

STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Ste. 502
Austin, TX 78701

DOCKET NO. 453-02-3527.M5
[MDR TRACKING NO. M5-02-1952-01]

OXYMED INC., PETITIONER	‘	BEFORE THE STATE OFFICE
	‘	
V.	‘	
	‘	OF
TEXAS WORKERS’ COMPENSATION	‘	
COMMISSION AND HARTFORD	‘	
INSURANCE GROUP, RESPONDENTS	‘	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Oxymed, Inc. (Petitioner) appealed the findings and decision of the Texas Workers’ Compensation Commission’s designee, an independent review organization (IRO), which found that a galvanic stimulator that Petitioner had provided a workers’ compensation claimant (Claimant), pursuant to a prescription by Claimant’s treating doctor, was not medically necessary healthcare. This decision and order finds the galvanic stimulator was not medically necessary healthcare for Claimant when prescribed.

I. Notice, Jurisdiction, and Procedural History

There were no contested issues of notice or jurisdiction. Therefore, those matters are set forth only in the Findings of Fact and Conclusions of Law without further discussion.

On January 9, 2003, the hearing in this matter convened at the State Office Of Administrative Hearings (SOAH), 300 W. 15th Street, 4th Floor, Austin, Texas, before SOAH Administrative Law Judge (ALJ) Ann Landeros. Attorney Peter Rogers appeared for Petitioner. Respondent Hartford Insurance Group (Carrier) was represented by attorney LeeAnna G. Mask. Respondent Commission chose not to participate in the hearing. After receipt of evidence and argument, the record closed that date.

II. Discussion

A. Background

Claimant sustained a compensable injury in _____. In January 2000, she underwent a cervical fusion for that injury. Although she returned to work the following month, she continued to have pain in her back and arms. In July 2001, her treating doctor examined Claimant and noted she complained of tingling in her hands with some numbness in her arms. He found her to be “status post-operative” for her cervical fusion, with normal CT myelogram and normal EMG. (Pet. Exh. 1, p. 9). He prescribed a cervical pillow and moist heating pad for her pain, along with a galvanic stimulator. Petitioner provided Claimant a pulse galvanic stimulator (PGS), which is a type of TENS unit. Petitioner’s literature described the PGS as:

New Wave’s-Smart Wave Galvanic Stimulator is truly the next generation of stimulators . . . Most TENS units are biphasic, delivering energy in millicurrents and are designed to stimulate the peripheral nervous system. Typically, TENS ramp in 100 microseconds, which does not permit the wave form to go deep into the tissue

beds of the human body. The Smart-Wave monophasic twin peak wave form ramps in 4-5 microseconds, allowing it to rapidly overcome the skin capacitance in order to penetrate deeply into tissue beds. . . . (Pet. Exh. p.5).

Petitioner billed Carrier for the three items of durable medical equipment (DME) provided Claimant. The bill for the PGS was \$475. After Carrier denied reimbursement for all items of DME billed, Petitioner appealed the denial to the Commission, which referred the appeal to an IRO. The IRO found the pillow and moist heating pad were medically necessary but that the PGS was not. (Carrier Exh. 1). The IRO reviewer stated:

. . . I am in agreement that the pulsed galvanic stimulator will be of low utility. The documentation provided by Oxy-Med themselves states that this device is used more for “acute stage of rehabilitation,” and it is certainly my understanding that this type of device is more beneficial in reducing acute swelling and inflammation from acute injuries. (Carrier Exh. 1).

Petitioner timely appealed the IRO decision.

B. Legal Standards

Petitioner has the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC 155.41. Pursuant to the Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. §408.021(a). Health care includes all reasonable and necessary medical services including a medical appliance or supply. TEX. LAB. CODE ANN. '401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN. § 401.011(31). The IRO was authorized to hear the medical dispute pursuant to 28 TAC §133.308.

C. Medical Necessity Not Established

1. Evidence

The issue in this case is whether the PGS was medically necessary healthcare for Claimant when prescribed at the end of July 2001. At that time, Claimant was twenty-one months post-cervical fusion. In the statement of medical necessity it provided the IRO, Petitioner claimed:

This patient is in an *acute state of rehabilitation* and has been prescribed a pulse galvanic stimulator to promote muscle relaxation, muscle-reeducation and reduction in pain. Pulse galvanic stimulation is a non-narcotic, non-invasive method of treating pain and muscle spasms associated with spinal muscle atrophy, disuse atrophy and muscle strain/sprain. This method of treatment has won worldwide acclaim in its ability to specifically address *acute inflammation* and *chronic edema* through normalization of tissue physiology. The same circulatory benefits that can be gained from an appropriate exercise program can, in the *very early stages of post injury rehabilitation and/or postoperative rehabilitation*, be achieved with high

voltage electrical stimulation without the adverse effects of movement, stress, tension, and torsion which are associated with exercise. (Emphasis added.) (Pet. Exh. 1, p. 3).

Petitioner did not present any testimony at the hearing, but relied on the documents admitted as Petitioner's Exhibit 1. Carrier presented documentary exhibits and the testimony of its expert, Dr. Thomas Padgett. Dr. Padgett is a board certified neurologist, who became a utilization reviewer for Forte after practicing orthopedic medicine for twenty-two years.

Dr. Padgett found that the PGS prescribed Claimant was not medically reasonable or necessary to cure or relieve the naturally occurring effects of Claimant's compensable injury for the reason that TENS units have not been shown to be effective outside the acute phase of injury or more than six months after surgery. As she was several years post-injury and twenty-one months post-surgery when the PGS was prescribed, Claimant was not shown to be in an acute phase of injury or recovery. Although his original impression was that the cervical fusion was successful, Dr. Padgett's opinion did not change upon learning that the fusion failed to produce the intended "union." Non-union of a fusion usually results in low-level chronic pain for which a PGS would not be beneficial.

2. Analysis

Petitioner failed to meet its burden of proof to show by a preponderance of the evidence that the galvanic stimulator was medically necessary healthcare for Claimant. Claimant's literature emphasized that the PGS is useful to treat *acute inflammation* and *chronic edema* and in the *acute* phase of injury, either as a substitute for exercise or an adjunct to other rehabilitative therapy. Both the IRO reviewer and Dr. Padgett found that the PGS is not useful outside the acute phase of treatment. There was nothing in the record to indicate that at the time the PGS was prescribed, Claimant was in an acute phase of either injury or rehabilitation. As used in Petitioner's literature for the PGS and by the experts in this matter, "acute" contemplates intense pain or pain accompanying a recent injury or surgery.

Claimant was almost two years post surgery when her doctor prescribed the PGS. At that time, the treating doctor noted her symptoms as intermittent tingling and numbness, not as acute pain or inflammation, or chronic edema. There was no indication that she was undergoing rehabilitative therapy at that time. Based on the evidence presented in this matter, the ALJ cannot conclude that a PGS was medically necessary healthcare for Claimant when prescribed to her in July 2001.

Petitioner also argued that it was entitled to rely on the treating doctor's prescription. Petitioner implied that as the medical "gatekeeper" in the Workers' Compensation system, the treating physician may be presumed to have fulfilled his duty to prescribe only DME that is medically necessary. The ALJ cannot agree that such a presumption, if it exists, could reasonably have been relied upon in this case. There was nothing in the record establishing that treating doctor found the PGS to be medically necessary. Absent such a threshold showing, there is no reason to presume that Petitioner relied upon or was misled by such a representation by Claimant's treating physician.

Petitioner's claim for reimbursement for the PGS provided Claimant should be denied because the galvanic stimulator provided Claimant was not medically necessary healthcare.

III. Findings of Fact

1. In _____, Claimant sustained an injury compensable under the Texas Workers' Compensation Act (Act).
2. At the time of her compensable injury, Claimant's employer had workers' compensation insurance coverage with Hartford Insurance Group (Carrier).
3. In January 2000, Claimant underwent a cervical fusion to treat her compensable injury
4. In July 2001, Claimant's treating physician found she complained of intermittent tingling in her fingers and numbness in her arms and that she was status post-surgery.
5. On July 30, 2001, Claimant's treating physician prescribed a pulse galvanic stimulator (PGS) to treat her upper body pain.
6. Oxymed, Inc. (Petitioner) provided Claimant with the PGS in August 2001.
7. A PGS is a type of TENS unit.
8. A PGS is used to stimulate the muscles to simulate the effects of exercise or enhance the benefits of rehabilitative therapy.
9. The beneficial effect of a PGS is limited to the acute phase of injury, the acute phase of rehabilitation, or the first six-months after surgery.
10. When her treating doctor prescribed the PGS, Claimant was not in an acute phase of injury, and was more than six-months post-surgery.
11. There was no evidence that Claimant was undergoing rehabilitative therapy or that she had acute inflammation or chronic edema at the time the PGS prescribed.
12. An acute phase is one immediately following the trauma from injury or surgery

IV. Conclusions of Law

13. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LABOR CODE ANN. § 413.031.
14. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to ' 413.031(d) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
15. The IRO was authorized to hear the medical dispute pursuant to 28 TAC § 133.308.
16. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX.ADMIN.CODE (TAC) § 133.308(u).

17. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
18. Petitioner has the burden of proof in this proceeding. 28 TAC § 148.21(h) and (i); 1 TAC 155.41.
19. Pursuant to the Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).
20. The PGS provided by Petitioner was not medically necessary healthcare for Claimant.

ORDER

It is ORDERED that Hartford Insurance Group is not liable to reimburse Oxymed, Inc. for the galvanic stimulator provided to Claimant because the device was not medically necessary healthcare.

SIGNED this 27th day of January, 2003.

**ANN LANDEROS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**