SOAH DOCKET NO. 454-08-3848.M5
DWC MR NO. M5-08-12752-01

TEXAS HEALTH, LLC,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	**OF**
	§	
DALLAS NATIONAL INSURANCE COMPANY,	§	
	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

From June 26, 2007, through August 29, 2007, Petitioner, Texas Health, L.L.C., a CARF-accredited facility,[1] provided work hardening services to a workers' compensation claimant. Respondent, Dallas National Insurance Company, determined that the treatment was not medically necessary. The amount in dispute is $6,228.80 for 11 visits in a four-week period and related functional capacity evaluations (FCEs).

Petitioner sought dispute resolution at the Texas Department of Insurance, Division of Workers' Compensation (DWC), and an Independent Review Organization (IRO) determined that the disputed services were not medically necessary. Petitioner appealed the IRO's decision and requested a hearing at the State Office of Administrative Hearings (SOAH). In this appeal, the Administrative Law Judge (ALJ) finds that Petitioner proved part of the program was medically necessary and orders partial reimbursement.

I. JURISDICTION, PROCEDURAL HISTORY, AND NOTICE

Notice and jurisdiction were not disputed and are discussed only in the Findings of Fact and Conclusion of Law. The hearing was conducted on October 6, 2008, before ALJ Sarah G. Ramos with attorney Matthew Lewis representing the Petitioner and attorney Jason A. Schmidt representing the Respondent. The hearing was adjourned and the record closed that same day.

[1] "CARF" stands for "Commission on Accreditation of Rehabilitation Facilities." CARF-accredited work hardening programs are exempt from preauthorization requirements. 28 TEX. ADMIN. CODE (TAC) § 134.600(a)(4).

II. DISCUSSION

A. Legal Standards

Petitioner's burden of proof is by a preponderance of the evidence.[2] In addition, Petitioner is subject to the Official Disability Guidelines (ODG) adopted by the Commissioner and applicable to health care provided after May 1, 2007.[3] The ODG criteria for admission to a work hardening program are:

1. Physical recovery sufficient to allow for progressive reactivation and participation for a minimum of four hours a day for three to five days a week.

2. A defined return to work goal agreed to by the employer and employee:

   a. A documented specific job to return to, or
   b. Documented on-the-job training.

3. The worker must be able to benefit from the program. Approval of these programs should require a screening process that includes file review, interview, and testing to determine likelihood of success in the program.

4. The worker must be no more than two years past the date of injury. Workers that have not returned to work by two years post injury may not benefit.

5. Work hardening programs should be completed in four weeks consecutively or less.

B. Background

The claimant sustained a work-related shoulder injury on ___, while rolling 200-300 pound drums. He subsequently experienced a constant shoulder ache, which worsened when he lifted, pulled, and drove. He also had parensthesias in the left fourth and fifth fingers. The symptoms worsened with cervical flexion.

[2] Although 28 TAC § 148.14(b) states that the IRO's decision is to be given presumptive weight, prior SOAH decisions have found otherwise. *See, e.g., J.H. v. Texas Workers' Compensation Commission and Insurance Company of the State of Pennsylvania*, Docket No. 453-03-0186.M2 (December 16, 2002), and *American Zurich Insurance Company v. Texas Department of Insurance, Division of Workers' Compensation & Jack Barnett, D.C.*, Docket No. 453-04-5005.P1.

[3] 28 TAC § 137.100.

Corticosteroid injections provided only transient relief. One surgeon who examined the claimant thought the problem was due to a brachial plexus upper and lower trunk injury with a partial rotator cuff tear, and another thought the problem was due to cervical spondylosis at C6- and C7-T1. The claimant had an initial FCE on May 24, 2007, which found the claimant could meet medium physical demands.[4] The claimant's treating physician, John D. Botefuhr, D.C., referred the claimant to Petitioner for evaluation and treatment.

C. IRO Decision

In a decision dated June 18, 2008, the IRO determined that the work hardening program was not medically necessary based on several factors, including five FCEs billed during the 11 weeks of treatment and the fact that the claimant's symptoms were aggravated by the program. Although the IRO noted that the claimant showed increases in functional capabilities, he still had work limitations and his pain levels improved only slightly. Further, the IRO determined that Petitioner was required to, but did not, clearly document the claimant's job requirements for re-entry into his work as a _____.

D. Evidence

At the hearing, Petitioner waived its appeal except for three FCEs and 11 visits during four weeks. Phil Bohart, LPC, one of Petitioner's principals and its clinical director, testified that, on June 26, 2007, he telephoned the employer to discuss the claimant's work demands and the possibility of his returning to work. He was told the claimant possibly could return to his employment if he could meet specified job demands that included occasional lifting of 75 to 100 pounds and frequent lifting of 35 to 50 pounds. These are heavy lifting demands. The employer also told Mr. Bohart that light duty work or an alternate job was not available.[5]

The program was for four hours a day, three-to-five days a week. The claimant had FCEs on May 24, June 26, July 6, August 14, and August 29, 2007. Writing in support of Petitioner's request, Bradley J. Eames, D.O., noted that the claimant had a job to return to with an agreed-upon vocational goal, was within two years of the date of injury when he was admitted, had

[4] P. Ex. 1 at 310.
[5] P.Ex. 1 at 213.

FCE's that showed he was not able to safely perform his job duties, had demonstrated psychosocial barriers that required a multidisciplinary approach to his care, and had a realistic chance to meet his job requirements within four weeks.[6] In addition, the claimant had not reached maximum medical improvement, and no doctor who saw the claimant said he was a surgical candidate.

E. Respondent's Arguments

Respondent noted that the IRO (a board-certified pain management physician), a peer reviewer, and two doctors with Injury Management Organization, Inc., all agreed the program was not medically necessary. Further, the claimant had no intervening treatment between the May 24 and June 26, 2007 FCEs, so there was no reason the second FCE was required.

F. Petitioner's Arguments

Petitioner argued that the issue is not whether the claimant actually benefited from the program. Rather, the issue is whether, at the commencement of the program, it appeared that the claimant would benefit from the program. Petitioner further noted that the four doctors who found work hardening was not medically necessary did not personally evaluate the claimant. One of the IMO doctors, Robert Honigsfeld, D.C., was under the mistaken impression that the employer had not been contacted with a written or verbal job description. Dr. Honigsfeld mistakenly thought the work may have required a medium demand level or that the employer might have been willing to accommodate the claimant's return to work with restrictions.

The claimant's progress was measured by his tolerance. Therefore, Petitioner asserted, the three FCEs were needed to determine the claimant's capability at the beginning of the program, after seven days to measure how he was tolerating the program, and at the end of the program.

[6] P. Ex. 1 at 401.

G. Decision

The ALJ finds that Petitioner met its burden of proof as to the first four weeks of treatment. The claimant was not physically able to meet his work requirements prior to entering the program and had the possibility of returning to work if he could meet heavy physical demands. The program fell within two years of his injury date, and the record includes psychological assessments that showed he could have benefited from the multidisciplinary approach to his care.

However, the ALJ does not agree with Petitioner that three FCEs were needed. Prior to beginning Petitioner's program, the claimant had an FCE on May 24, 2007. The claimant received no treatment between that initial FCE and the one Petitioner performed on June 26, 2007; thus, another FCE should not have been needed on that date. The last two FCEs (August 14 and 29, 2007) were provided past the allowable four weeks of treatment. Therefore, the ALJ finds that Respondent should reimburse Petitioner only for the July 6, 2007 FCE.

III. FINDINGS OF FACT

1. The claimant sustained a work-related _____ on ____, while rolling 200-300 pound drums.

2. The claimant subsequently experienced a constant shoulder ache, which worsened when he lifted, pulled, and drove, and he had parensthesias in the left fourth and fifth fingers. His symptoms worsened with cervical flexion.

3. Corticosteroid injections provided only transient relief.

4. Prior to beginning Petitioner's program, the claimant had an initial FCE on May 24, 2007, which found the claimant could meet medium physical demands.

5. Petitioner conducted FCEs on the claimant on June 26, July 6, August 14, and August 29, 2007.

6. Between May 24, 2007, and June 26, 2007, the claimant had no intervening treatment.

7. The FCEs on August 14 and 29, 2007, were conducted more than four weeks after the claimant began Petitioner's work hardening program.

8. The claimant's treating physician referred the claimant to Petitioner for evaluation and treatment.

9. When the claimant began Petitioner's work hardening program, he had not reached maximum medical improvement, and no doctor who saw the claimant said he was a surgical candidate.

10. Before the claimant began the work hardening program, his employer confirmed that he possibly could return to his employment if he could meet specified job demands that included occasional lifting of 75 to 100 pounds and frequent lifting of 35 to 50 pounds, which are heavy lifting demands.

11. The employer had no light duty work or an alternate job available for the claimant.

12. The interdisciplinary nature of the work hardening program was necessary to address the claimant's physical and psychological issues and achieve the goal of returning the claimant to work.

13. The claimant was within two years of the date of injury when he began the program.

14. The claimant had a realistic chance to meet his job requirements within four weeks.

15. The first four weeks of the work hardening program were medically necessary for the claimant.

16. The work hardening program did not meet the ODG after the first four weeks; therefore, treatment after that time was not medically necessary.

17. Respondent determined that the program was not medically necessary based upon peer review and denied reimbursement.

18. Petitioner submitted the matter to DWC and it was reviewed by an IRO, which ruled in Respondent's favor.

19. Petitioner appealed the IRO decision and requested a hearing before SOAH.

20. Notice of the SOAH hearing was sent to the parties on August 5, 2008.

21. The notice included the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

22. The SOAH hearing was conducted on October 6, 2008, before ALJ Ramos, with representatives of both parties participating. The hearing was adjourned and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.

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

3. Petitioner has the burden of proof in this proceeding by a preponderance of the evidence.

4. Petitioner is subject to the ODG adopted by the Commissioner of Insurance and applicable to health care provided after May 1, 2007. 28 TAC § 137.100.

5. Pursuant to TEX. LAB. CODE ANN. § 413.031, Respondent should be required to reimburse Petitioner for the first four weeks of the work hardening program and the FCE conducted on July 6, 2007.

ORDER

It is, therefore, ordered that Respondent shall reimburse Petitioner for the work hardening program provided to the claimant from June 26, 2007 through July 24, 2007, and the FCE provided on July 6, 2007.

SIGNED December 5, 2008.

SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS