

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
TAMPA DISTRICT OFFICE

Joy Hinzman,
Employee/Claimant,

OJCC Case No. 12-001982EDS

vs.

Accident date: 5/14/2011

Winter Haven Facility Operations LLC
D/B/A Consulate Health Care of Winter
Haven/Gallagher Bassett Services, Inc.,
Employer/Carrier/Service Agent.

Judge: E. Douglas Spangler

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COMPENSATION ORDER

THIS CAUSE came on for a merit hearing at OJCC Tampa, FL on March 27, 2017 to address the issues presented by a Petition for Benefits filed by the Claimant on May 26, 2016. The Claimant was represented by attorney E. Taylor Davidson. The Employer/Carrier (E/C) was represented by attorney Paul T. Terlizzee.

The Petition for Benefits demanded that the E/C provide a Dr. Wellness E-8 Exercise Spa (spa) based on the recommendation of the authorized treating physician Dr. Fabio Fiore, M.D. The E/C denied the request on the basis that the Spa is not medically necessary; and, the compensable accident is not the major contributing cause of the need for the spa. A complete list of the documentary evidence is contained in the Appendix to this Order.

The Claimant testified at the hearing. Based on the testimony received during the hearing, the testimony of witnesses presented by deposition, a review of the medical records and other documentation admitted into evidence, and, the written and oral arguments of counsel on behalf of their parties, the undersigned concludes that a hydrotherapy/exercise home spa is reasonable and medically necessary and one shall be provided to the claimant by the E/C. However, the exact model requested, a Dr. Wellness E-8 Exercise Spa as represented in a brochure provided to Dr. Fiore by the Claimant, per se, is not a reasonable option as it includes

many convenience and entertainment features that are not medically necessary. The reasons for this determination follow.

ULTIMATE FACTS

The Claimant sustained a compensable injury to her back on May 14, 2011. She has been a patient of Dr. Fabio Fiore, M.D. an orthopedic surgeon since July 2013 and eventually underwent surgery performed by Dr. Fabio Fiore on her low back at the L5-S1 level. She achieved maximum medical improvement on May 6, 2015, and was administratively accepted by the E/C as being permanently and totally disabled shortly thereafter. Dr. Fiore opined that the Claimant had a 15% permanent impairment rating due to S1 nerve root radiculopathy attributed to the development of scar tissue which inhibited the nerve root.

Thereafter, Dr. Fiore prescribed a walker to assist the Claimant with ambulation at home, and a motorized wheel chair to assist her mobility when away from home which devices were eventually provided by the E/C. On July 6, 2015 Dr. Fiore wrote a note summarizing an office visit with the Claimant on that date in which he recommended that Claimant should have home hydrotherapy to help control her symptoms and reduce her reliance on pain medication. He testified in deposition that such therapy would reduce the effect of gravity on the Claimant's back by providing buoyance, and the ability to regulate the temperature could reduce the perception of pain. In addition, he suggested that the force of the water flowing through the jets would apply pressure and resistance on her extremities which would increase her mobility, which was the goal. He stated that lowering the gravitational effect reduces stress on the injured low back which would enhance mobility. In an office note from his assessment of the Claimant on August 26, 2015, Dr. Fiore again mentioned that the Claimant should get an exercise spa for home use and, on this occasion, he wrote a prescription for "E-8 Exercise Spa" based on a brochure provided to him by Ms. Hinzman. Significantly, there is no record of Dr. Fiore completing and submitting a DWC-25 form with the office notes from either of these dates, and with the prescription mentioned above. Also significantly, there is no documentation in Dr.

Fiore's records, in evidence, that the E/C responded to the August 26, 2015 prescription.

Each party, however, offered as evidence a copy of a Facsimile Transmittal to Dr. Fiore from Work Comp Strategic Solutions dated September 10, 2015. Both parties also objected to this document being admitted as evidence based on the purpose and legal significance of the document as asserted by the opposing party. There are multiple copies of this document in the records submitted for consideration as evidence. The factual conclusions reached by the undersigned from this document, based on stipulations of the parties, are: Work Comp Strategic Solutions, the author of the document, is not a party to this case, is not the Carrier, and at best is a third party administrator, likely a medical care coordinator for the Carrier. The Carrier offered the document to prove that the September 10, 2015 Facsimile established that a timely response was provided by the Carrier to the request from treating physician Dr. Fiore that a home exercise Spa, the E-8 Exercise Spa, be provided to the Claimant. The Claimant objected to this use of the document arguing that the document itself is hearsay and not a document generated by the Carrier. Two copies of the document were also contained in the Claimant's offering of a composite of e-mails between Dr. Fiore's office and the law office of Claimant's counsel which were being offered for the purpose of establishing that the September 10, 2015 Facsimile was never received by Dr. Fiore. The E/C objected that these documents are hearsay, and they were not properly authenticated. The undersigned believes the objections from both parties are correct and no other factual inferences will be drawn from these documents.

After the August 26, 2015 request was not addressed, Dr. Fiore re-issued a prescription for the same spa on April 12, 2016. In a deposition conducted on February 24, 2017, the present adjuster on the file, Kathie Daniels, who has been the adjuster only since December 2016, noted that the April 12, 2016 request was received on April 29, 2016. She was unable to document that the carrier responded to or took any action to investigate this demand until August 2016 when a request for evaluation and pricing was made to a durable medical equipment provider. She was aware that after the April 12, 2016 request was received that a medical conference with Dr. Fiori and the E/C's attorney was conducted on June 1, 2016

Dr. Steven Tresser, M.D., a neurosurgeon, had been authorized to evaluate the Claimant

on two occasions: September 13, 2013, prior to the claimant receiving surgery from Dr. Fiore, and again on March 3, 2015, well before Dr. Fiore recommended the home exercise spa. Dr. Tresser provided a deposition on December 8, 2016 the primary purpose of which was to address the medical necessity of the recommended home exercise spa. The March 2015 evaluation found that the Claimant had persistent pain in her low back, which Dr. Tresser related to the development of fibrosis, or scar tissue, forming in the space around the nerve root, which he stated was a common development following the surgery she had experienced. He was not sure if the symptoms were from permanent nerve root damage or only a temporary irritation of the root and he recommended that the Claimant receive pain management. Dr. Tresser had previously in his practice recommended that some of his own surgical patients undergo aquatic therapy, but only in the context of supervised monitored pain management program. He personally had no experience ever recommending a home aquatic exercise spa for a patient, and recommended that it was best for a patient to undergo a trial of supervised aquatic therapy before a permanent arrangement was made. However, regarding the benefits and goals of aquatic therapy, he agreed that buoyance could provide a relaxation and release of pressure on the discs which would be beneficial, and that the goals of such therapy were to increase mobility, strengthen muscles, and help alleviate pain. However, he expressed personal doubts that aquatic therapy, per se, would work in accomplishing those goals, and recommended that only a supervised trial be implemented to verify success before a permanent decision was made. Until that occurred, he did not believe the home spa was medically necessary.

Dr. Jorge Chaumont M.D., an interventional pain management specialist, was authorized to evaluate the Claimant. The evaluation took place on June 9, 2015, following Dr. Tresser's March 2015 evaluation. He opined that the Claimant's recovery from surgery was complicated by persistent left lower extremity pain and weakness, atrophy of the left calf, and discoloration ("duskiness") and coolness. He noted that an MRI confirmed epidural fibrosis displaced the left S-1 nerve root. He noted that Dr. Fiore was providing pain management techniques to the Claimant and that she was very satisfied with those procedures. Consequently, he deferred to Dr. Fiore and did not assume pain management care of the Claimant. He provided a deposition on

December 7, 2016, the purpose of which was to address the home spa issue. He too expressed personal doubts about the necessity of the Claimant having a home therapy spa. His testimony was partially based on a reference to the Agency of Healthcare Research and Quality's Occupational Disability Guidelines, a copy of which were attached to the deposition for reference. The text of the guideline referred to by Dr. Chaumont was directed to the efficacy of aquatic therapy regarding instances of knee and leg pain. Based on the guideline, Dr. Chaumont noted that aquatic therapy could minimize the effects of gravity, and that aquatic therapy was recommended when the goal was to reduce the stress of weight bearing. He suggested that because the guideline recommended that aquatic therapy be provided in a 5 week, 4 sessions a week, format that it should be done in a structured environment under the supervision of a physical therapist. Dr. Chaumont indicated that with his own patients he would authorize a structured aquatic program for a 3-6 month period at a YMCA pool at the most.

DISCUSSION

Medical Necessity

The primary objection raised by the E/C to the Claimant's demand that she be provided with the Dr. Wellness E-8 Spa is that such a home exercise spa is not medically necessary. The Claimant argued that the E/C waived any defense based on medical necessity because the E/C did not timely respond to the prescription written by Dr. Fiore on August 26, 2015. There is no real dispute about whether that prescription was received at least by Work Comp Strategic Solutions because both parties acknowledge that it was evidently received because the Facsimile dated September 10 2015 referenced the request.

Both sections 440.13 (3)(d) F.S and 440.13 (3)(i) F.S. were argued by the parties as being applicable to this issue. The undersigned believes that the controlling statute is Sec.440.13 (3)(i) F.S. because the device being requested costs in excess of \$1,000, and it relates to physiotherapeutic or occupational therapy. Unfortunately, that statute is drafted in negative terms which complicate its meaning. But if the terms are restated in positive terms, the statute provides that the request made in this instance is valid and the E/C must provide the requested

item if a response to the request is not made properly by the **carrier** within ten days of the written request.¹ The statute mandates the provision of the treatment unless: the requesting provider is not authorized; the treatment is not in accordance with practice parameters established by rule or law, or unless a JCC determines that the treatment is not medically necessary in accordance with the practice parameters or protocols of treatment required by rule or law, or otherwise is not compensable.

Applying this provision to the facts of this case the undersigned determines that the E/C did not timely and properly respond to the written request for authorization and provision of the spa made by Dr. Fiore in August 2015 or again in April 2016. Dr. Fiore is an authorized treating physician and there is no specific objection or evidence provided suggesting that the requested device would not be within the practice parameters permissible by rule or statute. Therefore, it falls to the undersigned to determine if the otherwise valid request is in fact medically necessary.

The undersigned concludes that there is almost unanimous agreement among the three medical providers that aquatic therapy would have important therapeutic values for the Claimant. All three agree that her symptoms derive from epidural fibrosis (scar tissue) which has compromised and entrapped the S-1 left nerve root. The disagreement among the providers is one of preference or, in the case of Dr. Tresser, practicality, more than one of necessity. Dr. Tresser had limited experience with aquatic therapy and occasionally recommends it for his patients. His doubts are based on his personal skepticism, without any medically based findings, that aquatic therapy would accomplish Dr. Fiore's desired results. Dr. Chaumont recognized the issue from a pain management point of view; but, he too based his opinion regarding necessity on his own treatment protocols. However, Dr. Chaumont had also deferred to Dr. Fiore regarding the type of pain management that was to be provided to the Claimant when he was given an opportunity to become the provider. As for Dr. Fiore, he testified to the potential benefits he expected the Claimant to receive from the aquatic therapy to be: greater than 50% reduction in dependence on pain relieving medications; a decrease in reliance on mobility enhancing devices such as the scooter and powered wheel chair the E/C had already provided.

¹ Section 440.13 (3)(d) requires a written response within 3 business days after receipt of the request.

He opined that for many reasons a gym membership or use of a public swimming pool was not practical for this Claimant. In the end he justified his request for the spa and its medical necessity by his desire to reduce the Claimant's use of pain relieving medications and an anticipated increase in his patient's overall state of wellbeing. The undersigned finds these reasons from the Claimant's primary treating physician to be compelling and certainly more persuasive regarding the medical necessity for the spa than the objections from either Dr. Tresser or Dr. Chaumont.

NECESSITY OF SPECIFIC DR. WELLNESS E-8 MODEL SPA

The Claimant argued that because the E/C did not timely respond to the prescription for the E-8 Spa contained in the original prescription rendered by Dr. Fiore on August 26, 2015 the E/C had waived any argument against the medical necessity of that specific model of spa. The Claimant correctly pointed out that the Carrier did not respond at all, and that the September 10 2015 Facsimile response from Work Comp Strategic Solutions is not a response from the carrier. This argument is based on application of Sec. 440.13 (3)(d) F.S. to the facts of this case. Because the undersigned determined that the proper statute is Sec. 440.13 (3)(i) F.S. the merits of this argument is moot.

However, whether moot or not, application of Section 440.13 (3)(i) F.S requires that the medical necessity of the specific device be addressed by the undersigned. Even if Section (3)(d) applied, the undersigned would find that the exact Dr. Wellness E-8 model spa that was represented in the brochure provided by the claimant to Dr. Fiore is not medically necessary. Dr. Fiore testified that all the special electronics and entertainment features represented in the brochure were not medically necessary. What he called for was a spa of sufficient size and depth to allow the claimant to float freely and to be of sufficient force to provide buoyancy and resistance to be therapeutic for his patient. The "bells and whistles" are not required or necessary.

WHEREFORE, it is Ordered and Adjudged:

1. Pursuant to Section 440.13 (3)(i) F.S. the E/C shall provide the Claimant with a home

therapy spa of sufficient size and quality to meet the therapeutic requirements for aquatic therapy as recommended by Dr. Fiore.

2. The Claimant's specific demand for the Dr. Wellness E-8 model spa is denied as that model exceeds the threshold of medical necessity, and the requirements of Section 440.13 (3)(i) F.S.
3. Jurisdiction is reserved for a determination of entitlement and amounts of attorney's fees and costs.

DONE AND SERVED this 17th day of April, 2017, in Tampa, Hillsborough County, Florida.



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EXHIBITS

CLAIMANT'S EXHIBITS

1. Composite: Medical records from healthcare providers and IME physicians.
2. Deposition of Dr. Fabio Fiore, M.D. dated November 28, 2016, with attachments.
3. Composite: Fax coversheets from Orthopedic Center of Brandon (proffer only).

EMPLOYER/CARRIER EXHIBITS

1. Deposition of Dr. Steven Tresser, M.D. dated December 8, 2016, with attachments.
2. Deposition of Dr. Jorge Chaumont, M.D. dated December 7, 2016, with attachments.
3. Facsimile coversheet from Work Comp Strategic Solutions Dated September 10, 2015 (admitted for limited purpose).

JOINT EXHIBITS

1. Deposition of Claimant Joy Hinzman taken July 13, 2016.
2. Deposition of adjuster, Kathie Daniels taken February 24, 2017.

JCC EXHIBITS

Composite: PFB dated 5/26/2016; Response to PFB dated 6/24/2016; mediation reports dated 10/3/2016 and 12/15/2016; Pretrial Stipulation dated 9/6/2016 ; and Pretrial Order and Notice of final Hearing dated 9/7/2016.