SOAH DOCKET NO. 453-05-1113.M5
TWCC MR. NO. M5-04-3030-01

HIGHPOINT PHARMACY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
INSURANCE COMPANY OF THE STATE	§	
OF PENNSYLVANIA,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Highpoint Pharmacy (Provider) challenged the decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC or Commission) denying reimbursement to Provider for prescriptions it dispensed to ___ (Claimant) between May 14, 2003, and September 24, 2003.

The Insurance Company of the State of Pennsylvania (Carrier) argued that the medications, although prescribed for Claimant by her treating doctor, were not necessary seven years after the date of injury. On September 7, 2004, the Medical Review Division (MRD) of TWCC denied reimbursement.

The Administrative Law Judge (ALJ) concludes that Provider met its burden of proof to demonstrate that Neurontin, Celebrex, and Hydrocodone were medically necessary to treat Claimant in mid-2003. The Carrier must reimburse Provider for the disputed prescriptions.

The hearing in this matter convened on May 16, 2005, in Austin, Texas, with ALJ Cassandra Church presiding. Provider was represented by Nicky Otts, pharmacist. Carrier was represented by Jo Beth Gilleland, attorney. Notice was proper and jurisdiction was established in this case.

I. DISCUSSION

A. History of the Case and Evidence

At issue in this case are medications prescribed for Claimant by her treating doctor during a four-month period. Before the period in issue, Claimant had undergone three back surgeries, two of which occurred after her date of injury. Her most recent surgery occurred in November 2001. The medications were being prescribed for management of her continuing radicular left leg pain.[1] Carrier asserted that the medications Provider dispensed were not necessary to treat the compensable injury and that Claimant's continuing pain was due to the combined effects of the surgery that occurred before her date of injury and degenerative changes.[2] Provider argued that the medications were needed for management of Claimant's chronic pain resulting from her on-the-job injury in ___.

On ___, Claimant injured her lower back while lifting a 50-pound object. Her injury caused radiating pain (radiculopathy) to both legs. On January 30, 1996, an MRI examination of Claimant's back showed disc herniation at the L3-L4 levels on the left side and also evidence of a previous two-level fusion at the L4-L5 and L5-S1 levels.[3] She had a back fusion in 1992. After her back surgery in 1992, Claimant worked regularly until her injury in____.[4]

Immediately after her injury in ___Claimant was treated with a five-week course of physical therapy which did not relieve her pain.

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[1] Provider Exh. 1, p. 6.

[2] Carrier Exh. 1, p. 41.

[3] Carrier Exh. 1, pp. 39-42, 48.

[4] Provider Exh. 1, pp. 2-4; Carrier Exh. 1, p. 51.

Jacob Rosenstein, M. D., a neurosurgeon, began treating Claimant in April 1996. After overseeing a course of conservative care which did not relieve Claimant's back pain, Dr. Rosenstein performed back surgery in December 1996.[5] Before the surgery, Claimant underwent a facet injection on May 3, 1996, and, following that, epidural steriod injections. During 1996, Claimant experienced daily back pain and frequent pain in both legs, front and back, with pain in her left foot. On August 20, 1996, a lumbar myelogram showed a broad-based protrusion at the L4-L5 levels with other changes at the L5-S1 levels. On December 3, 1996, Dr. Rosenstein performed a discectomy of the L3-L4 levels of her spine.[6]

The degree to which Claimant benefitted from the surgery in December 1996 is not clear as neither party introduced medical records from this period. Claimant had not yet returned to work as of August 28, 1997, the date of her independent medical examination (IME) by Jack A. Kern, M.D.[7] Dr. Kern recommended a whole person impairment of 13 percent and determined that Claimant had reached maximum medical improvement as of August 1997. He said Claimant would not be able to continue working in jobs requiring lifting but could perform sedentary work. Carrier's peer reviewer, George M. Cole, D. O., asserted that by October 1997 Claimant had regained her ability to perform
some activities of daily living comfortably. His source for that observation was surveillance conducted in October 1997, presumably by the Carrier.[8] However, the fruits of any surveillance activities were not themselves in evidence.

Although Claimant's medical history between early 1997 and mid-2001 is not fleshed out, Claimant's condition apparently either degenerated or failed to progress during that period. On November 15, 2001, Dr. Rosenstein performed a second procedure to the L3-L4 spine levels, a

[5] Provider Exh. 1, p. 2.

[6] Carrier Exh. 1, p. 48 (IME report).

[7] Carrier Exh. 1, pp. 47-52.

[8] Carrier Exh. 1, pp. 40 and 43 (Peer Reviews, December 10, 2003, and April 20, 2003).

microdiscectomy on the left side. Immediately after that surgery, Claimant's leg pain ended, but by February 2002, her intermittent pain in her left thigh recurred.[9] In 2002, Dr. Rosenstein was prescribing Celebrex (an anti-inflammatory), Hydrocodone (an opiate pain reliever), and Neurontin. Neurontin is a drug used to treat epilepsy but which is also used to treat radicular pain.[10] Upon his examination on February 20, 2002, Dr. Rosenstein reduced the Hydrocodone dosage to five-milligram tablets per day. Laboratory work had been performed to evaluate the long-term effects of these drugs.[11]

There was an assertion in the report of the Independent Review Organization (IRO) that a second injury to Claimant's lower back may have occurred in___, before the second surgery to the L3-L4 level. However, the occurrence of this injury was not substantiated by medical records.[12] At the time of the hearing, there was no extent-of-injury challenge by the Carrier pending. Based on that, the ALJ concluded the surgery in November 2001 was for treatment of the compensable injury as the treatment was to the same spine levels and there was no credible evidence of an intervening cause.

Specifically at issue are four prescriptions for Hydrocodone, four for Celebrex, and four for Neurontin dispensed by Provider between May 14, 2003, and September 24, 2003. There is no dispute that all the prescriptions were issued by Dr. Rosenstein or that Dr. Rosenstein was Claimant's treating doctor during the period at issue.

To establish medical necessity, Provider relied on certain of Dr. Rosenstein's medical records and also on the testimony of Rick Taylor, D.O. Dr. Taylor stated that the dose of Hydrocodone, two

[9] Provider Exh. 1, pp 10 and 11.

[10] Carrier Exh. 1, p. 44.

[11] Provider Exh. 1, p. 7.

[12] Carrier Exh. 1, p. 58 (IRO Report, August 3, 2004). The author of the IRO report referenced all records that he or she had reviewed, but did not link conclusions reached to a source document.

five milligram tablets per day as needed, was a low dose and was not an aggressive or unreasonable level of pain-relief medication for a person with multiple back surgeries. He stated that some level of continuing pain is normal after back surgeries, including surgeries that are considered successful because they lowered, although did not eliminate, a patient's back pain. He termed the dosage levels of the three medications very conservative. He stated that Hydrocodone, an opiate, has potential for abuse, but that neither Neurontin nor Celebrex has addiction potential. Dr. Taylor said that a narcotic contract is the recommended practice for long-term use of opiate drugs but that physicians are not required to use them. The American Academy of Pain Management and practices primarily in that area of care certify Dr. Taylor.

Dr. Rosenstein's notes are from office visits and are rather brief.[13] On February 19, 2003, he stated the Neurontin and Celebrex were relieving Claimant's leg pain and also stated that he was reducing the prior Hydrocodone dosage levels.[14] On May 14, 2003, he stated that Claimant was continuing to have radiating pain in her left thigh and renewed each of the three prescriptions.[15] On August 18, 2003, the notes are substantially similar to those made in May, but with the addition of a reference to the ongoing workers' compensation dispute regarding the medication. All three prescriptions were again renewed.[16]

Carrier relied on Dr. Cole's peer review, Dr. Kern's IME report, and the report by the IRO reviewer. In 2003, Dr. Cole concluded that no treatment of any kind, including medication, was warranted on any date after August 2, 1997, to treat Claimant's compensable injury. He concluded that the compensable injury had resolved and that continuing pain and degenerative changes could be

[13] All Dr. Rosenstein's notes refer to other documents called "interval history sheets." These records are not themselves in evidence or explained in the notes.

[14] Provider Exh. 1, pp. 7 and 10.

[15] Provider Exh. 1, p. 5.

[16] Provider Exh. 1, p. 5.

traced to the 1992 surgery and the diseases of life.[17] Dr. Kern stated that he saw no need for additional surgery after August 1997; however, he did not comment on future medication use.[18] The IRO reviewer concluded that the medications were not necessary. The IRO reviewer based that conclusion on Dr. Rosenstein's failure to show documented objective measurement of the drugs' effectiveness for long-term use, treatment plans that failed to show the amount of medication being prescribed, and no documented narcotic contract.[19] The reviewer asserted such a contract was necessary. Although the IRO reviewer alluded to a possible intervening injury, he or she did not rely on that factor as a basis for the decision or mention the 1992 fusion as the cause of Claimant's current pain. Thus, Dr. Cole's report and the IRO review were not congruent on the medical necessity issue.

The IRO reviewer and Carrier both alluded to Dr. Rosenstein's potential for conflict of interest due to his 50 per cent ownership of the dispensing pharmacy.[20]

B. Analysis

Claimant's treating doctor determined that Neurontin, Celebrex, and Hydrocodone were necessary between May and September 2003 to treat her compensable injury. He had been overseeing her care since April 1996. Dr. Taylor, a specialist in pain management, stated that long-term use of these drugs, including low-dosage Hydrocodone, to manage post-surgical pain was not unreasonable. Dr. Taylor also stated that continuing pain following back surgery was common so the need for chronic pain management likely. There was no credible evidence that there had been a

[17] Carrier Exh. 1, pp. 41-42

[18] Provider Exh.1, p. 51.

[19] Provider Exh. 1, pp. 57-59.

[20] Carrier Exh. 1, pp. 60-64. Dr. Rosenstein acquired a 50 per cent ownership in the dispensing pharmacy on February 19, 2003. (TWCC on-line financial disclosure summary, printed May 2, 2005, www.txcomp.twcc.state.tx.us/twccprovidersolution.)

second injury before Dr. Rosenstein performed the second procedure on Claimant's L3-L4 spine levels – the levels which had been injured as a result of the compensable injury. There was at least some evidence that Claimant had not experienced incapacitating back pain between her back fusion in 1992 and her on-the-job injury in____.

While Dr. Cole's peer review was on its face credible, much of the foundation of his opinion was not in evidence. The ALJ ultimately gave greater weight to Dr. Taylor's conclusion due to his specialization in pain management. As the IRO's decision dealt primarily with Dr. Rosenstein's asserted practice and documentation defects, rather than Claimant's medical condition, the ALJ was unable to accord it much weight in regard to the question of medical necessity. Although both the IRO reviewer and Carrier alluded to the potential for a conflict of interest due to Dr. Rosenstein's financial interest in the dispensing pharmacy, there was no evidence of more than the potential for such a conflict. Due to the restricted scope of this appeal, the ALJ is also unpersuaded that this forum would have been the correct one to address any realized conflict of interest.

C. Summary

Based on the facts and analysis above, the ALJ concluded that Provider met its burden of proof to show that Neurontin, Celebrex, and Hydrocodone were medically necessary to treat Claimant's compensable injury between May 14, 2003, and September 24, 2003. Carrier is ordered to reimburse

Provider for all prescriptions for those three medications dispensed by it to Claimant between those dates.

II. FINDINGS OF FACT

1. On ___, ___ (Claimant) injured her lower back on the job when lifting a 50-pound object.

2. The Insurance Company of the State of Pennsylvania (Carrier) was the responsible insurer.

3. Claimant had a fusion of the L4-L5 and L5-S1 levels of her back in November 1992.

4. Following her November 1992 surgery, Claimant was regularly employed.

5. As a result of her compensable injury, Claimant suffered a disc herniation at the L3-L4 levels on her left side; the disc herniation caused pain in her lower back and radiating pain (radiculopathy) to both of her legs.

6. Conservative treatments of physical therapy, facet injection, and epidural injections in 1995 and 1996 failed to relieve Claimant's back and leg pain.

7. On December 3, 1996, Dr. Jacob Rosenstein, M. D., a neurosurgeon, performed a discectomy to the L3-L4 levels of her spine.

8. The December 3, 1996, surgery failed to fully relieve Claimant's pain.

9. On November 15, 2001, Dr. Rosenstein performed a second procedure, a microdiscectomy on the left side of the L3-L4 levels of her spine.

10. Immediately after the November 15, 2001, procedure, Claimant's leg pain ended but it recurred in 2002 and 2003.

11. Between May 14, 2003, and September 24, 2003, Claimant's treating doctor, Dr. Rosenstein, prescribed Neurontin, Celebrex, and Hydrocodone for Claimant to treat her recurring leg pain, which was relieved by these medications.

12. Celebrex is an anti-inflammatory. Neurontin is an epilepsy drug also used to treat radiculopathy and Hydrocodone is an opiate pain medication.

13. The dosage of Hydrocodone prescribed for Claimant, two five milligram tablets as needed per day, is a low dosage.

14. Celebrex, Neurontin, and Hydrocodone are drugs used in management of chronic pain following one or multiple back surgeries.

15. Patients who have undergone one or multiple back surgeries often have ongoing, chronic pain as back surgery may reduce but not eliminate pain.

16. Between May 14, 2003, and September 24, 2003, H. P. (Provider), a pharmacy, filled Dr. Rosenstein's prescriptions for Neurontin, Celebrex, and Hydrocodone and dispensed them to Claimant.

17. Carrier denied payment for all prescriptions for Neurontin, Celebrex, and Hydrocodone dispensed by Provider to Claimant on the grounds they were not medically necessary.

18. Provider sought review by the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC or Commission) of Carrier's denial of payment.

19. On September 7, 2004, the MRD denied reimbursement to Provider for the prescriptions of Neurontin, Celebrex, and Hydrocodone it had dispensed to Claimant on the basis that the drugs were not medically necessary.

20. On September 22, 2004, Provider requested a hearing on the MRD Decision.

21. On November 5, 2004, the Commission issued a notice of hearing that included the date, time, and location of the hearing, the applicable statutes under which the hearing would be conducted, and a short, plain statement of matters asserted.

22. Administrative Law Judge Cassandra Church conducted a hearing on the merits on May 16, 2005, and the record closed that day.

III. 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. LAB. CODE ANN. § 413.031 and TEX. GOV'T CODE ANN. ch. 2003.

2. Provider timely requested a hearing, as specified in 28 TEX. ADMIN. CODE § 148.3.

3. Proper and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Provider, as the petitioning party, has the burden of proof in this proceeding pursuant to TEX. LAB. CODE ANN. § 413.031, 1 TEX ADMIN. CODE § 155.41(b), and 28 TEX. ADMIN. CODE § 148.14(a).

5. Provider met its burden of proof to show that Neurontin, Celebrex, and Hydrocodone were medically necessary to treat or reasonably required to relieve the effects of or promote recovery from a compensable injury suffered by Claimant, within the meaning of TEX. LABOR CODE ANN. §§ 408.021 and 401.011(9).

ORDER

IT IS ORDERED that the Insurance Company of the State of Pennsylvania reimburse Highpoint Pharmacy for prescriptions of Neurontin, Celebrex, and Hydrocodone dispensed for the benefit of ___ between May 14, 2003, and September 24, 2003.

SIGNED July 14, 2005.

CASSANDRA J. CHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS