SOAH DOCKET NO. 453-05-1995.M5
TWCC MR NO. M5-04-3458-01

WACO ORTHO REHAB,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
AMERICAN HOME ASSURANCE	§	
COMPANY,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Waco Ortho Rehab. (Petitioner) requested a hearing to contest the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through Texas Medical Foundation, an Independent Review Organization (IRO), denying Petitioner reimbursement for therapeutic procedures and exercises, office visits, muscle testing, physical performance testing, range of motion testing, chiropractic manipulative treatment, mechanical traction, joint mobilization, and myofacial release, for the period August 9, 2003, through October 28, 2003 (Disputed Services). The IRO approved these chiropractic treatments for the period July 18, 2003, through August 8, 2003.[1]

This decision denies the relief sought by Petitioner and denies payment of the remainder of the Disputed Services.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened on September 19, 2006, before Administrative Law Judge (ALJ) Stephen J. Pacey. William Maxwell represented the Petitioner, and Tracey Tobin represented American Home Assurance Company (Respondent).

[1] American Home Assurance Company did not contest the IRO decision.

There were no contested issues of notice. David N. Bailey, D.C., testified for Petitioner. Phillip Osborn, M.D., and Raina Robinson testified for Respondent. The record closed the same day following adjournment of the hearing. Petitioner raised a jurisdictional issue.

II. JURISDICTION

In 2003, the rules provided in 28 TEX. ADMIN. CODE (TAC) § 133.304(h) that a carrier who reduces or denies payment for a treatment or service on the recommendation of a peer review, is required to provide the peer review report to the sender of the bill with the Explanation of Benefits (EOBs). Dr. Bailey testified that the peer reviews were not attached to the EOBs; consequently the State Office of Administrative Hearings (SOAH) does not have jurisdiction in this case as a matter of law. Raina Robinson, who is an Administrative Supervisor responsible for supervising the personnel that answer Respondent's requests for payment, testified that her section always attaches a peer review to the EOB if lack of medical necessity is the reason for the denial. Ms. Robinson said that when Respondent receives a bill from the Provider it is first entered into Respondent's system. It then goes to a panel of doctors to determine whether the treatments were medically necessary. If the doctors decide that the treatments were not necessary, the EOBs are prepared with the peer reviews attached.

Petitioner asserted that Ms. Robinson did not personally attach the peer reviews to the EOBs; therefore, she could not know whether they were attached in this case. Respondent argued that it was reasonable to infer that Dr. Bailey did not personally open the EOBs; therefore, he could not know whether the peer reviews were attached. Both Dr. Bailey and Ms. Robinson were credible witnesses. In this case, the Petitioner has the burden of proof, and Petitioner failed to prove by a preponderance of the evidence that the peer reviews were not attached to the EOBs.

III. DISCUSSION

__ (Claimant) sustained a work related injury on or about__, while pulling a palette. She experienced a sharp pull and pain in her shoulder and back. Claimant was diagnosed with a right shoulder sprain/strain and a lumbar/cervical sprain/strain. Dr. Baily began treating Claimant on June

9, 2003. His original treatment plan consisted of a trial of home program treatment using exercises and cryotherapy and a return to the clinic for an assessment of the progress. At that time, Dr. Bailey referred Claimant to Dr. Schickner for pain medication evaluation, and took Claimant off work. After Dr. Bailey received Dr. Schickner's report, Dr. Bailey conducted a complete evaluation developing a treatment plan on June 27, 2003. Dr. Bailey proceeded to perform chiropractic treatment on Claimant from July 18, 2003 through October 28, 2003. Respondent denied payment for the services based on peer reviews. On June 7, 2004 Dr. Bailey requested a Medical Dispute Resolution from the Medical Review Division. On August 25, 2004, the IRO decided that the services from July 18, 2003, through August 8, 2003, were medically necessary and that the services from August 9, 2003, through October 28, 2003 were not medically necessary. On October 27, 2004, Petitioner challenged the decision of the IRO insofar as it applies to those services found to be not medically necessary. Respondent did not appeal the decision.

II. ANALYSIS

The issue is whether the chiropractic treatments performed on Claimant between August 9, 2003, and October 28, 2003, were medically necessary.[2] Dr. Bailey testified on behalf of the Petitioner, and Phillip William Osborne, M.D., testified on behalf of the Respondent.

Dr. Osborne testified that Claimant's type of sprain/strain injury is usually resolved in approximately 16 visits over an eight-week period. In order to determine if Claimant needed additional therapy, Dr. Osborne considered the following factors:

- The lack of frequent treatment plans.
- The Claimant did not have evaluations after every six visits to determine if the therapy was improving Claimant's condition and whether the therapy needs to be changed.
- The strength testing was performed on a Dynatron machine which is inaccurate for this type of testing, making the results of the tests inconclusive.

[2] The services rendered between July 18, 2003 and August 8, 2003, are not part of this dispute.

Dr. Osborne said that these factors taken in conjunction with the September 8, 2003, requested medical examination (RME)[3] conducted by James E. Madison, M.D.; the July 29, 2003 neurological examination performed by Randolph B. Veazey, M.D.,[4] and, the July 15, 2003 unremarkable MRI[5] lead to the conclusion that further treatments were not medically necessary. According to Dr. Osborne, the Claimant did not improve. Except for temporary relief, the Claimant had virtually the same pain level at the end of the disputed services as at the start of the disputed services.

Dr. Bailey countered that the strength testing indicated a definite improvement, and the October 23, 2003 FCE[6] indicated that Claimant's pain level had improved to 4 of 10 on her best week. According to Dr. Bailey, this is drastically different than the pain levels noted by Dr. Osborne. Dr. Bailey indicated that further treatment was medically necessary because of the objective benefits Claimant was achieving.

The ALJ agrees with the IRO decision and Dr. Osborne's conclusion that the treatments from August 9, 2003, through October 28, 2003, were not medically necessary. Dr. Osborne testified that this type of injury usually resolves itself within about sixteen weeks. There is no indication that Claimant continued to receive any significant objective benefit. Even subjective pain levels did not appear appreciably affected despite prior therapy with a pain level at 5 of 10. If an individuals's restoration potential is insignificant in relation to the extent and duration of physical therapy services required to achieve such potential, the services should not considered reasonable or necessary. Dr. Veazey's July 29, 2003 neurological report indicated that from his perspective Claimant did not need to have any further testing. His report said that Claimant did not need an EMG/Nerve Conduction study of the upper extremities because her symptoms and complaints are consistent with a musculoskeletal type injury rather than a nerve root impingement injury. He reported that the

[3] Respondent's Exhibit 1 at page 134.

[4] Respondent's Exhibit 1 at page130.

[5] Respondent's Exhibit 1 at page139.

[6] Petitioner's Exhibit 2 at page 187.

usual response time to conservative therapy for these types of injuries is from 6-8 weeks. Dr. Veazey concluded that he did not see anything on examination implying a present significant impairment. In Dr. Madisen's September8, 2003 RME, he reported that there was no reason that Claimant should not be back to full and unrestricted work and this time, and there was not activity that she should not be engaged in due to her injury. In Claimant's July 15, 2003 MRI, Henry J. Boehm, M.D., reported that the scan showed no evidence of rotator cuff tendon tear. The rotator cuff tendons appeared to be within normal limits.

Even though Dr. Baily had access to the reports of these doctors, he continued to perform treatments with little with little or no evidence of significant objective benefit. A party's ability to return to work is one of the primary goals of workers' compensation, and the improvement in this aspect is another way to determine if the services rendered were medically necessary. Dr. Bailey's own evaluations indicate that Claimant was not improving as predicted. With the proposed chiropractic treatments, Dr. Bailey predicted on June 27, 2003, that Claimant should be able to perform a limited type of work by July 27, 2003; achieve MMI by September 27, 2003; and return to work full time by August 27, 2003.[7] On August 11, 2006, Dr. Bailey conducted another evaluation where he predicted Claimant's return to full time work by September 13, 2003; achieving MMI by November 13, 2003; and performing a limited type of work by August 13, 2003.[8] On the September 19, 2003, evaluation Dr. Bailey predicted that Claimant could return to a limited type of work by September 24, 2003, and return to work full time on October 30, 2003.[9] After approximately six weeks of treatment between June 27, 2003 and August 11, 2003, Claimant's functional ability had actually regressed in terms of Claimant's ability to work. In 12 weeks, Claimant's functional ability regressed again.

Using the predictions contained in Dr. Bailey's evaluations, and after 12 weeks of chiropractic treatment, Claimant's ability to work full time changed from a projection of August 27,

[7] Petitioner's Exhibit 2 at page 168.

[8] Petitioner's Exhibit 2 at page 185.

[9] Petitioner's Exhibit 2 at page 201.

2003 to a projection of October 30, 2003. Consequently, after 12 weeks of treatment, Claimant's ability to work full time was postponed by two months.

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Petitioner had the burden of proof in this proceeding. Petitioner failed to prove that Claimant continued to receive any significant objective benefit from the disputed services, and Petitioner failed to prove that Claimant's restoration was significant in relation to the extent and duration of physical therapy services. Petitioner failed to sustain its burden of showing that the Disputed Services were medically necessary.

IV. FINDINGS OF FACT

1. __ (Claimant) sustained a work related injury on or about__, which was caused by pulling a palette.

2. Claimant was diagnosed with a right shoulder sprain/strain and a lumbar/cervical sprain/strain.

3. David N. Bailey, D.C., proceeded to perform chiropractic treatment on Claimant from July 18, 2003 through October 28, 2003.

4. Claimant's type of sprain/strain injury is usually resolved in approximately 16 visits over an eight week period.

5. The July 29, 2003 neurological report of Randolph B. Veazey, M.D. indicated that Claimant does not have a present significant impairment.

6. The September8, 2003 requested medical examination by James E. Madsen, M.D., reported that there was no reason that Claimant should not be back to full and unrestricted work at this time, and there was not activity that she should not be engaged in due to her injury.

7. In Claimant's July 15, 2003 MRI, Henry J. Boehm, M.D., reported that the scan showed no evidence of rotator cuff tendon tear. The rotator cuff tendons appeared to be within normal limits.

8. Dr. Bailey's own evaluations indicate that Claimant was not improving as predicted.

9. The Disputed Services were provided by Waco Ortho Rehab (Petitioner) to and for the benefit of Claimant.

10. American Home Assurance Company (Respondent) denied reimbursement for the Disputed Services as not medically necessary.

11. By letter dated August 25, 2004, Texas Medical Foundation, an Independent Review Organization (IRO), concluded that the services from July 18, 2003, through August 8, 2003, were medically necessary and that the services from August 9, 2003, through October 28, 2003, were not medically necessary.

12. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).

13. The Commission issued a Finding and Decision on October 4, 2004.

14. Petitioner timely requested a hearing to contest the Commission' decision.

15. The Commission issued a notice of hearing on November 21, 2004.

16. A hearing was convened by Administrative Law Judge Stephen J. Pacey on November 19, 2006, in the hearing rooms of the State Office of Administrative Hearings and the hearing adjourned and the record closed the same day.

V. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §13.031.

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 TEX. LAB. CODE ANN. §13.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.

3. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§02.7 and 148.3.

4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.

5. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§48.21(h) and (i); 1 TAC §55.41(b).

6. Based upon the Findings of Fact, Petitioner did not prove by a preponderance of the evidence that the Disputed Services were medically necessary for treatment of Claimant's condition.

ORDER

THEREFORE IT IS ORDERED that Respondent American Home Assurance Company shall not reimburse Petitioner Waco Ortho Rehab for the Disputed Services provided to Claimant.

SIGNED November 20, 2006.

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STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS