

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

**COMPENSATION REVIEW BOARD
CRB 11-058**

**ERIC T. DALY,
Claimant-Petitioner,**

v.

**R.J. REYNOLDS AND ACE ESIS,
Employer and Insurer-Respondents**

Appeal from a Compensation Order by
Administrative Law Judge Anand K. Verma
AHD No. 10-193A, OWC 655062

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Michael J. Kitzman, Esquire, for the Claimant
Anthony J. Zaccagnini, Esquire, for the Employer and Insurer

Before LAWRENCE D. TARR, HENRY W. MCCOY, AND HEATHER C. LESLIE,¹ *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board Panel.

DECISION AND REMAND ORDER

This case is before the Compensation Review Board (CRB) on the request filed by the claimant for review of the May 27, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In the CO, the ALJ awarded the claimant payment of medical expenses for Dr. Smothers' treatment in 2009 and 2010 but denied the claimant's request for continuing medical treatment in the form of telephonic therapy from Dr. Smothers. The claimant has appealed the ALJ's decision denying his request for continuing medical treatment.

¹ Judge Leslie has been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

BACKGROUND FACTS OF RECORD

The claimant, Eric T. Daly, worked for this employer, R.J. Reynolds, as an outside salesperson. On November 12, 2008, the claimant was making a delivery for the employer when he was threatened by two men armed with guns. The claimant ran to his car and drove away. Later that day, the claimant was working for the employer when he was threatened by five men whom the claimant believed wanted to rob him. The claimant also escaped from this encounter.²

The current claim centers on the claimant's treatment for posttraumatic stress disorder by Dr. Kenneth R. Smothers. Dr. Smothers is a non-board certified psychiatrist with an office in the District of Columbia. The claimant was recommended to Dr. Smothers in February 2009 by his attorney. In his Psychiatric Initial Report of March 11, 2009, Dr. Smothers diagnosed posttraumatic stress disorder, found the claimant disabled from work, and began treating the claimant with weekly, individual therapy sessions and by medication.

Dr. Smothers held in-person individual therapy sessions during the next couple of weeks. There was a break in treatment between April and July, 2009, during which time the claimant, for financial reasons, moved to Illinois to live with his parents. After the claimant was in Illinois, Dr. Smothers continued to treat the claimant by telephone. Dr. Smothers' telephone counseling sessions initially were offered on a weekly basis and then were done once month.

The claimant visited the District of Columbia in the latter part of September 2010, and twice met with Dr. Smothers. Although the claimant continued to have telephonic therapy sessions with Dr. Smothers, he had just four, in-person therapy sessions with Dr. Smothers between April 2009 and February, 26, 2011.

The employer had the claimant examined for two IMEs by Dr. Daniel S. Smithpeter, a board certified psychiatrist, who also reviewed the claimant's medical records. Dr. Smithpeter opined on March 18, 2009, that the claimant "developed symptoms consistent with posttraumatic stress disorder causally related to the two incidents on November 12, 2008."

Dr. Smithpeter revised his opinion after he reviewed surveillance reports and watched a surveillance video. In the January 11, 2010, addendum to his March 18, 2009, report, Dr. Smithpeter stated:

Given the inconsistencies between his claimed symptoms and the objective findings provided for my review, albeit limited, I do not believe Mr. Daly is suffering from impairing psychiatric symptoms as he claims; however, I cannot further comment on any possible diagnosis given these inconsistencies and limitations.

² Although not critical to this review, we note that the record is inconsistent as to whether the two events occurred on the same day. We shall assume both events happened on one day because both parties' written statements and the medical history of IME Dr. Smithpeter and the medical history of utilization reviewer Dr. Khan stated the two events happened on November 12, 2008. We note that the ALJ stated the events happened in November and December, 2008, as did the medical history taken by Dr. Smothers.

Dr. Smithpeter met with the claimant on March 24, 2010, for his second IME. In the report from that examination, Dr. Smithpeter stated the claimant “has not benefitted from medications or counseling since my last visit [March 18, 2009] and as I opined in my addendum, talk therapy via phone is inappropriate and not likely to result in improvement.”

Dr. Smithpeter further stated in this report that the claimant was embellishing his symptoms, that it was “questionable” whether the claimant continued to meet the criteria for posttraumatic stress disorder, that it was “debatable” whether the claimant needed any psychiatric treatment, and that it was “hard to determine” whether the claimant was at maximum medical improvement but under any circumstances, the only treatment that would be useful for the claimant was in-person therapy.

The employer obtained a utilization review report from Dr. Salma Khan, a Board Certified psychiatrist. In his February 21, 2011, report, Dr. Khan questioned the claimant’s account of the two events on November 12, 2008, noted that he did not find any objective evidence that the claimant suffered from posttraumatic stress disorder, and stated that neither the treatment rendered after December 1, 2009, nor the ongoing treatment plan (telephonic therapy) were reasonable and necessary. Dr. Khan suggested the claimant receive four psychotherapy sessions to terminate treatment and four sessions of medical management to taper his current medication.

In the May 27, 2011, CO the ALJ awarded the claimant payment of certain medical treatment in 2009 and 2010 by Dr. Smothers. The employer has not appealed this determination. The ALJ also denied the claimant’s request for continuing medical treatment in the form of telephonic therapy by Dr. Smothers. The claimant has timely appealed this determination.

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 CO are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. “Substantial evidence” is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and District of Columbia Workers’ Compensation Act of 1979, as amended, D.C. Code, at §32-1521.01(d) (2) (A).

Consistent with this standard of review, the CRB is constrained to uphold a CO 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, supra*.

ANALYSIS

At issue is whether ongoing telephonic therapy with Dr. Smothers is reasonable and necessary. In his analysis, the ALJ correctly indicated that whenever the reasonableness and necessity of medical treatment is challenged, the utilization review procedures of D.C. Code § 32-1507 (b) (6) apply. The ALJ also correctly noted that neither the medical opinion of the claimant’s

treating physician nor the medical opinion of the utilization reviewer is given an evidentiary preference. CO at 6.

However, the ALJ applied the incorrect legal standard and it is for that reason that we must vacate the award and remand this case.

Although there is no presumption with respect to whether proposed medical treatment is reasonable and necessary, the ALJ applied a presumption-type analysis to the facts of this case. The ALJ, without recitation of any authority, held "A claimant establishes a *prima facie* case of reasonableness and necessity when a qualified treating physician indicates treatment is necessary for a work-related condition." *Id.*

Having found that Dr. Smothers' opinions established a *prima facie* case, the ALJ continued his incorrect analysis and stated "To rebut claimant's *prima facie* showing, employer is required to produce substantial evidence to that effect."³ CO at 6-7. The ALJ then applied another presumption-type analysis to this non-presumption case when he found that the opinions of the utilization review doctor and the IME doctor rebutted the presumption.⁴ CO at 7.

The CRB reviews decisions of AHD to determine whether the ALJ's order was supported by substantial evidence and is in accordance with the law. *Marriott*, *supra*.

Because the ALJ did not analyze the record evidence in accordance with the applicable law, we must remand this case. The CRB cannot affirm a CO that "reflects a misconception of the relevant law or a faulty application of the law." *WMATA v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown University v. DOES and Ford, Intervenor*, 971 A. 2d 909, 915 (D.C. 2009)).

CONCLUSION

We do not decide whether the ALJ correctly held that the requested medical treatment is unreasonable and not necessary. We remand this case so that the ALJ can issue a new decision in accordance with the proper legal analyses.

On remand, the ALJ shall consider the evidence and issue a new decision as to whether the claimant is entitled to continuing psychiatric treatment in the form of telephonic therapy from Dr. Smothers. In reaching this decision, the ALJ should not utilize a presumption-type analysis but should analyze the record evidence and determine whether the claimant met his burden of

³ The ALJ cited *Turner v. Director, OWCP*, 334 Fed. Appx. 693 (5th Cir. 2009), a Longshore and Harbor Workers' Compensation Act (LHACA) case from the Fifth Circuit Court of Appeals for the proposition that the employer had to produce substantial evidence to rebut a *prima facie* case. The Court in *Turner* affirmed an ALJ's decision under the LHWCA denying benefits for a back injury because the claimant had not proven any injury to invoke that Act's presumption of compensability.

⁴ As authority for this proposition, the ALJ cited another 1999 LHWCA case, also from the Fifth Circuit Court of Appeals, *Conoco v. Director, OWCP*, 194 F. 3d 684 (5th Cir. 1999). As in *Turner*, the decision in *Conoco* had nothing to do with the reasonableness and necessity of medical care.

proving, by a preponderance of the evidence, that the proposed treatment plan is reasonable and necessary.

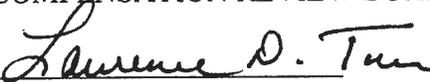
ORDER

The May 27, 2011, Compensation Order is AFFIRMED in part and VACATED AND REMANDED in part.

The ALJ's award for payment of certain medical treatment by Dr. Smothers in 2009 and 2010 is AFFIRMED.

The ALJ's denial of continuing medical treatment in the form of telephonic therapy by Dr. Smothers is VACATED and this case REMANDED to AHD for further proceedings consistent with this decision.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR
Administrative Appeals Judge

January 10, 2012

Date