

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-025

**ADONIS HOLLAND,
Claimant–Petitioner,**

v.

**ONCORE CONSTRUCTION COMPANY and
GUARANTY FUND MANAGEMENT SERVICES,
Employer/Third-Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 2 PM 12 09

Appeal from a January 27, 2016 Compensation Order
by Administrative Law Judge Mark W. Bertram
AHD No. 15-307, OWC Nos. 548557 and 601718

(Decided August 2, 2016)

Jose L. Estrada for Employer
David M. Snyder for Claimant

Before JEFFREY P. RUSSELL, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This appeal follows a formal hearing conducted on December 1, 2015 before an administrative law judge (ALJ) in the Administrative Hearings Division (AHD) within the Office of Hearings and Adjudication (OHA) of the District of Columbia Department of Employment Services (DOES).

Claimant sustained an injury to his back when, on September 8, 1999, he fell 25 feet from a ladder while working for Employer.

Employer provided medical care for the injury¹ for a period of time. This care included an MRI in May 2000 and an EMG in April 2005. Although the compensation order under review contains no reference to the nature of any additional care rendered in the time immediately following the accident, the hearing transcript (HT) reveals that his care had been managed by Dr. Hampton Jackson, who passed away in 2012, at which time Claimant chose to continue to be treated by Dr. Richard Ashby. HT 13. Prior to the death of Dr. Jackson, Claimant had begun, in 2011, taking Oxycodone.

On March 19, 2015, Employer had Claimant's medical regimen reviewed under the Utilization Review (UR) provisions of D.C. Code § 32-1507 (6)(B) by Dr. Mark Friedman, who authored a UR report indicating that the continued use of Oxycodone was not reasonable or necessary.

The issue presented for resolution at the formal hearing was whether the continued provision of Oxycodone as recommended by Dr. Richard Ashby between February 7, 2013 and December 1, 2015, was reasonable and necessary.

Following the formal hearing, the ALJ issued a Compensation Order on January 27, 2016 (the CO) in which it was determined that the requested medical care was not reasonable and necessary, and the claim was denied.

Claimant appealed the CO to the Compensation Review Board (CRB) by filing Claimant's Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief).

Employer filed a Memorandum of Points and Authorities in Opposition to Claimant's Application for Review (Employer's Brief).

Because the CO is supported by substantial evidence, we affirm.

ANALYSIS

Citing *White v. WMATA*, CRB No. 13-165 (May 30, 2014), the ALJ noted that as a general proposition "Claimant...has the legal burden to prove the contested medical treatment is reasonable and necessary, without the benefit of any presumption of compensability." CO at 4. And, citing the case usually denominated *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068 (February 19, 2008),² the ALJ further noted that "an ALJ has an obligation to weigh the treating physician's opinion with the UR opinion based upon the record as a whole; the ALJ must explain why the ALJ chooses one opinion and not the other, but no initial preference [for either opinion] is required." CO 4 – 5.

The ALJ sets forth the analytical basis of the decisions as follows:

¹ The CO is silent with respect to what indemnity, if any, Claimant has received or is currently receiving. This lack of information is of no relevance to the claim for relief, which is limited solely to the medical care request.

² As Claimant notes in Claimant's Brief, this citation transposed the claimant's name, which was Haregewoin Desta. Claimant's Brief, at 7, n. 5.

Claimant, over the past four years has been taking oxycodone on a regular basis. As discussed by the UR in this case, opioids may be appropriate for short-term use in selected patients with severe exacerbation of low back pain, but should not be used routinely and should be used in conjunction with caution for long-term treatment with chronic back pain.³ The UR also points out that the use of opioids should be used as part of a multi-modal therapy. The only active therapy Claimant has been receiving from Dr. Ashby appears to be the use of oxycodone. Dr. Ashby's other recommendations indicate that Claimant should stay active and lose weight.

³ To make the record clear, Claimant testified that his symptoms are worse when not taking his medication. HT 53:8-16. While I find against Claimant in the instant case, this order should not be construed as rendering any opinion regarding Claimant's future treatment to manage pain. Claimant is entitled to treatment that is reasonable and necessary.

CO at 5 (footnote in original).

In accepting this argument and rejecting Claimant's position, the ALJ wrote:

Claimant argues that he needs oxycodone for his pain. Claimant argues Dr. Ashby does follow the UR recommendations in that Dr. Ashby examines Claimant, monitors Claimant's drug use with screenings and has a contract with Claimant regarding controlled substances. Claimant testified he has tried other therapies. HT 46:1-13. Dr. Ashby's records are void of any references to alternative treatments that were considered or ordered.

Employer argues, and I concur, that Dr. Ashby's records are somewhat a "carbon copy" of each other. HT: 4-10. Claimant is routinely prescribed opioids on a refill basis without any elaboration as to a treatment plan, or investigative plan as to the causes of Claimant's back pain or other possible treatment alternatives. I also point out that the contract for long term substance therapy with Claimant was not formed until 2014. Also lacking in Claimant's evidence is any treatment plan to include performing imaging studies, physical therapy or psychological therapy as pointed out by the UR. EE 1, p. 7; CE 1. As noted before, the most recent study of any kind is an EMG approximately 10 years ago. The UR report and its conclusions are more persuasive regarding the reasonableness and necessity of the treatment provided by Dr. Ashby including the use of oxycodone.

Claimant makes only one record-based argument in this appeal, that being various iterations of his disagreement with the weight that the ALJ gave to the UR report. Thus, Claimant argues "By only considering the UR and Dr. Ashby's medical records, the Compensation Order did not consider one other important piece of substantial evidence: Mr. Holland's credibility" (CO at 8), "Neither the UR nor Compensation Order reference Mr. Holland's testimony that he had, in fact, tried other treatment options, such as physical therapy, cortisone shots, epidurals, or drugs such as Endocet before starting the long-term Oxycodone treatment plan" and "the UR relied upon by

the Compensation Order was not based on what actually happened to Mr. Holland, but instead upon a theoretical worst-case scenario for what could have happened to Mr. Holland.” (CO at 9).

We must respectfully disagree with these arguments. The above quoted portions of the CO reflect a full consideration of the UR and Dr. Ashby’s records, and the record supports the ALJ’s determination that the Oxycodone use alone, without any other treatment interventions, is condemned by the UR report as an unreasonable approach to managing chronic low back pain, and that the record fails to reveal any other recent or contemplated co-therapies.

Claimant is requesting that we reweigh the evidence, which is beyond our authority, in that we are only concerned with whether the determination of the ALJ is supported by substantial evidence and in accordance with the law. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

However, Claimant raises one point which, although it is not expounded upon at any length, does warrant discussion. Claimant asserts:

The Compensation Order also did not reference the October 17, 2013 Compensation Order that previously found Mr. Holland’s use of oxycodone was reasonable because it improved his function and [was] provided by only one practitioner.

Claimant’s Brief at 9.

Entered into evidence was a copy of that prior Compensation Order, CE 4. Although the reasonableness and necessity of Claimant’s Oxycodone use at that time was not identified as an issue in dispute in the compensation order, Employer did submit a “Peer Review” report questioning the use of that drug. Although the report did not purport to be authored by the statutorily required “URAC accredited” evaluator, the ALJ nonetheless discussed it and considered the claim as if it had been raised, and decided that despite the lack of URAC accreditation, the report would be considered and “accorded equal weight to the treating physician”. Compensation Order of October 17, 2013, at 4.

That order addressed the issue as follows:

Dr. Jackson diagnosed Claimant with chronic lumbar disc syndrome, chronic lumbar radiculopathy, and chronic non-alignment pain syndrome as a result of the September 8, 1999 work injury. Claimant underwent medical treatment with Dr. Jackson, and the associate physicians, from the date of injury through to 2012.⁵ To meet his burden [of proving reasonableness and necessity by a preponderance of the evidence], the Claimant puts forth his testimony that he has received various forms of medical treatment including, but not limited to narcotic medication for pain, and a lumbar brace.

Employer's evidence lists specific treatments and medications that it deemed excessive or not recommended for the treatment of Claimant's painful back symptoms [including]...Oxycodone....

The Peer Review stated that the Oxycodone was recommended "if it improves function" and "if it was provided by one practitioner". (EE 1 pg. 34). Oxycodone was appropriate because the medication was prescribed by Dr. Jackson, the primary treating physician and Claimant testified that the Oxycodone helped relieve his pain symptoms better than the previously prescribed Endocet. (HT 35).

* * *

For the above stated reasons, Employer's evidence, while concise and detailed, fails to prove that the contested medical treatments were not reasonable and necessary; therefore the treatment is compensable under the Act. Claimant's testimony, and the correlating medical records by a preponderance of the evidence, support the claim for the reimbursement for the claimed medical expenses.

⁵The treating physician died in 2012 (HT 40).

Compensation Order of October 17, 2013, at 5 – 6 (footnote in original).

We recognize that there are potential problems with this holding, including (1) the issue of reasonableness and necessity was not identified as an issue in dispute, (2) the "Peer Review" report apparently did not meet the statutory requirements for a UR report, and (3) the ALJ appears to have placed the burden of proof, at least initially, upon Employer to prove the lack of reasonableness and necessity.

However, none of these shortcomings inured to Employer's prejudice, and Employer did not appeal the compensation order.

Thus, we are presented with this question: does Claimant's reference to this prior compensation order constitute an argument in this appeal that Employer's contention that Oxycodone is no longer reasonable and necessary is a claim that requires modification of the prior compensation order? If so, there are implications relating to burdens of proof that the ALJ did not address, and that placing the initial burden upon Claimant to show reasonableness and necessity could be viewed as improperly removing the burden from the party seeking a modification. *See WMATA v. DOES*, 703 A.2d 1225 (D.C. 1997).

D.C. Code § 32-1524 governs modifications of compensation orders, and provides for a procedure for modification where there is reason to believe that a change of conditions has occurred which raises issues concerning "the fact or degree of disability or the amount of compensation payable pursuant thereto." D.C. Code § 32-1524 (a) (1).

This case is limited to issues relating to the provision of medical care, not the fact or degree of disability or the amount of compensation payable. Accordingly, the modification section is not

applicable. Thus, to the extent that Claimant's reference to the prior compensation order is a complaint that the procedures involved in modifications were not followed, it is rejected.

CONCLUSION AND ORDER

The Compensation Order's finding that the continued use of Oxycodone during the period addressed by the UR report is not reasonable and necessary is supported by substantial evidence, and the Compensation Order is affirmed.

So ordered.