

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

CRB No. 14-131

**MARIO JARQUIN,
Claimant-Respondent,**

v.

**OMNI SHOREHAM HOTEL
and GALLAGHER BASSETT SERVICES,
Employer/Insurer-Petitioners.**

Appeal from an October 31, 2014 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 14-280, OWC No. 705202

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAR 19 PM 12 39

Benjamin E. Douglas for the Claimant
Lisa A. Zelenak for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was working as a security officer when he injured his neck and right shoulder while using a bolt cutter to remove a padlock on May 28, 2013.

Claimant sought treatment and came under the care of Dr. Navin Sethi. Based on the results of objective testing and his examination of Claimant, Dr. Sethi diagnosed Claimant with a herniated right-sided cervical disc at the C6-C7 level. Dr. Sethi recommended surgical fusion. Dr. Mani Nair saw Claimant for a neurosurgical consultation and concurred with Dr. Sethi's surgical recommendation.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Jeffrey Abend on October 9, 2013. Dr. Abend took a history of Claimant's accident, medical treatment, and performed a physical examination. Dr. Abend opined that Claimant was in the final stages of treatment related to his work injury and that after two more weeks of physical therapy, Claimant would not require any more treatment related to his work injury. Dr. Abend reiterated this

opinion in two subsequent letters in response to Employer's questions, stating on February 26, 2014 that any treatment after October 23, 2013 was related to Claimant's pre-existing osteoarthritis/degenerative disk disease of his neck. Claimant's medical records were sent to Dr. Thomas S. Padgett for a utilization review (UR). Based upon the IME and UR, Employer denied Claimant's request for authorization for surgery.

A full evidentiary hearing was held on September 22, 2014. At that hearing, Claimant sought authorization for surgery per his physicians' recommendation. The issues presented were whether Claimant's current cervical condition is medically casually related to the work injury, and whether the surgical procedure recommended by Dr. Sethi was reasonable and necessary. A Compensation Order (CO) was issued on October 31, 2014 which granted Claimant's claim for relief.

Employer timely appealed. Employer argues the CO's conclusion that Claimant's cervical condition is medically casually related to his work accident is not supported by substantial evidence. Employer also argues that the ALJ's decision that surgery was reasonable and necessary is not in accordance with the law.

Claimant opposes Employer's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

ANALYSIS

Employer first argues the ALJ's conclusion that Claimant's current neck condition is medically casually related to the work accident is not supported by the substantial evidence in the record. Employer argues that the medical evidence submitted by Claimant does not provide a definitive opinion on the work relatedness of Claimant's cervical condition. Employer also argues the July 10, 2014 letter from Dr. Sethi should not be accorded any preference as it was authored at the request of Claimant in anticipation of litigation.

The ALJ, when discussing the medical evidence presented in the case, states:

The reports of Dr. Sethi and Dr. Nair support the existence of a medical causal connection between Claimant's cervical symptoms, which include radiculopathy radiating into his right arm and hand, and his 2013 accident. Dr. Sethi opined that Claimant's April 2014 MRI showed a herniated disc condition which requires

surgical correction. In this case, there is no reason to reject the medical conclusions of Claimant's treating physicians regarding the cervical symptoms and their causal connection with the 2013 work accident.

Claimant's position regarding causation is cogent and consistent with the Act, the record evidence and with the most applicable case precedent. The opinion of Dr. Abend is rejected.

CO at 4.

A review of the evidence supports the ALJ's conclusion above. As Employer notes, Dr. Sethi does opine on July 10, 2014 that Claimant's symptoms began after his May 28, 2013 injury and that he would require surgery in the future. Employer contests this opinion and argues it should not be given any weight because it was in a letter written in response to Claimant's counsel's request in anticipation of litigation. Employer urges us to question Dr. Sethi's motivations in preparing such a report. We reject Employer's arguments.

While Dr. Sethi's report was in response to a request by Claimant's counsel, this does not by itself impeach Dr. Sethi's opinion. As we stated in *Slaughter v. WMATA*, CRB No. 12-158, AHD No. 12-078 (December 14, 2012).

[T]he fact that a treating physician writes a report to be submitted in support of a claim for benefits has no bearing upon whether the physician is in a superior position to that of an IME physician to assess the medical condition of a claimant who is his or her patient. Indeed, in nearly every contested workers' compensation case, at some point a claimant will need to obtain a report or note written to address matters that are not generally included in a standard progress note. The issue in determining whether the treating physician's opinion is more reliable than an IME opinion is the status and relationship of the physician to the patient. It is error to devalue a treating physician's opinion because the opinion is expressed in a report authored to convey that opinion in a form other than a treatment note.

It is worth noting that of three "reports" Employer submitted from Dr. Abend, as described in Employer's exhibit 2, two were letters written to Employers representatives in response to correspondence from these representatives which clearly asked specific questions. If we were to follow Employer argument to its logical conclusion, two of Dr. Abend's reports would be called into question. We decline to follow this reasoning.

Moreover, contrary to Employer's argument, Dr. Sethi's July 10, 2014 report did consider the Claimant's history and a prior recommendation for surgery before the May 28, 2013 work injury.

We also reject Employer's argument that Dr. Nair's opinion should be discounted because he only saw Claimant one time. Claimant was referred to Dr. Nair by Dr. Sethi. Dr. Nair noted the work injury in his report and that Claimant has had symptoms since his May 2013 work related injury. Dr. Nair found after reviewing Claimant's medical treatment to date, objective testing results, and performing a physical examination, that surgery was reasonable and appropriate.

After taking all the evidence into consideration, including the medical opinions of Dr. Sethi and Dr. Nair, as well as Claimant's credible testimony, the ALJ concluded Claimant's cervical condition is medically casually related to the work injury. The ALJ did not find the opinion of Dr. Abend persuasive.

While an ALJ certainly can question a physician's opinion based upon the facts, testimony, and medical evidence as a whole, the ALJ in the case before us did not and we do not find any error in this. What Employer is asking this panel to do is to reweigh the evidence in its favor by questioning the ALJ's reliance on the physicians by pointing to specific evidence in its favor, a task we cannot do. As stated above, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Marriott* at 885.

Employer's second argument is that the ALJ's ruling that the requested surgical procedure is reasonable and necessary is not in accordance with the law. Employer argues that the ALJ did not articulate a reason to reject the UR in accordance with the law. We agree.

As the ALJ correctly noted:

The medical opinions in the record must be fully considered in determining Claimant's need, if any, for medical treatment. The ALJ has an obligation to weigh the treating physician's opinion and the UR opinion based upon the record as a whole; the ALJ must explain why the ALJ chooses one opinion and not the other, but no initial preference is required. *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008).

Haregewoin adopted the reasoning of the District of Columbia Court of Appeals (DCCA) in *Sibley Memorial Hospital v. DOES*, 711 A.2d 105 (D.C. 1998). The Court in *Sibley* remanded the case with instructions that the ALJ must specifically address why the UR report, by a firm called MCRS, was not credited. Specifically,

On remand, DOES must address expressly the differing expert opinions and explain clearly which experts it credits and why it credits them, as well as why the conclusion presented in the MCRS report is without merit. We understand the intent that the District of Columbia Council had in enacting D.C. Code § 36-307 (b)(6), as explained by the Committee Report, was to contain medical costs without diminishing the quality of health care. Hence, a utilization review report presented to DOES that concludes the surgery performed was unreasonable requires DOES to address specifically this report and articulate reasons why this report is being rejected.

Id., 711 A.2d at 107.

The ALJ, after quoting *Haregewoin*, summarized the parties' respective positions on the matter.¹ Bearing in mind the above requirement to list specific reasons why a UR is rejected, the ALJ stated:

The opinion of Claimant's treating physicians is given greater weight than that of Drs. Abend and Padgett. The surgery recommended by Dr. Sethi and Dr. Nair is reasonable and necessary to the course of Claimant's recovery from his 2013 work accident.

CO at 6.

We agree with the Employer that the ALJ does not sufficiently articulate the reasons for rejecting the UR, in accordance with the DCCA's instructions in *Sibley* and the CRB's in *Haregewoin*. As the Claimant concedes in argument, the CO's handling of the issue is "relatively short." Claimant's memorandum, unnumbered at 10. Because we cannot fill the gaps and determine from the record the specific reasons why the ALJ rejected the UR, we are forced to remand the case. See *Mack v. D.C. DOES*, , 651 A.2d 804, 806 (D.C. 1994). If after further review, the ALJ continues to reject the opinion of the UR, the ALJ must give specific reasons why the UR was rejected.

CONCLUSION AND ORDER

The October 31, 2014 Compensation Order AFFIRMED in part, and VACATED in part.

The Compensation Order's conclusion that Claimant's current cervical condition is medically casually related to the May 28, 2013 work accident is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

The Compensation Order's conclusion that the requested surgery is reasonable and necessary is not in accordance with the law. It is VACATED and REMANDED for further analysis consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Heather C. Leslie
HEATHER C. LESLIE
Administrative Appeals Judge

March 19, 2015
DATE

¹ The CO also makes a reference to Claimant's selection of Drs. Minniberg and Fechter as treating physicians. CO at 6. As Claimant has not been treated by either doctor, we will treat this reference as a drafting error.