. Outpatient lumbar L4-L5, L5-S1 right side microdiscectomy is not health care reasonably required for the compensable injury of (Date of Injury).

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 the IRO that Petitioner / Claimant is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury).

DECISION

Petitioner / Claimant is not entitled to outpatient lumbar L4-L5, L5-S1 right side microdiscectomy for the compensable injury of (Date of Injury).

ORDER

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

The true corporate name of the Respondent / insurance carrier is **(EMPLOYER) (SELF-INSURED)**, and the name and address of its registered agent for service of process is:

(NAME)
(ADDRESS)
(CITY), TX (ZIPCODE)

Signed this 4th day of January 2018.

Julio Gomez, Jr.
Administrative Law Judge