DOCKET NO. 453-05-5055.P1
TWCC NO. 00004400-75

LIBERTY MUTUAL INSURANCE COMPANY, Petitioner	**§**	**BEFORE THE STATE OFFICE**
v.	**§**	**OF**
TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION AND PAWAN GROVER, M.D., Respondents	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Liberty Mutual Insurance Company (Carrier) requested a hearing to contest a medical interlocutory order (interlocutory order)[1] issued by the Texas Department of Insurance, Division of Workers' Compensation (Division) requiring payment for certain care that was found to be medically necessary in a Prospective Review Medical Examination (PRME).[2] The Division and the treating doctor requesting the care, Pawan Grover, M.D., argued the care was medically necessary. The Administrative Law Judge (ALJ) concludes that some, but not all, of the services were medically necessary.

I. PROCEDURAL HISTORY

On December 6, 2004, Dr. Grover requested ongoing medical care and medication for an injured worker (Claimant). PRME doctor Liza Jo Leal, M.D., issued an opinion on January 10, 2005, concluding that certain medications, medication management, and EMG nerve conduction studies were medically necessary. The Division entered an interlocutory order on February 10,

[1] The interlocutory order was issued under authority of TEX. LABOR CODE ANN. §413.055, which authorizes the Division to enter an order requiring payment of medical benefits. The section authorizes an insurance carrier that disputes an order to receive a hearing at the State Office of Administrative Hearings (SOAH).

[2] The PRME doctor issued the opinion in accordance with an extensive procedure set out in 28 TEX. ADMIN. CODE (TAC) §134.650, providing for a PRME of the medical necessity of proposed care and, if needed, a determination of whether the compensable injury is the producing cause of the current medical condition that is the subject of the care. (Compensability of the injury was not an issue in this case.) If a PRME doctor issues an opinion that the care is medically necessary, the rule requires the Division to attempt to obtain the insurance carrier's voluntary agreement to provide the service. If an agreement is not reached, the Division is required to order the insurance carrier to pay for the benefits. The insurance carrier is required to comply with the order and pay for care found to be medically necessary. The carrier may then request a SOAH hearing on the issue and seek to obtain reimbursement from the Division's subsequent injury fund.

2005, requiring the Carrier to cover the services. The Carrier requested a hearing in a letter dated February 21, 2005.

A hearing convened and closed on December 5, 2005, before the undersigned ALJ at the State Office of Administrative Hearings (SOAH), Austin, Texas. The Carrier appeared and was represented by its counsel, Kevin Franta. The Division appeared and was represented by its counsel, Yvonne Williams. The hearing reopened on January 24, 2006, to consider certain matters relating to the record of the hearing. The hearing record finally closed on that date. As there were no issues concerning notice or jurisdiction, those matters are stated in the findings of fact and conclusions of law without further discussion here.

II. DISCUSSION

A. Background

The Claimant, a 48 year-old male, suffered a work-related, low-back injury on___, 1999, while picking up a 60 to 70 pound object. A designated doctor concluded on July 2, 2002, that he had reached maximum medical improvement and assessed a 14 percent whole person impairment rating.

The Claimant had a left L5-S1 laminotomy and decompression on January 5, 2000, followed by a series of facet injections, joint blocks, nerve blocks, and radio frequency of facet joints on July 11, 2000, September 26, 2000, October 24, 2000, November 21, 2000, March 13, 2001, April 3, 2001, and August 7, 2001, to relieve his pain. On December 9, 2002, the Claimant underwent a trial of a spinal cord stimulator followed by the implantation of a dual lead spinal cord stimulator on February 17, 2003, a revision of the spinal cord stimulator on October 20, 2003, and replacement of the spinal cord stimulator with a Synergy pulse generator on September 28, 2004.

The Claimant has been in pain since his January 2000 surgery. His pain level in December 2004, when Dr. Grover requested the care at issue, was 6 or 7 on a 0 to 10 scale, with 10 indicating the most pain.

Dr. Grover's testimony at the hearing indicates that he saw the Client and prescribed Lortab, Tompomax, and Duragesic on February 16, 2005. Dr. Leal found Lortab 10/500 4 per day, Topamax, Pamelor, and Ambien to be medically necessary. She did not opine on the necessity of Duragesic. Dr. Grover did not prescribe Ambien. The evidence is unclear on whether he prescribed Pamelor. The last time he saw the Claimant was in a March 5, 2005 office visit. He discharged the Claimant on March 9, 2005, with another Lortab prescription to relieve his pain until he saw a new doctor. He did not see the Claimant after that, but prescribed Lortab again in April because the Claimant had not yet seen the new doctor.

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§401.011 and 408.021. Section 408.021(a) provides, "An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment." Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

The Carrier has the burden of proof.[3]

B. Analysis

The ALJ concludes that the Carrier's appeal should be denied for some services and granted for others.

The preponderant evidence indicates Lortab is inappropriate for chronic-pain patients because it is short acting. This was the conclusion of William R. Culver, M.D., a fellow of the American Academy of Physical Medicine and Rehabilitation, in a November 26, 2002 peer review;[4] of Karl D. Erwin, M.D., a certified disability medical examiner for the State of Texas on May 28, 2004;[5] in an undated Medical Services Company Department of Clinical Services Pharmacist Drug

[3] 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TAC §148.14(a).

[4] Ex. 1 at 69.

[5] Ex. 1 at 102.

Review;[6] of Stephen A. Carter, M.D., on August 17, 2004, in an Amended Required Medical Evaluation;[7] and of James E. Grossman, M.D., in a January 13, 2005 peer review.[8] These several opinions were more persuasive than the PRME doctor's opinion, which did not contain a rationale on the issue, and Dr. Grover's assertion that Lortab is preferable to a heavier-dose opioid analgesic.[9] The weight of medical evidence is that a longer-acting drug would have been preferable.

Despite the above-described findings, the ALJ concludes the evidence did not show the Lortab prescriptions to be medically unnecessary, except for the last prescription in April 2005. This is because two of the doctors who concluded that Lortab should be replaced by another drug, Dr. Grossman and Dr. Culver, said the drug should be eliminated gradually. The other doctors did not expressly address that issue. Dr. Grossman said a six-to-eight week period of decreased use would be appropriate. Because Dr. Grover saw the Claimant and prescribed Lortab on February 16, 2005, a discontinuance period up to, but not including, the April 2005 prescription was appropriate. Because the Carrier did not prove the amount of reduction that would be appropriate over the February to April period, it should pay for all of the Lortab prescribed on or after February 10 until, but not including, the last prescription in April.

The medical opinions varied over the efficacy of Topomax for the Claimant's condition. Dr. Grover said it is similar to a neurotonin, and is frequently used in chronic pain patients for nerve and related pain as a way to decrease dependence on addictive narcotics.[10] Dr. Culver indicated it is reasonable and necessary for neuropathic pain as related to the reported injury.[11] Dr. Grossman said the drug is an anti-convulsant that is not established as useful for chronic pain.[12] Dr. Erwin expressed a similar opinion.[13] According to Dr. Carter, it is considered to be an adjunctive

[6] Ex. 1 at 108.

[7] Ex. 1 at 122.

[8] Ex. 1 at 138.

[9] Ex. 2 at 8.

[10] Ex. 2 at 8.

[11] Ex. 1 at 68.

[12] Ex. 1 at 138.

medication for the treatment of neuropathic and chronic pain, but is not FDA approved for that treatment.[14]

Because of the significant variance of opinion on the efficacy of Topomax, the ALJ concludes the Carrier did not carry its burden of proving Topomax was medically unnecessary.

Dr. Grover said Pamelor is a trycyclic antidepressant that is commonly used in chronic pain patients.[15] Dr. Grossman said tricyclic antidepressants like Pamelor can provide relief for chronic low-back pain and are reasonable and necessary.[16] Dr. Culver agreed that an anti-depressant is reasonable and necessary, but that it should be one of the newer SSRI, such as Effexor.[17] Dr. Erwin opined that the drug was not medically necessary because there is no evidence it has made any difference in the Claimant's pain.[18] Dr. Carter said Pamelor is considered to be an adjunctive medication for the treatment of neuropathic and chronic pain, but is not FDA approved for that treatment.[19]

There is significant variance of opinion on the efficacy of Pamelor. Dr. Grover's testimony is not clear, but the drug was possibly not being prescribed in 2005. In any case, the ALJ concludes that the Carrier did not carry its burden of proving it was medically unnecessary. Therefore, the Carrier is not entitled to reimbursement.

Dr. Grover indicated the Claimant's Ambien prescription was discontinued in the summer of 2004 and thus was not provided after the interlocutory order. In any case, the weight of evidence indicates Ambien was either unnecessary or not the best sleep medication for the

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[13] Ex. 1 at 102.

[14] Ex. 1 at 122.

[15] Ex. 2 at 8.

[16] Ex. 1 at 138.

[17] Ex. 1 at 68.

[19] Ex. 1 at 122.

Claimant's condition.[20] Based on evidence that the Carrier did not pay for Ambien prescribed on or after February 10, 2005, there is no reason to order that it receive reimbursement from the subsequent injury fund.

Dr. Grover prescribed Duragesic on February 16, 2005. However, the PRME doctor's opinion and interlocutory order did not include that drug. There is therefore no basis for requiring the Carrier to pay for it. To the extent it paid for Duragesic prescribed on or after February 10, 2005, the Carrier should receive reimbursement from the subsequent injury fund.

Dr. Grover defended the necessity of monthly office visits based on the Claimant's use of controlled substances and "State Board"[21] rules saying it is up to the individual doctor to determine the frequency of periodic review in relation to individual patients. He said he had "complete liability" for prescribing the medications and did not feel comfortable following up on less than a monthly basis. Dr. Erwin said office visits every three to six months are reasonable, but not monthly office visits.[22]

The ALJ concludes the Carrier should not receive reimbursement for office visits on and after February 10, 2005. The February 16, 2005 visit was the first visit after the interlocutory order and therefore appropriate. The last visit, on March 9, 2005, although less than a month later, was to discharge the Claimant. Because there was no evidence on the necessity of an office visit to discharge a patient, the Carrier did not carry its burden of proof on that issue.

Although Dr. Leal found EMG nerve conduction studies to be medically necessary, they were not mentioned in the testimony, the peer reviews, or the medical opinions. The ALJ concludes that the Carrier did not prove that these studies were medically unnecessary and if it has paid for them, it should not receive reimbursement.

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[20] Ex. 1 at 68, 102, 109, and 122.

[21] It appears Dr. Grover meant the Texas Board of Medical Examiners.

[22] Ex. 1 at 102.

III. FINDINGS OF FACT

1. The Claimant, a 48 year-old male, suffered a work-related, low-back injury on___, __, while picking up a 60 to 70 pound object.

2. A designated doctor concluded on July 2, 2002, that the Claimant had reached maximum medical improvement and assessed 14 percent whole person impairment.

3. The Claimant had a left L5-S1 laminotomy and decompression on January 5, 2000, followed by a series of facet injections, joint blocks, nerve blocks, and radio frequency of facet joints on July 11, 2000, September 26, 2000, October 24, 2000, November 21, 2000, March 13, 2001, April 3, 2001, and August 7, 2001, to relieve his pain.

4. On December 9, 2002, the Claimant underwent a trial of a spinal cord stimulator followed by the implantation of a dual lead spinal cord stimulator on February 17, 2003, a revision of the spinal cord stimulator on October 20, 2003, and replacement of the spinal cord stimulator with a Synergy pulse generator on September 28, 2004.

5. The Claimant's pain persisted after his January 2000 surgery.

6. The Claimant's pain level in December 2004, when Dr. Grover requested the care at issue, was 6 or 7 on a 0 to 10 scale, with 10 indicating the most pain.

7. In December 2004, the Claimant's treating doctor, Pawan Grover, M.D., prescribed certain medication, medication management, and EMG nerve conduction studies.

8. The insurance carrier, Liberty Mutual Insurance Company (Carrier), denied the treatment as medically unnecessary.

9. In January 2005, a Prospective Review Medical Examination (PRME) doctor concluded that medication management, nerve conduction studies, Lortab 10/500 4 per day, Topamax, Pamelor, and Ambien were medically necessary.

10. On February 10, 2005, the Texas Department of Insurance, Division of Workers' Compensation issued an interlocutory order requiring the Carrier to pay for the care found by the PRME doctor to be medically necessary.

11. The Carrier requested a State Office of Administrative Hearings hearing on February 21, 2005.

12. All parties received adequate notice of not less than 10 days of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

13. All parties had an opportunity to respond and to present evidence and argument on each issue involved in the case.

14. Dr. Grover prescribed Lortab, Topomax, Duragesic, and possibly Pamelor in an office visit on February 16, 2005.

15. Neither the PRME doctor's opinion nor the interlocutory order addressed Duragesic.

16. Dr. Grover did not prescribe Ambien on or after February 10, 2005.

17. Dr. Grover saw the Claimant for the last time in an office visit on March 5, 2005, at which time he prescribed Lortab to relieve the Claimant's pain until he could see a new doctor.

18. Dr. Grover prescribed Lortab in April because the Claimant had not yet seen the new doctor.

19. There was insufficient evidence to conclude that Dr. Grover prescribed EMG nerve conduction studies on or after February 10, 2005.

20. There was no evidence that EMG nerve conduction studies were medically unnecessary.

21. Lortab is inappropriate for the Claimant, a chronic-pain patient, because it is not a long-acting medication.

22. It was appropriate to eliminate the Claimant's Lortab prescription gradually, over a six to eight week period.

23. Some Lortab usage by the Claimant was appropriate from February 2005 until early April 2005, but not after that time.

24. There was no evidence of the amount of reduction of Lortab that would be appropriate from February 2005 until early April 2005.

25. There was insufficient evidence to show that either Topomax or Pamelor were not reasonably required by the nature of the Claimant's injury.

26. The Claimant's February 16, 2005, office visit to Dr. Grover was reasonably required by the nature of the Claimant's injury because it was the first visit after the interlocutory order.

27. The Claimant's March 5, 2005, office visit to discharge the Claimant was not shown to be medically unnecessary.

IV. 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. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.

2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052.

3. The Carrier had the burden of proving that the disputed services were not medically necessary.

4. The Carrier proved that the April 2005 Lortab prescription was medically unnecessary.

5. The Carrier did not prove that the Lortab prescriptions before April 2005, Topomax, or Pamelor were medically unnecessary.

6. The Carrier did not prove that the office visits or any EMG nerve conduction studies were medically unnecessary.

7. The Carrier should not be required to pay for any Duragesic prescriptions provided to the Claimant.

8. The Carrier should be reimbursed for the April 2005 Lortab prescription and any Duragesic prescriptions from Dr. Grover for the Claimant after the entry of the February 10, 2005 interlocutory order during the period covered by the Carrier's appeal. TEX. LABOR CODE ANN.§413.055.

ORDER

IT IS THEREFORE ORDERED that Liberty Mutual Insurance Company be reimbursed for the April 2005 Lortab prescription and any Duragesic prescriptions from Dr. Grover for the Claimant after the entry of the February 10, 2005 interlocutory order during the period covered by the Carrier's appeal.

IT IS ORDERED FURTHER, except as described above, that Liberty Mutual Insurance Company's appeal of the February 10, 2005, interlocutory order of the Texas Department of Insurance Division of Workers' Compensation be, and the same is hereby, denied.