

**SOAH DOCKET NO. 453-04-3630.M2
TWCC MR NO. M2-04-0630-01**

CITY OF GALVESTON,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
STEVEN CALLAHAN, Ph.D.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

The City of Galveston (Petitioner) appealed the decision of the Texas Workers' Compensation Commission's (Commission) designee, an independent review organization (IRO), in MR Docket No. M2-04-0630-01, which granted a request by psychologist Steven Callahan, Ph.D., (Respondent) for preauthorization of a chronic pain management (CPM) program for a workers' compensation claimant (Claimant). Petitioner's denial was based on its finding that the CPM program was not medically necessary healthcare. This decision finds Petitioner failed to prove the CPM program is not medically necessary healthcare for Claimant.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice or venue. Therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened April 19, 2004, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas, with Administrative Law Judge (ALJ) Ann Landeros presiding. The record also closed that date. Petitioner was represented by its attorney, John Fundis. Respondent represented himself. The Commission was did not participate in the hearing.

II. DISCUSSION

A. Background Facts

In ____, Claimant sustained a back injury compensable under the Texas Workers' Compensation Act (Act). At the time of the compensable injury, Petitioner, as Claimant's employer, was self-insured for workers' compensation coverage. The injury left Claimant with low back pain and a constant numbness in his right foot.

Claimant underwent chiropractic care, passive and active therapy, injections, lumbar spine surgery, and post-surgical rehabilitation. Pre-surgically, he also participated briefly in a work hardening program that he was unable to complete due to his medical condition. Multiple pre-surgical epidural steroid injections reduced his pain by only 40%. Post-surgically, his foot numbness

resolved, but his low back pain continued. Thirteen weeks of post-surgical physical medicine failed to resolve his back pain. (Res. Exh. 1, p. 7). Claimant's pain medications include Vicodin and Flexeril and he has not returned to work. (Res. Exh. 1, p. 51).

Five of Claimant's doctors¹ recommended Claimant receive treatment for his ongoing pain. All but one of the doctors specifically recommended some type of pain management instruction, either in a work hardening program or a chronic pain management program. In October 2003, Claimant's surgeon prescribed a work hardening program for him, but the consensus of the other doctors was Claimant's pain levels made it doubtful he could complete a work hardening program, so they recommended a CPM program. (Res. Exh. 1, pp. 30, 33, 40, 43, 44).

In March 2004, Dr. Pedro Lozano, D.C., (Claimant's treating physician) wrote:

The patient is showing signs of physical and emotional stress, which have been objectively quantified and documented, resulting from events surrounding this injury. . . . As his treating doctor, I feel the emotional trauma and physical limitations have caused some return-to-work barriers that require a qualified mental health provider's attention. Participation in a single disciplinary program was not sought due to probable failure because of the overlying psychosocial issues. Participation in this multidisciplinary program will address the issues concerning his safety, productivity, positional tolerances, work restrictions and mental status as detailed by TWCC and CARF-modeled standards. (Res. Exh. 1, p. 31).

In October 2003, Dr. Callahan assessed Claimant's psychological state. Using several standard psychological assessment tests, he diagnosed Claimant with a pain-related depression. Using a nationally recognized criteria for CPM admissions,² Dr. Callahan found Claimant a suitable candidate for a CPM program. (Res. Exh. 1, pp. 50-60).

After Petitioner denied his request for a CPM program for Claimant as being medically unnecessary, Dr. Callahan requested the Commission review the denial. That review produced the IRO decision, dated January 28, 2004, which preauthorized the service. Petitioner timely appealed the IRO decision.

B. IRO Decision

As a basis for the decision, the IRO reviewer wrote:

The records indicate the patient was injured on the job and has undergone intensive primary and secondary levels of care. To date no tertiary level of care has been

¹ Pedro Lozano, D.C.; Robert Levinthal, M.D.; John Banda, D.C.; Ben Tionsin, M.D.; and Steven Callahan, Ph.D.

² The criteria included: chronic pain lasting more than six months; the pain is more than psychogenic; failure of past conventional treatments; excessive dependency of others, including health care providers; psycho-pathology associated with pain; and impaired functioning or significant impairment of activities of daily living. (Res. Exh. 1, pp. 19, 22-25, 56).

performed on this patient. There is a recommendation from a neurosurgeon for this patient to undergo a work hardening program; however, the treating doctor determined that due to the patient's high pain level, he may be unable to satisfactorily complete a work hardening program.

Instead, the treating doctor recommended that the chronic pain management program would be appropriate for his condition. The National Treatment Guidelines allow for a chronic pain management program in conditions of this nature. This patient has completed primary and secondary levels of care and continues to exhibit physical and psychological conditions that may adequately respond to a chronic pain management program. There is sufficient documentation provided in the records, as well as detailed behavioral assessment, that clearly indicates this patient is a candidate for a chronic pain management program. There is nothing in the records that would prevent him from enrolling and participating in this program. In conclusion, the request for chronic pain program x15 sessions is, in fact, reasonable, usual, customary, and medically necessary for the treatment of this patient's condition.

C. Legal Standards

Petitioner has the burden of proof in this proceeding. 28 TEX. ADMIN. CODE (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). For a carrier to be liable to reimburse a provider, certain services, including CPM programs, must be preauthorized by the carrier. 28 TAC 134.600(h)

D. Petitioner's Evidence

Petitioner's expert witness, Benjamin Agana, M.D., is board-certified in physical medicine and rehabilitation. He is in private practice specializing in pain management. In his report dated October 26, 2003, Dr. Agana wrote:

At this point, the patient has already reached maximum medical improvement. He probably needs a functional capacity evaluation to determine his work restrictions, and he should be referred thusly to a productive lifestyle in the form of work, possibly to TRC [Texas Rehabilitation Commission].

I agree with the previous reviewer stating that this patient probably would not benefit from any further intervention, including pain management. He has already [been] through some psychological treatments prior to his surgery, and he should have been taught self-biofeedback and relaxation techniques, as well as an exercise program, which is what a chronic pain program would constitute any way. Therefore, no

further treatment is required at this time, except for home exercises and medication management, if any, at this time. I feel that the claimant's prognosis is probably poor because he will continue to complain of pain regardless of whatever intervention is proposed. (Pet. Exh. 2, p. 15).

Dr. Agana's testimony at the hearing reflected the opinions stated in his report. In his opinion, a CPM program is appropriate only if there is a reasonable likelihood that the patient can improve. William Maxwell, M.D., found Claimant at MMI in September 2003. Dr. Agana interpreted an MMI finding as a finding that the patient's condition is static and stable with little chance of further improvement. Because Claimant is at MMI, Dr. Agana assumed he could not benefit from a CPM program. Additionally, citing to a statement in Dr. Callahan's report, Dr. Agana found that Claimant had not benefitted from prior psychological counseling, so his prognosis in a CPM program would be poor.

Dr. Callahan's report stated:

. . . [Claimant] acknowledged having a familial history of psychological problems, stating that his father abuses alcohol and his mother was physically abused by one of [Claimant's] stepfathers. Regarding his own psychological history, [Claimant] reported that he was also physically abused by the same stepfather and that he met with a mental health professional in 1994 or 1995 to address pain complaints. These services, however, were not helpful. (Resp. Ex. 1, p. 52).

From this statement, Dr. Agana assumed that Claimant had received, but not benefitted from, all the major components of a CPM program, consisting of: (1) counseling for physical pain; (2) training in biofeedback; (3) relaxation techniques; and (4) exercise instruction.

On cross-examination, Dr. Agana admitted that Dr. Callahan used appropriate criteria to assess Claimant's suitability for the CPM and that Claimant met the entrance criteria.

Petitioner also presented the report of its expert psychiatrist Edwin Johnstone, M.D., who had not examined Claimant, but based his opinion on a review of Claimant's clinical records, including Dr. Callahan's behavioral assessment.

Dr. Johnstone wrote:

There is no strong indication of any significant level of genuine distress requiring any treatment. . . . Patient's personality pathology revealed in psychological testing is being presented as a qualification of participation in a chronic pain management program. Personality pathology is not going to be corrected by any such program. Ingrained patterns of perception and behavior would be expected to defeat the intentions of the therapists providing those services. Claims that the program could make this patient less dependent on caregivers is not credible; his course suggests that prolonged exposure to ineffective therapies promotes chronicity. (Pet. Exh. 2, p. 12).

E. Respondent's Evidence

Dr. Callahan testified at the hearing. He reiterated the reasons for referring Claimant to the CPM that are set out in Section A above.

F. Analysis

Petitioner failed to establish by a preponderance of the evidence that a CPM is not reasonable and medically necessary healthcare for Claimant. Dr. Agana admitted that Dr. Callahan assessed Claimant's need for a CPM program using standard and appropriate criteria. The overwhelming evidence established that Claimant met all the criteria for admission, including long-term pain, failure of past treatments, excessive, dependency on others, impairment of daily living functions, and depression associated with chronic pain.

Dr. Agana's opinion that Claimant did not need a CPM program was based on one statement in Dr. Callahan's assessment that indicated Claimant had not benefitted from past counseling "for pain." This vague reference did not establish that Claimant would not benefit from counseling in a CPM program. Read in context, there is no reason to presume the reference was to counseling for depression emanating from chronic physical pain. Based on that reference, Dr. Agana's assumption that Claimant had previously received or failed to benefit from counseling for physical pain, biofeedback, or relaxation techniques was unfounded.

Dr. Agana's opinion also was unduly influenced by the MMI finding, which he found to automatically invalidate any request for care other than to maintain a claimant's status quo. MMI is not a finding that automatically renders any type of care unreasonable or medically unnecessary. The record did not support Dr. Agana's conclusion that Claimant will not benefit from a CPM program.

Dr. Johnstone's opinion was unsupported by Claimant's medical records. Having never examined Claimant, Dr. Johnstone claimed to discovered "psychopathologies" in Claimant's makeup that rendered his failure in the CPM program a "virtual certainty." Dr. Johnstone's insight into Claimant's personality was based solely on Dr. Callahan's behavioral assessment, an assessment that in no way supported Dr. Johnstone's extreme and negative conclusions.

Petitioner failed to meet its burden of proof. The evidence in this matter proved that Claimant meets the admission criteria for a CPM program which is reasonable and medically necessary healthcare for Claimant. Petitioner's appeal should be denied.

III. FINDINGS OF FACT

1. In ____, Claimant sustained a back injury compensable under the Texas Workers' Compensation Act (Act).
2. At the time of the compensable injury, Claimant's employer, the City of Galveston (Petitioner) was self-insured for the workers' compensation insurance.

3. After Petitioner denied his request for a chronic pain management (CPM) program for Claimant as being medically unnecessary, Claimant's psychologist, Steven Callahan, Ph.D., requested the Texas Workers' Compensation Commission review the denial. That review produced the Independent Review Organization's (IRO) decision, dated January 28, 2004, which granted preauthorization for the CPM program.
4. Petitioner timely appealed the IRO decision.
5. Claimant suffers from depression associated with his chronic low back pain.
6. The following treatments have failed to resolve or sufficiently reduce Claimant's low back pain: chiropractic care, passive and active therapy, injections, lumbar spine surgery, and post-surgical rehabilitation.
7. Claimant's pain levels make it doubtful he could complete a work hardening program.
8. Claimant has not had psychological counseling for his low back pain-related depression.
9. Participation in a single disciplinary program such as work hardening will not address Claimant's overlying psychosocial issues.
10. Participation in a multidisciplinary program such a CPM program will benefit Claimant by addressing the issues of safety, productivity, positional tolerances, work restrictions and mental status.
11. Claimant meets the nationally-recognized admission criteria for a CPM program because he suffers from long-term pain, past treatments have failed to significantly reduce his chronic pain, he has an excessive dependency on others, his activities of daily living are impaired by pain, and he is depressed from his chronic pain.

IV. CONCLUSIONS OF LAW

1. 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.
2. 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.
3. 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) §§ 133.305 and 133.308.

4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner had the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41.
6. The IRO had authority to review the parties' positions and issue a decision pursuant to the Commission's rule at 28 TAC §§ 133.305 and 133.308.
7. 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).
8. 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).
9. For a carrier to be liable to reimburse a provider for a chronic pain management program, the service must be preauthorized. 28 TAC § 134.600(h).
10. A chronic pain management program was shown to be reasonable and medically necessary healthcare for Claimant and should be preauthorized.

ORDER

It is ORDERED that the request of Steven Callahan, Ph.D., for preauthorization of a chronic pain management program for Claimant is granted.

SIGNED May 6, 2004.

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