SOAH DOCKET NO. 453-05-1232.M5
TWCC NO. M5-05-0231-01

CHURCH MUTUAL INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	**OF**
V.	§	
	§	
FIRST RIO VALLEY MEDICAL, P.A., n/k/a SOUTH COAST SPINE AND REHABILITATION,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

SOAH DOCKET NO. 453-05-1460.M5
TWCC NO. M5-04-3961-01

CHURCH MUTUAL INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	**OF**
V.	§	
	§	
FIRST RIO VALLEY MEDICAL, P.A., n/k/a SOUTH COAST SPINE AND REHABILITATION,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**
	§	
	§	

DECISION AND ORDER

Church Mutual Insurance Company (Carrier) is challenging the determination of the independent review organization (IRO) that Carrier should pay for preauthorized health care provided by First Rio Valley Medical, P.A. (Provider). Carrier argues that Provider's pain management program is an unacceptable program, which was not preapproved. The Administrative Law Judge (ALJ) concludes that while preauthorization was given for a pain management program, the services provided did not conform to any legal or logical definition of a such a program. Accordingly, Carrier is not liable for payment.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

ALJ Lilo D. Pomerleau conducted a hearing on February 10, 2005, at the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 West 15th Street, Austin,

Texas. Robert S. Howell, D.C., appeared on behalf of Provider. Attorney Wendy Schrock appeared on behalf of Carrier. The record closed the day of the hearing. The parties did not contest notice or jurisdiction.

II. DISCUSSION

A. Background

Claimant sustained a work-related injury on ___, while employed as custodian for ___ in ___, Texas. The injury occurred when Claimant was removing a room divider while standing on a three-foot ladder. The room divider fell towards him and he jumped to the floor, landing on his heels. He felt pain and a pinching sensation in his lower back.[1] Subsequent to the injury, Dr. Madhaven Pisharodi operated on Claimant's lumbar spine in April 2000. The surgery failed. Claimant was first evaluated by Provider on October 31, 2002, with a diagnosis of failed back syndrome, displacement of lumbar disc without myelopathy, radiculitis, and disturbance of skin sensation.[2] Dr. Gilbert Meadows performed a second lumbar spinal surgery on July 31, 2003. On March 2, 2004, Provider reevaluated Claimant, noting that he continued to complain of minimal and constant right foot pain, numbness and a tingling sensation on his right foot, minimal right hip pain, moderate and constant mid and low pack pain, and marked headaches on his left side.[3] Provider requested preauthorization for participation for thirty sessions of a pain management program. Carrier approved this request.[4] Claimant began a chronic pain management program on or about March 8, 2004. The disputed dates of service range from March 15, 2004, to May 11, 2004. The amount in dispute is $25,000. Carrier denied payment as "unnecessary treatment with peer review."[5]

Carrier argues that "the services allegedly provided were not those which may be characterized as what was billed."[6] Further, Carrier asserts that Provider misled Carrier in obtaining preauthorization.

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[1] Carrier's Ex. 8 at 9 (Provider's interim report dated 3/2/04).

[2] Carrier's Ex. 8 at 7 (Provider's initial evaluation).

[3] Carrier's Ex. 8 at 9.

[4] Specifically, Carrier approved: (1) on March 2, 2004, an initial three weeks of pain management to determine Claimant's participation and progress after failed back surgery, ending April 3, 2004; (2) on March 30, 2004, an additional 15 treatment sessions of pain management, ending May 1, 2004.

[5] Provider's Ex. 1, Tab 5.

[6] Carrier Ex. 12 at 3 (request for hearing).

B. Pain Management Program

1. Carrier's Evidence and Argument

Michael Booth, D.C., testified that Provider's pain management program failed to: (1) include a treatment plan and subsequent updates; (2) document changes in Claimant's physical condition; and (3) provide safe, cost effective treatment. According to Dr. Booth, whose own practice is affiliated with a pain clinic, the program offered by Provider was more properly characterized as a job simulation program rather than a chronic pain management program. Dr. Booth specifically took issue with the following:

- < outside activities were performed in a non-therapeutic and uncontrolled environment;
- < riding a lawn mower tractor for approximately three hours in one day was contraindicated both for pain and as a post-surgery activity;
- < power washing the pool is a work-related activity, not a chronic pain management activity; and
- < computer use and watching movies are activities that can be done at home, after which the patient can report to the clinic.

In response to cross examination, Dr. Booth explained that a typical pain management program might include medication management, biofeedback, group or individual counseling, relaxation techniques, and nerve blocks. However, any program would likely be interdisciplinary and tailored to the individual. Work simulation and work hardening are not the same, according to Dr. Booth. Also, in response to cross-examination, Dr. Booth stated that Provider did not follow these 1996 Medical Fee Guideline requirements:

> II.G.(6) An individualized plan of treatment shall be supervised by a doctor within a therapeutic environment. Although some time is spent with a doctor on a one-to-one basis, more that 50% of the time is spent in direct care under the supervision of the physical therapist, occupational therapist, Qualified Mental Health Provider, doctor or other licensed member of the interdisciplinary team. The recommended group size is no larger than five patients per HCP.
>
> (7) Program supervision is provided by a doctor who is trained and experienced in the treatment of patients with chronic pain syndrome as described earlier in this section. The program supervisor shall:
>
> a. provide direct on-site supervision of the daily pain management activities; . . .

c. write the treatment plan for the patient and write changes to the plan based on documented changes in the patient's condition.

2. Provider's Evidence and Argument

Dr. Howell testified he requested preauthorization for 40 sessions, but Carrier only preapproved three weeks of treatment after Dr. Crane and Dr. Howell discussed the case. Then, Dr. Howell sought and received preapproval of a second series of chronic pain treatment. However, Carrier subsequently denied payment.

Dr. Howell noted that Claimant had a failed back surgery then a second surgery, at which Dr. Howell was present. Claimant has had pain for over four years, resulting in physical, psychological, and vocational problems. Dr. Howell asserted that the chronic pain management program was tailored to allow Claimant to function on the job even with his pain. Claimant was unable to undertake a number of activities during this four-year period, but Dr. Howell had Claimant undertaking more activities during this period than he had in four years. Thus, the activities, carefully detailed by Provider, were designed to coincide with Claimant's work and home life: he was required to bend, stretch, use muscles while stretching in the pool, building kites, cleaning cars, weeding, making breakfast and lunch, cleaning the refrigerator and stove, climbing a ladder, buffing floors, sitting at a computer, and watching movies. Dr. Howell testified that having Claimant perform, under supervision, daily tasks such as cooking breakfast and lunch for six weeks resulted in Claimant being able to correctly perform such tasks (bending, reaching, washing dishes) on his own, without thinking about it. Dr. Howell stated that Claimant could not watch videos at home for two reasons: (1) he was tested afterward, and (2) his facility has only one set of copyrighted tapes.

In response to Dr. Booth's testimony, Dr. Howell noted that Dr. Booth agreed that some of the services provided to Claimant in the program such as biofeedback and counseling are reasonably found in pain management programs and were clearly a part of the program at issue. As to concerns that some of the activities were not at performed in a clinic environment, Dr. Howell stated that Claimant was constantly supervised while performing the program's activities. For instance, Dr. Howell himself attended the movies with Claimant and took notes of Claimant's reaction to sitting for such a length of time. Dr. Howell suggested that a "therapeutic environment," as referenced in the rules, means any place beneficial to the patient-it could be a peaceful place outside. As to concerns about attending the movies, according to Dr. Howell, movies are relaxing and thus perform a dual service: relaxation and sitting for long periods. He indicated this is the same

program he has provided to various clients for the last five years. When asked if this program was more properly characterized as job simulation rather than pain management, Dr. Howell stated that the pain management program is more intensive than job simulation or work conditioning.

Dr. Howell testified that a February 26, 2004 treatment plan was submitted to Carrier but it was not available at the hearing (and is not part of this record). However, treatment and activities were documented hour by hour on a daily basis and one could see the changes in the patient's condition. Dr. Howell testified that the treatment plan indicated Claimant's limitations (cannot bend, crouch, kneel, etc.) but did not indicate the program specifics. According to Dr. Howell, there is no need for the treatment plan to state the obvious-how the program would work on lessening Claimant's inability to bend, crouch and kneel. Dr. Howell explained that pain is subjective and the focus was not necessarily on relieving pain, rather the focus of Claimant's program was to get Claimant to function under pain. Claimant was discharged from the program upon the end of the preauthorization and is not coming in for more treatment; he is off narcotic pain relievers, and his cardiovascular conditioning has improved.

C. Analysis

Because Carrier preauthorized the services, the medical necessity of the pain management program is not at issue in this proceeding. Rather, the issue is whether the services provided are properly characterized as part of a reasonable and necessary pain management program. Stated another way, does Provider's program meet the statutory and regulatory definition of a pain management program, which was preauthorized by Carrier.[7] Carrier bears the burden of proving that the treatment program does not meet such a definition. The ALJ finds Carrier met that burden-showing that the overall program was not a reasonable pattern of practice and that Carrier was not envisioning such a program when it preauthorized the pain management program.

Under § 408.021 of the Act, an injured worker is entitled to "health care reasonably required" to relieve the effects of the injury or to enhance the ability to continue working. However, care that provides only superficial improvement or *relief at inordinate cost* is not "reasonably" required. In this case, a significant portion of the treatment program's activities were performed at extraordinary

[7] Under the workers' compensation system, the employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN.§ 408.021. "Health care"includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN.§ 401.011(19). The 1996 Medical Fee Guideline at II.G. defines and sets the standards of a chronic pain management program.

cost. Specifically, Dr. Booth suggested that certain activities could have been performed for only a few weeks and that Provider opted for costly therapy when a similar home program might have been as efficacious at significantly less cost. For instance, teaching Claimant how to safely bend, stretch and move while preparing food-a daily portion of the program consisted of supervising Claimant while he fixed breakfast and lunch-could have taken only a few sessions or, at most, a few weeks (8-10 sessions). Hours Claimant spent sitting at the computer, watching a back therapy videotape, and watching movies could have been performed at home, and his response to such activities reported to the clinic the following session.

Dr. Booth convincingly testified that certain activities (cleaning an indoor pool with a power washer; fixing and using a riding lawnmower; cleaning the clinic van; washing a car) are better classified as work hardening or work conditioning. Dr. Howell testified that he didn't "care about [Claimant's] pain but about function." Such a statement was compelling argument in support of Dr. Booth's observation that the emphasis of this program was misplaced and inappropriate. Under the Medical Fee Guidelines, a chronic pain management program is related to reducing the use of medication, decreasing the intensity of subjective pain, increasing the ability of the worker to manage pain, reducing health care, or returning to work.[8] A chronic pain management program provides services "to reduce pain, improve functioning, and decrease the dependence on the health care system."[9] In contrast, both work conditioning and work hardening programs emphasize a highly structured goal-oriented program designed to return the injured worker to work by: (1) simulating "work activities in conjunction with conditioning tasks" (work conditioning) or (2) maximizing "the ability of the persons served to return to work" (work hardening).[10] Provider's program inappropriately included activities that were contraindicated for Claimant and focused more on return to work than on pain reduction or pain management.

Dr. Booth also took issue with the lack of an individualized treatment plan, required under the Medical Fee Guideline at II.G.6 and referenced at II.G.7, which requires the program supervisor to "write the treatment plan for the patient and write changes to the plan based on documented changes in the patient's condition." Clearly, Provider documented the daily treatment and Claimant's response. However, although Dr. Howell testified that a treatment plan existed, he failed to proffer

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[8] *See* Medical Fee Guideline. II.G. at 1 and 11.

[9] Medical Fee Guideline. II.G.

[10] Medical Fee Guideline. II.D. and E.

one and did not indicate that any documented changes were included in the treatment plan as envisioned by the Medical Fee Guideline. There appeared to be no means of charting the goals of the plan with the Claimant's progress.

Concerning the issue of whether the program was performed in a therapeutic environment, the ALJ makes no finding that certain treatment can or cannot be performed outside the clinic offices. However, Dr. Booth's testimony-that Claimant's participation in bowling, watching movies, and driving a riding lawn mower are not commonly known as activities performed in a therapeutic environment-was convincing. Certain activities, such going to Home Depot to buy supplies, and playing darts and bowling, are not usually found in any therapy program.[11] Because such activities are not commonly known as therapeutic activities, it follows that they were not performed in a clinic environment despite Dr. Howell's protestations that these activities were good for Claimant.

The ALJ acknowledges Dr. Howell's frustration that this expensive treatment program was not only preauthorized once but twice by Carrier. Certainly once the program began, before preauthorizing additional sessions, Carrier should have made a better attempt to obtain a treatment plan (if one existed) or somehow ascertain the specifics of the program being provided to Claimant. However, Carrier's lack of diligence does not negate the fact that Provider's program was not a reasonable pain management program.

Finally, Dr. Howell admitted that his facility is not certified by the Commission of Accreditation of Rehabilitation Facilities (CARF). Thus, his billing for $125 per hour does not meet the Commission's maximum allowable reimbursement (MAR) guidelines. Any services provided under the program at issue are limited by MAR to $100 per hour.

III. FINDINGS OF FACT

1. Claimant, a custodian for ___ in___, Texas, suffered a compensable injury to his lower back on ___, removing a room divider while standing on a three-foot ladder. The room divider fell towards him and he jumped to the floor, landing on his heels. He felt pain and a pinching sensation in his lower back.

2. At the time of the injury, Church Mutual Insurance Company (Carrier) was the insurance carrier for Claimant.

[11] *See* Carrier Ex. 2 for list of activities.

3. Subsequent to the injury, Dr. Madhaven Pisharodi operated on Claimant's lumbar spine in April 2000. The surgery failed.

4. Claimant was first evaluated by Robert S. Howell, D.C. at First Rio Valley Medical, P.A. (Provider) on October 31, 2002, with a diagnosis of failed back syndrome, displacement of lumbar disc without myelopathy; radiculitis, and disturbance of skin sensation.

5. Dr. Gilbert Meadows performed a second lumbar spinal surgery on July 31, 2003.

6. On March 2, 2004, Provider reevaluated Claimant, noting that he continued to complain of minimal and constant right foot pain; numbness and a tingling sensation on his right foot; minimal right hip pain; moderate and constant mid and low back pain, and marked headaches on his left side.

7. Provider requested preauthorization to treat Claimant with thirty sessions of a chronic pain management program. Carrier approved this request for a period of three weeks only.

8. Provider requested preauthorization to treat Claimant with an additional 25 sessions of a chronic pain management program. Carrier approved this request.

9. Claimant received treatment from Provider billed as a chronic pain management program beginning on or about March 8, 2004.

10. Services provided from March 15 to May 11, 2004, were denied by Carrier as "unnecessary treatment with peer review."

11. Provider requested medical dispute resolutions before the Texas Workers' Compensation Commission (Commission). One request concerned services from March 15 through May 11, 2004. Another request concerned services provided on March 26, 2004.

12. The Commission's designee, an independent review organization (IRO), found that the services (both requests) had been preauthorized and, thus, were medically necessary.

13. Provider requested contested case hearings before the State Office of Administrative Hearings.

14. As the issues and parties for both matters were the same, the two matters were consolidated for a single hearing on the merits.

15. All parties received not less than ten days'notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the statutes and rules involved; and the matters asserted.

16. The joint hearing on the merits convened on February 10, 2005, before Lilo D. Pomerleau, Administrative Law Judge. Robert S. Howell, D. C., appeared on behalf of Provider. Attorney Wendy Schrock appeared on behalf of Carrier. The record closed that same day.

17. Provider's chronic pain management program included daily preparation of breakfast and lunch and an almost daily cleaning of the table and washing the dishes; an almost daily task of watching educational videos; sitting at the computer several times a week; occasionally

going to Home Depot to purchase supplies; cleaning the clinic's van and pool area; cleaning Claimant's own vehicle; and watching a movie at a movie theater most Fridays.

18. The activities listed in Finding of Fact No. 17 are not commonly found in the therapeutic environment of a chronic pain management program.

19. It is not necessary to perform activities of daily living, such as preparation of food twice a day for over a month, for a patient to learn how to bend and stretch while performing such activities.

20. Claimant's use of a riding lawn mower for several hours in one day is contraindicated for pain and post surgery.

21. Certain program activities (cleaning an indoor pool with a power washer; fixing and using a riding lawnmower; cleaning the clinic van; washing a car) are more appropriately classified as a work hardening or work conditioning program rather than a chronic pain management program.

22. Provider's chronic pain management program failed to comply with the requirement found in the Medical Fee Guideline that the program include an individualized plan of treatment within a therapeutic environment and that the treatment plan be updated to reflect changes in the plan based on changes in the patient's condition.

23. Because Provider's services are not certified by the Commission of Accreditation of Rehabilitation Facilities (CARF), services must be reimbursed in compliance with maximum allowable reimbursement (MAR) guidelines. Any services provided under Provider's program are limited by MAR to $100 per hour.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the 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(k) 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) §§148.001-148.028.

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

5. Carrier, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC § 148.21(h).

6. Based upon the foregoing Findings of Fact, the treatments for Claimant on March 15 through May 11, 2004, do not represent elements of health care medically necessary under § 408.021of the Act.

7. Based upon the foregoing Findings of Fact and Conclusions of Law, the findings and decisions of the IRO and of the MRD were incorrect; Petitioner's request of reimbursement for services should be denied.

ORDER

IT IS THEREFORE, ORDERED that the reimbursement requested by Dr. Howell, First Rio Valley Medical, P.A., for services rendered on March 15 through May 11, 2004, is denied.

SIGNED April 5, 2005.

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LILO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS