

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-087

**HUGO ACUNA,
Claimant–Respondent,**

v.

**CLEVENGER CORPORATION and PENN NATIONAL INSURANCE,
Employer/Carrier–Petitioner**

Appeal from a June 21, 2013 Compensation Order by
Administrative Law Judge Sandra M. McNair
AHD No. 08-267C, OWC No. 648492

David M. Schloss, Esquire, for the Claimant/Respondent
Jamie L. DeSisto, Esquire, for the Employer/Carrier–Petitioner

Before: HENRY W. MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on June 21, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) determined that Claimant’s request for epidural steroid injections was reasonable and necessary and granted authorization for that treatment.¹

Claimant injured his back while working as a carpenter on December 11, 2007. He was treated conservatively for low back pain and later referred for pain management under the care of

¹ *Acuna v. Clevenger Corporation*, AHD No. 08-267C, OWC No. 648492 (June 21, 2013).

Dr. Reza Ghorbani where he underwent physical therapy and epidural steroid injections in addition to other treatment options with no appreciable improvement. Dr. Ghorbani recommended a percutaneous disc compression, which was contested by Employer as neither reasonable nor necessary.

Following a formal hearing, a CO issued on September 29, 2011 in which it was determined that the recommended surgery was reasonable and necessary.² On October 12, 2011, Claimant underwent percutaneous L3-L4 disc compression surgery. While Claimant experienced a reduction in his level of pain after the surgery, his pain returned within a year to its pre-surgical level.

On or about October 19, 2011, Claimant and Employer entered into a settlement agreement, approved by the Office of Workers' Compensation (OWC), with regard to future wage loss benefits. Under the agreement, Employer remained responsible for future reasonable, necessary, and causally related medical expenses.

As Claimant's pain returned to its pre-surgical level, Claimant continued to treat with Dr. Ghorbani, receiving treatment consisting of physical therapy and pain medication, including Neurontin and Soma, but without any significant relief. In February, 2012, Dr. Ghorbani recommended a further course of epidural steroid injections. Employer contested the reasonableness and necessity of this course of treatment.

On April 23, 2012, Employer received a Utilization Review (UR) report from Dr. Rebecca Ovsowitz wherein it was determined that the recommended "booster" course of epidural steroid injections was not reasonable, necessary, or medically indicated. The UR doctor reached the same conclusion regarding a peripheral nerve stimulator. A copy of the UR report was forwarded to Dr. Ghorbani on August 15, 2012 by Employer's counsel.

The ALJ found that Dr. Ghorbani responded to the UR report on September 12, 2012. In a letter to Claimant's counsel, Dr. Ghorbani repeated his opinion that Claimant was a candidate for lumbar epidural steroid injections which would decrease pain and inflammation, reduce the use of medication, and avoid surgery. Dr. Ghorbani considered this a reasonable request as it was part of Claimant's treatment plan. In a November 2, 2012 letter, Dr. Ghorbani repeated this justification.

On October 10, 2012, Claimant underwent an independent medical evaluation (IME) by Dr. David C. Johnson. As the ALJ found, Dr. Johnson opined that Claimant was at maximum medical improvement (MMI), that his pain was down to a level to be expected for someone with degenerative disk disease of the lumbar spine, and that he did not require further treatment, and there was specifically no need for further epidural steroid injections, insofar as previous injections had not provided lasting relief. In a November 20, 2012 supplemental report, Dr. Johnson stated his examination of Claimant on October 10, 2012 did not support Dr. Ghorbani's diagnosis of Claimant's condition so as to justify the recommended injections.

² *Acuna v. Clevenger Corporation*, AHD No. 08-267B, OWC No. 648492 (September 29, 2011).

With Claimant requesting and Employer contesting further epidural steroid injections on the basis of reasonableness and necessity, the issue proceeded to a formal hearing for resolution. The presiding ALJ determined in a June 21, 2013 CO that the recommended injections were reasonable and necessary. Employer filed the instant appeal and Claimant filed in opposition.

On appeal, Employer argues the ALJ erred (1) in rejecting the conclusions of the UR report; (2) in basing her decision on a misunderstanding of the settlement agreement; and, (3) in making inappropriate recommendations for future medical treatment. Claimant counters that the CO is supported by substantial evidence and in accordance with the law and should be affirmed.

ANALYSIS

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.³ *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The CRB has held that where the issue of the reasonableness and necessity of requested medical treatment is raised, utilization review pursuant to D.C. Code § 32-1507(b)(6) is mandatory.⁴ When the utilization review (UR) report has been admitted into evidence, it is not deemed to be dispositive, but rather is to be considered on equal footing with the opinion rendered by the treating physician.⁵ Specifically, the ALJ

is free to consider the medical evidence as a whole on the question, and is not bound by the outcome of the UR report. The issue should be decided based upon the ALJ's weighing of the competing medical evidence and [the ALJ] is free to accept either the opinion of the treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.⁶

³ "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

⁴ *See Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

⁵ *See Children's National Medical Center v. DOES*, 992 A.2d 403 (D.C. 2010).

⁶ *Green v. Washington Hospital Center*, CRB No. 08-208, AHD No. 07-130B, OWC No. 628552 (June 17, 2009).

In deciding that one opinion is entitled to greater weight, it is incumbent upon the ALJ to explain why that opinion is more persuasive than the other.⁷

In the instant case, the ALJ reviewed the competing medical opinions:

[D]r. Ovsiowitz opined that the Claimant has failed to present with current active symptoms of radiculopathy. And, she used this opinion as a basis for her rationale that the epidural injections are not medically reasonable or necessary. However, a review Dr. Ghorbani's medical records from December 15, 2011 through April 19, 2012 repeatedly reference the Claimant's right leg pain and pain radiating from his lower back to his right leg (CE #1 at 119-128). Moreover, although Dr. Ovsiowitz opined that "[r]epeat injections should be based on continued objective documented pain relief, decreased need for pain medications, and functional response," she fails to recognize that the Claimant has not been permitted to have any injections since the percutaneous discectomy procedure on October 12, 2011. In December 2011, after temporary relief from pain and radiculopathy as a result of the surgery, the Claimant again complains of these symptoms as noted in Dr. Ghorbani's medical records. Specifically, Dr. Ghorbani opines in his December 15, 2011 records that the Claimant has not been able to continue with the decrease in his medications as his pain has returned; and that if Claimant continued having pain while attempting to decrease his medications, the "booster" epidural injections would be necessary to alleviate the pain while continuing to wean the Claimant off of his pain medications (CE #1; and EE #2).⁸

With this reasoned analysis, the ALJ proceeded to credit the opinion of Dr. Ghorbani in reaching the conclusion that the recommended injections were reasonable and necessary, stating:

Therefore, although the Employer has produced medical reports suggesting that the Claimant has fully recuperated from his work-related injury and the requested medical treatment is unnecessary and unreasonable; the Claimant's treating physician has not indicated in medical records that Claimant has fully recuperated from his work-related injury or that all symptomatic complaints have resolved. Moreover, based on the rationale provided in the UR report, Dr. Ghorbani is proceeding in the medically prudent manner that Dr. Ovsiowitz recommended when she opined that "[r]epeat injections should be based on continued objective documented pain relief, decreased need for pain medications, and functional response." Here, Dr. Ghorbani has indicated his trifold purpose for the "booster" epidural injections: avoid the need for a more invasive procedure, to alleviate Claimant's pain, and to reduce his dependency on

⁷ See *Haregewoin v. Loew's Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008). The CRB's Decision and Remand Order transposes the claimant's name. The claimant's name is Haregewoin Desta, not Desta Haregewoin. See *Desta v. Loew's Washington Hotel*, AHD No. 07-041A, OWC No. 603483 (December 7, 2007).

⁸ CO at p. 10.

Soma and Neurontin, which are in concert with the recommendations of both Dr. Johnson's IME and Dr. Ovsiowitz's UR report. As such, the logical corollary that the recommended epidural steroid injections are not reasonable or necessary cannot be asserted or accepted on the basis that the symptomatic complaints have primarily resolved and that Claimant has reached MMI. Thus, in this instance, greater weight is afforded the medical records and treatment recommendations of Dr. Ghorbani over those of Dr. Johnson and Dr. Ovsiowitz.⁹

Employer takes issue with the conclusion reached by the ALJ by first arguing that the ALJ committed error because the conclusion is based on a misunderstanding of Dr. Ovsiowitz's opinion and second, a failure of the UR report to factor in the possible efficacy of further injections after the surgery. We are not persuaded by these arguments.

With regard to the alleged misunderstanding of the UR physician's opinion, Employer argues that it was wrong to reject Dr. Ovsiowitz's opinion because as the ALJ reasoned "Claimant has failed to present with current active symptoms of radiculopathy." Rather, Employer points to the stated opinion in the UR report that "radiculopathy has not been documented by physical examination and corroborated by imaging studies." However, reading further in the report, Dr. Ovsiowitz states:

Moreover, the current physical examination findings do not include clinical signs consistent with the focal neurological deficit in a dermatomal or myotomal pattern to cause concern for current, active radiculopathy.

It thus appears that it is Dr. Ovsiowitz's opinion rather than "failing to present with current active symptoms of radiculopathy", Claimant's "current, active radiculopathy" based on "current physical examination findings" are not a "cause [for] concern" and thus further injections are not warranted.

While the misunderstanding of the UR report physician's opinion ascribed to the ALJ is not totally without merit, we do not find that it rises to the level of reversible error. In the final analysis, the ALJ compared Dr. Ovsiowitz's opinion that Claimant's current manifestation of pain symptoms with Dr. Ghorbani's treatment reports to conclude in favor of Dr. Ghorbani's assessment.

As to the assertion of another misunderstanding of the UR report by the ALJ in concluding that the report "fails to recognize that Claimant has not been permitted to have any injections since the percutaneous discectomy procedure on October 12, 2011", we disagree with Employer's assessment. The ALJ makes this statement after quoting Dr. Ovsiowitz's opinion that "Repeat injections should be based on continued objective documented pain relief, decreased need for pain medications, and functional response." As the ALJ later notes, pain relief and decreased need for pain medications, are justifying reasons offered by Dr. Ghorbani for the "booster" injections, in addition to avoiding another surgery.

⁹ *Id.*

The purpose of the instant proceedings is to obtain authorization for a course of post-surgery steroid injections. Thus, while the UR report can be read to establish the necessary protocols for determining successive series of those injections, it does not render an opinion as to the efficacy of a successive series after surgical intervention. We discern no error by the ALJ.

Employer also argues the ALJ committed error by basing her decision on a misinterpretation of the settlement agreement and the prior Compensation Order. Specifically, Employer asserts that the ALJ inappropriately insinuated that it was improper for it to challenge the requested medical treatment and that it was inappropriate for the ALJ to accept and incorporate by reference the findings of fact from the September 29, 2011 Compensation Order. We disagree.

Employer admits that the settlement agreement signed by the parties made it responsible for reasonable and necessary medical treatment. It was upon that basis that the parties appeared at the formal hearing: to resolve the reasonableness and necessity of another course of steroid injections. To the extent that the ALJ's statements can be interpreted as insinuating that it was improper for Employer to challenge the requested treatment, insinuation is not basis for reversal. As to incorporating by reference the findings of fact from the prior CO, those facts are the law of the case, and it was not error for the ALJ to incorporate them into her decision.

Finally, Employer seeks reversal because the ALJ went beyond her authority in recommending future medical treatment. While we agree the statement of recommended treatment went beyond the ALJ's authority, we deem it not a cause for reversal.

After concluding that Claimant had met his burden based upon the medical evidence presented, the ALJ stated:

Accordingly, the contested medical treatment of epidural injections is deemed reasonable and necessary, but that should this series of epidural injections prove unsuccessful, alternative medical treatment including, but not limited to surgery should be considered to address the Claimant's chronic complaints of pain and numbness.¹⁰

It was the ALJ's responsibility to rule on the reasonableness and necessity of the requested epidural steroid injections. This she did and upon doing so, her job ended, as did the limits of her authority in this matter. Her authority did not extend to rendering an opinion as to a possible future treatment plan for Claimant. As the statement on recommended future treatment is not contained in either the Conclusion of Law or the Order, we classify it as dictum with it having no force or effect on either party and thus no cause to remand for correction.

CONCLUSION AND ORDER

The ALJ's conclusion that the recommendation for epidural steroid injections is reasonable and necessary is supported by substantial evidence and is in accordance with the law. Accordingly, the June 21, 2013 Compensation Order is AFFIRMED.

¹⁰ CO, p. 11.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

October 2, 2013

DATE