

ATTACHMENT C
RESPONDENT'S ARGUMENT

DEC - 5 2014

CalPERS Board Unit

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In The Matter of the Appeal of the Denial
of Health Benefits Coverage on behalf of
PAMELA WALCHAK by

DAVID WALCHAK,

Respondent.

AGENCY CASE NO. 2013-0125

OAH NO. 2014050385

RESPONDENT'S ARGUMENT

ALJ: Honorable David L. Benjamin
Hearing Date: October 7, 2014
Hearing Location: Oakland, CA

Respondent DAVID WALCHAK and his spouse, PAMELA WALCHAK, hereby object to the Proposed Decision filed November 7, 2014, and request that this Proposed Decision, if adopted by the Board of Administration of the California Public Employees' Retirement System ("CalPERS Board"), not be published as "precedent" based upon the following facts:

GENERAL OBJECTIONS REGARDING DESIGNATION AS PRECEDENT

The Proposed Decision contains statements that are inconsistent with the medical record of Respondent PAMELA WALCHAK which, if published, would disseminate information that is incorrect and misleading and constitute defamatory comments regarding PAMELA WALCHAK by making public information that is incorrect and inconsistent with both the trial testimony and her medical records.

SPECIFIC OBJECTIONS

1. Proposed Decision, Page 2, Paragraph 3: *“In 1996, claimant had a two-level fusion in her cervical spine. After a motor vehicle accident in 2002, claimant underwent fusion surgery again.”*

Respondent’s Objection: While it is true that Pamela Walchak (the “claimant” referred to in the “Proposed Decision”) underwent a two-level cervical fusion in 1996, there was no motor vehicle accident in 2002. The motor vehicle accident was in January 1990, followed by a second one on 2/14/97. A two-level cervical fusion was performed on June 16, 1996; and the second cervical fusion (three levels) was performed on June 2, 1997. [See, trial testimony of Pamela Walchak; medical chart of Pamela Walchak from SpineCare Medical Group]

Analysis: It is imperative that any Decision published as “Precedent” reflect the correct nature of Pamela Walchak’s medical condition, and the Proposed Decision contains errors which, if published, would be defamatory to Mrs. Walchak.

2. Proposed Decision, Page 2, Paragraph 3: *“She now has a five-level fusion from C5 to T1.”*

Respondent’s Objection: First, the condition of Pamela Walchak’s cervical spine was not an issue before this Court, nor was it the subject of this appeal. The Proposed Decision misstates the status of Pamela Walchak’s cervical fusions which are at levels C3 to T1.

Analysis: It is imperative that any Decision published as “Precedent” reflect the correct nature of Pamela Walchak’s medical condition, and the Proposed Decision contains errors which, if published, would be defamatory to Mrs. Walchak.

3. Proposed Decision, Page 4, Paragraph 12: Regarding the report of Dr. Bruce McCormack, a neurosurgeon to whom Pamela Walchak was referred for an additional opinion,

the Proposed Decision states, *"The report does not state what Dr. McCormack means by the criteria for fusion."*

Respondent's Objection: At the time that Pamela Walchak was referred to Dr. McCormack for an additional opinion/evaluation, the surgical authorization sought by Anthem was for the left sacroiliac joint. While Dr. McCormack did not specify which joint should be fused first, the chart notes of SpineCare Medical Group and Anthem's own files reflect that by January 22, 2011 (the date of Dr. McCormack's exam), the authorization sought by Pamela Walchak's physicians was for fusion of the left sacroiliac joint. Anthem's own records will show that on January 18, 2011, a second request seeking to fuse only the left sided sacroiliac joint was submitted to Anthem by Dr. Noel Goldthwaite. Dr. McCormack's report concurs that ***"She meets the criteria for SI Joint fusion. Bilateral procedure has been entertained. It would seem to me, doing one at a time would also be prudent."*** The documentary evidence in Pamela Walchak's medical records, as well as the January 18, 2011 request to Anthem support the fact that at the time of Dr. McCormack's examination, the left sacroiliac joint was at issue . [See, Trial Exhibits B, H, I, J, and M; Anthem's internal records dated on or about January 18, 2011]. Further, at Paragraph 14, the Proposed Decision states that ***"After Dr. McCormack's examination, Dr. Goldthwaite requested authorization for a unilateral fusion on the left side, instead of the bilateral procedure he had proposed earlier."*** [Emphasis added]

Analysis: If Paragraph 12 of the Proposed Decision takes issue with Dr. McCormack's report, how can there be any question as to which side Dr. McCormack referred to when, at Paragraph 14 of the Proposed Decision, it states that following Dr. McCormack's examination, the surgical authorization was modified to request fusion of the "left side" rather than "bilateral"? Therefore, it was clear from not only the chart notes, but also from the revised

request for surgery conveyed to Anthem, and even to the Court at Paragraph 14 of the Proposed Decision, that Dr. McCormack was referring to fusing the left side first. Therefore, there is no ambiguity in Dr. McCormack's opinion as stated in Paragraph 12.

4. Proposed Decision, Page 6, Paragraph 20. Qualifications of Dr. Richard Sun.

Respondent's Objection: The CalPERS Consultant, Dr. Richard Sun, while well-qualified in the field of "preventive medicine," is not an orthopedic surgeon, nor was he knowledgeable of the most basic of diagnostic tests for determining sacroiliac joint dysfunction. Specifically, during trial, Dr. Sun was asked if he knew what a "FABER Test" was, and he did not. Positive FABER findings (found through several examinations of Pamela Walchak) will often lead the physician to explore further diagnostics whether through radiologic exams (plain x-ray, MRI scans) to the "Gold Standard" test which includes intra-articular injections of the joint, using a mixture of Novocaine and sometimes cortisone. If a patient has a high percentage of pain relief from the sacroiliac joint injections, this is an indicator that sacroiliac joint fusion will be beneficial for the patient) [See, 9/20/11 and 11/8/11 Letters by Dr. Noel Goldthwaite [Trial Exhibits I and M, respectively].

Respondent further objects on the grounds that significant medical data to support sacroiliac joint dysfunction was ignored in the Proposed Decision. Furthermore, Respondent experienced a significant disadvantage in that Dr. Sun was permitted to testify on all matters, while Respondent was unable to offer live testimony from her treating physician, Dr. Noel Goldthwaite.¹

Analysis: Dr. Sun testified that, instead of fusion, more conservative treatments such as physical therapy, aqua-therapy, and neurolisys are available to Pamela Walchak. The medical

¹ Respondent was unable to produce Dr. Goldthwaite for testimony to contradict Dr. Sun's opinions due to Respondent's inability to afford payment of Dr. Goldthwaite's customary daily fee for testimony which is \$8,100

evidence shows that she exhausted these conservative treatments with the exception of neurolysis. However, in September 2013 when Pamela Walchak's surgeon requested neurolysis of the sacroiliac joint, Anthem denied this request. [See, trial testimony of Dr. Richard Sun; 10/7/14 trial testimony of Pamela Walchak; SpineCare medical chart of Pamela Walchak].

It is undisputed that on two separate occasions when Pamela Walchak underwent injections of the sacroiliac joints, both procedures resulted in the complete and total numbing of her left leg from the groin to her foot. This did not occur on her right side. Both her surgeon, Dr. Noel Goldthwaite, and Dr. Richard Derby, the anesthesia pain management specialist who performed the sacroiliac joint injections, concluded that the Novocain injected into the left sacroiliac joint leaked due to disruption of the joint capsule and extravasation. (See, report of Dr. Richard Derby dated 9/21/10 [Trial Exhibit U]; report of Dr. Noel Goldthwaite dated 9/21/10 [Trial Exhibit V]; report of Dr. Richard Derby dated 2/14/11 [Trial Exhibit X]; report of Dr. Noel Goldthwaite dated 9/20/11 [Trial Exhibit I]; report of Dr. Noel Goldthwaite dated 11/08/11 [Trial Exhibit M]; 10/7/14 trial testimony of Pamela Walchak).

5. Proposed Decision, Page 7, Paragraph 2: The Proposed Decision refers to the MAXIMUS Report and testimony of Dr. Richard Sun which take issue with the findings of Dr. Derby, the doctor who performed the joint blocks on Pamela Walchak. Both MAXIMUS and Dr. Sun attempt to use an article in which Dr. Derby is listed as a contributing author to suggest that Dr. Derby stands for the proposition that authors of this study "*found fair to poor evidence for sacroiliac joint blocks to diagnose sacroiliac joint pain.*"

Objection/Analysis: The subject article referred to by MAXIMUS and Dr. Sun is entitled "*A Critical Review of the American Pain Society Clinical Practice Guidelines for Interventional*

Techniques: Part 1. Diagnostic Interventions." ("Pain Physician" 2010; 13:E141-E174). This article can be found online by a verbatim search of its title. It is a 34-page article which deals with three different subjects and takes issue with the findings of Chou, et al. Dr. Derby contributed statistics to this article. If one reads the article in its entirety, it is clear that Dr. Derby's contribution to this article was limited to "Provocational Discography." (See article, p.12, et. seq). There is no language in this article attributed to Dr. Derby in which he stated that there is "*fair to poor evidence for sacroiliac joint blocks to diagnose sacroiliac joint pain.*" Rather, if the doctors at MAXIMUS and even Dr. Sun had taken the time to read all 34 pages of this article, the reader will not find any such statement by Dr. Derby. Dr. Derby's contributions are limited to provocative discography and not regarding sacroiliac joint blocks. It is an incorrect and incomplete conclusion by MAXIMUS and any doctor from Anthem to attribute such a misstatement to Dr. Derby. This article must be read in its entirety for Dr. Derby's contribution to be taken in its proper context. He made no such statement regarding sacroiliac joint blocks.

CONCLUSION

Based on the foregoing, and in particular, the incorrect statements contained within the Proposed Decision, Respondent and Pamela Walchak hereby object to the Proposed Decision and request that it not be published as a "precedential decision."

December 4, 2014

Respectfully submitted,



DAVID WALCHAK