SOAH DOCKET NO. 453-05-6882.M5
TWCC MRD NO. M5-05-2139-01

J. M. C., D. C.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
AMERICAN HOME ASSURANCE COMPANY,	§	
	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jarrod M. Cashion, D. C. (Provider), challenged the decision of the Texas Workers' Compensation Commission (TWCC or Commission)[1] that denied reimbursement to Provider for sessions of therapeutic exercises and a special service rendered by Provider for__ (Claimant) between March 27 and June 22, 2004 (disputed period). Provider contended that physical therapy was necessary to treat Claimant's shoulder pain and bicep weakness. On May 12, 2005, the Medical Review Division (MRD) of TWCC determined that the care was not medically necessary based on the report of the Medical Review Institute of America, Inc., an independent review organization (IRO).

The hearing in this matter convened on February 28, 2006, in Austin, Texas, with Administrative Law Judge (ALJ) Cassandra Church presiding. The record closed on March 1, 2006. Provider appeared on his own behalf. Carrier was represented by Dan C. Kelley, attorney. Notice was proper and jurisdiction was established in this case.

The ALJ concludes that Provider failed to meet his burden of proof to demonstrate that sessions of therapeutic exercises provided during the disputed period were necessary to treat Claimant's compensable injury. Provider also failed to meet his burden of proof to show that a special service provided on June 21, 2004, was a medically-necessary activity. Carrier will not be required to reimburse Provider for any additional services during the disputed period.[2]

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[1] The Commission was abolished effective September 1, 2005, and the functions of the Commission assigned to the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC). The Commission' s decision was issued on May 12, 2005, and referred to State Office of Administrative Hearings (SOAH) for contested-case hearing in June 2006, both dates before the transfer of authority. The agency names at the time of the MRD decision will be used for clarity.

[2] Provider asserted that Carrier was inconsistent in its payment decisions for services rendered in April, May,

I. DISCUSSION

A. History of the Case and Evidence

In___, Claimant fell from a ladder, dislocating his right shoulder, damaging his rotator cuff, and breaking a bone in that shoulder. Several days after the injury he underwent surgery. Claimant's orthopedist, George A. Richardson, M. D., prescribed physical therapy with Provider about a month later. Dr. Richardson released Claimant to work without restrictions on January 15, 2004; however, Claimant was returned to light duty later in 2004.[3]

In January 2004, Provider noted that Claimant was not regaining strength in his right bicep despite his conditioning exercises. Provider then administered a nerve conduction test which suggested some problem or damage to the nerve in Claimant's right bicep. Further testing revealed that Claimant had developed isolated right musculocutaneous nerve injury with severe biceps denervation. Denervation is a potential complication of the injury Claimant suffered. A healing period of between 12 and 18 months was likely and some residual bicep atrophy possible.[4] During the first half of 2004 most of Claimant's nerve function returned, although he suffered some permanent muscle atrophy.[5]

For four months following the denervation diagnosis, Provider continued to administer an extensive program of in-house, one-on-one physical therapy. The chief evidence of direction from Dr. Richardson regarding therapy after denervation diagnosis was a February 5, 2004, letter from Provider to Dr. Richardson confirming that Dr. Richardson had verbally authorized an additional four to six weeks of rehabilitation at a frequency of two to three times per week.[6] The letter does not specify one-on-one therapy was needed.

After March 27, 2004, Provider conducted 22 sessions of therapeutic exercises, all or most of them on a one-on-one basis.[7] The exercises consisted of strengthening exercises and stretching

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and June 2004, denying some claims but paying others. The ALJ does not dispute the accuracy of this statement. However, this decision will cover only those dates of service reviewed by the MRD for which the Carrier denied payment.

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

[4] Provider Exh. 1, pp. 53-55.

[5] Provider Exh. 1, p. 114.

[6] Provider Exh. 1, pp. 57, 92 and 93.

[7] Provider Exh. 1, p. 136 (IRO Report).

routines for Claimant's right arm and shoulder. Sample exercises included shoulder abduction and flexion with resistance, rows, external rotation exercises, and bicep curls.[8] Provider also had instructed Claimant on a home exercise program, which Claimant performed.[9] On most dates of service, including those at the end of the disputed period, Claimant reported low to moderate levels of pain.[10]

Provider contended that the treatment was necessary to enhance Claimant's recovery and strengthen his shoulder and arm during the period while the nerve was healing and that the treatment resulted in gains in strength and flexibility, as well as aiding in pain control. Provider also contended that strengthening of muscles close to the bicep was necessary in order to help them compensate for the impaired bicep.

Carrier's experts contended the course of intensive therapeutic exercises was not necessary, listing three grounds. First, they contended that any physical therapy focused on Claimant's bicep during that period was pointless since the pace of nerve recovery cannot be sped up by external treatment such as physical therapy. Second, they contended that physical therapy was not warranted for pain control because Claimant showed no substantial variance or improvement in his pain. Third, they contended that Claimant showed no significant, measurable gains in overall arm or shoulder strength and that a home exercise program would have been sufficient for Claimant to maintain his arm strength and flexibility approximately six months after surgery

R. Michael Hamby, D. C., testifying on behalf of Carrier, stated that damaged nerves will recover spontaneously, if they recover at all. He said that physical therapy would not change the outcome of the nerve-healing process or shorten its length, which can vary considerably among patients whose nerves do heal. Dr. Hamby did not dispute that Claimant needed to continue strengthening and stretching his shoulder, but disputed that Claimant presented the kind of extenuating circumstances that warranted an intensive in-office therapy regimen. He also noted that the therapy program did not show progression. That is, the variety and intensity of exercises varied little during the disputed period.[11]

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[8] Provider Exh. 1, p. 86; Carrier Exh. 1, p. 163.

[9] Carrier Exh. 1, p. 166; Provider Exh. 1, p. 139.

[10] Carrier Exh. 1, p. 186.

[11] Carrier Exh. 1, pp. 90-194.

Provider contended that his records demonstrated significant increases in Claimant's functionality during the disputed period. To support his assertion, Provider pointed to his staff's treatment notes showing gradual progress toward greater strength and an improved range of motion.[12]

One of Carrier's peer reviewers, Phillip Osbourne, M. D., concluded that Claimant did not show significant improvement by objective testing, notwithstanding Claimant's subjective reports of improvement after his therapy sessions.[13] Dr. Osbourne stated a patient's subjective reports of improvement were not sufficient to support a finding of medical necessity.

B. Analysis

Notwithstanding Provider's conviction that his treatments assisted Claimant, his assertions were not supported by the evidence on those sessions. The records show a pattern of nearly-identical exercises that appeared to be administered at much the same level of intensity throughout the disputed period. The exercises appeared to have had little or no effect on Claimant's ability to manage pain-causing activities in his life as Claimant's pain levels remained fairly consistent throughout the period. The description of the exercises appears very similar to exercises one would perform at a gymnasium or at home. Claimant failed to identify any special factors concerning Claimant's lack of capacity, either physical or mental, that could prevent him - with some periodic oversight from Provider - from maintaining a conditioning program on his own.

Dr. Hamby's testimony on nerve recovery as independent of physical therapy was credible. Provider was credible in stating that other arm and shoulder muscles needed to be strengthened to compensate for the impaired bicep muscle. However, Provider failed to demonstrate that an intensive program of in-office, one-on-one therapy was necessary for Claimant to maintain such compensatory conditioning.

There was one instance of Provider requesting reimbursement for an unlisted special service (CPT Code 99199). The service, provided on June 21, 2004, comprised time spent by Provider to prepare his administrative appeal. Carrier denied payment for this on the basis that it was not related to patient care. Provider provided no evidence to show that the time was actually spent on patient

[12] Provider Exh 1, pp. 83, 88-90, 99, 106.

[13] Carrier Exh. 1, p. 11-15.

care nor did he raise the issue that the matter should have been decided as a fee issue. The ALJ concluded that Provider failed to meet his burden of proof on the medical necessity for this service.

C. Summary

Based on the facts and analysis above, the ALJ concluded that Provider failed to meet his burden of proof to show that one-on-one sessions of therapeutic exercises and the special service on June 21, 2004, were medically necessary to treat Claimant's compensable injury during the disputed period. Claimant's request for reimbursement for all services rendering during that period is denied.

II. FINDINGS OF FACT

1. On___, in a fall from a ladder, ___(Claimant) dislocated his shoulder, fractured the anterior glenoid bone, and tore his rotator cuff.

2. American Home Assurance Company (Carrier) was the responsible insurer.

3. On October 28, 2003, Claimant underwent surgery to repair the dislocation, fracture, and rotator cuff tear.

4. By November 2003, Claimant was experiencing low levels of pain and demonstrated nearly full passive range of motion.

5. On December 15, 2003, Claimant was referred to Jarrod Cashion, D.C. (Provider), for physical therapy for a four-week period.

6. On January 15, 2004, George A. Richardson, M. D., released Claimant to work without restrictions, although some duty restrictions were imposed later in 2004.

7. In early February 2004, Dr. Richardson authorized six additional weeks of rehabilitation but did not require one-on-one therapeutic exercises sessions.

8. Provider conducted 35 sessions of therapeutic exercises with Claimant between December 22, 2003, and March 25, 2004.

9. Provider conducted 22 sessions of therapeutic exercises between March 27 and June 22, 2004 (the disputed period), in which he administered the exercises on a one-on-one basis (CPT Code 97110).

10. In December 2003 Claimant was given a home exercise program; Claimant performed his home exercises throughout his treatment by Provider.

11. In January 2004, Claimant was diagnosed with an isolated right musculocutaneous nerve injury with severe biceps denervation, a complication of his shoulder injuries.

12. In the case of muscle weakness arising from a nerve injury, the speed and degree of muscle strength regained is controlled by the rate of recovery of the nerve.

13. Recovery from a denervation may take between 12 to 18 months and may leave the patient with some permanent muscle atrophy.

14. In the case of bicep muscle weakness secondary to a nerve injury, simple curl exercises are sufficient to regain muscle strength as the nerve recovers.

15. Claimant=s bicep function slightly improved between January and June 2004, but Claimant did not show significant, measurable gains in range of motion, strength, or shoulder function during the disputed period.

16. Claimant reported low to moderate pain levels throughout the disputed period.

17. In July 2004, Claimant was certified at maximum medical improvement with a 14 per cent permanent impairment based on some reduction in his shoulder range of motion and some permanent residual atrophy of his right bicep.

18. Provider requested reimbursement for an unlisted special service (CPT Code 99199) provided on June 21, 2004, that comprised the preparation by Provider of his administrative appeal.

19. Carrier denied reimbursement for therapeutic exercise sessions conducted by Provider during the disputed period based on peer reviews conducted by the Carrier; Provider sought review by the Commission's Medical Review Division (MRD) of Carrier's denial.

20. On May 12, 2005, the MRD determined that one-on-one therapeutic exercises administered during the disputed period were not medically necessary, based on the report of the Medical Review Institute of America, Inc., an independent review organization (IRO)

21. On May 12, 2005, the MRD determined that the special service provided on June 21, 2004, should not be reimbursed as it did not involve patient treatment.

22. On June 3, 2005, Provider requested a hearing on the MRD Decision.

23. On June 21 and 28, 2005, the Commission issued, respectively, a notice of hearing and a corrected 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.

24. Administrative Law Judge Cassandra Church conducted a hearing on the merits on February 28, 2006, and the record closed March 1, 2006.

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(k), TEX. GOV'T CODE ANN. ch. 2003, and Acts 2005, 79th Leg., ch. 265, §8.013, eff. Sept. 1, 2005**.**
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 failed to meet his burden of proof to show that sessions of one-on-one therapeutic exercises were medically necessary during the disputed period 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).

6. Provider failed to meet his burden of proof to show that preparation of an administrative appeal on June 21, 2004, was a special service that was 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 all requests by Provider for reimbursement from the American Home Assurance Company for sessions of one-one therapeutic exercises administered between March 27, 2004, and July 22, 2004, and for the special service (CPT Code 99199) provided on June 21, 2004, aredenied.

SIGNED April 27, 2006.

CASSANDRA J. CHURCH

ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS