

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-133

JOSEPHINE BEMBRY,

Claimant-Respondent,

v.

GOOD HOPE INSTITUTE AND AMGUARD INSURANCE COMPANY,

Employer and Carrier-Petitioners.

Appeal from a Compensation Order by
The Honorable David L. Boddie
AHD No. 08-377B, OWC No. 647887

Jeffrey W. Ochsman, Esquire for the Petitioner
Matthew Pepper, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ JEFFREY P. RUSSELL,² and LAWRENCE TARR, *Administrative Appeals Judges.*

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

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the October 28, 2011, Compensation Order (CO) 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 CO, the ALJ granted the Claimant's request for authorization for pain management. We AFFIRM.

¹ Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

² Judge Russell has been appointed by the Director of the DOES as a Interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

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FACTS OF RECORD AND PROCEDURAL HISTORY

On March 19, 2008, the Claimant was employed as a Clinical Supervisor with the Employer when she tripped on carpet and fell down a flight of stairs. The Claimant injured her neck, low back, left shoulder and left leg. In a CO dated March 13, 2009, the Claimant was awarded medical benefits and temporary total disability benefits from May 6, 2008 to the date of the Formal Hearing and continuing.

On May 11, 2011, a Formal Hearing was held on the Claimant's request for authorization for medical treatment, specifically pain management. The Employer contested this request, raising the issue of reasonableness and necessity. On October 28, 2011, a CO was issued granting the Claimant's claim for relief. The ALJ found that the pain management recommended by the Claimant's treating physician, Dr. John Byrne, was reasonable and necessary.

The Employer timely appealed with the Claimant opposing. The Employer argued that the ALJ erred in failing to analyze the competing evidence presented and improperly rejected the utilization report (UR) based upon the fact the UR physician had viewed the surveillance film of the Claimant. The Claimant in turn argues that the ALJ properly rejected the UR and that rejection is supported by the substantial evidence in the record.

We affirm.

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 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. See District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that the ALJ failed to analyze the competing evidence. Specifically, the ALJ failed to offer any reasoning for "why the opinion of the treating orthopedist, Dr. Byrne, should be accepted." Employer's Argument at 6. We disagree.

In *Washington Hospital Center v. DOES and Paul A. Thielke, Intervenor*, 821 A.2d 898 (2003) (Thielke), the District of Columbia Court of Appeals (DCCA) held with respect to treating physicians that only the reasons for *rejecting* a physician's opinion must be explained. Here, the ALJ did not reject the opinion of Dr. Byrne, but rather that of the UR.³ The ALJ stated,

³ Indeed, the Court in *Thielke* went on to say,

Nevertheless, this court's task is not to parse finely the reasons given by the finder of fact for accepting one set of expert opinions rather than another. Only with respect to *treating* physicians have we even held that

It is for all of the above reasons that I reject the UR opinions of Dr. Borelli, as not reflecting anything resembling a general overview of the treatment received by the Claimant, or setting forth rational medical evidence to support the finding or conclusion reached that the treatment recommended is neither reasonable nor necessary.

CO at 7.

As correctly noted by the ALJ the UR is accorded equal weight as the opinion of the treating physician when reasonableness and necessity of medical treatment is at issue, the ALJ gave several cogent reasons as to why the UR was to be rejected. We do not agree, as the Employer suggests, that after giving several reasons to reject the UR opinion, the ALJ must then go on to explain why, in light of this rejection, he then accords more weight to the opinion of the other physician, that of Dr. Byrne. The general rule is that "an agency, as a finder of fact, may credit the evidence upon which it relies to the detriment of conflicting evidence, andneed not explain why it favored the evidence of one side over that of the other." *Metropolitan Poultry v. DOES*, 706 A.2d 33, 35 (D.C. 1998).

Moreover, it is clear that the ALJ did review and consider the reports of Dr. Byrne. The ALJ noted,

In support of her testimony the Claimant submitted into evidence medical reports of her Dr. Byrne dating from August 14, 2009 to April 26, 2011, and a copy of the July 2, 2010, pain management referral by Dr. Byrne. CE 1-2.

The medical reports of Dr. Byrne, in summary reflect, generally consistent with the Claimant's testimony, that she has continuous basis subjectively reported complaints of persistent symptoms of pain in her neck and low back, with occasional notes of worsening, or new complaints, including, of shoulder pain, radicular symptoms into the hands causing numbness, and of back pain radiating down into the legs consistent with sciatica. CE 1.

the examiner must give reasons for rejecting medical testimony, *see Canlas v. District of Columbia Dep't of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1999), although such an explanation obviously facilitates appellate review by the Director and this court. The hearing examiner went on to explain that the studies relied on by WHC's experts establishing the infrequency of abnormal response to viral vaccinations did not include "subjects exactly like [Thielke] -- an individual with severe cerebral brain damage who is then given an MMR shot as an adult." Dr. Kurzrok, Thielke's other expert, had opined that "his former severe head injury . . . may have placed him at increased risk for . . . reaction [to the vaccine]," and Dr. Mayle's opinion was even stronger that "a febrile [*i.e.*, fever] reaction to the injected material . . . has been known throughout the literature to precipitate seizures in those patients who have some type of brain damage . . . that predisposes to seizure activity." Although Dr. Mayle did not cite "the literature" he had in mind (as indicated, WHC did not take his deposition to challenge this assertion among others), and his conclusion that "this observation is well-known to all neurologists" was not shared by Drs. Rickler and Peterson, neither point invalidates the examiner's inference that Thielke's pre-existing injury may have worked to shorten the normal reaction time between the vaccination and seizure effects of the kind he experienced. [footnotes omitted]

The medical reports also reflect the course of treatment included medications for pain, anti-inflammatories, and sleep, consisting of Ambien, Demoral, Skelaxin, Meloxicam, and Vicodan, with occasional changes over time such as Percocet for Demoral, and Soma instead of Ambien. Dr. Byrne's medical reports reflect that he consistently reported objective findings of abnormalities during the course of treatment, primarily spasms. CE 1.

In a July 2, 2010, medical report Dr. Byrne indicated with the referral to Dr. Hung for a pain management consult, he was discharging the Claimant from treatment to return on an "as needed" basis for treatment. In an August 10, 2010, medical report he stated that he was still pushing for the evaluation by pain management and opined that from a surgical standpoint there was nothing he could do for her. In a November 17, 2011, medical report Dr. Byrne noted that the Claimant's condition was worsening and beginning to affect her activities around the home and her family. And in a January 12, 2011, report Dr. Byrne authorized and released the Claimant's return to work on a light duty sedentary basis. CE 1.

CO at 3 – 4.

We find no error in the above analysis.

The Employer also argues that the ALJ was in error rejecting the UR's opinion based upon the UR's review of surveillance film. The ALJ, after listing several reasons to reject the UR opinion, went on further to state,

Finally, an additional reason why I reject and find unpersuasive, as well as unreliable, the UR report and conclusions reached by Dr. Borelli, is because in his report he also referred to reviewing video surveillance in reaching those conclusions. In addition to specifically stating in his recommendation "the patient's current activity level, *as manifested by the video*, reveals the lack of functionality restrictive pain and therefore a pain management specialist would not be medically necessary." (emphasis added).

CO at 7.

The ALJ relied upon *Santos v. DOES*, 536 A.2d 1085 (D.C. 1998) for the proposition that the UR was precluded from viewing the surveillance video of the Claimant as it was not a medical record or report. The Employer argues that this was in error and that pursuant to *Washington Post v. DOES*, 675 A.2d 37. 44 (D.C. 1996), the surveillance film was properly considered. We agree with the Employer that the UR physician was free to consider the surveillance.

The ALJ states that "UR is foreseen as being a review of the Claimant's medical records or reports." CO at 7. While this is certainly true, the UR is also free to consider other evidence to aid in his opinion, including surveillance films of the Claimant. We do not read *Santos* as standing for the proposition that a UR provider cannot review anything other than a medical

report. In *Santos*, the DCCA found the ALJ to be in error in finding the Claimant to be an incredible witness based upon a doctor's observation of the Claimant outside of a medical office setting and using that observation as a basis to terminate the Claimant's disability. The DCCA found this to be in error as the ALJ's credibility finding was based on too "scanty" of an observation to be the basis of terminating disability after that date. *Santos, supra*, at 1089. Such is not the case here.

A review of the UR report reveals that the surveillance video was only *part* of the record used by the provider in coming to his conclusion that the medical treatment was not reasonable or necessary. The UR provider utilized not only the video, but also the medical records provided to him as evidenced by his report. The ALJ was in error in using the review of the surveillance video as a reason to reject the UR opinion.

We however find this error to be harmless as the ALJ listed numerous other reasons to reject the opinion of the UR report in favor of Dr. Byrne when coming to his ultimate conclusion that the requested medical treatment was reasonable and necessary. The ALJ rejected the UR, not only because of the video surveillance, but also for the following reasons:

- The UR cited to items that were not relevant to pain management;
- The UR's rejection of pain management was unclear;
- The UR's rejection of pain management lacked rationality;
- The UR failed to discuss the findings of Dr. Byrne from April 4, 2008 through September 8, 2010;
- There were objective findings of abnormalities reflected by the medical reports between August 14, 2009 through April 26, 2011;
- The UR's recitation of treatment dates does not coincide with the dates of the cited reviewed data;
- The UR failed to discuss any medical reports that were later than April 30, 2008;
- The UR report relies on only one IME report of Dr. London and fails to discuss the other IME report of Dr. London.

CO at 6-7.

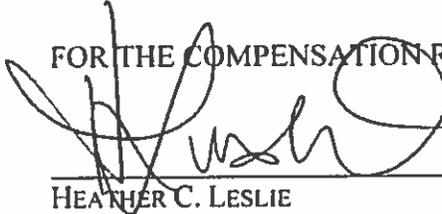
We are quick to note that had the ALJ listed the video surveillance as the sole reason for rejecting the UR report, or one of only a few reasons, we would be unable to find such error harmless. Here however, the ALJ listed, by our count 8 other reasons to reject the UR. Thus, we find the error harmless.

What the Employer is asking us to do is to re-weigh the evidence in the Employer's favor including the rejection of the UR report, as task we cannot do. Although there may be substantial evidence to support a contrary conclusion, there is substantial evidence to support the CO's conclusion that pain management was reasonable and necessary.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the October 28, 2011 Compensation Order is supported by substantial evidence in the record. It is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in black ink, appearing to read 'H. Leslie', written over a horizontal line.

HEATHER C. LESLIE
Administrative Appeals Judge

May 16, 2012

DATE