



September 13, 2021

Rita Chapin
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

Via email to rules.development@tmb.state.tx.us

Re: Comments on Proposed Rule 22 Tex. Admin. Code § 174.5 (46 Tex. Reg. 33, Pages 4907-5108, August 13, 2021)

Dear Ms. Chapin:

On behalf of the Texas Medical Association (TMA) and Texas Pain Society, and our over 55,000 physician and medical student members, we submit the following comments on the Texas Medical Board's (TMB's) proposed amendments to 22 Tex. Admin. Code § 174.5, as published in the August 13, 2021 Texas Register. We generally support TMB's proposed amendments to issuing prescriptions to treat chronic pain via telemedicine. We believe these changes will remove some of the unnecessary barriers to facilitate better treatment options for patients and physicians while preserving safeguards to deter patient prescription abuse. However, we offer just a few comments for clarity and consistency to prevent unintended confusion, as well as two requests relating to this rule proposal—we thank you in advance for your consideration and attention to these items.

Comment

1. We suggest three main clarifying edits to proposed amended subsection (e) to avoid language that can unfairly stigmatize patients receiving treatment for chronic pain and to avoid possible confusion regarding the requirements to permit a telemedicine visit. First, it is important not to identify the patient as a “chronic pain” patient in Clause (i). Identifying the patient in this manner unfairly stigmatizes patients who seek treatment for chronic pain. Instead, it should be clear that the individual is a patient of the physician, and the patient receives treatment for chronic pain.

Second, the current language “is receiving a prescription that is **identical** to a prescription issued at the previous visit” is too narrow. The language “identical” does not take into account flexibility in treatment needed to effectively manage chronic pain. For example, one of the goals in pain management treatment is to reduce a patient’s treatment dosage when possible. A textual

application of the word “identical” could limit telemedicine services from being provided in this situation, despite a similar prescription being issued previously. Further, after receiving a prescription for treating chronic pain at an in-person or telemedicine visit, a patient could have a follow-up appointment within the 90-day window for various reasons and not receive *another* identical prescription for treating chronic pain during the last previous visit. Practically, it is unlikely the board intended the patient to be disqualified from using telemedicine in this situation, and we offer language below to resolve this possible misinterpretation.

Third, it is unclear what the board intended by using “prescribing physician or health professional defined under Chapter 111.001(1) of the Texas Occupations Code”. Section 111.001(1) assigns “health professional” and “physician” the same meanings as those in Section 1455.001, Insurance Code. In Section 1455.001(1), a “health professional” also includes a “physician” (which, as an aside, is why we also recommend including “**other health professional**”). See Section [1455.001\(1\)\(A\)](#).

Based on this definition, “health professional” in the proposed amended rule could be interpreted to mean the prescribing physician could issue a prescription to treat chronic pain via telemedicine for a patient who has seen *another* physician or another physician’s delegatee in the last 90 days in-person or via telemedicine. Of course, there are legitimate reasons why TMB would want to permit this where a valid patient-physician relationship exists, such as emergencies where a previous treating physician may no longer be available. If this is TMB’s intent, we support this interpretation and do not recommend any changes except to add “**other**” for proper clarity (and change “Chap” to “Section” for proper drafting).

However, if TMB intended the exception to apply narrowly to only a qualifying visit with the prescribing physician or the prescribing physician’s delegate, we ask that this be clearly expressed in the rule to prevent confusion and unintentional misapplication.

Accordingly, we offer suggestions below to incorporate the comments in this section, including two options to address the “health professional” language in subsection (e)(A)(iii), as well as a few other edits for consistency and structure, such as using “physician or other health professional” instead of “provider”:

(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) Treatment for Chronic Pain. For purposes of this rule, chronic pain has the same definition as used in §170.2(4) of this title (relating to Definitions).

(A) Telemedicine medical services used for the treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless a patient:

(i) is an established ~~[chronic pain]~~ patient of the **physician or other health professional** ~~[provider]~~ issuing the prescription **to treat chronic pain in accordance with this subsection;**

(ii) is receiving a prescription **to treat chronic pain** that is **similar** ~~[identical]~~ to a prescription issued at a ~~[the]~~ previous visit; and

Option 1

(iii) has been seen **in the last 90 days** by the prescribing physician, or other health professional **as defined under Section [Chap] 111.001(1), [of Texas] Occupations Code, [in the last 90 days]** either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

Option 2

(iii) has been seen **in the last 90 days** by the prescribing physician, or other health professional **authorized to assist the prescribing physician in providing telemedicine medical services that are delegated and supervised by the physician [defined under Chap 111.001(1) of Texas Occupations Code, in the last 90 days]**, either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

(2) **Treatment for Acute Pain.** For purposes of this rule, acute pain has the same definition as used in §170.2(2) of this title. **Telemedicine medical services may be used for the treatment of acute pain with scheduled drugs, unless otherwise prohibited under federal and state law.**

2. We urge TMB to ask the Texas Board of Nursing (BON) to modify its proposed rule to conform to TMB's proposed rules on using telemedicine to prescribe treatment for chronic pain. BON also [proposed rules](#) in the Texas Register on August 13, 2021 regarding providing telemedicine medical services to treat chronic pain. We are concerned BON's rules do not properly distinguish that the advanced practice registered nurse (APRN) is operating under a physician's delegated authority and not independently prescribing treatment for chronic pain. Further, we are concerned the additional proposed factors in BON's rule in subsection (e)(1)(B) will interfere with the prescribing physician's delegated authority because it narrows when the

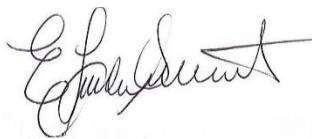
APRN can accept delegated authority from the physician to assist in providing telemedicine medical services to treat a patient with chronic pain. We hope that TMB might be able to coordinate with BON for a unified approach in providing treatment for chronic pain through telemedicine medical services with proper delegation and supervision. We have attached our letter to BON addressing our concerns for TMB's reference.

3. We respectfully remind TMB to reassemble stakeholders to further discuss improvements and clarifications to the definitions of acute and chronic pain. We have one final comment, which is to remind TMB of its prior commitment to resume stakeholder discussions on the definitions of acute and chronic pain in 22 Tex. Admin. Code. § 170.2. TMA and other stakeholders submitted several comments when TMB changed the definitions of acute and chronic pain in 2020. The board stated during its executive public meeting in June or July 2020 that, based on the feedback from stakeholders about the confusion caused by the definitions, it would resume stakeholder meetings for further input on these definitions. The pandemic and legislative session likely (and understandably) delayed this initiative, but now that we have adjusted to this new normal, we urge TMB to promptly organize the stakeholders to continue discussions on this issue.

Conclusion

Thank you for your consideration of the above comments. If you have any questions, please contact any of the following TMA staff by email: Rocky Wilcox, vice president and general counsel, at rocky.wilcox@texmed.org; Kelly Walla, associate vice president and deputy general counsel, at kelly.walla@texmed.org; Laura Thetford, associate general counsel, at laura.thetford@texmed.org; or Dan Finch, vice president of advocacy, at dan.finch@texmed.org; by phone at 512-370-1300; or at our mailing address: 401 West 15th Street, Austin, Texas 78701.

Sincerely,



E. Linda Villarreal, MD
President



Maxim S. Eckmann, MD
President, Texas Pain Society

ATTACHMENT



September 13, 2021

Kristin Benton, Director of Nursing
James W. Johnston, General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, Texas 78701

Via email to Kristin.Benton@bon.texas.gov and Dusty.Johnston@bon.texas.gov

Re: Comments on Proposed Rule 22 Tex. Admin. Code § 217.24 (46 Tex. Reg. 33, Pages 4907-5108, August 13, 2021)

Dear Ms. Benton and Mr. Johnston:

On behalf of Texas Medical Association (TMA) and Texas Pain Society, and our over 55,000 physician and medical student members, we submit the following comments on the Texas Board of Nursing's (BON's) proposed amendments to 22 Tex. Admin. Code § 217.24, as published in the August 13, 2021 Texas Register. We generally support BON's proposed amendments to issuing prescriptions to treat chronic pain via telemedicine so long as such services are provided with proper physician delegation and supervision. We believe these changes will remove some of the unnecessary barriers to facilitate better treatment options for patients while preserving safeguards to deter patient prescription abuse. However, we are concerned that the rules as proposed present several possible issues, including scope of licensure conflicts, potential confusion on when telemedicine services to treat chronic pain can be rendered, as well as some narrow language limitations that would prohibit telemedicine from being used most effectively to treat a patient with chronic pain. Accordingly, we offer the following comments—we thank you in advance for your consideration and attention to these items.

Comment

1. We have five main concerns with the proposed language in Subsection (e):

a. The proposed language in Subsection (e) could be impermissibly interpreted to allow independent prescribing practices, as well as other improper prescribing practices, for advanced practice registered nurses (APRNs) inconsistent with Chapter 157, Occupations Code. Clause (iii) states: “has been seen by a prescribing APRN or physician or health professional as defined in Tex. Occ. Code §111.001(1) ...” It is unclear why “prescribing

APRN” is standalone language in this provision when an APRN is already included in the definition of “health professional” under the applicable Occupations Code provision cited to in the same clause (it includes a qualified individual acting under the physician’s delegated authority and supervision). See [Section 1455.001\(1\)](#). The APRN’s authority to prescribe comes from the prescribing physician’s delegation authority. See generally, Tex. Occ. Code Chapter 157. To prevent unintended confusion and impermissible applications of this proposed rule, we ask BON to strike “APRN” in this clause.

Further, as proposed, there may be confusion about whether the rules account for the limitations on delegated prescribing authority for controlled substances in Chapter 157. For example, Texas Occupations Code § [157.0511](#) provides limitations on when an APRN can be delegated prescribing authority for scheduled drugs, and delegated prescription authority for Schedule II drugs are further limited to specific practice settings. Subsection (e) contains broad permissive language for the use of telemedicine medical services without including the statutory guardrails that still apply. Thus, to prevent misapplication of the law, we strongly urge BON to be clear that nothing in the proposed rule supersedes the requirements of Chapter 157. The existing parameters in [Subsections \(a\)-\(d\)](#) are not direct enough to resolve our concern.

b. We also ask BON to clarify its intent in Clause (iii) where it uses the language “prescribing APRN or physician or health professional defined under Chapter 111.001(1) of the Texas Occupations Code”. In addition to the scope concerns mentioned above, it is not clear how the “health professional defined under Chapter 111.001(1) of the Texas Occupations Code” language will be applied. Section 111.001(1) assigns “health professional” and “physician” the same meanings as those terms are defined in Section 1455.001, Insurance Code. In [Section 1455.001\(1\)](#), a “health professional” also includes a physician and a qualified individual acting under the physician’s delegated authority and supervision. As drafted, it is unclear whether the proposed amended rule could be interpreted to mean the APRN acting with delegated authority from the prescribing physician could issue a prescription to treat chronic pain via telemedicine for a patient who has been seen (in-person or via telemedicine) by a different physician (not the one delegating prescribing authority) or a different physician’s delegatee in the last 90 days.

Of course, there are legitimate reasons to permit this when a valid established patient relationship exists, such as emergencies where a previous treating physician may no longer be available, and if this is the agency’s intent, we support this interpretation and do not recommend any changes except to add “other health professional” for proper clarity (and change “Chap” to “Section” for proper drafting, and strike “APRN”).

However, if the intent is for the exception to apply narrowly to only a qualifying visit with the prescribing physician or the prescribing physician’s delegate, we ask that this be clearly expressed in the rule to prevent confusion. We offer language to this point below in Section 2 below.

c. The language proposed in Clause (ii) about an “identical” prescription issued at “the previous visit” is too narrow and may unintentionally interfere with the purpose of the rule if applied as drafted. The current language in Clause (ii), “is receiving a prescription that is identical to a prescription issued at the previous visit” is too narrow. First, the language

“identical” does not take into account flexibility in treatment needed to effectively manage chronic pain. For example, one of the goals in pain management treatment is to reduce a patient’s treatment dosage when possible. A textual application of the word “identical” could limit telemedicine services from being provided in this situation, despite a similar prescription being issued previously.

Second, after receiving a prescription for treating chronic pain at an in-person or telemedicine visit, a patient could have a follow-up appointment within the 90-day window for various reasons and not receive *another* identical prescription for treating chronic pain during the last previous visit. Practically, it is unlikely BON intended the patient to be disqualified from using telemedicine in this situation, and we offer language below in Section 2 to prevent this possible misinterpretation.

d. It is important not to identify the patient as a “chronic pain” patient. Identifying the patient in this manner in Clause (i) unfairly stigmatizes patients who seek treatment for chronic pain. Instead, it should be clear that the individual is a patient, and the patient receives treatment for chronic pain. We offer amended language below in Section 2.

e. Finally, we urge BON to strike the additional factors in Subparagraphs (B) and (C) to avoid interfering with the physician’s delegation authority under Chapter 157, Occupations Code. We are concerned the additional proposed factors in BON’s rule in Subsection (e)(1)(B)-(C) will interfere with the prescribing physician’s delegated authority by limiting when the APRN can accept delegated authority from the physician to assist in providing telemedicine medical services to treat a patient with chronic pain. We urge BON to align its rules with TMB’s rules for a unified approach in providing treatment for chronic pain through telemedicine medical services with proper delegation and supervision. A unified approach will help prevent confusion and disruption in the patient’s treatment.

2. To address the above comments and to include other suggested minor drafting edits, we offer the following language:

(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated, but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) For purposes of this rule, chronic pain has the same definition as used in 22 Texas Administrative Code §170.2(4) (relating to Definitions). ~~Treatment of chronic pain with scheduled drugs through use of telemedicine medical services is prohibited, unless otherwise allowed under federal and state law. For purposes of this section, “chronic pain” means a state in which pain persists beyond the usual course of an acute disease or healing of an injury. Chronic pain may be associated with a chronic pathological process that causes continuous or intermittent pain over months or years.]~~

(A) Telemedicine medical services used for the treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless a patient:

(i) is an established ~~[chronic pain]~~ patient of the APRN **issuing the prescription to treat chronic pain in accordance with this subsection;**

(ii) is receiving a prescription **to treat chronic pain** that is **similar [identical]** to a prescription issued at a ~~[the]~~ previous visit; and

Option 1

(iii) has been seen **in the last 90 days** by the prescribing ~~[APRN]~~ physician, or **other** health professional as defined under **Section [Chap] 111.001(1), [of Texas] Occupations Code, [in the last 90 days]** either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

Option 2

(iii) has been seen **in the last 90 days** by the prescribing ~~[APRN]~~ physician, or **other** health professional **authorized to assist the prescribing physician in providing telemedicine medical services that are delegated and supervised by the physician [defined under Chap 111.001(1) of Texas Occupations Code, in the last 90 days]**, either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

~~[(B) An APRN, when determining whether to utilize telemedicine medical services for the treatment of chronic pain with controlled substances as permitted by paragraph (1)(A) of this subsection, shall give due consideration to factors that include, at a minimum, the date of the patient's last in-person visit, patient co-morbidities, and occupational related COVID risks. These are not the sole, exclusive, or exhaustive factors an APRN should consider under this rule.~~

~~[(C) If a patient is treated for chronic pain with scheduled drugs through the use of telemedicine medical services as permitted by paragraph (1)(A) of this subsection, the medical records must document the exception and the reason that a telemedicine visit was conducted instead of an in-person visit.]~~

(2) For purposes of this rule, acute pain has the same definition as used in 22 Texas Administrative Code §170.2(2). Telemedicine medical services may be used for the treatment of acute pain with scheduled drugs, unless otherwise prohibited under federal and state law. ~~[Treatment of acute pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise~~

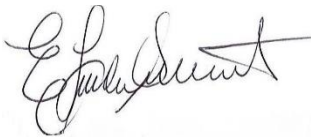
~~prohibited under federal and state law. For purposes of this section, "acute pain" means the normal, predicted, physiological response to a stimulus, such as trauma, disease, and operative procedures. Acute pain is time limited.]~~

(f) Nothing in this section shall be interpreted to supersede or alter, or be applied in a manner to conflict with, Chapter 157, Occupations Code. An APRN must comply with the requirements and limitations provided in Chapter 157, Occupations Code relating to delegated authority to prescribe or order drugs or devices, including controlled substances.

Conclusion

Thank you for your consideration of the above comments. If you have any questions, please contact any of the following TMA staff by email: Rocky Wilcox, vice president and general counsel, at rocky.wilcox@texmed.org; Kelly Walla, associate vice president and deputy general counsel, at kelly.walla@texmed.org; Laura Thetford, associate general counsel, at laura.thetford@texmed.org; or Dan Finch, vice president of advocacy, at dan.finch@texmed.org; by phone at 512-370-1300; or at our mailing address: 401 West 15th Street, Austin, Texas 78701.

Sincerely,



E. Linda Villarreal, MD
President



Maxim S. Eckmann, MD
President, Texas Pain Society