# Compensation Review Board

**CRB No. 12-185**

**SUSAN P. INGAGLIATO,**
**Claimant–Respondent,**

**v.**

**SIBLEY MEMORIAL HOSPITAL,**
**Self-Insured Employer-Petitioner.**

Appeal from a Compensation Order by
The Honorable Anand K. Verma, Administrative Law Judge
AHD No. 02-432A, OWC No. 534522

Charles V. Krikawa, IV, Esquire, for the Claimant/Respondent
D. Stephenson Schwinn, Esquire, for the Self-Insured Employer/Petitioner

Before: JEFFREY P. RUSSELL,[1] HENRY W. MCCOY, and HEATHER C. LESLIE, and *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

### OVERVIEW

On December 31, 1998 Respondent Susan P. Ingagliato was injured while employed by Sibley Memorial Hospital (Sibley) as a registered nurse. She filed a claim for compensation benefits, which

[1] Judge Russell and Judge Leslie have been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012) and Administrative Policy Issuance No. 12-02 (June 12, 2012).

claim she ultimately resolved by way of an Agreement of Final Compromise and Settlement, in which she retained the right to obtain future causally related medical care.

She has been receiving treatment from Dr. Justin Wasserman for management of her chronic pain, which treatment includes administration of 5 mg of Methadone daily. Sibley challenged the reasonableness and necessity of this ongoing care, and obtained a utilization review (UR) report, authored by Dr. Yusuf Mosuro, in which Dr. Mosuro opined that the ongoing pain management regimen, including the Methadone, was not medically reasonable and necessary. The parties presented the matter for resolution to an Administrative Law Judge (ALJ) in the Department of Employment Services. Following a formal hearing the ALJ issued a Compensation Order on October 24, 2012, in which the pain management regimen was found to be reasonable and necessary. Sibley appealed, to which appeal Ms. Ingagliato filed an opposition.

## STANDARD OF REVIEW

The scope of review by the CRB, 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.[2] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

## ANALYSIS

Sibley first argues that the ALJ applied the improper analytic framework in assessing the relative merits of UR opinion as opposed to treating physician opinion, complaining that it is error to treat these competing opinions "on equal preferential footing". Petitioner's Memorandum in Support of Application for Review (Petitioner's Memorandum), page 7. Sibley argues that "If the ALJ is correct, then utilization review is nothing more than an enhanced procedure for retaining an expert witness, whose opinion is almost always counterbalanced by the treating physician's."

We disagree with the assertion that the ALJ erred in not according either treating physician or UR opinion an initial preference in evaluating their relative merits. If Sibley wishes to characterize UR as an "enhanced" independent medical evaluation (IME) procedure, it is worth noting the nature of the "enhancement". IME opinion is at an initial disadvantage when put up against treating physician opinion; UR opinion is not. That's the enhancement.

[2] "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. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

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:*

> [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. The outcome of the UR process is to be accorded equal initial weight to the opinion of a treating physician, and 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.

Skipping for the moment Sibley's second argument concerning the burden of proof, we address next the argument that "there is no basis for rejecting the Utilization Review Report's conclusions." Petitioner's Memorandum, page 9.

Sibley analyzes the ALJ's consideration of the UR report's contents in three areas, which it characterizes as (1) Failure to Monitor Pain Symptoms, (2) Lack of Functional Improvement, and (3) Propriety of Long Term Opiate Treatment.

As to the first two areas, Sibley asserts that the ALJ draws impermissible inferences from reviewing the treating physician's progress notes. The ALJ reviewed the treatment notes and reports and concluded that the UR report's implied finding of a lack of pain monitoring and lack of functional improvement, two pillars upon which its conclusions were premised, were not accurate assessments of the medical history, thereby rendering the UR report less reliable than it would be otherwise.

Sibley argues that this analysis by the ALJ is akin to the "substitution" of the ALJ's medical opinion for that of the physician, a practice the CRB has held to be improper. See, *Crawford v. National Rehabilitation Hospital,* CRB No. 11-131, AHD No. 10-380, OWC No. 625645 (June 25, 2012). There is a difference between this case and *Crawford*, however. In *Crawford*, the ALJ concluded that the course of treatment which the treating physician had provided to the claimant was the substantial equivalent of the specific regimens of treatment that the UR report opined was necessary to have been completed prior to commencing the particular course of medical care that the claimant

wished to undergo. There was no medical evidence in the record upon which such a finding of "substantial compliance" could have been based; it was undisputed that the preliminary courses of treatment had not been undertaken, and there was no basis upon which the ALJ could have found that the treatment that had been undertaken was essentially the medical equivalent of the treatment the UR report characterized as necessary preliminary treatments.

In the case before us now, however, the ALJ reviewed the medical reports and notes and concluded that the UR reports assertions that the treatment rendered had not included monitoring of pain levels and had demonstrated no functional improvement were in certain important respects inaccurate. That is a factual matter, and the record supports the ALJ's determination that the treating physician did in fact monitor Ms. Ingagliato's pain levels routinely, and that she did, on occasion, demonstrate functional improvement.

As to the third area, while the ALJ did not deal extensively with the UR report's concerns about long term opiate treatment, he did not, as argued by Sibley, ignore it entirely. Rather, the ALJ noted that the record lacked "evidence of abuse of the prescribed methadone". Even accepting that Sibley is right that Ms. Ingagliato acknowledged having become "dependant" upon methadone, such an acknowledgment does not necessarily connote "abuse" in every instance.

In sum, Sibley seeks to have us re-weigh the evidence and draw from it the inferences that it prefers, rather than permit the ALJ's weighing and inferences to stand. This we are not inclined or empowered to do.

Finally, we address the argument that the ALJ appears to have improperly placed the burden of proof upon Sibley to prove that the disputed medical care was not reasonable and necessary, rather than placing the burden of proof upon Ms. Ingagliato to establish entitlement to the care by a preponderance of the evidence.

Ms. Ingagliato acknowledges that the burden of proof rests with her to demonstrate entitlement to the benefits sought. "There is no question that Ms. Ingagliato has the burden of proving that her medical care is both reasonable and necessary." Memorandum of Points and Authorities in Opposition to Application for review, page 8. However, she asserts that the ALJ did not shift the burden of dis-proof to Sibley. We must disagree.

Although the ALJ did not specifically state what he perceived the burden to be, or upon whom it lay, in both the Compensation Order and the Hearing Transcript (HT), the ALJ characterized the "claim for relief" under consideration not as Ms. Ingagliato's claim for continued Methadone and pain management, but rather as "Employer requests that Dr. Wasserman's pain management treatment of claimant's work injury, including the prescription of methadone 5 mg, be found not reasonable and necessary" (Compensation Order, page 2, "Claim for Relief"). And, in HT, the ALJ said "All right, at this time, I will ask Employer's Counsel, because this is Employer's application for formal hearing, to state the claim for relief that you're seeking, sir", to which Sibley's counsel responded "Thank you, Your Honor. Your Honor, we'd like Your Honor to consider the issue of whether or not the Claimant's treatment with Dr. Wasserman, pain management—pain management treatment is reasonable and necessary for treatment of the Claimant's injury". HT 8, lines 8 – 19.

And, in the concluding paragraphs of the Compensation Order, in the "Conclusion of Law", the ALJ wrote "the undersigned concludes employer has not sustained its burden under the Act of proving Dr. Wasserman's treatment, including prescription Methadone 5 mg, is not reasonable and necessary." Compensation Order, page 8.

The only reasonable conclusion we can reach from this is that the ALJ was operating under the misapprehension that it was "employer's burden under the Act" to prove that the disputed treatment was "not reasonable and necessary."

As we have stated, in *Gorham v. Marriott Wardman Park Hotel*, CRB No. 10-036, AHD No. 07-388A, OWC No. 619390 (August 10, 2011) and elsewhere, and quoting from *District of Columbia Department of Mental Health v. DOES,* 15 A.3d 692 (2011):

> We cannot affirm an administrative determination that "reflects a misconception of the relevant law or a faulty application of the law." Because the ALJ applied to Ms. Gorham's claim the "substantial evidence" standard of proof, as opposed to the more demanding preponderance of the evidence standard, the law requires we reverse the Compensation Order; the case must be returned to consider anew the evidence that may bear on Ms. Gorham's work capacity as well as her entitlement to temporary total disability benefits.

It is a claimant's burden to prove entitlement to the requested benefits, and to do so by a preponderance of the evidence. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1989). Because the ALJ appears to have placed the burden of proof upon Sibley, we must vacate the decision and remand for further consideration of the claim with application of the correct burden of proof.

## CONCLUSION AND ORDER

The ALJ was not in error in considering the apparent inaccuracies in the UR report when evaluating whether to accept or reject its conclusions. The ALJ properly accorded the UR report and treating physician opinion equal initial evidentiary weight. The ALJ improperly placed the burden of proof upon the employer to prove lack of reasonableness and necessity, when the burden of proof properly rests with the claimant to show entitlement to the requested benefits by a preponderance of the evidence. The Conclusion of Law and Decision contained in the Compensation Order of October 24, 2012 are vacated, and the matter is remanded for further consideration using the proper allocation of the burden of proof.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

January 24, 2013
DATE