

____,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
TEXAS MUTUAL INSURANCE	§	
COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

____, the Claimant, sought preauthorization for a discogram with CT scan at discs C3 through T1.¹ Texas Mutual Insurance Company (Carrier) denied the request for preauthorization, and an Independent Review Organization (IRO) determined the requested treatment was not medically necessary. In this decision, the Administrative Law Judge (ALJ) agrees with the IRO and concludes that the requested procedure should not be preauthorized.

I. NOTICE, PROCEDURAL HISTORY, AND JURISDICTION

Neither party contested notice or jurisdiction, and those matters are addressed only in the Findings of Fact and Conclusions of Law. The hearing convened on July 15, 2004, at the State Office of Administrative Hearings, 300 West Fifteenth Street, Austin, Texas. Assisted by Ombudsman Anthony Walker, the Claimant represented herself. The Carrier was represented by attorney R. Scott Placek. The hearing concluded the same day, and the record closed on July 30, 2004, after the parties had an opportunity to file closing briefs.

¹ Ex. 3, p. 274.

II. DISCUSSION

1. IRO

The IRO reviewer explained his reasons for recommending against the preauthorization request:

Generally there is no indication for a discogram to determine if the injured worker has discogenic pain unless and until documentation of the level of that pain, exhaustion of conservative treatment and radiographic findings indicate fusion to be under active consideration. . . Discography is a controversial test that can demonstrate anatomic abnormality in asymptomatic people and subjective response can be widely skewed particularly with psychological issues. Discography is not a primary diagnostic tool but a confirmatory study in the presence of an established diagnosis of a significant disc condition when spinal fusion is anticipated. Upon review of all information provided, there is no documentation that fusion is under active consideration. There is no documentation of a surgical lesion at C3/4 or C7/T1. An MRI report dated 3/28/03 indicates a disc bulge at C3/4. There is no documentation of significant collapse or instability at this motion segment level. Furthermore, a myelogram dated 5/21/02 indicates no significant narrowing of the spinal canal or flattening of the cervical cord. An EMG/NCV study report dated 7/2/03 documents a normal study with no evidence of radiculopathy. There is no documentation of exhaustion of conservative measures of treatment including but not limited to oral nonsteroidal and steroidal anti-inflammatory medications, bracing, and physical therapy emphasizing dynamic spinal stabilization/McKenzie. I strongly recommend continued conservative management in this clinical setting.

2. Claimant's Testimony

The Claimant testified she had a repetitive trauma injury in her neck with a reported injury date of _____. In 1998, she underwent discectomy and fusion surgery at C4-5. She had no relief of the tingling in her left arm. After receiving a discogram that showed discs C5-7 as pain generators, she had fusions at those levels in 2001. She felt well enough after the second surgery to begin working, but a few months later, the pain began to intensify. Her neurosurgeon then inserted a spinal cord stimulator into her spinal column, and it helped for a few months. The Claimant also received passive and active physical therapy, nerve conduction studies, and pain medications. In 1999, she had reached maximum medical improvement with a 24% impairment rating. She is now in so much pain that she takes morphine.

In her July 2004 appointment with her neurosurgeon, Arnold B. Vardiman, M.D.², the claimant discussed having surgery at C3-4. The Claimant said she is requesting discography so that she will know whether surgery is appropriate. She has loss of use in her arm; it always feels numb. She cannot work full time and can do very little housework. The Claimant is willing to risk surgery as opposed to having constant pain and such a limited life-style.

3. Medical Status

The Claimant has a solid, interbody fusion from C4-7. Even though the original preauthorization request seeks discography from C3 through T1, the pertinent points are C3-4 and C7-T1 because of the fusion at the other discs. Her current diagnosis is complex, chronic pain syndrome and C3-4 spondylosis herniated nucleus pulposus with mild spinal stenosis. She also has evidence of mild myelopathy. In 2000 or 2001, Dr. Vardiman inserted a cervical dorsal column stimulator, but after the Claimant developed intractable headaches, it was removed in 2003. She has had extensive, unsuccessful conservative therapy.

A March 28, 2003, MRI revealed the condition of various discs:

C2-3: Normal appearing.

C3-4: There is a moderate board-based disc bulge. There is moderate indentation of the thecal sac and impingement on the spinal cord. The foramina are patent.

C4-5 through C6-7:

The disc spaces were obscured by metallic artifact. The foramina appeared patent.

C7-T1: The disc was unremarkable and the foramina were patent.

² Diplomate, American Board of Neurological Surgery.

In July 2003, Dr. Vardiman examined the Claimant and concluded that she had accelerated degenerative change at C7-T1, but he added, "I really question as to whether or not it is in her best interest to press forward with surgical decompression and fusion at that level." Dr. Vardiman wrote, "I think our best option is probably going to be long-term pain management as opposed to further surgical intervention."

At Dr. Vardiman's request, David J. Mozersky, M.D., saw the Claimant on August 18, 2003. Dr. Mozersky noted that the Claimant had a decreased pulse with neck and arm positional changes. However, Dr. Mozersky said he was reluctant to ascribe her problem to thoracic-outlet syndrome. "I think that [the Claimant] would benefit from pain control management. She is quite desperate about her situation. I think that if the pain control management is a failure, it may be worth removing the rib and her scalenus anticus muscle prior to abandoning her as untreatable."³

Frank K. Kuwamura, III, M.D., examined the Claimant on August 25, 2003, and recommended a discogram at C3-4 and C6-7. Based upon his examination, he wrote

Of course, surgical intervention would be a last resort and I am hesitant to recommend that. She really would like to find the etiology of her pain. She has severe pain in her neck radiating into her upper extremities. The diskogram is a test that may shed some light. I am encouraged that there is no evidence of a radiculopathy pattern.

On October 7, 2003, Donald P. Atkins, M.D., one of Dr. Vardiman's partners, examined the Claimant at Dr. Vardiman's request. Dr. Atkins agreed that the outlook for improvement from more surgery is poor. Even so, he said there is a possibility of "at least transient improvement from further surgical intervention at C3-4." Dr. Atkins supported Dr. Vardiman's recommendation of discography at the two levels, C3-4 and C7-T1. Dr. Atkins said surgery at C3-4 would be appropriate if C3-4 were positive and C7-T1 negative. However, he noted the obvious drawbacks of continuing segmental disease above and below the surgery areas, as well as the possibility of a spinal dislocation or spinal cord injury if the Claimant were in a motor vehicle accident.

³ Ex. 3, p. 37.

On December 4, 2003, Michael L. Murphy, M.D., who has treated the Claimant for pain for some years, noted that Dr. Vardiman wanted the Claimant to have a C3-4 and C7-T1 discogram. Dr. Murphy said he felt the Claimant needed a stronger oral analgesic. She was then taking seven Hydrocodone tablets a day and he wanted that to decrease to five.⁴

Dr. Vardiman wrote in a December 2003, letter:

I think cervical discography probably is our only way to determine if there is some pain-generator remaining that might provide [the Claimant] some relief of her symptoms. . . . I would hope that we could approve [her] discography and make decisions based on the results of those studies.

In another note, Dr. Vardiman indicated discography was “the only option” for the clamant.

4. Carrier’s Witness

Page Nelson, M.D.,⁵ testified that use of discography to pinpoint a pain area is not advisable because of the subjective nature of the test; those who are sensitive to pain can respond to an injection in an area that is unrelated to an injury. Dr. Nelson said discography is helpful when an IDET procedure or fusion is being actively considered for treatment, and those treatments are not indicated in this case. It is highly unlikely that another surgery would be successful, particularly considering that the Claimant’s two fusion surgeries gave her no lasting relief. Highlighting Dr. Atkins’ opinion that the outlook for improvement from more surgery is overall poor, Dr. Nelson said a surgeon should not operate on a person whose prognosis is poor. Moreover, Dr. Nelson testified that radiculopathy, *i.e.*, damage to a nerve root,⁶ is measured by an EMG. None of the Claimant’s objective tests have shown radiculopathy.

The Claimant’s March 28, 2003, MRI showed a moderate broad-based bulge at C3-4 with contact at the thecal sac, which is the canal that holds the spinal fluid, and within the spinal fluid, the

⁴ Ex. 3, p. 84.

⁵ Dr. Nelson is a board-certified orthopaedic surgeon.

⁶ The nerve root is the point at which the nerve comes off the spinal cord.

spinal cord. The herniation alone does not indicate the appropriateness of fusion surgery, Dr. Nelson said. If the bulge continued to grow (and that is a big if, Dr. Nelson said), it could press on the spinal cord and cause neurological problems. If there were flattening of the spinal canal, the Claimant would be in a hazardous situation in which she might develop a problem with the use of her arm and leg that could lead to paralysis. Obviously, that has not happened at this point, Dr. Nelson testified.

In Dr. Nelson's opinion, continued conservative management is most advisable for the Claimant. She should be seen periodically and treated for her discomfort with medications and physical therapy. Dr. Nelson said he would not change her current treatment unless she has some neural deterioration that is documented in an EMG/NCV.

5. Party's Arguments

While agreeing that cervical discography is medically necessary in certain circumstances, Respondent argued it is not necessary in this case. The test is not advisable to determine the origin of Petitioner's pain. Further, Petitioner did not adequately rebut the IRO's reasons against the test.

Petitioner asserted that discography is necessary to determine the next step in her treatment. Another surgery has not been ruled out, all conservative treatment has been exhausted, the second surgery was successful enough so that she was able to return to work, and all doctors who have examined her have recommend the discogram. Thus, Petitioner asserts, it is the most reasonable option for her.

F. ALJ's Analysis

The IRO concluded that discography is not appropriate unless the level of discogenic pain has been documented, conservative treatment has been exhausted, and radiographic findings indicate fusion to be under active consideration. As the IRO found and Dr. Nelson testified, it is

inappropriate to use discography as a primary diagnostic tool. It may, however, be used as a confirmatory study when spinal fusion is anticipated.

In July 2003, Dr. Vardiman questioned whether it was in the Claimant's best interest to pursue fusion and determined long-term pain management was best for her. Nevertheless, by December of that year, Dr. Vardiman had concluded that the Claimant had no other option for determining whether the disc bulge at C3-4 was the cause of her continued pain and numbness. He indicated that he wanted to use discography results to make care decisions, not to confirm other test results. According to Dr. Nelson, that is not an appropriate use of discography.

The Claimant clearly proved that significant pain and physical limitations have significantly impacted her daily life. Even so, the IRO's reasoning and Dr. Nelson's testimony more strongly support the Carrier's position in this case. The Claimant's surgery outlook is poor. In addition, no objective tests indicate the claimant has radiculopathy, even though she has numbness and some loss of use in her arm. The Claimant bore the burden of proof in this case, and the evidence did not support the preauthorization request more persuasively than the opinions against discography. Therefore, the ALJ denies the request.

III. FINDINGS OF FACT

1. The Claimant sustained a repetitive trauma injury in her neck with a reported injury date of___.
2. At the time of Claimant's injury, Texas Mutual Insurance Company (Carrier) was the workers' compensation insurer for the Claimant's employer.
3. The Claimant has had two discectomy and fusion surgeries, the first at C4-5 in 1998 and the second at C5-7 in 2001. She has a solid, interbody fusion from C4-7.
4. The Claimant has complex, chronic pain syndrome a moderate board-based disc bulge at C3-4 with a moderate indentation of the thecal sac and impingement on the spinal cord.
5. The Claimant sought preauthorization for a lumbar discogram with CT scan at discs C3-4 and C7-T1.
6. The Carrier denied the preauthorization request, concluding the requested procedure was not medically necessary.

7. The Claimant then requested medical dispute resolution by the Texas Workers' Compensation Commission's Medical Review Division, which referred the matter to an Independent Review Organization (IRO).
8. By decision dated March 5, 2004, the IRO reviewer determined the discography with CT scan was not medically necessary.
9. On April 5, 2004, the Claimant requested a hearing on the IRO's decision, and the case was referred to the State Office of Administrative Hearings (SOAH).
10. Notice of the hearing was sent to all parties on April 7, 2004. 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.
11. The hearing convened on July 15, 2004, at the State Office of Administrative Hearings, 300 West Fifteenth Street, Austin, Texas. Both parties were represented. The hearing concluded the same day, and record closed on July 30, 2004, after the parties had an opportunity to file closing briefs.
12. Generally, discography is not appropriate to determine if the injured worker has discogenic pain unless and until documentation of the level of that pain, exhaustion of conservative treatment, and radiographic findings indicate fusion to be under active consideration.
13. Discography can indicate anatomic abnormality in asymptomatic people and subjective responses can be widely skewed.
14. Discography is too subjective a test for use in determining a pain generator.
15. Discography is not a primary diagnostic tool but a confirmatory study when spinal fusion is anticipated.
16. The Claimant's EMG/NCV study showed no evidence of radiculopathy, significant collapse or instability, or significant narrowing of the spinal canal at C3-4.
17. Although the Claimant's surgeon indicated conservative care has been exhausted and was ineffective in providing her relief, there was no evidence that she has received bracing and physical therapy that emphasized dynamic spinal stabilization.
18. The Claimant's two prior surgeries gave her no lasting relief.
19. The Claimant's outlook for improvement from further surgery is overall poor.

IV. CONCLUSIONS OF LAW

1. 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(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
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 Claimant had the burden of proof. 28 TEX. ADMIN. CODE §§ 148.21(h) and 133.308(w).
5. The Claimant failed to prove, by a preponderance of the evidence, that the requested discogram is a medically necessary treatment of her compensable injury.
6. The Claimant's request for preauthorization should be denied. TEX. LABOR CODE ANN. §§ 401.011(19) and 408.021.

ORDER

IT IS, THEREFORE, ORDERED that the Claimant's preauthorization request for discography with CT scan at discs C3-4 through C7-T1 is denied.

SIGNED September 27, 2004.

**SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**