
In the Matter of the Medical Fee Dispute of

Humphrey, Terrell L., Claimant

Contested Case No: HH02-008

FINAL ORDER

August 22, 2002

SAIF CORPORATION, Petitioner

JOHN V. HAMBY, MD, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Pursuant to administrative order dated January 2, 2002 the Medical Review Unit (MRU) determined that NC-Stat testing was reimbursable. SAIF Corporation appealed MRU's decision. The hearing was initially set for March 5, 2002 and reset for March 26, 2002 for Dr. Hamby's receipt of exhibits. On March 21, 2002, SAIF Corporation notified the hearing officer and Dr. Hamby that it was also raising the issue of its liability to pay the disputed medical fee on the ground that the NC-Stat™ device is a surface test for measuring nerve conduction and, as such, surface EMG tests do not constitute compensable medical services under OAR 436-009-0015(6). SAIF failed to copy this notice to WCD. Hearing Officer Paul Vincent conducted a telephone hearing on March 26, 2002. Attorney Jerry Larkin represented petitioner SAIF Corporation (SAIF). Respondent, John V. Hamby, MD, appeared *pro se*. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Charles Moore, MD, and Linda Vance testified for SAIF. Dr. Hamby testified on his own behalf.

The respondent, Dr. Hamby, filed exceptions to Hearings Officer Vincent's April 24, 2002 Proposed and Final Contested Case Hearing Order, which reversed MRU's order. SAIF timely responded. Before the Director, the issue is whether NC-Stat testing is reimbursable. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Findings of Fact

The director adopts the hearing officer's findings of fact, with the following supplementations.

Dr. Hamby obtained nerve conduction velocity and F-wave latency testing of claimant's wrists using the Neurometrix electroneurometer (NC-Stat). The ulnar nerve and left median nerve testing on claimant were normal and the right medial distal motor latency was prolonged. Dr. Hamby diagnosed right wrist strain and right carpal tunnel syndrome (CTS). (Exs. 3A, 4, 4C).

Dr. Hamby used the NC-Stat™ as a nerve conduction study. He felt electromyogram (EMG) was unnecessary because claimant's CTS was not mild. Dr. Hamby also felt it unnecessary to have a sensory nerve testing component in claimant's case, because he had obvious moderate to severe CTS. Claimant also did not have signs of cervical neuropathy.

SAIF accepted the claim for right wrist strain and right wrist traumatic CTS. (Ex. 6).

In November 2001, Dr. Hamby noted that claimant was worse and referred him for formal baseline nerve conduction studies. (Ex. 10A). In January 2002, Dr. Jeffrey Gerry performed motor nerve conduction and sensory nerve conduction studies, and a needle EMG examination, which revealed moderate CTS. (Ex. 15A). Claimant underwent a right carpal tunnel release on January 11, 2002. (Ex. 15D).

Before MRU, SAIF contended that reimbursement for the NC-Stat™ under CPT code 95903 was based on standard electrophysiological/diagnostic studies and that the NC-Stat™ was not a standard electrophysiological/diagnostic study, but a screening tool. (Ex. 14). MRU determined that SAIF was liable for the electrodiagnostic testing performed by Dr. Hamby. After its request for contested case hearing, SAIF raised the additional issue that the NC-Stat did not constitute a compensable medical service under OAR 436-009-0015(6).

Electrodiagnostic studies include nerve conduction studies (NCS) and EMG. Conventional electrodiagnostic testing measures sensory and motor components of the nerve. A typical NCS involves electrical stimulation of an appropriate nerve and includes, *inter alia*, “recording and studying the electrical responses from peripheral nerves or the muscles they innervate.” (Ex. B). Sensory nerve conduction, which records the electrical response along the nerve, is the standard measure for diagnosing median nerve entrapment. (Exs. B-1, 21-6, 26). Motor nerve conduction records the electrical response from an appropriate muscle. (Ex. B-1). Usually surface electrodes are used, although needle electrodes may be required to evaluate a nerve that is deep in the tissue. (Exs. B-1, 22-4). A needle electrode is also used to determine whether muscle has loss innervation. (Dr. Moore’s testimony).

The manufacturer of the NC-Stat™ described it as a “hand-held nerve conduction monitoring system” that provides “electrodiagnostic information” about the median and ulnar nerve. The device performs motor nerve studies. By electrically stimulating the median or ulnar nerve and collecting the evoked compound muscle action potential (CMAP), the NC-Stat™ measures distal motor latency (DML), distal sensory latency (DSL), and F-wave latency. The biosensor, which is attached to the wrist, “detects the bioelectrical activity of the thenar muscles outside the immediate vicinity of the muscle, a process known as volume conduction.” (Exs. A, C, D, 19). The NC-Stat™ does not perform sensory nerve testing. (Ex. 26). The NC-Stat™ is also not meant to be a substitute for formal electrodiagnostic studies; however, it provided accurate results in claimant’s case for purpose of nerve conduction study. (Dr. Hamby’s testimony). Dr. Moore testified that the NC-Stat™ is a surface device for picking up muscle activity, and in that sense it is a surface EMG device.

The American Association of Electrodiagnostic Medicine (AAEM) describes surface EMG as “a recording of electrophysiologic signals from skeletal muscles. The recording is made using electrodes placed on the surface of the skin overlying the muscle, and consists of motor unit action potential (MUAP) discharges. The electrical activity is only observed when the muscle is activated. It does not include any monitoring of externally stimulated muscle activity as occurs in nerve conduction studies, H reflexes, F waves, and other tests.” (Ex. 20)

Conclusions of Law and Opinion

Medical fee disputes arising under ORS 656.248 are reviewed *de novo*. OAR 436-001-0225(2).

Before MRU, SAIF stated that it disallowed payment because the NeuroMetrix Electroneurometer (NC-Stat) did not qualify under CPT code 95903. SAIF further argued that the *Carpal Tunnel Syndrome, Diagnosis and Treatment Guidelines*, developed by WCD in 1997, reported that neurometers had some value as a screening tool, but were not a substitute for electrodiagnostic testing. MRU determined that Dr. Hamby was not bound by the *Guidelines* because WCD had not adopted them as administrative rules. Next, MRU approved the use of CPT code 95903. MRU stated that CPT™ 2001 defined code 95903 as “nerve conduction, amplitude and latency/velocity study, each nerve; motor, with F-wave study,” but that it did not restrict or specify what type of machine may be used. MRU, therefore, concluded that SAIF was liable for the electrodiagnostic testing performed by Dr. Hamby.¹

At the contested case hearing, SAIF argued that the billings were not compensable under OAR 436-009-0015(6), which disallows payment for surface EMG tests. Citing to *Taber’s Cyclopedic Medical Dictionary*, which defined electromyogram as “a graphic record of the contraction of a muscle as a result of electrical stimulation,” and relying on the testimony of Dr. Moore, the hearing officer determined that the NC-Stat™ functioned as a surface EMG. Lastly, although CPT code 95903 would have made the NC-Stat testing reimbursable, the specific rule which made surface EMG tests non-reimbursable applied.

Evidentiary Ruling

In his exceptions, Dr. Hamby contends that the NC-Stat™ is a nerve conduction study and that he used the NC-Stat™ device to perform nerve conduction studies on claimant. Dr. Hamby further argues that the surface EMG is an entirely different procedure from nerve conduction studies. Dr. Hamby submitted four documents to support his contentions. The first is a technology review by the American Association of Electrodiagnostic Medicine (AAEM) titled *The Use of Surface EMG in the Diagnosis and Treatment of Nerve and Muscle Disorders*. The second is a 2001 WCD Policy Issue decision regarding reimbursement for use of the NCStat™ device. The third is a table of technical specifications required of nerve conduction equipment. The last is an article published in April 2000 in the *Journal of Occupational & Environmental Medicine* titled *Median Neuropathy at the Wrist: Diagnostic Utility of Clinical Findings and an Automated Electrodiagnostic Device*. Dr. Hamby asserts that the Director should take official notice of these documents as “judicially cognizable facts” pursuant to ORS

¹ MRU’s decision is consistent with a 2001 Policy Issue statement issued by WCD, in which WCD determined that neither the statute nor the administrative rules prohibited the use of the NC-Stat nerve conduction monitoring system and that it should be billed under CPT code 95903.

183.450(4). Dr. Hamby further argues that because the hearing officer relied on *Taber’s Cyclopedic Medical Dictionary (Taber’s)*² in defining electromyogram, the AAEM article is admissible to explain the technical distinction between surface EMG and NC-Stat™.

Relying on *Eugene Senger*, 5 WCSR 248 (2000), SAIF argues that this “new evidence” is not admissible after the hearing record closed, and that remand is not appropriate because some of the evidence was available before the hearing and because the evidence would not affect the outcome of the case.

ORS 183.450(4) states:

“The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. Parties shall be notified at any time during the proceeding but in any event prior to the final decision of material officially noticed and they shall be afforded an opportunity to contest the facts so noticed. ***”

As such, an administrative agency may take judicial notice of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *SAIF v. Calder*, 157 Or App 244 (1998). Oregon courts have approved reference works, such as scientific articles and medical dictionaries, and public records, such as court judgments, as “sources whose accuracy cannot reasonably be questioned.” *Arlington Educ. Assn’n v. Arlington School Dist. No. 3*, 177 Or App 658, 667 (1984). Because the WCD has a certain amount of medical expertise relating to the provision of medical services, it may take official notice of technical facts within its specialized knowledge.

Dr. Hamby’s submission of the AAEM article has already been admitted as SAIF’s Exhibit 20. Because the AAEM article has already been admitted as evidence, the Director need not take official notice of it. The 2001 WCD policy issue statement is a source widely available to the public on the WCD website. Because the WCD was acting as the Director’s designee when it adopted the policy, the Director takes official notice of the existence of WCD’s policy. However, the Director declines to take official notice of the substance of the policy statement because that is the issue currently in dispute. The Director takes official notice of the April 2000 scientific article in the *Journal of Occupational & Environmental Medicine*.³ The technical table appears to be an analysis from the manufacturer of the NC-Stat™ rather than the type of scientific article contemplated by the courts as acceptable reference works. As such, the Director declines to take official notice of it.

² Dr. Hamby cites to an updated version of Taber’s which now defines electromyogram as “the graphic record of resting and voluntary muscle activity as a result of electrical stimulation.” Taber’s 19th edition (2001).

³ Because the director is taking official notice of “judicially cognizable facts” and “general, technical or scientific facts” rather than “evidence,” the *Senger, supra*, decision is inapplicable.

The NC-Stat™ Device

SAIF relies on OAR 436-009-0015(6) to argue that the NC-Stat testing is not reimbursable because it is a surface EMG. The administrative rules do not define EMG or

surface EMG. OAR 436-009-0015(6) provides:

“Payment shall not be made for DMSO except for treatment of compensable interstitial cystitis. Additionally, payment shall not be made for surface EMG tests, rolting, prolotherapy, and thermography. While these services may be provided, medical providers shall not be paid for such services or for treatment of side effects.”

Contrary to SAIF’s contentions, this is not a case of interpreting the meaning of the rule. Rather, the issue is whether the NC-Stat™ is a surface EMG. If it is, then it is not reimbursable pursuant to OAR 436-009-0015(6). If it is not, then the rule does not apply.

Dr. Hamby cites to an updated version of *Taber’s*, which defines electromyogram as “the graphic record of resting and voluntary muscle activity as a result of electrical stimulation.” *Taber’s*, (19th edition 2001). He argues (and relies on the AAEM article) that surface EMG and nerve conduction testing are two different and mutually exclusive tests. EMG tests muscle activity. NCS evaluates the function of the nerve, not the muscle. He further argues that the hearing officer incorrectly determined that surface EMG equals “surface” plus *Taber’s* definition of “EMG.” Dr. Hamby contends that the NC-Stat™ is a nerve conduction study, not an EMG, and, therefore, OAR 436-009-0015(6) does not apply.

Electrodiagnostic studies include nerve conduction studies (NCS) and EMG. Conventional electrodiagnostic testing measures sensory and motor nerve conduction. NCS performs electrical stimulation, by surface or needle electrodes, of the nerve and records electrical responses from the nerves or the muscles they innervate. The NC-Stat™ performs electrical stimulation of the nerve. Like conventional NCS, the NC-Stat detects CMAP, but through volume conduction. NC-Stat™ performs motor nerve testing, but not sensory nerve testing. Although the NC-Stat™ does not perform all the functions of conventional electrodiagnostic studies, it serves as a nerve conduction study. Dr. Hamby used the device as a nerve conduction study.

Conventional needle EMG records resting and voluntary muscle activity. It includes electrically stimulating the muscle. Surface EMG records electrical response when a muscle is activated. It uses surface electrodes to stimulate the muscle. Conventional EMG and surface EMG measure motor unit action potential (MUAP). Dr. Moore testified that the NC-Stat™ is a surface device for picking up muscle activity, and in that sense it is a surface EMG device. However, Dr. Hamby testified that it was unnecessary for claimant to have an EMG. Because Dr. Moore’s testimony is general and not specific to claimant, as is Dr. Hamby’s, more weight is given to Dr. Hamby’s testimony. Thus, in this case, the NC-Stat™ functioned as a nerve conduction study. Therefore, OAR 436-009-0015(6) does not apply to defeat reimbursement. The administrative rules do not prohibit reimbursement of the NC-Stat™ as a nerve conduction study. The Director agrees with MRU that CPT™ 2001 definition for code 95903 does not restrict or specify what type of machine may be used under that code. Neither the statute nor the medical fee schedule rules prohibit the use of the NC-Stat™ nerve conduction monitoring system. The Director also agrees with MRU that the NC-Stat™ should be billed under CPT code 95903.

Lastly, Dr. Hamby used the NC-Stat™ as a screening device. He acknowledged that the NC-Stat™ was not meant to be a substitute for formal electrodiagnostic studies, but that it provided accurate results for the purpose as a nerve conduction study. When claimant's symptoms worsened, then Dr. Hamby obtained formal nerve conduction studies. Those studies confirmed the CTS. The NC-Stat's use as a screening device does not defeat its reimbursability. *See e.g., Melvin Kuykendall, ___ WCSR ___ (July 1998) (psychological evaluations were reasonable and necessary medical treatment as a screening tool prior to surgery recommendation).*

IT IS HEREBY ORDERED that the April 24, 2002 Revised Proposed and Final Contested Case Hearing Order is reversed.

DATED this day of August, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____

John Shilts, Administrator
Workers' Compensation Division