GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 09-016

BEVERLY MCCORMICK,

Claimant–Respondent,

v.

CHILDREN'S NATIONAL MEDICAL CENTER,

Self-Insured Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Gerald D. Roberson
AHD No. 08-353, OWC No. 650382

David M. Schoenfeld, Esquire, for the Petitioner

Douglas K. Allston, Jr., Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LESLIE A. MEEK[1], *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the majority of the Compensation Review Panel, and LESLIE A. MEEK, concurring in part and dissenting in part:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Administrative Law Judge Meek is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-01 (October 10, 2008) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on October 28, 2008, the Administrative Law Judge (ALJ) granted Respondent's claim for provision of a right total knee replacement and temporary total disability benefits from June 8, 2008 through the date of the formal hearing and continuing thereafter. Petitioner filed an Application for Review (AFR) on November 20, 2008 seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's determination, that the condition for which surgery was authorized is causally related to the stipulated work injury, is not supported by substantial evidence. Petitioner also asserts that the ALJ's order to provide the medical care is not in accordance with the law because Respondent's attending physician failed to request reconsideration of a Utilization Review (UR) report, in which the physician performing the UR concluded that Respondent was not a good candidate for the requested surgery due to her obesity, and that such failure to request such reconsideration renders the UR report and determination dispositive.

Because the ALJ's determination that Respondent's knee condition for which surgery is requested is causally related to the work injury is supported by substantial evidence, it is affirmed. Because the attending physician recommending that Respondent obtain the requested surgery testified in his deposition the day following the issuance of the UR report to his disagreement with the UR report's recommendation against the surgery, and specifically addressed the reasons for his disagreement with the UR report's recommendation, the Act's UR provisions were followed in substance, and the ALJ acted within his authority in considering Respondent's claim for medical care.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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 Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order 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.

Turning to the case under review herein, Petitioner first alleges that the ALJ's decision finding that the condition for which Respondent sought authorization for surgery, in the form of a total knee replacement, is causally related to the work injury, is unsupported by substantial evidence. This is

premised in part upon the evidence that Respondent's attending physician, Dr. Azer, had opined, prior to the work injury, that Respondent's pre-existing degenerative arthritis would ultimately require a total knee replacement be performed, and in part upon Petitioner's IME physician's opinion that the pre-existing condition alone is the cause of the condition for which the replacement is recommended. Petitioner argues that the attending physician's reasoning is "weak", and is in some important respects inaccurate.

We must respectfully reject Petitioner's assertions with regard to the causal relationship finding. Petitioner admits that Respondent's attending physician expressed the opinion that the work injury aggravated the underlying pre-existing condition, and gave reasons for that opinion. See, Employer's Brief in Support of Application for Review, page 16. While Petitioner puts forth several cogent reasons[2] why that opinion might have been rejected by the ALJ, we point out that the acceptance or rejection of medical opinion is a matter of credibility, and as such is within the sound discretion of the fact finder. We will not disturb the ALJ's exercise of his discretion in accepting the opinion of the attending treating physician in this case.

Petitioner's second argument is fundamentally different. In this case, there was also an issue relating to whether the requested surgery, total knee replacement, is "reasonable and necessary". Petitioner argues, and the Compensation Order confirms, that the utilization review process provided for under the Act at D.C. Code § 32-1507 (b)(6), was employed, with Petitioner obtaining a UR report from Dr. Mendelssohn. In that report, Dr. Mendelssohn concluded that Respondent "was not an appropriate candidate" for the surgery due to her obesity, and would not become such an appropriate candidate "until there is significant weight loss". Compensation Order, page 9, quoting EE 7, the UR Report. The ALJ considered the issue in the context of Dr. Azer's deposition testimony, in which he opined that the obesity objection raised was not controlling, because, testified Dr. Azer, according to a study conducted by "NIH", presumably meaning the National Institute of Health, obesity is "no longer a contraindication to total knee replacement". Compensation Order, page 9, referring to CE 5, Dr. Azer's deposition.

D.C. Code § 32-1507 (b)(6), provides as follows:

> Any medical care or service furnished or scheduled to be furnished under this chapter shall be subject to utilization review. Utilization review may be accomplished prospectively, concurrently, or retrospectively.
>
> (A) In order to determine the necessity, character, or sufficiency of any medical care or service furnished or scheduled to be furnished under this chapter and to allow for the performance of competent utilization review, a utilization review organization or individual pursuant to this chapter shall be certified by the Utilization Review Accreditation Commission.

[2] Petitioner's arguments concerning causal relationship are divided into three sub-arguments. They are (i) the evidence demonstrates that Petitioner had a pre-existing knee condition for which surgery was ultimately a likely necessity, (ii) Petitioner's IME physician opined persuasively that the current condition for which such surgery is being considered is completely attributable to and explained by that pre-existing condition, and (iii) Dr. Azer's opinion to the contrary is flawed, weak, and should not be accepted. These arguments are all, to one degree or another, the same: Respondent's evidence is inferior to Petitioner's and is insufficient to support a finding that the current condition for which surgery has been recommended is in part at least causally related to the work injury.

(B) When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual.
(C) If the medical care provider disagrees with the opinion of the utilization review organization or individual, the medical care provider shall have the right to request reconsideration of the opinion by the utilization review organization or individual 60 calendar days from receipt of the utilization review report. The request for reconsideration must be written and contain reasonable medical justification for the reconsideration.
(D) Disputes between a medical care provider, employee, or employer on the issue of necessity, character, or sufficiency of the medical care or service furnished, or scheduled to be furnished, or the fees charged by the medical care provider shall be resolved by the Mayor upon application for a hearing on the dispute by the medical care provider, employee, or employer. A party who is adversely affected or aggrieved by the decision of the Mayor may petition for review of the decision by the District of Columbia Court of Appeals.
(E) The employer shall pay the cost of a utilization review if the employee seeks the review and is the prevailing party.

In *Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007), the CRB conducted an exhaustive review of the structure, content, and legislative history of the above quoted statutory provisions, and concluded that the UR process is mandatory and exclusive in cases involving the reasonableness and necessity of medical care. Although we used the term "exclusive" in discussing the applicability of the procedures, we did not hold, or intend to suggest or imply that such issues could never be brought to a formal hearing. Rather, the decision stated that:

> However, we also take it as clear from the 1991 amendments that questions concerning "necessity, character or sufficiency" of medical care *are* the proper subjects of such formal hearings, because they have always been considered such, and because the amendments expressly provide for such hearings in subsection (D).

Gonzalez, supra, at 10.

And, as was held in *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008), the District of Columbia Court of Appeals has provided an analysis of what is required in evaluating the contents of a UR report which closely mirrors the obligations imposed upon an ALJ in evaluating a treating physician's opinion, requiring an explanation with persuasive reasons for rejecting such opinion. The CRB noted in *Haregewoin* that:

> [The] framework set forth by the court in *Sibley* [*Memorial Hospital v. District of Columbia Department of Employment Services and Ann Garrett, Intervenor*, 711 A.2d 105 (D.C. 1998)] is substantially identical to that espoused by the court in the treating physician cases, and we view it as the appropriate manner to treat UR opinion under the Act. While it can be argued that the Act could be viewed so as to

> grant an even higher preference to UR opinion over treating physician opinion, we note that the processes envisioned by the statutory UR provisions call for consideration of treating physician opinion and UR opinion, without specifying any preference for one or the other by virtue of its being treating physician opinion on the one hand, and UR opinion on the other. Accordingly, we view the statute as placing an obligation upon the ALJ to weigh the competing opinions based upon the record as a whole, and to explain why the ALJ chose one opinion and not the other, but does not require that either opinion be given an initial preference.

Haregewoin, supra, at 4. Thus, it is established that (1) a formal hearing is available to resolve a dispute that remains following the UR process, (2) the UR process must be concluded (in the sense discussed below) prior to the matter being presented to the agency for resolution in such a hearing, (3) the outcome of that process is to be accorded equal initial weight to the opinion of a treating physician, and (4) the process is not a process of "independent medical evaluation" as that term is used to ordinarily describe a litigant's obtaining a second medical opinion from a non-treating physician for litigation purposes.

Petitioner argues that it is a requirement of that process that reconsideration be requested where a party wishes to contest the outcome of a review and that failure to request such reconsideration renders the UR conclusion dispositive. That was the holding of the CRB in *Chaupis v. George Washington University*, CRB No. 08-075, AHD No. 07-112A, Consolidated OWC Nos. 608434 and 622922 (March 4, 2008). Petitioner argues that, in this case, Respondent failed to request reconsideration of the UR report, rendering it dispositive.

However, as the ALJ stated, while "the record does not reveal Dr. Azer has requested reconsideration" , he also went on to note that "he [Dr. Azer] clearly disagreed with that aspect of the utilization review report that concluded surgery should not take place until Claimant lost weight. At his deposition, Dr. Azer stated obesity was no longer a contraindication to total knee arthroplasty". Compensation Order, page 9.

Subsection (C), which provides for "reconsideration" of the UR report's conclusions, states that "If the medical care provider disagrees with the opinion [of the UR report], the medical care provider shall have the right to request reconsideration of the opinion … within 60 calendar days." This right is not given to anyone other than the medical care provider. Specifically, it is not given to either the employer or the claimant. We therefore view the subsection as giving the physician the right to request reconsideration if he/she wants to advocate for the patient, or if he/she wants to assist in getting a Compensation Order in order to receive payment for a procedure already undertaken, if he/she wishes to assist in getting authorization for a procedure before undertaking to perform it so as to not risk performing it and not getting paid, or for some other purpose. The statutory "right to request reconsideration" is solely a right belonging under the Act to the physician (a right that he/she would not otherwise have, given that the UR process is a statutory creation in a workers' compensation adjudication system to which the physician is not a direct party).

In *Chaupis*, the following statement is found: "[I]f the parties had undertaken the entire procedure envisioned by the UR statute, and at its conclusion (i.e. following a reconsideration of the UR

determination) either party was unwilling to accept the results of the reconsideration, a formal hearing as provided in subsection (D) would be available."

While we continue to maintain that the statutory process of UR must be completed insofar as the parties (that is, the claimant and the employer) are concerned, before the matter may be heard at a formal hearing, we should and do hereby clarify that the final step outlined in the statutory process insofar as the parties are concerned is the UR report.

This view is, we recognize, is at odds with the above quotation from *Chaupis.* Where it appears to us that language in a previous decision is overbroad, and where that decision has not become so entrenched in our system of workers' compensation law and adjudication as to have become widely accepted as part of the process, we are willing to clarify the matter. We therefore take this opportunity to clarify *Chaupis*, and to hold that the UR process is complete, for the purposes of obtaining a formal hearing by the claimant or employer, upon obtaining the initial UR report.

Accordingly, the award of causally related medical care in the form of knee replacement surgery is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of October 28, 2008 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of October 28, 2008 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

January 2, 2009
DATE

Leslie A. Meek, Administrative Appeals Judge, *concurring in part and dissenting in part*:

I concur with the majority's opinion upholding the ALJ's decision. However, I write separately as I disagree with the majority's assertion the utilization review process is mandatory in cases involving the reasonableness and necessity of medical care.

I also write separately as the majority posits the final step in the statutory process regarding utilization review is the issuance and receipt of the utilization report.

Section 32-1507(b)(6)(B) and (C) of the Act states;

> (B) When it appears the necessity, character or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual.
>
> (C) If the medical care provider disagrees with the opinion of the utilization review organization or individual, the medical care provider shall have the right to request reconsideration of the opinion by the utilization review organization or individual 60 calendar days from receipt of the utilization review report. The request for reconsideration shall be written and contain reasonable medical justification for the reconsideration.

Upon review of the language of these provisions, it is prudent to first determine, "if the language is plain and admits of no more than one meaning**.**" *Hiligh v. Federal Express Corporation and Alexis Inc.*, CRB No. 05-36, OHA No. 99-138, OWC 513435 citing, *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979).

> "When the language of a statute is plain and unambiguous, the plain meaning of that language is binding. *See Hudson Trail Outfitters v. D.C. Department of Employment Services*, 801 A.2d 987, 990 (D.C. 2002) (citation omitted). "However, 'even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.'" *Hively v. D.C. Department of Employment Services*, 681 A.2d 1158, 1161 (D.C. 1996) (citation omitted). In that event, the court will "look to policy and the statute's 'manifest purpose' in order to assist" in the interpretation of ambiguous statutory language. *Hively*, at 1163.
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> Both the Supreme Court and the D.C. Court of Appeals have recognized that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" *Harrison v. Northern Trust Co.*, 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943) (citations omitted); *Davis, supra*, 397 A.2d at 956; *see*

Sanker v. United States, 374 A.2d 304, 307 (1977) (quoting *Lynch v. Overholser*, 369 U.S. 705, 710, 8 L. Ed. 2d 211, 82 S. Ct. 1063 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, ... for 'literalness may strangle meaning**.**'") (citations omitted).

As the D.C. Court of Appeals has explained, it is appropriate to look beyond the plain meaning of statutory language in several different situations. "First, even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve. *Sanker, supra*, 374 A.2d at 307 (quoting *Barbee v. United States*, 392 F.2d 532, 535 n. 4 (5th Cir.), cert. denied, 391 U.S. 935, 20 L. Ed. 2d 855, 88 S. Ct. 1849 (1968) ('Whether or not the words of a statute are clear is itself not always clear')); accord *Davis, supra*, 397 A.2d at 956. Second, 'the literal meaning of a statute will not be followed when it produces absurd results.' *Varela*, supra, 424 A.2d at 65 (quoting *District of Columbia National Bank v. District of Columbia*, 121 U.S. App. D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted)); *Berkley v. United States*, 370 A.2d 1331, 1332 (D.C. 1977) (per curiam) ("statutes are to be construed in a manner which assumes that Congress acted logically and rationally"). Third, whenever possible, the words of a statute are to be construed to avoid "obvious injustice." *Metzler v. Edwards*, 53 A.2d 42, 44 (D.C. Mun. App. 1947); *see Center for National Policy Review on Race & Urban Issues v. Weinberger*, 163 U.S. App. D.C. 368, 372, 502 F.2d 370, 374 (1974) ('[a] court may qualify the plain meaning of a statute" to avoid consequences that would be "plainly ... inequitable'). Finally, a court may refuse to adhere strictly to the **plain** wording of a statute in order "to effectuate the legislative purpose," *Mulky v. United States*, 451 A.2d 855, 857 (D.C. 1982), as determined by a reading of the legislative history or by an examination of the statute as a whole. *Floyd E. Davis Mortgage Corp. v. District of Columbia*, 455 A.2d 910, 911 (D.C. 1983) (per curiam) ("a statute is to be construed in the context of the entire legislative scheme"); *Dyer v. D. C. Department of Housing and Community Development*, 452 A.2d 968, 969-70 (D.C. 1982) ("the use of legislative history as an aid in interpretation is proper when the literal words of the statute would bring about a result completely at variance with the purpose of the **Act**"); *District of Columbia v. Orleans*, 132 U.S. App. D.C. 139, 141, 406 F.2d 957, 959 (1968) ("the 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned, by equitable construction or recourse to legislative history")." *Peoples Drug Stores v. District of Columbia*, 470 A.2d 751, 753-754 (D.C. 1983) (en banc).

Hiligh, supra.

The majority herein reasserts its ruling in *Gonzalez v. UNICO Service Company*, CRB No. 07-005, AHD No. 604331 (February 21, 2007), stating, "The UR process is mandatory and exclusive in cases involving the reasonableness and necessity of medical care". I am of the opinion the majority and *Gonzalez* fail to apply the plain meaning of the Act or in the alternative substantiate the need to rely upon an alternative construction of the Act.

Section 32-1507(b)(6)(B) of the Act provides the Mayor, employee or employer with the *option* to initiate review of requested medical care via utilization review when the necessity, character or sufficiency of said medical care requires clarification. This provision in no way *requires* the utilization review process to be invoked in such instances. The Act merely offers the utilization review as an available right that *may* be initiated.

The majority asserts the utilization review process ends upon the completion of the utilization report. In making such a determination, the majority further asserts the process does not require a party to wait for a response to the physician's request for reconsideration before the matter may be considered by AHD. The majority posits, the issuance of the initial utilization review renders the administrative process complete. This begs the question, why the Act would offer a physician the option to request the utilization review organization reconsider its decision if there was no intention of await the results of the reconsideration.

The majority explains, it interprets Subsection (C) to give, "The attending physician the right to request reconsideration if he/she wants to advocate for the patient, or if he/she wants to assist in getting a Compensation Order in order to receive payment for a procedure already undertaken, or wishes to assist in getting authorization for a procedure before undertaking to perform it so as not to risk performing it and not getting paid". This may be so however, it is obvious the argument offered by the physician in the request for reconsideration will not only assist the physicians' efforts to obtain remuneration for procedures already performed, but such arguments would also likely aid the employee in his/her own efforts to obtain benefits.

I am of the opinion the drafters of this section of the Act intended the utilization process to be at an end once it is apparent the physician has no intention of appealing the initial utilization review decision, or once the response to the request for reconsideration is issued.

In this instance, the need to look beyond, or deviate from the plain meaning of the statutory language in §§ 32-1507(b)(6)(B) and (C) has not been justified by the majority, not in this decision nor in the holding in *Gonzalez*. No recognition of ambiguities in the language of the statue has been made; no expectation that some absurdity will result upon the reliance of the plain meaning of the provisions has been offered; the record is void of any assertion that an injustice will occur by relying upon the plain meaning of this provisions; and there is no identification of a legislative purpose that would be thwarted by relying upon the plain meaning of the statute.

Absent an in-depth review of the legislative history of these provisions, we must rely upon the plain meaning of the statute. *See Hiligh, supra*. In my opinion, the plain meaning of the statute is clear. The Act does not mandate the initiation of the utilization review process when the issues of reasonableness and necessity are raised. The Act does not render the utilization review process complete upon the issuance of the initial utilization review report.

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Leslie A. Meek
Administrative Appeals Judge