COMPENSATION REVIEW BOARD

CRB No. 13-145

DANTES AUGUSTIN,
Claimant–Respondent,

v.

SODEXHO MARRIOTT SERVICES and GALLAGHER BASSETT SERVICES,
Employer/Carrier-Petitioners

Appeal from a October 30, 2013 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 11-114B, OWC No. 636638

Benjamin T. Boscolo, for the Respondent
Jennifer L. Ward, for the Petitioners

Before: HENRY W. MCCOY and JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Law Judge*.

HENRY W. MCCOY for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on October 30, 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) granted Claimant's request for temporary total disability benefits from May 22, 2013 through July 23, 2013, for authorization for an orthopedic mattress, and for ongoing physical therapy.[1]

Claimant has worked for Employer for four years primarily as a cashier but would perform other catering functions as needed. His duties required him to stand for eight hours each

[1] *Augustin v. Sodexho Marriott Services,* AHD No. 11-114B, OWC No. 636638 (October 30, 2013)(CO).

workday. Claimant, who is a political refugee from Haiti, obtained asylum in 2005 with a requirement that his visa be renewed annually.

While at work on August 17, 2006, Claimant's lumbar spine was severely injured when an opening door slammed into his back. From the time of the incident into 2009, Claimant's symptoms of back pain with radiculopathy increased in scope and severity. In July 2009, Claimant underwent back surgery, performed by Dr. Reza Ghorbani. The surgery, which included implantation of a spinal stimulator, provided Claimant relief from his symptoms for the period immediately following the surgery. With his symptoms worsening in 2010, Claimant was treated with epidural steroid injections, with the last injections in October 2012.

Claimant has attempted to return to work on several occasions, with his last attempt being in January 2010 and he hasn't work for any employer since then. At some unspecified time, Claimant's spinal stimulator was found to be defective, can't be recharged, and has been recalled by the manufacturer. A second surgery has been recommended to remove it. As a result of the failed stimulator, Claimant's debilitating back and lower extremity pain has recurred and worsened. Claimant is unable to lie on his back, his pain level is affected adversely by the weather, and the pain is aggravated by sitting, standing and walking.

In May 2011, Claimant's treating physician, Dr. Ghorbani, first prescribed a special bed to help with Claimant's back support. Prescriptions for physical therapy were written in November 2011 and November 2012, with a Temper Pedic Tempur-HD mattress prescribed as a medical necessity in October 2012.

In August 2010, Employer had Claimant examined by Dr. David C. Johnson who recommended that all medical treatment be stopped since none was found to be beneficial. A March 15, 2012 report by Dr. Daniel Weinberg, another medical examiner engaged by Employer, opined that an orthopedic hospital bed was not warranted. Employer has refused to authorize either the additional physical therapy or the prescribed orthopedic mattress.

It was specifically found that Claimant was candid regarding his immigration status. Claimant was issued an Employment Authorization Card (EAC) which authorized him to work legally in the United States. For purposes relevant here, Claimant's EAC card was valid from April 11, 2012 through April 10, 2013. The record shows that Claimant was hospitalized for a period of eight days in April 2013 after a reaction to an epidural injection and during this hospitalization, his EAC expired. Claimant had yet to apply for renewal although that process allowed him to apply 120 days prior to the card's expiration. Claimant's renewal application was received by the immigration service on April 22, 2013.

Claimant began vocational rehabilitation with Employer's provider in 2013 and fully participated until its completion on May 13, 2013. Employer suspended the payment of temporary total disability benefits from May 22, 2013 to July 23, 2013. Claimant obtained a new EAC that is good for the period July 2013 to July 2014.

Claimant filed a claim to recover the loss of disability benefits he incurred when Employer suspended payment and he also sought authorization for the prescribed physical

therapy and orthopedic bed. Employer challenged Claimant's claim by asserting he had voluntarily limited his income when he failed to timely file for the renewal of his EAC and that the physical therapy and orthopedic bed were not reasonable and necessary to Claimant's recovery. The (ALJ) hearing the case found the evidence supported Claimant's case and granted the claim for relief. Employer has timely appealed, with Claimant filing in opposition.

On appeal, Employer argues the ALJ erred as a matter of law in determining that Claimant's failure to renew his EAC did not constitute a voluntary limitation of his income and further erred in accepting the treating physician's opinion on the reasonableness and necessity of an orthopedic bed and further physical therapy. Claimant counters that each of the ALJ's determinations are supported by substantial evidence 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.[2] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545, 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.

Claimant is a political refugee from Haiti who received asylum in 2005 that has allowed him to remain in the United States. Claimant has a visa and an Employment Authorization Card (EAC) that allows him to work legally in this country. There is no dispute that when Claimant was injured at work on August 17, 2006, he was working under a valid EAC. There is also no dispute that relevant to case under review, Claimant was receiving workers' compensation benefits predicated upon his then EAC that was valid for the period April 11, 2012 through April 10, 2013. Claimant allowed this card to expire and his renewal application was not received by the immigration service until April 22, 2013. Claimant's application was approved and he now has an EAC valid for the period July 2013 through July 2014.

The ALJ found that Claimant began participating in vocational rehabilitation provided by Employer apparently at some time early in 2013. After being discharged from a brief hospitalization due to an adverse reaction to epidural injections, Claimant became aware on or about April 15, 2013 that his EAC had expired and Employer's vocational rehabilitation provider also became aware at this time when Claimant showed a counselor the expired card. Vocational rehabilitation services ended on May 13, 2013 with no further services provided and Employer suspended payment of temporary total disability benefits from May 22, 2013 through July 23, 2013. Employer resumed payment of those benefits when Claimant obtained his renewal EAC.

[2] "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. DOES*, 834 A.2d 882 (D.C. 2003).

Employer argues that the ALJ erred in ruling that Claimant did not fail to cooperate with vocational rehabilitation services and that he did not voluntarily limit his income when he allowed his EAC to expire. Specifically, Employer argues that when he allowed his EAC to expire he was ineligible to work and therefore ineligible for vocational rehabilitation. In addition, Employer argues that because Claimant's EAC had expired, he was unable to apply for suitable employment, which constituted a voluntary limitation of his income. It is Employer's contention that as Claimant was ineligible to work legally during the time his EAC was expired; it was under no obligation to continue wage loss benefits. We disagree.

In addressing the issue of whether Claimant failed to cooperate with vocational rehabilitation services, the ALJ reasoned:

> The Act only provides for suspension [of benefits] during the period of unreasonable refusal to accept rehabilitation. In pertinent part, the Act provides:
>
> > (d)….If at any time…the employee unreasonably refuses….to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation…during such period, unless the circumstances justified the refusal. D.C. Code, as amended, §32-1507(d).
>
> Thus, Employer's claim for suspension of benefits is not supportable where, as here, there is no evidence of unreasonable failure or refusal to accept vocational rehabilitation.
>
> Employer's position, regarding Claimant's alleged voluntary limitation of income/willful refusal to cooperate with vocational rehabilitation is not supported by the weight of the record evidence. It is clear from the record evidence that Claimant was fully cooperating with the vocational rehabilitation process when he discovered that he had forgotten to renew his application. His hospitalization and vision problems also had an effect on his untimely re-application for the EAC. In the past, during his tenure with Employer, he was allowed to work during the grace period when the EAC lapsed between renewals. HT 42-44.[3]

The ALJ further reasoned that Claimant fully cooperated with Employer's vocational rehabilitation provider and that he put forth a reasonable effort to meet and communicate with that provider. It is on this basis that the ALJ concluded that Employer's suspension of Claimant's benefits was not supported by the record.

[3] CO, p. 5.

On the issue of voluntary limitation income[4], Employer argues that because Claimant knew the renewal process for his EAC but did not renew in a timely fashion, this constituted a voluntary action that limited his income thus relieving Employer of the responsibility to pay wage loss benefits for the period in question. In addressing this issue, the ALJ applied the burden shifting device in *Logan*[5] without reference to whether Claimant's EAC was valid or not.

The ALJ determined that Claimant had demonstrated an inability to perform his usual job which under *Logan* constituted a *prima facie* showing of total disability and shifting the burden to Employer to establish the availability of suitable alternative employment. The ALJ determined that Employer made no such showing in rebuttable and went on to find that Claimant made a diligent effort, without success, in obtaining employment commensurate with his abilities. The ALJ accordingly ruled that Claimant had not voluntarily limited his income.

Specifically, the ALJ determined:

> Employer's contention that claimant's immigration status, if illegal, constitutes a voluntary limitation of income is without merit. Undocumented alien status is not one of the elements to be considered when determining whether an injured worker has an incapacity to earn wages. See *Rivera v. United Masonry*, 292 U.S. App. D.C. 182, 948 F.2d 774 (1991).[6]

Employer argues that the ALJ has misapplied the holding in *Rivera*, because pursuant to holding there, it cannot "be required to prove there are employer [sic] who hire undocumented workers as this would require the Employer to 'employ testers or other ruses to make its showing'" of suitable alternative employment.[7]

The CRB addressed the application of *Rivera* to a worker's undocumented status in its decision in the matter of *Gonzales v. Asylum Company*[8]. The ALJ in *Gonzales* determined that the injured employee, Palemon Gonzales, was temporary totally disabled from the date of injury, June 20, 2005, until January 26, 2006, the date he was released to return to work by his treating physician. In addition, the ALJ found that Gonzales' wage loss after he returned to work on July 17, 2005 without being released to do so, was due to his work injury and not due to his status as an undocumented alien. The CRB affirmed both findings.

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[4] D.C. Code § 32-1508(3)(V)(iii) states in part: "If the employee voluntarily limits his or her income or fails to accept employment commensurate with the employee's abilities, the employee's wages after the employee becomes disabled shall be deemed to be the amount the employee would earn if the employee did not voluntarily limit his or her income or did accept employment commensurate with the employee's abilities."

[5] *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

[6] CO, p. 5.

[7] Employer's *Memorandum of Points and Authorities*, p. 9, quoting *Rivera, supra*.

[8] *Gonzales v. Asylum Company*, CRB No. 08-077, AHD No. 06-224, OWC No. 617421 (August 22, 2008).

While *Gonzales* stands for the proposition that the Act applies to injuries sustained by undocumented aliens, the CRB decided to go further to make sure it was clear that "the fact of that status is not irrelevant at all times and in all cases. The Panel refers to the effect of the discovery by an employer of that status after a worker sustains a work related injury."[9]

To address this issue, the CRB turned to the *Rivera* case, a decision that arose under the predecessor statute to the Act, the Longshore and Harbor Workers' Compensation Act (LHWCA). As summarized by the CRB, the case involved

> …an undocumented worker, and whether the fact that a worker is undocumented has any potential impact upon entitlement to ongoing wage loss benefits after the worker has regained the physical (but not legal) capacity to return to work. Although presented in a somewhat awkward way rendering the result subject to some degree of misapprehension if not analyzed carefully, the Appeals Court held because a worker's undocumented status prevents legally employing the worker, the worker's continued wage loss is not, by itself, sufficient to support an award of ongoing disability compensation if, had the worker been documented, the worker could have returned to gainful employment. The Panel agrees.[10]

The CRB went on to state:

> While the Appeals Court did not explicitly address whether the LHWCA protections extend to undocumented aliens, by failing to even discuss the issue, the Appeals Court clearly assumed the provisions did. Likewise, as discussed above, the Panel takes the same approach, and explicitly determines (1) the Act applies to all workers to which the definition of "employee" applies, thereby entitling such workers to temporary total disability benefits for the duration of the temporary total disability, and medical benefits for so long as they would be available to a legal or documented worker, but (2) an undocumented alien's inability to legally obtain employment is relevant to the issue of causal relationship of the injury to the claimed wage loss, in the sense that it can be considered to represent an independent and unrelated cause of continuing unemployment following recuperation, sufficient to break the causal connection between the work injury and the ongoing wage loss. (fn omitted).
>
> Thus, the Panel notes the usual formulations of an employer's obligations following an injury must be read in a different context where an undocumented alien's status is discovered following a work injury. For example, while it is frequently stated that an employer is obligated to return a worker either to his pre-injury job or a modified position within his physical capacity, or to demonstrate the availability of suitable

[9] *Gonzales*, *supr*a, 2008 DC Wrk. Comp. LEXIS 353 at *23.

[10] *Id*. at *24.

> alternative employment, *see Logan v. D.C. Department of Employment Services*, 805 A.2d 237 (2002), in the case of an undocumented alien, an employer is forbidden by federal law from continuing to employ the undocumented alien. Similarly, among the benefits to which an injured worker is entitled under the Act is vocational rehabilitation, which frequently means providing job placement assistance. Again, however, it could be a crime for an employer or its rehabilitation service provider to seek to place an undocumented alien in a position with some unwitting third party employer, or seek to place the undocumented alien with a third party employer in knowing collusive violation of federal law.
>
> In such circumstances, the undocumented status appears to limit the range of options to (1) establishing whether and when an injured worker has recovered physically sufficiently to be able to return to work in some gainful capacity, assuming a legal status, (2) establishing whether at that point the level of wages that would be expected to be earned if the worker were documented is above, at, or below the pre-injury wage, and (3) adjusting the ongoing wage loss benefits, if any, accordingly.
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> The Panel repeats this formulation is required not because the Act does not apply to undocumented aliens; it does. It is necessary because federal law makes illegal the provision of some types of benefits (e.g., job placement services) and forbids employers to conduct themselves in certain ways (i.e., retain the worker on the payroll and/or provide modified employment) where the worker is undocumented, which are legal and/or required if the worker is documented. A corollary of this analysis, as noted in *Rivera* and with which the Panel agrees, is that if wage loss benefits were awarded to an undocumented alien merely because it is illegal for the worker to return to employment, an undocumented alien would be entitled to benefits to which a documented worker in the same situation would not, a scenario the Panel does not believe the legislature intended when it created the workers' compensation system in this jurisdiction. *See Rivera, supra*, at 776.[11]

The question in the instant matter, as in *Gonzales*, revolves around the discovery that Claimant lost his authorization to work, becoming in essence undocumented, while he was receiving wage loss benefits. There is no question under existing case law that Claimant was entitled to the benefits he was receiving, as he had a valid work permit until it expired on April 10, 2013.

The CRB in *Gonzales* agreed with the Appeals Court in *Rivera* that an undocumented worker's "continued wage loss is not, by itself, sufficient to support an award of ongoing disability compensation if, had the worker been documented, the worker could have returned to gainful employment." In the instant case, no finding has been made that Claimant was released

[11] *Id* at *27-*32.

to return to work in any capacity; thus he could not have "returned to gainful employment." As the D.C. Court of Appeals stated in its review of the CRB's decision in *Gonzales*:

> We agree with respondent DOES that, under the Act, "the fact that an employee may be unable to work for reasons beyond his injury does not affect his entitlement to benefits, as long as the injury independently causes that disability."[12]

Claimant at all times, in the instant matter, remained totally disabled under the Act, as per *Logan*.[13] The physical limits on Claimant's work capacity are caused by his work injury. As such, Claimant's work injury remained the cause of his total wage regardless of his overall lack of employability upon the expiration of his EAC. In this posture, Claimant gained no unfair advantage over a documented worker such as to contravene the legislative intent in the Act and as held by the court in *Rivera*. We therefore affirm the ALJ's determination that Employer had no basis for suspending Claimant's wage loss benefits.

We turn now to the reasonableness and necessity of Claimant's request for authorization to receive further physical therapy and an orthopedic mattress as prescribed by his treating physician. The ALJ ruled that both are reasonable and necessary to the course of Claimant's recovery from his 2006 work injury. In this appeal, Employer argues that the ALJ did not accord its Utilization Review report its proper evidentiary weight with regard to the orthopedic mattress and that its medical opinion on the receipt of further physical therapy should prevail.

When the issue to be resolved is the reasonableness and necessity of medical treatment, the utilization review process is mandatory.[14] Once a utilization review report has been submitted into evidence, that report is not dispositive, but is entitled to equal footing with an opinion rendered by a treating physician.[15] 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 treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.[16]

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[12] *Asylum Company v. DOES*, 10 A.3d 619, 630 (D.C. 2010).

[13] Under the Act, "disability" means "physical or mental incapacity because of injury which results in the loss of wages." D.C. Code § 32-1501 (8) (2012).

[14] See *Gonzales v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

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

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

Regardless of which opinion the ALJ gives greater weight, it is incumbent upon the ALJ to explain why one opinion is chosen over the other.[17]

In weighing the competing evidence, the ALJ reasoned

> In this case, the medical opinions of Dr. Ghorbani, as supplemented with the opinion of Chief Physician Assistant Messick, were more persuasive than the Coventry UR report. The UR report detailed no cognizable medical rationale for the conclusion that an orthopedic bed should not be certified. In fact, the UR report states that its "ODG Low Back (updated 2/22/13) chapter" was "silent" on the request for Orthopedic Hospital Bed, and that an alternative guideline, "ODG Knee and Leg (updated 1/29/13)" was actually used to process Claimant's treatment. RX 2, p. 6. Dr. Ghorbani's request for an appropriate bed has been pending, and rejected by Employer, since 2011.[18]

A review of the UR report submitted by Employer shows that Dr. Daniel Weinberg, in his review analyzed the request as whether an "Orthopedic Hospital Bed" was medically necessary. Dr. Ghorbani's opinion was that a new mattress, specifically the Temper Pedic Tempur-HD, was medically necessary in that it would "relieve pressure and provide therapeutic support." Dr. Weinberg reviewed the medical necessity of a piece of "Durable medical equipment", *i.e.*, an orthopedic hospital bed, an item distinguishable from a mattress, which is part of a bed, and an item not recommended by Dr. Ghorbani.

Dr. Weinberg did not analyze the medical necessity of the recommended mattress. Furthermore, although Dr. Ghorbani used language from the mattress catalogue of the benefits to be derived, his opinion also pointed out that conservative treatments for Claimant's symptoms had failed and that he continued to experience "severe lumbar radiculopathy despite the daily use of the spinal cord stimulator." The ALJ's finding that Dr. Ghorbani's opinion of the medical necessity of a new mattress as more persuasive is supported by substantial evidence in the record.

Employer also challenged the ALJ's determination that additional physical therapy was medically reasonable and necessary. There is no dispute that Dr. Ghorbani wrote two prescriptions for physical therapy, the first on November 17, 2011 and the second on November 20, 2012. The ALJ also found that Dr. Ghorbani "verbally recommended physical therapy to address Claimant's severe lumbar radiculopathy."

In the UR report submitted by Employer, Dr. Weinberg addressed the reasonableness and necessity of an orthopedic bed but did not assess the recommendation for physical therapy. Employer did not submit a separate UR report on physical therapy; relying instead on the IME from Dr. David Johnson. As the utilization review process is mandatory in resolving the

[17] *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008).

[18] CO, p. 7.

recommended treatment and it is incumbent on Employer as the concerned contesting party to provide that needed utilization review, in not doing so, the ALJ was correct in accepting the treating physician's recommendation as more persuasive.

CONCLUSION AND ORDER

The ALJ's determination that Claimant did not voluntarily limit his income or unreasonably fail to cooperate with vocational rehabilitation and that the treatment recommendations for an orthopedic mattress and prescribed physical therapy are reasonable and necessary are supported by substantial evidence in the record and are in accordance with the law. The October 30, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

March 7, 2014
DATE