

**SOAH DOCKET NO. 453-04-8264.M2
TWCC NO. M2-04-1458-01**

—, Petitioner	:	BEFORE THE STATE OFFICE
	:	
V.	:	OF
	:	
TEXAS COUNCIL RISK MANAGEMENT FUND,	:	
Respondent	:	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

After an Independent Review Organization (IRO) denied preauthorization for a lumbar discogram, Claimant appealed. This decision finds that the lumbar discogram is medically necessary and orders preauthorization.

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 September 14, 2004, at the State Office of Administrative Hearings (SOAH), 300 W. 15th Street, Austin, Texas, with Administrative Law Judge (ALJ) Charles Homer III presiding. The record was closed that date. Claimant participated by telephone and was assisted by Anthony Walker, ombudsman. Respondent Texas Council Risk Management Fund (Carrier) did not appear.

II. DISCUSSION

A. Background

On ____, Claimant fell over backwards in a chair and sustained a lower back injury compensable under the Texas Workers' Compensation Act. Initially she was treated conservatively, but therapy did not relieve her pain. After that she was seen by Dr. Mankins and eventually several others, and had epidural blocks and pain management, without relief. In her sixties, she was diagnosed by a September 2002 MRI with some degenerative changes in her lumbar spine. In July 2003, Claimant was seen by John H. Pelozza, M.D., who thereafter consistently recommended and requested a lumbar discogram for the purpose of determining whether her pain is disc-related.¹ At present, Claimant continues on pain medication, and suffers urinary incontinence and difficulty walking, with occasional falls.

B. IRO Decision

As a basis for its decision, the IRO reviewer cited papers delivered to the North American Spine Association and stated that Claimant has no surgical indicators.² The reviewer also mentions Claimant's history of childhood polio and possible emotional problems, and states that Adiscography is not a reliable test in the emotionally unstable individual.³

C. Legal Standards

Petitioner has the burden of proof in this proceeding.⁴

¹ Pet. Exh. 1, pp. 20-28, 44. On October 14, 2003, Dr. Pelozza withdrew his request for lumbar discography, apparently in order to gain approval of epidural steroid injections, but reinstated it in February 2004, and repeated the request in March and April 2004.

² *Id.* p. 2.

³ *Id.* p. 3.

⁴ 1 TEX. ADMIN. CODE (TAC) ' 155.41.

Employees have a right to medically necessary health treatment under TEX. LABOR CODE ANN.

' 408.021. Section 408.021(a) provides:

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. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment.

D. Petitioner's Evidence

Petitioner testified that she worked as an instructor at a mental health/mental retardation facility when she was injured. She has had incontinence for about one year, has difficulty walking, and has fallen and hurt herself. She has numbness in her feet and toes to the point of feeling immobilized. She stated that Dr. Pelozza's request for a discogram has been denied three times, and that he wants a discogram before considering surgery because he needs to know exactly what is wrong with her.

Petitioner offered documentary evidence in the form of reports by Claimant's treating physician and a peer reviewer, summarized as follows:

- X Mark E. Huff, Jr. M.D. (orthopedic surgeon, peer reviewer in this case) Finds causal connection between the compensable injury and Claimant's current complaints and findings. He was not sure Claimant is a surgical candidate, but recommends that she Ahave a discogram as recommended by Dr. Pelozza to determine whether her pain could be discogenic in nature. ' ⁵

- X Mark L. Mankins, M.D. (Claimant's treating physician) - Has exhausted treatment options for Claimant's pain, states that Claimant desperately wants to get on with her life, and requests that Adiscograms [be allowed] to proceed on as requested by the specialist [.] ' ⁶

⁵ Pet. Exh. 1, p. 10.

⁶ *Id.*, p. 15.

- X John H. Peloza, M.D. (surgeon) B Diagnosed Claimant with degenerative disc disease in the lumbar area, but is uncertain about whether one or more discs are the actual cause of her pain, and, if so, he is uncertain at which level the source(s) are located. After seeing a March 2004 MRI⁷, he still wants to have a discogram before performing surgery, and has re-urged his request.⁸

III. ANALYSIS

The ALJ concludes that Petitioner proved that an outpatient lumbar discogram is medically necessary. The IRO determination is more based upon general considerations than those specific to Claimant. For instance, the reviewer generalizes from a study that because discograms may be less accurate in workers' compensation claimants, that this particular patient will not benefit despite her intractable pain, her undeniable incontinence and difficulty walking, and an MRI that demonstrates disc bulges throughout her lumbar spine, the area about which she complains.⁹ The reviewer cites literature submitted to the North American Spine Association in support of his denial¹⁰; Dr. Peloza cited other such literature in support of his request.¹¹ Despite the reviewer's innuendo, there is little or nothing in Claimant's treatment record that indicates she is emotionally unstable. Claimant's treatment record does not show past over-treatment abuses, and the ALJ believes that Dr. Peloza is in a better position than the reviewer to select diagnostic tools.

Against the IRO determination are three medical doctors, including Claimant's treating physician, all of whom support the requested study. The lumbar MRI obtained in March 2004 revealed disc bulges at every lumbar level, with bilateral impingement on nerve roots at L4-L5.¹²

⁷ *Id.*, pp. 46-47.

⁸ *Id.*, pp. 20-31.

⁹*Id.*, p. 46-47.

¹⁰ *Id.*, p.3.

¹¹ *Id.*, p. 44.

¹² *Id.*, pp. 46-47.

The presence of multiple possible sources of pain in Claimant's lower back appears to be perfectly consistent with Dr. Pelozza's request for a discogram to ascertain which levels, if any, are actually causing Claimant's pain.

Petitioner has shown that the lumbar discogram is medically necessary. Petitioner's appeal should be granted.

IV. FINDINGS OF FACT

1. On ____, Claimant (Petitioner in this proceeding) sustained a lower back injury that is compensable under the Texas Workers' Compensation Act.
 2. Respondent Texas Council Risk Management Fund (Carrier) provides workers' compensation insurance covering Claimant's compensable injuries.
 3. After Carrier denied Dr. John H. Pelozza's request for an outpatient lumbar discogram (L1-S1) with post-discogram CT scan (discogram), as being medically unnecessary, Dr. Pelozza requested the Texas Workers' Compensation Commission (Commission) to review the denial.
 4. The Commission review produced the Independent Review Organization's (IRO) decision, dated July 19, 2004, which denied preauthorization for the discogram.
 5. On July 27, 2004, Claimant appealed the July 19, 2004, IRO decision.
 6. Mark L. Mankins, M.D. has treated Claimant for her lower back injury since shortly after the injury, and remained her treating physician as of April 28, 2004.
 7. Dr. Mankins recommends that Claimant have the discogram at issue.
 8. John H. Pelozza, M.D., neurosurgeon, recommended a lumbar discogram for Claimant on July 7, 2003, and has repeated that recommendation several times since.
 9. Claimant has not benefitted significantly from physical therapy, steroid injections, rest, and pain medication.
 10. No prior lumbar discogram has been performed on Claimant.
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11. An MRI of Claimant's lumbar spine reveals disc bulges at all levels, with impingement of the nerve root at L4-L5.
12. Dr. Pelosa intends to use the discogram results to determine whether Claimant's pain has a specific, operable source.

V. CONCLUSIONS OF LAW

1. Petitioner timely appealed the IRO decision.
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(k) of the Texas Worker's Compensation 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. Petitioner ___ had the burden of proof in this proceeding. 1 TEX. ADMIN. CODE (TAC) ' 155.41.
5. Before a carrier can be held liable to reimburse a provider for a discogram, the service must be preauthorized. TEX. LABOR CODE ANN. ' 413.014 and 28 TAC ' 134.600(h).
6. A lumbar discogram with post-discogram CT scan is medically necessary healthcare for Claimant.
7. Based on the foregoing Findings of Fact and Conclusions of Law, preauthorization for the requested lumbar discogram with post-discogram CT scan should be granted.

ORDER

IT IS ORDERED that Petitioner ___'s for relief is **GRANTED** and preauthorization of an outpatient lumbar discogram (L5-S1) with post-discogram CT scan is **GRANTED**.

SIGNED October 13, 2004.

**CHARLES HOMER III
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**