

**SOAH DOCKET NO. 453-04-0075.M2
TWCC NO. M2-03-1104-01**

RS MEDICAL,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
CONTINENTAL CASUALTY	§	
COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

RS Medical (Provider) challenged the decision of Continental Casualty Company (Carrier) denying preauthorization for an inferential muscle stimulator, model RS4I (RS4I), for an injured worker, (Claimant). In this decision, the Administrative Law Judge (ALJ) finds that Provider did not meet its burden of showing that the requested equipment is reasonable and necessary medical care and should be preauthorized. Therefore, the ALJ does not order preauthorization of the requested muscle stimulator.

The hearing convened and closed on February 3, 2004, before ALJ Steven M. Rivas. Provider appeared and was represented by Patrick K. Cougill, an employee of Provider and an attorney not licensed in Texas. Carrier appeared and was represented by Jane L. Stone, attorney.

I. DISCUSSION

1. Background Facts

Claimant sustained a compensable back injury on _____. After her injury, Claimant underwent physical therapy and was prescribed medication to treat her injury. In October 2002, Claimant was prescribed an RS4I and started using it without preauthorization. Claimant reported good results after using the RS4I and, subsequently, Provider requested preauthorization for Claimant to continue using the RS4I, which Carrier denied as not medically necessary. The dispute was referred to an Independent Review Organization (IRO), which agreed with Carrier. Provider appealed the IRO decision to the State Office of Administrative Hearings.

2. Applicable Law

Pursuant to the Texas Workers' Compensation Act ("the Act"), TEX. LAB. CODE ANN. § 408.021 *et seq.*, an employee who sustains a compensable injury is entitled to all 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.

Under TEX. LAB. CODE ANN. § 401.011(19), health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.

Certain categories of health care identified by the Commission require preauthorization, which is dependant upon a prospective showing of medical necessity under § 413.014 of the Act and 28 TEX. ADMIN. CODE (TAC) § 134.600. In this instance, under 28 TAC § 134.600(h) (11) preauthorization is required for the inferential muscle stimulator requested by Provider.

3. Evidence and Analysis

Mark D. Barhorst, M.D., testified on behalf of Provider that although he did not treat Claimant in this matter, he often prescribes the RS4I to his patients in order to treat back spasms. Dr. Barhorst testified he prescribes the RS4I to his patients because it has a "profound" effect on treating back spasms as opposed to other modalities like a TENS unit. Despite the success rate of Dr. Barhorst's patients that use the RS4I, he admitted he was "bothered" by the fact that no studies or literature supported the use of this device to treat back injuries or spasms.

Carrier presented Leonard Hershowitz, M.D., who testified he has never prescribed the RS4I for any of his patients. Dr. Hershowitz further stated no literature or objective findings exist that establish the efficacy of the RS4I, even though it has been around for ten years. But even discounting the absence of objective findings, Dr. Hershowitz testified the RS4I was not medically necessary to treat Claimant because Claimant should have displayed some improvement after using it since October 2002. Furthermore, Dr. Hershowitz testified Claimant should already be completely healed or at least showing signs of improvement from her _____ soft-tissue injury.

Claimant starting using the RS4I in October 2002, and Dr. Hershowitz found that Claimant's treating doctors still noted that Claimant was experiencing pain after two years with the device. Dr. Hershowitz also found that Claimant was taking medications at the same time she was using the device, and no doctor ever noted that Claimant had improved despite the medications and her use of the RS4I for two years.

The ALJ was persuaded by the evidence regarding the absence of literature on the RS4I, especially after ten years of its existence. Furthermore, the testimony that this Claimant had not improved after using the RS4I since October 2002, compels the conclusion that the device was not medically necessary. Therefore, the RS4I should not be preauthorized.

II. FINDINGS OF FACT

1. ____ (Claimant) sustained a compensable injury on ____.
2. Claimant was treated for her injury at RS Medical (Provider).
3. In October 2002, Provider prescribed an inferential muscle stimulator, model RS4I, to Claimant, which Claimant began using without preauthorization.
4. Provider prescribed continued use of the RS4I and sought preauthorization from Continental Casualty Company (Carrier), which was denied.
5. Provider sought medical dispute resolution with the Texas Workers' Compensation Commission's Medical Review Division, which referred this matter to an Independent Review Organization (IRO). The IRO report concurred with Carrier and denied preauthorization.
6. Provider timely requested a hearing before the State Office of Administrative Hearings (SOAH).
7. Notice of the hearing in this case was mailed to the parties on October 22, 2003. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
8. The hearing convened and closed on February 3, 2004, before Steven M. Rivas, Administrative Law Judge (ALJ). Provider appeared and represented himself. Carrier appeared and was represented by Steve Tipton, attorney. The hearing was adjourned and the record closed the same day.

9. Claimant underwent physical therapy after her injury.
10. Claimant has been using the RS4I since October 2002. Claimant has also been taking medications since her injury.
11. No studies or medical literature exist that supports the efficacy of the RS4I.
12. Claimant has experienced no improvement in her condition after using the RS4I sine October 2002.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* ("the Act").
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. The Provider, as Petitioner, had the burden of proof on appeal by a preponderance of the evidence under § 413.031 of the Act, and 28 TEX. ADMIN. CODE §148.21(h).
5. Provider has failed to show the RS4I will cure or relieve the effects of Claimant's compensable injury under TEX. LAB. CODE ANN. § 408.021, *et seq.*
6. The requested RS4I is not medically necessary for treating Claimant's compensable injury.

ORDER

IT IS, THEREFORE, ORDERED that preauthorization for the RS4I is denied.

SIGNED March 5, 2004.

**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**