CRB No. 11-105

LOLITA HARRISON,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,

Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 10-083, DCP No. 761032-0003-2006-0018

Lolita Harrison, *pro se* Petitioner[1]

Justin Zimmerman, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[2] LAWRENCE D. TARR and HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board:

ORDER DISMISSING APPEAL

BACKGROUND

Petitioner Lolita Harrison was injured on November 6, 2005 when she fell down a flight of steps while working as a Correctional Officer for the District of Columbia Department of Corrections (DOC). She obtained medical care as authorized by the Disability Compensation Program, now known as the Public Sector Workers' Compensation Program (PSWCP). After several years, in

[1] Although Ms. Harrison was represented at the formal hearing, her counsel struck his appearance prior to the issuance of the Final Compensation Order which is before us.

[2] Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-03 (November 5, 2011).

2009, a dispute arose concerning whether a series of epidural injections recommended by Dr. Beverly Whittenberg was medically necessary. On June 15, 2010, Sedgwick CMS (for "Claims Management Service"; see, EE 3) (Sedgwick)[3] issued a document, which was mailed to Ms. Harrison, stating that the requested medical treatment was being denied as being not medically necessary.[4] The document also stated that "If you disagree with this decision, you may request reconsideration through the appeal process. To appeal this determination, submit a written request within 30 days of receipt of this notice and provide additional information which documents the medical necessity of the service", and "If you believe this determination warrants immediate appeal, you may request expedited appeal by calling Sedgwick", at a given phone number.[5]

Ms. Harrison requested a formal hearing by filing an Application for Formal Hearing in the hearings section of the Department of Employment Services. A formal hearing was conducted on January 10, 2011. DOC opposed the hearing, arguing that the ALJ and DOES did not have jurisdiction to hear the claim because Ms. Harrison had not sought reconsideration of the Sedgwick letter, and hence had not exhausted her administrative remedies. DOC also argued that, pursuant to the medical evidence that it submitted, including the Sedgwick letter, the ALJ should deny the requested medical care as not being reasonable and necessary. At that hearing, the Sedgwick claims examiner, Lauren Whitaker, testified that the epidural request was submitted to Sedgwick's internal utilization review department, which she testified was an accredited utilization reviewer.[6]

Following the formal hearing, the ALJ issued a Final Compensation Order (the CO) on September 21, 2011, in which he awarded the requested medical care. The DOC appealed, raising again its jurisdictional argument, to which appeal Ms. Harrison, now acting *pro se*, filed an opposition.

DISCUSSION

D.C. Code §1-623.23 (a-2)(4) governs certain aspects of the utilization review process, specifically how disputes concerning that process are resolved both initially and on appeal. It reads as follows:

> Disputes between a medical care provider, employee, or District of Columbia government on the issue of necessity, character, or sufficiency of the medical care or

[3] Although there is nothing directly describing what Sedgwick CMS is in the record, all concerned in the formal hearing treated it as if it were the PSWCP. Thus, the witness for the employer/PSWCP was referred to as "Ms. Harrison's claims examiner" (HT 39). From their business name, it is evident that they are a private company that manages claims for compensation and medical care such as those brought by persons such as Ms. Harrison, known also as a third party administrator, or TPA.

[4] As noted by the ALJ, the document isn't signed, and it does not contain any reference to what if any relationship Sedgwick has to the PSWCP, Ms. Harrison, or her employing agency. We note further that it contains not a single reference to the words "utilization review", nor does it contain any indication that the putative author is an accredited utilization review provider.

[5] Nothing in the document makes any reference to Ms. Harrison's rights under the Act; it does not characterize her reconsideration rights as being mandatory in order to ultimately obtain a formal hearing; it doesn't state whether requesting reconsideration will cause her to miss a statutory deadline in seeking a formal hearing.

[6] She also testified that it is her practice, as a Sedgwick claims examiner, to submit all requests for medical care "other than six visits of physical therapy, and initial evaluations" to utilization review. HT 52 – 54.

> service furnished, or scheduled to be furnished … shall be resolved by the Mayor upon application for formal hearing by the District of Columbia government, employee, or medical provider. The decision of the Mayor may be reviewed **by the Superior Court of the District of Columbia.** The decision may be affirmed, modified, revised, or remanded in the discretion of the court. The decision shall be affirmed if supported by substantial competent evidence on the record.

(bold added).

This provision has rarely been the subject of cases brought to the Compensation Review Board (CRB). We can only find four: *Ashton v. D.C. Department of Motor Vehicles*, CRB No. 11-113 (April 30, 2012), *Lyles v. D.C. Department of Mental Health*, CRB No. 10-200 (August 23, 2011), *Lewis v. D.C. Public Schools*, CRB No. 10-110 (September 10, 2010), and *Tinsley v. D.C. Office of the State Superintendent of Education*, CRB No. 11-051 (January 5, 2011) . The first three of these cases dealt with the fact that §1-623.23 (a-2)(4) has been amended to remove language making mandatory the application of the "treating physician preference", and did not involve anything having to do with utilization review or the reasonableness and necessity of medical care.

Tinsley did deal with an appeal which related to a claim involving reasonableness and necessity and utilization review. However, in that case, the PSWCP took the position that the Sedgwick CMS letter advising the employee of the denial of medical care was not a "Notice of Determination"[7], a position that the ALJ had accepted, and to which acceptance the CRB deferred. It was decided, therefore, that the ALJ's authorizing the surgery was not in accordance with the Act, because there had been no Notice of Final Determination, hence the ALJ was without jurisdiction to hear the claim.

Our research fails to reveal any Director's Decision or District of Columbia Court of Appeals decision in which the provision is cited.

Although *Tinsley* assumed that the CRB had jurisdiction over ALJ decisions regarding reasonableness and necessity and utilization review under the private sector Act, we are unaware of any prior authority in which the question of the CRB's jurisdiction over appeals from decisions of "the Mayor upon application for formal hearing" arising under §1-623.23 (a-2)(4) was addressed directly.

That phrase, "the Mayor upon application for formal hearing", in this context, can only be referring to §1-623.24 (b)(1), where a person not satisfied with a decision made by the Public Sector Workers' Compensation Program (PSWCP) with regards to a claim for benefits under the Act may seek resolution of disputes at "a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge." That is the only type of "formal hearing" referenced anywhere in the Act. And that is precisely the route this claim has taken: a utilization review decision to deny the requested medical care was brought to an Administrative Law Judge in DOES by way of an application for formal hearing filed by the employee, Ms. Harrison.

[7] Oddly, PSWCP and DOC do not take the same position in this case as was taken in *Tinsley* that the letter from Sedgwick doesn't constitute an Notice of Denial. This type of inconsistent stance is precisely the type of problem that was noted to in the concurrence in *Tinsley*.

While §1-623.24 (b)(1) contains within it reference to appeals pursuant to §1-623.28 (a) (governing agency review of ALJ decisions in public sector workers' compensation claims), §1-623.23 (a-2)(4) does not. The only reference to appeals of "reasonableness and necessity" decisions following utilization review disputes that are brought to a formal hearing vests review authority not in DOES, but in the Superior Court of the District of Columbia.

Under the plain, unambiguous and clear language of §1-623.23 (a-2)(4), given that appellate review authority is vested elsewhere, the CRB lacks jurisdiction to consider an appeal of a decision following a formal hearing on issues pertaining to "necessity, character, or sufficiency of medical care furnished, or scheduled to be furnished, or fees charged by the medical care provider" in public sector workers' compensation cases.

Accordingly, we have no choice but to dismiss this appeal as being beyond our jurisdiction.

CONCLUSION

The CRB lacks jurisdiction over this appeal.

ORDER

The Application for Review is dismissed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

June 26, 2012
DATE