GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-130

PATTIE L. CRAWFORD,
Claimant–Respondent,

v.

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

Appeal from a Compensation Order on Remand by
The Honorable 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,[1] JEFFREY P. RUSSELL,[2] and HENRY W. MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board;
JEFFREY P. RUSSELL, *concurring.*

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 July 6, 2012, 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.

[1] Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2] Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

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 CRB affirmed the determination of a causal relationship but vacated the finding that the surgeries were reasonable and necessary, stating

> 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*[[3]*v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008).[4]]

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 ODG[Official Disability Guidelines] requirements of a specific

[3] 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).

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

> 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, [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.[5]

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.[6]

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[5] *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.)

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

In response, the ALJ issued the October 28, 2011 Compensation Order on Remand.[7] After a review of the ODG guidelines 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 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.[8]

That portion of the CO was vacated for further findings of fact and conclusions of law as "the ALJ's assessment that the ODG guidelines have been 'substantially met' is not based upon substantial evidence and is vacated.[9]" 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.[10] 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.[11] 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.[12]
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> 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.[13]

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 guidelines had been met by the Claimant's failed course of conservative care, thus warranting surgery. The

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[7] *Crawford v. National Rehabilitation Hospital*, AHD No. 10-380, OWC No. 625645 (October 28, 2011).
[8] *Id*. at p. 3. (Emphasis added.)

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

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

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

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

[13] *Id.*

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.

The Employer timely appealed on August 6, 2012. On appeal, the Employer argues that the ALJ erred in determining that the ODG guidelines have been substantially met and failed to cite any specific evidence confirming such a conclusion. The Claimant in opposition argues the ALJ has fully complied with the CRB's previous directives and the COR should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand 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 Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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).

DISCUSSION AND ANALYSIS

As noted in the CRB's June 29, 2012 Decision and Remand Order

> Although an ALJ may draw inferences from the evidence,[14] the ability to draw an inference is not license to substitute a legal opinion for a medical opinion.[15] Here, the ALJ's assessment that the ODG guidelines have been "substantially met" is not based upon substantial evidence and is vacated.[16]

In the subsequent COR, the ALJ stated,

> In responding to the CRB's allegation that the ALJ should specify the medical evidence which provides a support for the treatment of de Quervain's tenosynovitis, the undersigned refers to the following CE 4 consisting of Dr. Pyfrom's diagnosis of de-Quervain's syndrome in his December 22, 2008 examination and prescription for an extra large size spica splint. (CE 3). The UR further cites the ODG that recommends (does not require) de Quervain's tenosynovitis as an option if consistent symptoms, signs, and failed 3 months of conservative care with splinting and injection. As part of Claimant's conservative treatment, on July 6, 2009, Dr. Shockley observed tenderness over the radial side of the right wrist and noting positive Finkelstein's test, he prescribed Ultracet to alleviate the pain and dispensed a sample

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

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

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

> of Voltaren gel to apply on her wrist. (CE 5). Dr. Shockley continued his conservative care of Claimant by following her up on August 6, September 3, 2009 and March 10, 2010, when he continually diagnosed her with radial styloid tenosynovitis and noted limited range of motion of the right wrist coupled with limited ulnar and radial deviation and tenderness over the radial aspect of the right wrist. Claimant's follow up examinations by Dr. Shockley were also consistent with positive Finkelstein's test. (CE 5, pp 38-48).
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> Further, in claimant's follow up examination on August 17, 2010, Dr. Pyfrom noted Claimant continued to suffer from numbness and tingling in the right hand over the dorsal thumb. Upon examination, Dr. Pyfrom noted positive Finkelstein's test and triggering of the right thumb and on that basis, he reemphasized the need for surgical release of the right wrist. (CE 4, p. 36). Accordingly, more than three months of Claimant's failed conservative care on July 6, 2009, August 6, 2009 and September 3, 2009 meets the ODG, relied on by Dr. Rubinstein in his October 6, 2010 UR report on the reasonableness and necessity of the surgery to the right wrist. The record demonstrates Claimant underwent follow up treatments by Dr. Shockley on March 10, 2010 and by Dr. Pyfrom on August 17, 2010. Thus, Dr. Rubinstein who authored the UR report incorrectly noted therein that there was no documentation of any specific splinting and no documentation of a trigger point injection. Even though the record evidence does not demonstrate Claimant ever received a trigger point injection, there is concrete evidence of spica splinting of the right thumb. (CE 4, p.35). Therefore, there is no misapprehension of "the substance and meaning of a piece of evidence." Legal analysis of facts in evidence and derivation of legal conclusions therefrom cannot be analogized with the algebraic equations, which consistently yield uniform results.

COR at 4.

While we appreciate the specific summary of the medical evidence above, it is clear the ALJ misunderstood the CRB's previous directive. Stated simply, the ALJ cannot, upon his own review, render a medical opinion. The ODG recommendations relied upon by ALJ state,

> Regarding de quervain's tenosynovitis surgery, the ODG state, "Recommended as an option if consistent symptoms, signs, and failed 3 months of conservative care with splinting *and* injection."

Employer's Exhibit 5 at 41.

The conclusion that the ODG guidelines have been met, or substantially met, is a medical conclusion that falls under the expertise of a physician, not an adjudicator. We note, as has been previously mentioned and acknowledged by the ALJ, that the Claimant has not undergone any injections. Thus, it can be argued that by the very language quoted above regarding the ODG recommendations, both splinting *and* injections must occur for the ODG guidelines to be met, which has not occurred in the case bar. This is the crux of the underlying issue: neither the CRB nor the ALJ can render a medical opinion. We must vacate the finding that the ODG recommendations

have been substantially met. Upon remand, any medical conclusion the ALJ relies upon must originate from a physician.

We also must remand the case as the ALJ's analysis regarding whether the medical treatment is reasonable and necessary is similar to the original CO, where the ALJ required the Claimant establish a *prima facie* case of the necessity of treatment, and then required the Employer to rebut this *prima facie* case. As stated in our original Decision and Order on Remand,

> As there is no requirement in the case law interpreting the Act to make a *prima facie* showing of the reasonableness and necessity of medical treatment nor a concomitant requirement to produce rebuttal evidence, not to mention rebuttal evidence that is substantial in nature, this matter must be returned to the ALJ to apply the proper legal analysis with the proper evidentiary standard superimposed.[17]

The CRB further stated,

> In evaluating the contents of a UR report, the CRB in *Haregewoin v. Loews Washington Hotel,* CRB No. 08-068 (February 19, 2008) adopted the analysis of the District of Columbia Court of Appeals by stating:
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> > [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.
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> *Haregewoin, supra,* at 4. Thus, the UR opinion and the treating physician opinion are given equal weight by the ALJ with an explanation provided as to why one is chosen over the other.[18]

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

[18] *Id*.

Thus, we are unfortunately forced to remand the case for a fourth time for the ALJ to first, analyze the medical evidence anew, consistent with the above discussion. The ALJ is to,

1. Reconsider the medical evidence regarding whether or not the ODG guidelines have been met. Any inferences made must be supported by the medical evidence and the opinions of the physicians.

2. Reconsider whether or not the medical treatment is reasonable and necessary, under the legal theory and analysis to the UR process as set forth in *Gonzalez* and *Haregewoin.*

CONCLUSION AND ORDER

The July 6, 2012 Compensation Order is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

January 16, 2013
DATE

JEFFREY P. RUSSELL, *concurring.*

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.

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.

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.

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".

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Jeffrey P. Russell
Administrative Appeals Judge