GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-028

PATTIE L. CRAWFORD,
Claimant–Respondent,

v.

NATIONAL REHABILITATION HOSPITAL and SEDGWICK CMS,
Employer/Carrier-Petitioner.

Appeal from a February 12, 2013 Compensation Order By
Administrative Law Judge Anand K. Verma
AHD No. 10-380, OWC No. 625645

John C. Duncan, III, Esquire for the Petitioner
Eric M. May, Esquire for the Respondent

Before, HEATHER C. LESLIE, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board**.**

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer-Petitioner (Employer) of the February 12, 2013, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ granted the Claimant's request for authorization for medical surgery. We VACATE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 4, 2006, Ms. Pattie L. Crawford sustained multiple injuries when she fell in the parking lot at National Rehabilitation Hospital ("NRH"). After presenting for initial treatment at

Washington Hospital Center, Ms. Crawford was referred to Dr. Hudson Drakes for ongoing right wrist pain; she later was referred to Dr. Ricardo O. Pyfrom who recommended surgical release of the right thumb.

An ALJ conducted a formal hearing on October 12, 2010. In a Compensation Order dated November 26, 2010, the ALJ concluded there was a medical causal relationship between Ms. Crawford's right de Quervain's tenosynovitis and trigger thumb and her on-the-job accident; the ALJ also determined surgeries on Ms. Crawford's right wrist and thumb were reasonable and necessary. The ALJ granted authorization for surgery as recommended by Dr. Pyfrom.

The November 26, 2010 Compensation Order was appealed to the CRB. On April 12, 2011, the causal relationship ruling was affirmed, but the

> conclusion that Respondent has made a *prima facie* showing of the reasonableness and necessity of the recommended surgeries but Petitioner has not rebutted that showing with substantial evidence is not in accordance with the law and is VACATED and REMANDED to the ALJ to apply the proper legal theory and analysis to the UR process as set forth in *Gonzalez* [*v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007)] and *Haregewoin*[[1]*v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008)].[2]

In a Compensation Order on Remand dated June 29, 2011, the ALJ, again, granted Ms. Crawford's claim for relief; however, on August 26, 2011, the Compensation Order on Remand was vacated:

> The ALJ's assertion that Dr. [Michael P.] Rubinstein's opinion is premised upon causal relationship is clearly erroneous, as is the ALJ's assertion that Dr. Rubinstein agrees that the thumb surgery is reasonable and necessary. What the UR report states is that (1) Dr. Rubinstein, like Dr. [Stephen F.] Gunther, does not believe that the claimant has de Quervain's tenosynovitis, because of a negative Finkelstein's sign, and therefore she should not have the wrist surgery, because the surgery is to treat de Quervain's, a condition that is absent (in his opinion), (2) even if a patient does have de Quervain's, the [Official Disability Guidelines ("ODG")] requirements of a specific course of conservative care prior to surgical intervention have not been met, and Dr. Rubinstein feels that in the absence of that care, surgery is not warranted, and (3) per ODG guidelines, Dr. Rubinstein believes that surgery on the thumb is not indicated until cortisone injections have been undertaken. He does not state an opinion relating to causal relationship,

[1] The Compensation Review Board's Decision and Order transposes the claimant's name; the claimant's name is Haregewoin Desta, not Desta Haregewoin. *Desta v. Loew's Washington Hotel*, AHD No. 07-041A, OWC No. 603483 (December 7, 2007).

[2] *Crawford v. National Rehabilitation Hospital*, CRB No. 10-204, AHD No. 10-380, OWC No. 625645 (April 12, 2011), p. 6.

> [footnote omitted] and does not express the opinion that either of the proposed surgeries are reasonable and necessary.
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> Similarly, we note that nowhere in Dr. Gunther's IME report (EE 4) is it stated that the wrist complaints are unrelated to the work incident. While he questions the de Quervain's diagnosis as well as Ms. Crawford's veracity (e.g., "The sort of pains which Ms. Crawford claims simply do not remain unabated for three and one-half years. [. . .] I would point out that the fact that she alternately works 40 and 55-hour weeks and has been doing so for some time is not consistent with all these pains"), Dr. Gunther does not express a causation opinion regarding the wrist complaints. On this issue, both the ALJ and Dr. Rubinstein were in error.[3]

As a result,

> Where, as here, the fact finder so misapprehends the substance and meaning of a piece of evidence, and then relies upon that misapprehension as the principal basis of the ultimate decision, the decision can not be said to be supported by substantial evidence. NRH was and is entitled to a fair consideration of its evidence, and where, as here, that evidence is a UR report, if that evidence is rejected, there must be reasons enunciated and those reasons must be, at a minimum, actual. Here, the ALJ's reasons for rejecting the UR report are erroneous and based upon a clear misunderstanding of the UR report. For that reason, we reverse the award and remand for further consideration, taking into account the actual contents of the UR, IME and treating physician reports, as well as the entire record.
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> Lastly, because the ALJ will be reconsidering the matter anew, we do not rule upon Petitioner's arguments against, and Respondent's argument in support of, the ALJ's analysis to the effect that the ODG requirements for treatment of the de Quervain's tenosynovitis had been "substantially met" by treatment rendered by Dr. Tristan Shockley between July 6, 2009 and March 25, 2010 and the attendant prescription medications and application of voltaren gel. Compensation Order on Remand, page 7. We do advise, however, that on remand, if the ALJ seeks to rely upon that analysis, he should identify any record medical evidence that, as a medical matter, those treatment modalities are substantially equivalent to the ODG requirements.[4]

In response, the ALJ issued the October 28, 2011 Compensation Order on Remand.[5] After a review of the ODG in the context of Dr. Pyfrom's reports and Dr. Gunther's opinions, the ALJ granted Ms. Crawford's claim for relief. The Employer timely appealed the Compensation

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[3] *Crawford v. National Rehabilitation Hospital*, CRB No. 11-071, AHD No. 10-380, OWC No. 625645 (August 26, 2011), pp. 4-5. (Ellipsis in original.)

[4] *Id*. at p. 6.

[5] *Crawford v. National Rehabilitation Hospital*, AHD No. 10-380, OWC No. 625645 (October 28, 2011).

Order on Remand. On June 29, 2012, the CRB issued a Decision and Remand Order, finding the ALJ had impermissibly substituted a legal opinion for a medical opinion when concluding,

> ODG's optional guideline before the de Quervain's tenosynovitis surgery has been substantially met when claimant has clearly established a failed conservative care for far more than the ODG recommended three months to alleviate the right wrist infirmity.[6]

That portion of the CO was vacated for further findings of fact and conclusions of law as "the ALJ's assessment that the ODG's have been 'substantially met' is not based upon substantial evidence and is vacated.[7]" The CRB also found the ALJ had,

> For a third time, when the issue for resolution is reasonableness and necessity of medical treatment, the utilization review process is mandatory.[8] 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.[9] The ALJ
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> > 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.[10]
>
> 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.[11]

On July 6, 2012, a Compensation Order on Remand was issued, again granting the Claimant's claim for relief. The ALJ found that the medical evidence supported a finding that the ODG had been met by the Claimant's failed course of conservative care, thus warranting surgery. The ALJ also found that the Claimant had established a *prima facie* case for surgery and that the Employer, through the IME and UR had failed to rebut the Claimant's *prima facie* claim.

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[6] *Id*. at p. 3. (Emphasis added.)

[7] *Crawford v. National Rehabilitation Hospital*, CRB No. 11-071, AHD No. 10-380, OWC No. 625645 (June 29, 2012).

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

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

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

[11] *Id.*

The Employer timely appealed on August 6, 2012. On January 16, 2013, a Decision and Remand Order was issued vacating and remanding the Compensation Order on remand with virtually the same directions as the prior Orders; that the ALJ cannot render his own medical opinion that the ODG had been met.[12] Any inferences made regarding whether or not the ODG had been met must be supported by the medical opinions in the record and not mere speculation on the part of the ALJ. The ALJ was also directed to reconsider whether medical treatment was reasonable or necessary pursuant to *Gonzalez*[13] and *Haregewoin*.[14]

A Compensation Order on Remand was again issued on February 12, 2013.[15] In that order, the ALJ concluded,

> The record on the whole, upon reconsideration, compels a conclusion that in light of Claimant's failed conservative care to her right wrist for fifteen months by Dr. Pyfrom and Dr. Shockley, the recommended first dorsal compartment of the right wrist and tendon sheath incision of the right thumb are both reasonable and necessary.[16]

The Employer timely appealed on March 14, 2013. The Employer argues that the ALJ again failed to follow the CRB's prior dictates and as such, the COR should be vacated and remanded. The Claimant opposes, arguing the ALJ has thoroughly analyzed the issue and the order should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

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[12] *Crawford v. National Rehabilitation Hospital*, CRB No. 12-130, AHD No. 10-380, OWC No. 625645 (January 16, 2013).

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

[14] *See* footnote 1.

[15] *Crawford v. National Rehabilitation Hospital*, AHD No. 10-380, OWC No. 625645 (February 12, 2013).

[16] *Id*. at 6.

DISCUSSION AND ANALYSIS

We are again presented with an appeal in this matter for the fifth time. We begin our discussion with the ALJ's analysis on the burden of proof of the issue of reasonableness and necessity of medical treatment, at the end of the COR. We find the ALJ's analysis to be similar, if not identical, to an earlier case wherein the CRB discussed the ALJ's erroneous analysis. In *Ingagliato v. Sibley Memorial Hospital*, the CRB stated,

> We start by noting that in the Compensation Order on Remand, the ALJ has cited a case that he erroneously refers to as *Crawford v. Director of Workers' Compensation*, 932 A.2d 152 (2d Cir. 1991), which we have determined is more than likely a reference to *Crawford v. Director, OWCP*, 932 F.2d 152 (2d Cir. 1991), to support his misapprehension as to the correct burden of proof to be applied to cases under D.C. Code § 32-1501 *et seq.*, the District of Columbia Workers' Compensation Act (the Act). It is a workers' compensation case, arising under the Longshore and Harbor Workers' Compensation Act, (33 U.S.C. § 901, *et seq.*)(LHWCA), but it has absolutely nothing to say about "*prima facie*" cases, or their being overcome by substantial evidence.
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> Even if it did, the ALJ proceeds under the mistaken impression that a Second Circuit federal LHWCA case is controlling authority in this jurisdiction. We remind the ALJ that LHWCA cases, particularly from our own federal Circuit, may have persuasive authority in cases arising under the Act, but only where there is a lack of existing law in this jurisdiction on the subject in question (which is not the situation in this case) and that at a minimum an adjudicatory body that seeks to rely upon this variety of persuasive authority must explain in some detail why this authority is so persuasive. Such an explanation requires at least a minimal distillation of the facts of the case and discussion of how the case at hand is similar to the case being cited, and why the outcome should be same. The Compensation Order on Remand under review contains no such information or analysis.
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> Further, even if the standard (or evaluative scheme) that the ALJ seeks to impose in this case were proper, it is manifest error to assert that Sibley has not produced substantial evidence in opposition to the reasonableness and necessity of the ongoing administration of opiates. It has produced an IME report from Dr. Levitt and a UR report from Dr. Mosuro to that effect. Sibley's evidence is "such evidence as a reasonable person might accept" to support the proposition that the continued administration of opiate medication to this patient is not medically reasonable or necessary.
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> The ALJ's persistence in asserting that the burden of proof is as he describes it suggests a lack of understanding of a basic legal truth: there can be substantial evidence supporting *both* sides of a disputed issue. The scheme that the ALJ appears to be emulating echoes that employed when analyzing the issue of medical causal relationship where there are competing medical opinions. If the

> ALJ truly understood the proper use of "substantial evidence" in that exercise, he would recognize that ultimately, the question comes down to a preponderance standard.
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> The burden of proof to establish the reasonableness and necessity of the disputed medical care is upon the claimant, and that burden is by a preponderance of the evidence. [17]

We refer the ALJ again to the above discussion. We are uncertain what the ALJ is attempting to accomplish by inserting the paragraphs at the very end of the decision.[18] As we are remanding the case, we refer the ALJ to the above discussion and direct the ALJ analyze whether or not the Claimant proved, by a preponderance of the evidence, whether or not the disputed medical care is reasonable and necessary.

The ALJ also takes several paragraphs to question the CRB's prior orders. We again reiterate to the ALJ that any medical opinions rendered, specifically whether or not the ODG have been met, must be rendered by a medical expert. It is beyond the expertise of the ALJ to render a medical opinion of any form.

> Although an ALJ may draw inferences from the evidence,[19] the ability to draw an inference is not license to substitute a legal opinion for a medical opinion.[20] Here, the ALJ's assessment that the ODG guidelines have been "substantially met" is not based upon substantial evidence and is vacated.[21]

Turning to the ALJ's analysis, the ALJ states,

> The principal issue in the case, *sub judice*, relates to whether or not the treatment protocols of Dr. Pyfrom and Dr. Shockley met the ODG recommendations which were optional in nature and not mandated by the UR. The undersigned notes that Dr. Pyfrom conservatively treated Claimant from December 22, 2008 through August 17, 2010 with pain medications, spica splint and physical therapy. However, despite this care, Claimant's right wrist remained symptomatic in the follow up examination of August 17, 2010 with positive Finkelstein's test. Accordingly, with Claimant's persistent pathology in her right wrist and right thumb, Dr. Pyfrom continued to maintain his recommendation for its surgical release, which Claimant consented to undergo. In this case, there is no evidence in

[17] CRB No. 13-026, AHD No. 02-432A (May 6, 2013).

[18] *Crawford v. National Rehabilitation Hospital*, AHD No. 10-380, OWC No. 625645 (February 12, 2013) at p.5-6.

[19] See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

[20] See *Seals v. The Bank Fund Staff Federal Credit Union,* CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

[21] *Crawford v. National Rehabilitation Hospital*, CRB No. 11-071, AHD No. 10-380, OWC No. 625645 (June 29, 2012).

> the record which demonstrates Claimant was excessively treated or where her treating physicians prescribed treatment which was unwarranted. Hence, the palliative treatment Claimant underwent or that which Dr. Pyfrom recommended seems to be within the purported meaning of the Report on the District of Columbia Workers' Compensation Equity Act of 1990, Bill 8-74 at page 18.[22]

We note that the principal issue in this case is whether or not the recommended surgery is reasonable and necessary taking into consideration all the medical evidence in the file, including the treating physician's opinion as well as the UR report.

Moreover, as we stated in our prior decision and remand order, if the ALJ continues to conclude the ODG have been met, then record based evidence must be identified. Stated more directly, a medical physician must opine whether or not the ODG have been met and what impact, if any, this determination will have on the doctor's opinion whether or not surgery as requested is reasonable and necessary.[23] Not the ALJ. Upon remand, the ALJ is to reconsider the evidence. Any conclusions must be supported by the substantial evidence in the record and must not be based upon conjecture.

Finally, while the ALJ has acknowledged in the Compensation Order on Remand on June 29, 2011 the well settled principle that there is no treating physician preference applicable to the

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[22] *Crawford v. National Rehabilitation Hospital*, AHD No. 10-380, OWC No. 625645 (February 12, 2013) at 5.

[23] As Judge Russell stated in his concurrence in the preceding decision and remand order,

> I agree that the ALJ in this case persists in perpetuating the analytical error of rejecting the UR opinion on an unsupportable basis, i.e., the ALJ's belief that the ODG has been "substantially met". As we point out in the Decision and Remand Order, such a conclusion is a medical determination which is unsupported by anything that we have seen in the record.
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> However, I write separately to remind all concerned that the ALJ may still reject the UR opinion and award the surgery, if reasonable grounds are articulated. I believe that the ALJ comes close to doing so by referencing the failure of conservative care so far. Bearing in mind that the treating physician's opinion is entitled to equal weight with the UR report, and inferring from the treating physician recommendation of the procedure that he disagrees with the UR's reliance upon the ODG, the ALJ may elect to accept the treating physician's opinion over that of the UR.
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> There are two conflicting medical opinions concerning the need for surgical release, and those opinions seem to be centered upon the timing of the treatment. The UR report, relying upon ODG, opines the surgery is premature until certain other treatment options have been exhausted, while the treating physician, by implication at least, does not. In the absence of any medical evidence addressing the pros and cons of each position, the ALJ may conclude that he is unable to resolve which opinion has greater validity as a medical matter. Bearing in mind that the treating physician and UR opinions are deemed equal in the eyes of the law, and taking into account the fact that conservative care has so far failed to reach the desired medical outcome, he might be persuaded that the treatment recommended by the treating physician and which the claimant wishes to undergo is reasonable and necessary.
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> All we are saying is that the ALJ may not reject the UR by finding a medical fact that is not supported in the record, i.e., that the ODG has been "substantially complied with".

issue of reasonableness and necessity is at issue[24], the ALJ in the Compensation Order on Remand before us discusses only the opinions of Dr. Pyfrom and Dr. Shockley in the analysis section when determining whether the treatment is reasonable or necessary. The ALJ ignores the rational of the UR report, thus calling into question whether or not the ALJ is now extending the treating physician preference to Dr. Pyfrom by omitting any discussion of the UR report, which is in error. Upon remand, the ALJ is to discuss both the treating physician's opinion as well as the UR report, according their opinions equal weight, then explaining with specificity why one opinion is chosen over the other.

We also take this time to remind the ALJ, evoking the concept of appellate review, that it is up to the District of Columbia Court of Appeals to determine whether or not ultimately the CRB is correct or incorrect. To ignore this concept often results in multiple remands, such as the case before us, which can be detrimental to the both the Claimant and Employer most importantly, and secondly, to the agency. To attempt to ignore the appellate process flies in the face of the concept of a fair and efficient judiciary.

We are at a loss to explain the ALJ's continued refusal to follow simple appellate review procedures, resulting in multiple remands. Most, if not all, of the ALJ's remand decisions in this case spend an inordinate time focusing on unnecessary criticisms of the CRB, rather than addressing the legal and procedural errors found by the CRB, causing each successive remand decision to become more convoluted. Had the ALJ followed the CRB's instructions, this matter would have concluded, giving the parties some finality in a quick and timely way. While our above discussion includes specific language remanding the matter back to the ALJ with specific instructions, we note that at this juncture, the best recourse would be to start anew to ensure a quick resolution. We urge the Office of Hearings and Adjudications to take the necessary steps to assure that this is done.

[24] Specifically, it has been established that (1) a formal hearing is available to resolve a dispute that remains following the Utilization Review (UR) process, (2) the UR process must be concluded 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. *Chaupis v. George Washington University*, CRB No. 08-075, AHD No. 07-112A (March 4, 2008, *McCormick v. Children's National Medical Center*, CRB No. 09-016, AHD No. 08-353 (January 2, 2009).

CONCLUSION AND ORDER

Given the continued failure of the ALJ to follow remand instructions to apply the law to the facts appropriately in this case, the CRB sees no way to adequately and fairly resolve this matter other than to VACATE the February 12, 2013 Compensation Order on Remand and to direct that on REMAND this matter be considered anew. The CRB lacks authority to exercise administrative control over the Office of Hearings and Adjudications and cannot direct that on remand a matter must be decided by an ALJ different from the ALJ who issued the decision on appeal;[25] however, when the substantive content of the decision on appeal lacks legal authority, the contradictory analysis over a protracted period of time suggests an intent to reach a specific conclusion, and the ALJ demonstrates unwillingness to follow the specific instructions of the CRB despite several remands to address the same errors (all of which needlessly prolong a process designed to provide swift relief), the CRB is compelled to recommend the matter be reassigned to a new ALJ in order to protect the parties' rights to fundamental fairness and due process.[26]

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

September 20, 2013
DATE

[25] *Galligan v. John F. Kennedy Center for Performing Arts,* CRB No. 04-28(R), OHA No. 03-045A, OWC No. 571106 (August 8, 2007).

[26] *Gonzalez v. DOES*, No. 12-AA-1603, Mem. Op. & J. (D.C. August 7, 2013).