SOAH DOCKET NO. 453-05-1541.M2
TWCC MRD NO. M2-04-1565-01

___,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
LUMBERMEN'S MUTUAL CASUALTY COMPANY,	§	
	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

___ (Claimant) challenged the decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) denying preauthorization for the purchase of supplies to use of a muscle stimulator (MS) unit. The MRD concluded that the MS unit and supplies were not medically necessary to treat Claimant.

Claimant failed to meet her burden of proof to show that her continued use of an MS unit is medically necessary to treat her compensable injury. Preauthorization for the supplies necessary to use the MS unit is thus denied.

The hearing in this matter convened on February 14, 2005, in Austin, Texas, with Administrative Law Judge (ALJ) Cassandra Church presiding. Claimant represented herself; she was assisted by Luz Loza of the Commission's Office of the Ombudsman. Lumberman's Mutual Insurance Company (Carrier) was represented by Tommy W. Lueders, II, attorney. The Commission did not participate in the hearing.

Matters of jurisdiction and notice were not disputed, so are set forth in the Findings of Fact and Conclusions of Law without further discussion here.

I. DISCUSSION

A. Factual Background

Claimant was injured on ___, in fall on a wet sidewalk outside her work site. She sprained her lower back and injured her left knee and her left hip. She was treated conservatively.[1] In 1994 and in late 2000, she underwent sacroiliac joint intra-articular steroid

[1] Claimant Exh. 1, pp. 34-35.

injections.[2] The injections relieved her back pain.[3] For some period during her treatment, Claimant used a TENS unit.

In an independent medical examination conducted on June 6, 2002, Claimant was diagnosed as having mild sacroiliitis on the right side and mild chondromalacia of the right knee.[4] Sacroilliitis is an inflamation of the sacroiliac joint. Chondromalacia is softening of the cartilage in the knee. There is no dispute that this is an accurate diagnosis of her condition in 2002. Her diagnosis has not changed since 2002.

Claimant has a normal lumbar spine.[5] Claimant has normal neurologic functions in her legs.[6] In 2002, Claimant showed no abnormal movement or gait.[7] Notwithstanding those findings, Claimant has continued to report low back and left hip pain which worsens the more hours she works or when she undertakes extensive physical activity. Her employment as a home health aide may require her to lift or support the weight of her patients.

In July 2001, Claimant obtained a MS unit to aid in pain control.[8] Over the past three years, Claimant has continued periodic use of the MS unit. She also takes non-steroidal anti-inflammatory drugs for pain relief. Carrier apparently had been paying for supplies for the MS unit until February 2004. At that time, Carrier stopped preauthorizing Claimant's purchase of the supplies.

In order to use the MS unit, Claimant must obtain batteries and electrodes, as well as an electrode contract cream. The approximate cost to Claimant for these supplies is $ 116.00 per month at her rate of usage of the unit. There was no dispute that the requested supplies would be necessary for Claimant to properly use the MS unit.

Over the past three years, Claimant has used the MS unit on a self-directed schedule. That is, if she is experiencing a flare-up of pain, she may use the unit for an entire week throughout each day. If she wakes up feeling pain in her hip, she may use the unit during the day. However, if she believes she will have a low-physical-demand day or week, she will not will use the unit or use it less frequently. She reports that use of the MS unit relieves her pain and enables her to be more physically active. Specifically, she states that using the unit enables her to work a full work week, rather than part time.

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[2] Claimant Exh. 1, pp. 12-18, 26-27, 29.

[3] Claimant Exh. 1, p. 29.

[4] Claimant Exh. 1, pp. 5-8.

[5] Claimant Exh. 1, p. 43 (MRI of the lumbar spine, December 9, 1994)

[6] Claimant Exh. 1, p. 52.

[7] Claimant Exh. 1, pp 5-8. (Independent medical evaluation report, June 6, 2002, Charles W. Kennedy, Jr., M.D.)

[8] Claimant Exh. 1, p. 3. Claimant testified that she had been using the MS unit for eight years. However, contemporaneous medical records indicate that the MS unit was not acquired until 2001. Claimant may have been referring to her combined use of both the TENS and MS units.

Lawrence Lenderman, M.D., an orthopedic surgeon who has been treating Claimant since February 1993, recommended that approval be granted for the supplies. Dr. Lenderman based his recommendation was on the fact that Claimant reports that she obtains pain relief from continued use of the MS unit. Dr. Lenderman also stated that Claimant's reaction to the unit has been somewhat unexpected because it is more usual for users of MS units to experience a decrease or tapering off of the benefit from the machine a couple of months after use begins. TENS and MS units are more commonly used in the acute care phase of an injury rather than as a chronic pain management tool.[9] However, he concluded that as Claimant has experienced long-term benefits, she should continue to use the unit in the same manner that she has been using it for the past three years.

Dr. Lenderman also acknowledged that Claimant's pain relief may be the result of a placebo effect. That is, the pain relief arises from her belief that the unit is providing relief rather than actual changes caused by the unit. However, he said that from the point of view of benefit to the patient, it did not matter to him whether the MS unit actually relieves Claimant's pain or whether it does so because Claimant merely believes that it does.

Dr. Lenderman did not indicate whether there had been any supervised trial during the past three years of discontinuing Claimant's use of the MS unit for a period of time to determine whether the unit was providing the pain relief. However, there has been a trial of sorts as Claimant has not been using the MS unit over the past eight months. She stated that during that eight-month period she has been she has unable to work more than 20 hours without experiencing pain severe enough to prevent further work and that she has doubled her daily dose of pain medication. Dr. Lenderman has not changed her pain medication prescription. There was no evidence on what other self-help activities, if any, Claimant has undertaken over the past eight months to help relieve her pain.

In February 2004, Ira Posner, M.D., the Carrier's peer reviewer, recommended against paying the costs of the MS unit.[10] He concluded that Claimant's medical records failed to demonstrate any objective, quantifiable findings to support use of the MS unit. Dr. Posner stated that indications of the need for an MS unit included measurable muscular atrophy, graded muscle spasms identified by muscle or muscle group, evidence of decreased or impaired local circulation, or the need for muscle reeducation.

B. **Analysis**

Under the Workers' Compensation Act (the Act), insurers are obliged to pay for all services or treatments which are required to treat, reasonably required to relieve the effects of or promote recovery from the compensable injury suffered by an injured worker, or to enhance the ability of the employee to return to or retain employment.[11] However, there is nothing in the Act which obligates insurers to pay for materials or treatments the benefit from which arises solely out of an injured worker's belief that those treatments or procedures are making him or her feel better.

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[9] Carrier Exh. 1, pp. 1-3. The reviewer for Medical Review of Texas, the Independent Review Organization (IRO), concluded that a MS unit was generally used as an adjunct therapy in the acute phase of care, and that Claimant's medical records did not show objective indicators for its necessity in the chronic phase of Claimant's injury.

[10] Carrier Exh. 1, pp. 4-5.

[11] TEX. LAB. CODE ANN. §§ 408.021 and 401.011(19).

The need for treatment in workers' compensation cases must be based on objective manifestations of conditions arising from the compensable injury.[12] Dr. Posner found no objective indications in Claimant's medical history for use of the unit; nor did the IRO reviewer. Even Claimant's treating doctor, Dr. Lenderman, was unable to state conclusively that the MS unit itself, rather than Claimant's belief in its benefits, was the mechanism effecting her pain relief. Claimant's spine, nerves, and gait are normal.

The ALJ acknowledges that from the treating physician's point of view, it may not matter whether the MS unit was itself relieving pain or was triggering pain relief through the placebo effect. However, from the point of view of obligating an insurance carrier to fund an ongoing, long-term course of treatment it matters very much. In this case, there were no objective manifestations that demonstrated that the operation of the MS unit was relieving Claimant's pain. The preauthorization request for the supplies necessary to use it is denied.

C. Claim

The scope of the claim in this case is not clear. The request for preauthorization in this case was apparently for an indefinite period of time. That is, Claimant asked Carrier to continue to pay for the supplies but included no specific duration in her request.

In a notice of retrospective determination issued on February 9, 2004, the Carrier's peer reviewer recommended upholding the previous denial of authorization retrospectively from January 1, 2003, to February 9, 2004, and also recommended that any further use of the MS unit after February 9, 2004 be denied.[13] The MRD Decision did not address the open-ended nature of either the request or the denial. Normally, a preauthorization request is for a specific procedure or a finite course of treatment.

The open-ended nature of this claim is problematical. Even if the Claimant had successfully demonstrated that the supplies for the MS unit were medically necessary, it would not be an appropriate use of the preauthorization procedure to approve of their use for an indefinite, perhaps lifelong, period without some provision for revisiting that decision after a reasonable period of time. The request in this case provided for nothing of that nature.

By the same token, any denial of preauthorization for an indefinite period should not be treated as a lifelong denial without regard for a change of condition or for Claimant's submission of new evidence on her condition.

Since this case was presented as a preauthorization, only future purchases by Claimant of the supplies is at issue here, not reimbursement for any past purchases of supplies that may have occurred. This Decision denies preauthorization for future purchases based on medical evidence in the record as of the time of this request.

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[12] *See* SOAH Docket No. 453-04-1018.M2 (May 2, 2004, J. Norman) [muscle stimulator].

[13] Carrier Exh. 1, p. 4.

D. Summary

Claimant failed to carry her burden of proof to show that the supplies for the MS unit were medically necessary to treat any lingering effects of her compensable injury. This ruling is based on evidence in the record of this case and does not rule prospectively on any future requests that may be made in regard to this treatment.

II. FINDINGS OF FACT

1. On ___, ___ (Claimant) sprained her low back and also injured her left knee and left hip in a fall.

2. Lumbermen's Mutual Casualty Company (Carrier) is the responsible insurer.

3. Claimant's current diagnosis is mild sacroiliitis on the right side and mild chondromalacia of the right knee.

4. Immediately after the injury, Claimant was treated with conservative care measures. During some period during her treatment, she used a TENS unit.

5. In 1994 and in late 2000, she underwent sacroiliac joint intra-articular steroid injections. The injections relieved her pain.

6. Claimant has a normal lumbar spine, normal neurologic functions in her legs, and no abnormal movement or gait.

7. Claimant has not manifested any objective indicators for use of a muscle stimulator (MS) unit such as measurable muscular atrophy, graded muscle spasms identified by muscle or muscle group, evidence of decreased or impaired local circulation, or the need for muscle reeducation.

8. From her date of injury to the present, Claimant continued to report ongoing episodes of pain which worsen when she lifts heavy objects, works a full work week with high physical demand, or undertakes extensive physical activity.

9. In 2001, Claimant received a MS unit to aid in pain control.

10. The use of a MS unit requires supplies, including batteries, electrodes, and electrode contact cream. At Claimant's frequency of use, the approximate monthly cost of the supplies is $116.00.

11. Claimant has continued to use the MS unit on a self-directed schedule during the past three years.

12. Claimant uses the MS unit throughout the day for up to a week if she is experiencing a flare-up of pain or anticipates heavy physical-demands at her job. She does not use the unit, or uses it less frequently, if she anticipates a low-physical demand day or week on her job or is experiencing low levels of pain.

13. Claimant reports that use of the MS unit relieves her pain and enables her to more physically active; specifically, its use enables her to work a 40-hour work week rather than part time.

14. For most patients the pain-relieving effects of a TENS unit or a MS unit taper off after an approximate two-month period of use. Continuing to get high levels of pain relief from a MS unit over the course of three years or longer is unusual.

15. TENS and MS units are most frequently used in the acute phase of an injury.

16. Over the past eight years, Claimant has not undergone any supervised trial period of attempting to perform her full-time work and normal activities of daily living without recourse to the MS unit.

17. Claimant has not used the MS unit for the past eight months due to the pending preauthorization dispute and has been working part time during that period due to her pain.

18. Claimant has doubled her intake of pain-relief med ication in the past eight months, although the type and amount of medication prescribed is the same.

19. Whether Claimant undertook other self-help methods to control her pain during the past eight months is unknown.

20. Claimant takes non-steroidal anti-inflammatory pain medications for pain relief.

18. Use of a MS unit may relieve pain because of the placebo effect, *i.e.*, due to the patient's belief in its beneficial effects.

19. It is unknown whether Claimant is experiencing pain relief from the placebo effect or as a direct result of the operation of the MS unit.

20. In February 2004, Carrier denied preauthorization for the supplies for the MS unit on the basis that they were not medically necessary. Claimant's request for preauthorization and Carrier's denial were for a period of time of unknown duration.

21. Claimant appealed the Carrier's denial of preauthorization to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission).

22. On September 20, 2004, based on the review by an Independent Review Organization (IRO), Medical Review of Texas, the MRD denied preauthorization.

23. On October 12, 2004, Claimant requested a hearing on the MRD decision.

24. On October 28, 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. The case was continued on motion of the parties.

25. Administrative Law Judge Cassandra Church conducted a hearing on the merits of this case on February 14, 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. Claimant 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. Claimant, as the petitioning party, has the burden of proof in this proceeding pursuant to TEX. LAB. CODE ANN. §§ 413.031 and 28 TEX. ADMIN. CODE § 148.21(h).

5. Claimant failed to met her burden of proof to show that continued use of a muscle stimulator (MS) unit and the supplies needed to use the MS unit were medically necessary to treat or reasonably required to relieve the effects of or promote recovery from the compensable injury suffered by Claimant, within the meaning of TEX. LAB. CODE ANN. §§ 408.021 and 401.011(19).

ORDER

IT IS ORDERED that preauthorization for ___ (Claimant) to be reimbursed for an indefinite period of time for her purchases of supplies to operate a muscle stimulator unit is hereby denied.

SIGNED March 14, 2005.

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