GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB Nos. 15-181(1) & 15-182(1)

JUANA BENAVIDES,
Claimant– Petitioner/Cross-Petitioner,

v.

RENAISSANCE HOTEL and
MARRIOTT CLAIM SERVICES,
Employer/Third-Party Administrator- Respondent/Cross-Petitioners.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 OCT 6 PM 2 21

Appeal from an October 22, 2015 Compensation Order
by Administrative Law Judge Amelia G. Govan
AHD No. 14-171A, OWC No. 706009

(Decided October 6, 2016)

Julie D. Murray for the Employer
David J. Kapson for the Claimant

Before HEATHER C. LESLIE, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Order, the Compensation Review Board ("CRB") outlined Juana Benavides' ("Claimant") injury, treatment, and the procedural history of Claimant's claim as such:

> Ms. Juana Benavides worked for Renaissance-Washington, D.C. ("Renaissance") as a housekeeper. On June 10, 2013, she fell and hit her head against the wall. She injured the right side of her body and has not worked since her accident.
>
> Ms. Benavides began treating with Dr. Lawrence Zumo, a neurologist. On July 22, 2013, Dr. Zumo certified Ms. Benavides as unable to work and referred her for an orthopedic evaluation. On October 4, 2013, Dr. Zumo released Ms. Benavides to her pre-injury employment with a work site evaluation by her

supervisor. Thereafter, on December 16, 2013, Dr. Zumo authorized Ms. Benavides to gradually return to work with worksite evaluation.

On August 6, 2013 at Dr. Zumo's recommendation, Ms. Benavides began treating with Dr. Phillip Omohundro, an orthopedic surgeon. Following diagnostic testing, injections, and aquatic physical therapy, Dr. Omohundro conditionally released Ms. Benavides to return to work if an EMG/Nerve Conduction Study was negative or referred for work reconditioning; if the EMG was positive, Dr. Omohundro suggested pain management. An EMG revealed no documentable neurologic damage, and Dr. Omohundro released Ms. Benavides to full duty as of December 30, 2013.

Dr. Louis Levitt examined Ms. Benavides on September 17, 2013 at Renaissance's request. Dr. Kenneth Eckmann, a neurologist, also examined Ms. Benavides at Renaissance's request.

Based upon Dr. Levitt's opinion that Ms. Benavides could return to her pre-injury work, Renaissance stopped voluntarily paying wage loss benefits on October 14, 2013. The parties, therefore, proceeded to a formal hearing to resolve the following issues:

1. What is the nature and extent of Claimant's disability?

2. Did Claimant fail to cooperate with vocational rehabilitation?

3. Did Claimant voluntarily limit her income?

In a Compensation Order dated May 22, 2014, an administrative law judge ("ALJ") granted Ms. Benavides temporary total disability benefits for the closed period of October 15, 2013 through December 30, 2013. The ALJ determined Dr. Omohundro's opinion that Ms. Benavides is able to return to full duty work as of December 30, 2013 is entitled to decisive weight on the issue of the nature and extent of Ms. Benavides' work-related disability. Ms. Benavides appeals the May 22, 2014 Compensation Order.

On appeal, Ms. Benavides disputes the award of temporary total disability benefits for the closed period of October 15, 2013 through December 30, 2013 as well as any denial of ongoing medical benefits. Ms. Benavides contends she met her burden to prove "that the symptoms she continues to experience in her head, neck, right shoulder, and low back since the June 10, 2013 work accident have precluded her from returning to her regular employment as a housekeeper." Specifically, Ms. Benavides argues

> [t]he ALJ does not explain why, in light of the differing opinions of all the physicians to examine Ms. Benavides regarding her work status, the ALJ chose to accept only this period and reject the others.

> Ms. Benavides also argues the denial of additional treatment for her right shoulder "does not flow rationally from the facts and represents an arbitrary and capricious abuse of discretion." Ms. Benavides asserts that the parties stipulated to the causal relationship between Ms. Benavides' right should injury and her work-related accident and that entitlement to ongoing medical benefits was not raised by the parties. For these reasons, Ms. Benavides requests the Compensation Review Board ("CRB") reverse the Compensation Order in part.
>
> In response, Renaissance maintains the ALJ offered detailed reasons for accepting Dr. Omohundro's opinion regarding Ms. Benavides' work capacity. In addition, Renaissance concedes "the denial of medical benefits should be construed as only pertaining to those which were recommended by Dr. Zumo as of the formal hearing date [including a] MRI of the right shoulder, orthopedic evaluation/possible second opinion, and work hardening." Renaissance requests the CRB affirm the Compensation Order.
>
> Neither party appeals the ALJ's ruling that Ms. Benavides did not fail to cooperate with vocational rehabilitation or the ALJ's ruling that Ms. Benavides did not voluntarily limit her income.

Benavides v. Renaissance-Washington, D.C., CRB No. 14-080 (November 25, 2014) at 2-3. (Footnotes omitted).

After considering the parties argument, the CRB affirmed the administrative law judge's ("ALJ") conclusion that Claimant was entitled to temporary total disability benefits from October 15, 2013 through December 30, 2013. The CRB further amended the underlying order to strike any denial of medical treatment as it was not raised before the ALJ.

The CRB's decision was not appealed.

After a period of time, Claimant became dissatisfied with her treatment by Dr. Omohundro and requested an informal conference with the Office of Workers Compensation ("OWC"). Claimant sought authorization to begin treatment with Dr. David Arango. Claimant's request was granted. Employer timely appealed. In a Decision and Remand Order ("DRO"), the CRB concluded the Claims Examiner failed to perform the proper legal analysis. *Benavides v. Renaissance-Washington, D.C.*, CRB No. 15-036 (June 24, 2015). The CRB vacated and remanded the case, stating:

> Until such time as the Claim Examiner explains fully why a change of physician was necessary and in Claimant's best interest, as well as necessary and desirable (or not), taking into consideration the arguments of both parties, we cannot say the Final Order is in accordance with the law.

DRO at 3-4.

To date, OWC has not acted upon the DRO.

Claimant has continued to treat with Dr. Arango. Dr. Arango restricted Claimant to light duty work and recommended physical therapy. Dr. Arango opined her condition is directly related to the work accident.

A full evidentiary hearing occurred on August 19, 2015. Claimant sought an award of temporary total disability benefits from February 15, 2015 to the present and continuing, payment of causally related medical treatment and authorization for medical treatment with Dr. Arango. The issues to be adjudicated were whether the claim for relief constituted a request for modification based upon a change of condition pursuant to D.C. Code § 32-1524, the nature and extent of Claimant's disability, if any, and whether the medical treatment is reasonable and necessary.

A Compensation Order ("CO") issued on October 22, 2015. The ALJ found that indeed Claimant was seeking a modification of the prior order in requesting temporary total disability benefits but that the claim for medical benefits and treatment was a new claim. The ALJ determined Claimant had not shown a change of condition had occurred, relying upon the medical opinions of Dr. Omohundro and Dr. Levitt. The CO did determine the physical therapy as recommended by Dr. Arango was reasonable and necessary.

Claimant appealed. Claimant argues the CO's conclusion that her medical condition has not changed since the May 22, 2014 order is not supported by the substantial evidence, relying on Dr. Arango's medical opinion in support.

Employer also appealed the CO. Employer argues the ALJ erred in awarding causally related medical treatment with Dr. Arango. Specifically, Employer argues the ALJ failed to address whether Claimant had made an unauthorized change in physicians, an issue raised at the time of the hearing.

ANALYSIS[1]

A request for authorization for a change of treating physicians is governed by D. C. Code § 32-1507(b) (4) and 7 DCMR § 213.13. The code provisions states:

> The Mayor shall supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered [...], shall have full authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may order a change of physician [...] when in his judgment such change is necessary or desirable.

[1] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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).

The referenced regulation states:

> If the employee is not satisfied with medical care, a request for change may be made to [OWC], [which] may order a change where it is found to be in the best interests of the employee.

In *Renard v. DOES,* 731 A.2d 413 (D.C. 1999), the District of Columbia Court of Appeals has held that requests for authorization to change an attending or treating physician are within the sole province of OWC. As the case presently stands, Dr. Omohundro is Claimant's current treating physician, pending further action by OWC in light of the CRB's June 24, 2015 Decision and Remand Order which vacated the prior OWC decision.

With the above statutory and case law in mind along with the current procedural status of the case before us, we turn first to Employer's argument, that the ALJ's failure to determine whether Claimant had made an unauthorized switch in physicians is in error requiring remand. In argument, Employer states:

> ... D.C. Code provides that an employee has the right to choose an attending physician to provide medical care and treatment. Once a treating physician has been selected by an employee, that employee may not change treating physicians without authorization from the Employer of the Office of Workers' Compensation.

Employer's argument at 7.

We agree with Employer that the CO's analysis on this issue is wrong, but for different reasons. As stated above, as the case presently stands, Dr. Omohundro is the attending physician for purposes of our review.

The CRB has pointed out, the attending physician is:

> ...a designation with implications concerning what doctor will be deemed to control the medical care program and provide or prescribe medical care for which an employer is liable to pay under the Act. The attending physician rules exist to avoid subjecting employer's to liability to pay for unauthorized medical care where a claimant is "doctor shopping" or otherwise obtaining medical care and incurring medical expenses at claimant's own whim. **And, the identity of the attending** physician **has significant implications in cases involving the invocation of the utilization review (UR) provisions concerning the reasonableness and necessity of specific medical care.** See, D.C. Code § 32-1507 (b)(6); also, *Gonzalez v. UNICCO Service Company,* CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

Butcher-Wallace v. District of Columbia Water and Sewer Authority, CRB. No. 13-046 (August 6, 2013) at 5. (Emphasis added). *See also West v. Washington Hospital Center,* CRB No. 99-097(R) March 14, 2011.[2]

When the reasonableness and necessity of medical care is at issue, utilization review is mandatory. 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 the **attending physician**. *Children's National Medical Center v. DOES*, 992 A.2d 403 (D.C. 2010) (Emphasis added). The ALJ

> ...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.

Turning to the case before us, the ALJ incorrectly analyzes the reasonableness and necessity of Claimant's care as the opinion of Dr. Arango is treated as the attending physician for purposes of the Act. This is incorrect. The attending physician is Dr. Omohundro.

Normally such a mistake would cause us to remand the case for further analysis. However, we need not remand in futility as the evidence presented in the case compels one conclusion over the other to the exclusion of any other inference. *See WMATA v. DOES and Payne Intervenor*, 992 A.2d 1276 (D.C. 2010). Dr. Omohundro did not recommend any further treatment after December of 2013. Thus, no treatment has been recommended by the attending physician. Pursuant to § 32-1521.01(d)(2), we amend the CO to strike that portion which awards medical treatment as recommended by Dr. Arango.

Turning to Claimant's argument, Claimant argues the CO erred in not determining Claimant had showed a change of conditions warranting a modification of the prior CO which denied Claimant disability benefits. Specifically, Claimant relies upon the opinion of Dr. Arango.

In determining whether Claimant had satisfied her burden, that of a preponderance of the evidence, when proving a change of condition had occurred since the last hearing, the ALJ stated:

> On this issue, Claimant contends that she continues to be severely symptomatic from the injuries sustained in the June 10, 2013 accident and had not been released from the care of her current treating physician. In Claimant's view, Dr. Arango's opinion is persuasive, while those of the independent medical examination ("IME") physicians should be rejected. Arguing that objective

[2] *West,* also citing to *Gonzalez v. UNICCO Service Company, supra,* notes "The CRB has held: "The terms "treating physician" and "attending physician" are both used in decisions of this Agency and the Court of Appeals in connection with requests for medical care and an employer's responsibility for it. These terms are frequently used interchangeably."

findings of a rotator cuff tear have been noted on the June 2013 MRI and examination report, she challenges the conclusions of the examining experts retained by Employer and maintains that she is unfit for return to her usual work duties.

Dr. Omohundro, Claimant's prior orthopedic specialist, stated in December of 2013 that Claimant did not appear to be a surgical candidate for the shoulder, reported that EMG/NCS results were negative, injected her right shoulder, and released her to return to full duty as of December 30, 2013. He did not recommend any additional treatment at that time. CX 7, p.48.

Orthopedic specialist Louis Levitt, who examined Claimant in September of 2013 and March and June of 2015, at Employer's request, provided an opinion, upon which Employer relies, regarding nature and extent. In sum, Dr. Levitt did not credit Claimant's subjective complaints or recognize any current symptoms related to the June 2013 work accident that physically limited Claimant's performance of her usual work duties or required further medical treatment. Dr. Levitt disagreed with the diagnostic evidence (7/15/13 MRI, CX 7) showing Claimant to have a right shoulder rotator cuff tear. RX 8, p. 61-62.

CO at 7.

The ALJ found more persuasive the opinions of the attending physician, Dr. Omohundro, and Dr. Levitt, Employer's independent medical examination ("IME") physician over that of Dr. Arango. The ALJ found their opinions more "cogent and consistent with the Act, the record evidence and with the most applicable case precedent." CO at 7. While it is technically true that Dr. Arango can be called a treating physician as he treated Claimant six times, it is clear the ALJ found more persuasive the opinions of the attending physician, Dr. Omohundro and Employer's IME physician, Dr. Levitt.

Furthermore, the ALJ found Claimant to be an incredible witness, describing her testimony as "somewhat exaggerated." CO at 4. This finding has not been appealed. Thus, the ALJ concluded Claimant failed in her burden to show a change in conditions based upon the medical evidence and incredible testimony of the Claimant. We affirm this finding. For us to find otherwise would require us reweigh the evidence and substitute our judgment for that of the ALJ, a task that we are not empowered to undertake.

CONCLUSION AND ORDER

That portion of the Compensation Order which awarded medical treatment as recommended by Dr. Arango is hereby stricken.

With this amendment, the October 22, 2016 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.