SOAH DOCKET NO. 453-04-7261.M2
TWCC MR NO. M2-04-1320-01

KENNETH BERLINER, M.D.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
FIDELITY & GUARANTY	§	
INSURANCE CO.,	§	
Respondent	§	
	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. INTRODUCTION

Kenneth Berliner, M.D. (Provider) disputes a determination by an independent review organization (IRO) on behalf of the Texas Workers' Compensation Commission (TWCC) regarding medical services for ___ (Claimant). The IRO found that the Claimant did not have reasonable medical need a total right knee arthroplasty (knee replacement). For that reason, the IRO agreed with Fidelity & Guaranty Insurance Co. (Carrier) that the knee replacement should not be pre-authorized.

The only disputed issue is whether the knee replacement is reasonably medically necessary. Because the IRO found that it was not, the Provider has the burden of proof. As set out below, the Administrative Law Judge (ALJ) cannot find that the knee replacement is reasonably medically necessary, hence he finds that service should not be pre-authorized at this time.

II. DISCUSSION

The Provider testified that in his opinion the Claimant needed a total knee replacement. On February 10, 2004, the Claimant's treating doctor, Dr. MacMillan, reported that the Claimant had persistent pain in her right knee and referred the Claimant to the Provider for an orthopaedic surgery consultation. The Provider saw the Claimant only once, on or about March 18, 2004. He sought pre-authorization for the total knee replacement from the Carrier on March 25, 2004, and it was denied. The Provider resubmitted the request on April 13, 2004, which was denied on April 20, 2004. The Provider sent a request for medical dispute resolution to TWCC on April 27, 2004.

The Provider recommended the knee replacement because he concluded that the Claimant's pain was not going away. He based that opinion on his review of Dr. MacMillan's February 10, 2004, report of persistent pain; a report by another physician, Lubor Jarolimek, M.D.; and the Provider's single meeting with the Claimant. It is not even clear that the Provider saw Dr. Macmillan' report. The Provider testified that he had no record of the Claimant's office visits with other physicians prior to August 2004.

According to the Provider, Dr. Jarolimek conducted an arthroscopic examination of the Claimant's right knee in December 2002, which showed that she had chondromalacia (abnormal softness of cartilage[1]) in her right knee that was grade IV (bone-on-bone) in certain places and grade III (near bone-on-bone) in other places. According to the American Academy of Orthopaedic Surgeons (AAOS), such a patient should be considered for a total knee replacement; however, the Provider testified that Dr. Jarolimek did not recommend for or against that surgery.

The Provider testified that the only documentation he submitted to support the request for pre-authorization was his own March 18, 2004, report. He did not even offer that report as evidence at the hearing. The Provider only offered four AAOS documents concerning osteoarthritis of the knee, which were very general and not specific to the Claimant.

The IRO referred to and discussed other reports, which the Carrier submitted to it but which are not in evidence, that led the IRO to conclude that the Claimant does not need a knee replacement. The IRO noted that the Claimant had an arthroscopic surgery on her right knee on September 30, 2002, and at that time, she did not experience appreciable mechanical issues and had only moderate chondromalacia. The IRO also noted that a October 10, 2003, magnetic resonance image (MRI) was reported to have shown "scar tissue, mild hypertrophic [degenerative joint disease] of the knee joint compartment, myxoid changes and post-operative changes." In the IRO's opinion, that level of disease would not require a total knee replacement.

The Provider argues that an MRI is not as reliable as the arthroscopy that Dr. Jarolimek conducted that found grade III and IV damage to the Claimant's cartilage. The AAOS questions the reliability of an MRI in detecting lower grade cartilage lesions but notes that an MRI is useful in detecting higher grade ones. Since neither the Jarolimek report nor the MRI is in evidence, the ALJ cannot compare them, but the indirect evidence of the MRI at least partially refutes the indirect evidence of the arthroscopy showing that the Claimant has grade III and IV cartilage degeneration.

It is unclear what measures short of a total knee replacement have been tried to limit the Claimant's pain. According to the AAOS, a wide range of conservative and more aggressive non-surgical treatments should be tried before surgery, including analgesics, nonsteroidal anti-inflammatory medications, active modifications including weight reduction, therapeutic exercises, knee braces, ambulatory assistive devices, orthoses, and inter-articular injections in the knee with steroid or viscosupplementation.

Based on a review of the reports submitted to it, the IRO indicated that the Claimant had been treated with knee injections, physical therapy, and oral anti-inflammatories. However, the IRO also said that the submitted documentation did not clearly indicate what types of non-operative or conservative management had been tried to treat the patient's knee.

At the hearing, the Provider offered no documentary evidence detailing the scope of such conservative treatment, if any, that the Claimant may have received. He testified that the Claimant walked with the assistance of a cane, but declined to testify that was an unacceptable lifestyle modification. The Provider testified that the Claimant told him that in June 2003 she had been given three cortisone injections in her right knee. But the Provider did not know which physician gave her the injections or exactly which medications she was given. On cross examination, he could not even confirm that cortisone was injected, only that there were three injections.

[1] Merriam-Webster Medical Dictionary, <http://www.nlm.nih.gov/medlineplus/mplusdictionary.html>, (2003).

Total knee replacement is a radical step, especially when the patient is relatively young. According to the IRO, replacement joints have limited longevity. The Claimant is only 49, and in the context of evaluating whether the knee replacement was necessary, the IRO described that age as very young. Nevertheless, it is possible that the Claimant needs a total knee replacement. According to the AAOS, good results have been reported with certain patients under 55. However, the AAOS believes that there should be extensive consultation between the patient and the surgeon exploring the risks and that alternative and less dramatic steps should be thoroughly exhausted before surgery. There is no evidence that such extensive consultation has occurred between the Claimant and the Provider or any other knowledgeable physician.

Based on the evidence, the ALJ cannot conclude that the Claimant more likely than not needs her knee replaced. The very odd complete lack of supporting documentation would require the ALJ to conclude the proposed surgery is necessary based solely on the word of the Provider. Yet the Provider had only one brief meeting with the Claimant, did not examine her himself, looked at only a small amount of documentation of her prior care, and had very little information concerning the injections and other more conservative care that she had received. His opinion that surgery is needed also conflicts with the indirect evidence of an MRI, contained in the IRO report, showing that the extent of the Claimant's knee degeneration is not so great as to warrant a total knee replacement.

The ALJ concludes that the Provider's request for pre-authorization to replace the Claimant's right knee should be denied.

III. FINDINGS OF FACT

1. On ___, the Claimant sustained a work-related injury to her right knee as a result of her work activities (Compensable Injury).

2. On the date of injury, the Claimant's employer was ___, and its workers' compensation insurance carrier was the Carrier.

3. The Claimant had an arthroscopic surgery on her right knee on September 30, 2002, and at that time, she did not experience appreciable mechanical issues and had only moderate chondromalacia.

4. On or about December 2, 2002, Lubor Jarolimek, M.D., performed an arthroscopy on the Claimant's right knee.

5. Based on that arthroscopy, Dr. Jarolimek concluded that the Claimant had chondromalacia (abnormal softness of cartilage) in her right knee that was grade IV (bone-on-bone) in certain places and grade III (near bone-on-bone) in other places.

6. According to the American Academy of Orthopaedic Surgeons (AAOS), such a patient should be considered for a total knee replacement; however, Dr. Jarolimek did not recommend that surgery.

7. An MRI is useful in detecting grade III and IV chondromalacia.

8. A October 10, 2003, magnetic resonance image (MRI) showed "scar tissue, mild hypertrophic [degenerative joint disease] of the knee joint compartment, myxoid changes and post-operative changes."

9. The above-described level of disease would not require a total knee replacement.

10. On February 10, 2004, the Claimant's treating doctor, Dr. MacMillan, reported that the Claimant had persistent pain in her right knee and referred the Claimant to the Provider for an orthopaedic surgery consultation.

11. The Provider saw the Claimant only once, on or about March 18, 2004.

12. The Provider recommended the knee replacement because he concluded that the Claimant's pain was not going away.

13. The Provider reviewed no records of the Claimant's office visits with other physicians prior to August 2004.

14. A wide range of conservative and more aggressive non-surgical treatments should be tried before knee replacement surgery, including analgesics, non-steroidal anti-inflammatory medications, active modifications including weight reduction, therapeutic exercises, knee braces, ambulatory assistive devices, orthoses, and inter-articular injections in the knee with steroid or viscosupplementation.

15. The Claimant has been treated with unspecified knee injections, physical therapy, and oral anti-inflammatories.

16. The Claimant walks with the assistance of a cane.

17. In June 2003, the Claimant was given three unspecified injections in her right knee.

18. Replacement joints have limited longevity, and the Claimant, who is only 49, is very young to be receiving a total knee replacement.

19. Before a knee is totally replaced, there should be extensive consultation between the patient and the surgeon exploring the risks, and alternative and less dramatic steps should be thoroughly exhausted.

20. There is no evidence that such extensive consultation has occurred between the Claimant and the Provider or any other knowledgeable physician.

21. The Provider sought pre-authorization for a total right knee replacement from the Carrier on March 25, 2004.

22. On April 1, 2004, the Carrier denied the requested pre-authorization, claiming that the submitted documentation did not show that the knee replacement was reasonably medically necessary.

23. The Provider resubmitted the request on April 13, 2004, and it was again denied on April 20, 2004.

24. The Provider sent a request for medical dispute resolution to TWCC on April 27, 2004.

25. An independent review organization (IRO) reviewed the medical dispute and found, based on the documentation submitted, that the knee replacement was not medically necessary to treat the Claimant's injury at this time.

26. After the IRO decision was issued, the Provider asked for a contested-case hearing by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).

27. Required notice of a contested-case hearing concerning the dispute was mailed to the Carrier and the Provider.

28. On September 29, 2004, SOAH ALJ William G. Newchurch held a contested-case hearing concerning the dispute at the William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas. The hearing concluded on that same day.

29. The Carrier appeared at the hearing through its attorney, Steven Tipton.

30. The Provider appeared at the hearing by telephone.

31. The record closed on October 6, 2004, when the parties filed post-hearing legal arguments.

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 TEX. LABOR CODE ANN. (Labor Code) §§ 402.073(b) and 413.031(k) (West 2004) and TEX. GOV'T CODE ANN. (Gov't Code) ch. 2003 (West 2004).

2. Adequate and timely notice of the hearing was provided in accordance with Gov't Code §§ 2001.051 and 2001.052.

3. Based on the above Findings of Fact and Gov't Code § 2003.050 (a) and (b), 1 TEX. ADMIN. CODE (TAC) § 155.41(b) (2004), and 28 TAC §§ 133.308(v) and 148.21(h) (2004), the Provider has the burden of proof in this case.

4. An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed 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. Labor Code § 408.021 (a).

5. Pre-authorization is required for a total knee replacement surgery. 28 TAC § 134.600.

6. The above Findings of Fact and Conclusions of Law do not show that the Claimant more likely than not reasonably medically needs her right knee replaced.

7. Based on the above Findings of Fact and Conclusions of Law, the Provider's request for pre-authorization to replace the Claimant's right knee should be denied.

ORDER

IT IS ORDERED THAT the Provider's request for pre-authorization to replace the Claimant's right knee is denied.

SIGNED October 13, 2004.

WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS