COMPENSATION REVIEW BOARD

CRB No. 12-159

CLARICE L. PARRAN,
Claimant–Petitioner,

v.

CASH MANAGEMENT SOLUTIONS and CAN INSURANCE COMPANY,
Employer/Insurer-Respondent

Appeal from a Compensation Order on Remand by
The Honorable Anand K. Verma, Administrative Law Judge
AHD No. 11-053, OWC No. 669891

David J. Kapson, Esquire, for the Claimant/Petitioner
Allan H. Kittleman, Esquire, for the Employer-Insurer/Respondent

Before: JEFFREY P. RUSSELL[1] MELISSA LIN JONES, *Administrative Appeals Judges,* and LAWRENCE D. TARR*, Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.
MELISSA LIN JONES, *Administrative Appeals Judge*, dissenting in part.

DECISION AND 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

This appeal follows the issuance on August 31, 2012 of a Compensation Order on Remand (CO I) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the

[1] Judge Russell has 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).

District of Columbia Department of Employment Services (DOES). In that CO I, Claimant was granted authority to undergo additional treatment "for a follow up examination by Dr. Cirillo to undergo removal of the right ankle hardware." Unlike the award made in CO I, the award in the instant COR contained no limiting language purporting to or which can be construed to deny other medical care. For the reasons stated below, we affirm the revised award of medical care.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

On January 8, 2010, Claimant broke her right ankle when she fell on ice which eventually led to a claim seeking an award of 28% permanent partial impairment of the right lower extremity, authorization for medical treatment, and causally related medical expenses. Following a formal hearing, Claimant was awarded 5% permanent partial impairment but denied additional treatment.[2] Claimant timely appealed. This Compensation Order was issued July 19, 2011 (CO I).

In a December 22, 2011 Decision and Remand Order (DRO I), the CRB affirmed the award of 5% permanent partial impairment to Claimant's right lower extremity. However, that portion of CO I denying additional medical treatment was vacated. The CRB specifically stated:

> The law requires we remand this matter for clarification as to the issue regarding authorization for additional medical treatment including surgery. Is the issue causal relationship which would require an analysis of the application of the presumption of compensability or is the issue reasonableness and necessity which would require an analysis of a utilization review report? On remand, the ALJ is directed to clarify the issue and provide the proper analysis of it.[3]

On remand, the ALJ issued a Compensation Order on Remand (CO II) on January 30, 2012 where he again denied additional follow up treatment with Dr. Cirillo, except for the limited purpose of hardware removal and subsequent surgical procedure if needed.[4] Claimant filed another appeal, repeating her arguments challenging the 5% permanent impairment award which was previously affirmed and became the law of the case, and also arguing the ALJ ignored her subjective complaints of ankle pain as well as the medical reports that indicated she would benefit from additional treatment. Employer argued that the COR II should be affirmed as the Act made it liable for medical benefits during the process of recovery from an injury[5] and if additional treatment was recommended in the future, it could raise the issue of reasonableness and necessity.

In a Decision and Remand Order dated May 9, 2012 (DRO II), the CRB remanded again for clarification of the issue regarding authorization for additional medical treatment including surgery

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[2] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (July 19, 2011). (CO I)

[3] *Parran v. Cash Management Solutions*, CRB No. 11-080, AHD No. 11-053, OWC No. 669891 (December 22, 2011), p. 7 (DRO I).

[4] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (January 30, 2012) (CO II).

[5] D.C. Code § 32-1507(a).

to the right ankle. The CRB determined that while the ALJ conducted a review of the medical evidence, the question raised and directed by the CRB in DRO I for resolution by the ALJ remained unanswered and required a further remand.

The ALJ issued another Compensation Order on Remand (CO III) on May 22, 2012. In it the ALJ granted Claimant authorization for additional follow-up treatment with Dr. Cirillo for the limited purpose of hardware removal. Claimant appealed with Respondent filing in opposition. The arguments of both parties mirrored those previously made in the prior appeal. The CRB ruled as follows in a DRO issued August 28, 2012 (DRO III), first from the body of DRO III:

> The statement and argument of what Claimant is seeking, to see the doctor to help her control her pain, amounts to a request for authorization for pain management. To the extent that the ALJ has awarded permanent partial disability that included an element of continuing pain, it could be reasoned that this ongoing pain is subsumed in the medical causal relationship already stipulated to by the parties and therefore Employer would be liable for ongoing doctor's visits to manage this pain. To the extent any type pain management constitutes a new treatment plan, it could be challenged by Employer as to whether it is reasonable or necessary requiring that it be submitted to utilization review. Either way, it is for the ALJ to determine. Until he does, this matter will continue to be returned.
>
> With all due deference to our colleague in dissent, we believe there is a "cognizable claim for medical care" before the ALJ for resolution that requires no conjecture on the part of the CRB. As noted above, Claimant's counsel clarified for the ALJ that at the time of the formal hearing Claimant did not have authorization for follow up visits to see Dr. Cirillo and was therefore requesting that authorization. In addition, as further clarified by Claimant's counsel in the quoted passage above from the HT, Claimant is seeking authorization "to see her doctor to help her control her pain." We have interpreted that to mean pain management. To the extent there is a need for clarity on this issue, as suggested by our colleague, it is the ALJ's job, based on the record created, to clarify the issues raised in order to rule on them. If the record remains unclear, the ALJ has the authority to re-open the record in order to fill in any perceived gaps. To do otherwise, is to allow the ALJ to abrogate his responsibility.

Then from the Conclusion and Order of DRO III:

> As the Compensation Order on Remand of May 12, 2012 makes an award that has not been requested and that is not supported by substantial evidence in the record, it is not in accordance with the law and is Vacated. In addition, the Compensation Order on Remand of May 12, 2012 fails again to provide clarification on the legal issue that was the reason for the CRB remands on December 22, 2011 and May 9, 2012, this matter is again remanded for further consideration consistent with this Decision and Remand Order and well as the previous ones.

On August 31, 2012, the ALJ issued a Compensation Order on Remand (CO IV), which has again been appealed to the CRB by Claimant, and which appeal has again been opposed by Employer. In the CO IV, the ALJ reiterated his earlier assertion that "the only issue presented was nature and extent"[6], and again made an award of medical care. The award was as follows:

> Upon reconsideration of the entire evidence of the record, claimant is authorized for a follow up examination by Dr. Cirillo to undergo removal of right ankle hardware.

In contrast to the earlier award of medical care, the ALJ did not phrase the award such that it could be interpreted as being a denial of any other care that might be requested at some point in the future or as might be deemed necessary upon Dr. Cirillo's evaluation.

In the appeal of the present CO IV, the parties reiterate their earlier positions concerning the schedule award, preserving their positions for any eventual appeal to the District of Columbia Court of Appeals. Their respective arguments in connection with the medical care issue are also the same as before. However, in its Opposition to Claimant's Application for Review, Employer asserts:

> THE REQUEST FOR AUTHORIZATION FOR MEDICAL TREATMENT IS MOOT.
> …
> The only request for further medical treatment received by Employer/Insurer since Claimant reached maximum medical improvement was received on October 5, 2012 when it was communicated by Claimant's counsel. At that time Claimant requested authorization to be evaluated by Dr. Cirillo due to increasing pain in her ankle near the location of the hardware. The request for authorization to see Dr. Cirillo was approved *the same day* and a written authorization was sent to the insurance company directly to Dr. Cirillo's office so that an appointment could be scheduled.
> …
> In light of these recent developments, the medical care issue is now moot.

We shall accept Employer's representation that the medical care authorized in the CO IV has been authorized in writing to Dr. Cirillo on October 5, 2012.

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.[7] *See* D.C. Workers'

[6] The ALJ's persistence in insisting that the only issue was nature and extent is puzzling, given that he also awards medical care which constitutes an action beyond the scope of the issue of nature and extent.

[7] "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. DOES*, 834 A.2d 882 (D.C. 2003).

Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005) (the Act), 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

As before, we will not revisit the issues concerning the award under the schedule, which we have affirmed.

Regarding the claim for medical care, in this most recent iteration, the ALJ has made an award of medical care, the award of which the Employer has now authorized and does not oppose in these proceedings.

Claimant's appeal of the award appears, as a practical matter, to be premised upon a fear that the award of this specific care might somehow be viewed as a denial of some other type of care that may be deemed reasonable and necessary in the future.

Unlike the prior award, this award has no limiting language. It authorizes a specific evaluation, but it is not limited and does not purport to limit treatment. Employer concedes that it continues to be under the obligation to provide reasonable and necessary causally related medical care in its opposition brief, where it states that "If she is denied medical treatment in the future, Claimant retains the option of requesting another formal hearing."

In light of the expressed consent by the Employer to accept the award of the evaluation by Dr. Cirillo, particularly given that the award has, as far as the Employer is able, been complied with, and given that the award in no way limits Claimant's ability to seek additional medical care in the future and as the need arises, we see no need to vacate it. It is indeed moot.

Our colleague in dissent makes a very reasonable point, to the effect that the *body* of the CO IV does again contain language that purports to limit the care awarded to evaluation for hardware removal. We share her frustration at the continued obstinacy, or lack of diligence and understanding on the part of the ALJ. If there were any medical care at issue other than the evaluation and treatment of problems related to the hardware, we would agree that the CO IV would have to be either vacated, amended or remanded by the CRB.

However, since the only medical care identified as being sought before the ALJ related to the hardware, we believe it would unnecessarily delay this case to issue a remand to this ALJ. Therefore, so that the parties (and the ALJ) have no doubt, we specifically state that any future request for treatment would not be barred by *res judicata* or law of the case considerations.

CONCLUSION AND ORDER

Our prior affirmance of the schedule award is reiterated herein for the reasons previously set forth in our prior Decision and Remand Orders. The award of medical care as contained in the CO IV of August 31, 2012, as clarified in this Decision and Order, is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

January 30, 2013
DATE

MELISSA LIN JONES, *dissenting in part:*

As frustrating as it may be to face another remand in this matter, I do not see how it can be avoided.

In the Compensation Order on Remand dated August 31, 2012 (the Compensation Order on Remand that has been appealed this time),[8] the administrative law judge reaches the conclusion that "claimant is authorized for a follow up examination by Dr. Cirillo to undergo removal of the right ankle hardware."[9] He then orders "Claimant's request for follow up with Cirillo is granted for the limited purpose of hardware removal."[10] I do not agree with the majority that this award "[u]nlike the award made in CO I [contains] no limiting language purporting to or which can be construed to deny other medical care."

The plain language in the August 31, 2012 Compensation Order on Remand does limit Ms. Parran's access to medical care. Ms. Parran specifically is limited to a follow up examination with Dr. Cirillo for the purpose of hardware removal.

Moreover, this language is precisely the same as the language in the Conclusion of Law in the May 22, 2012 Compensation Order on Remand: "Upon reconsideration of the entire evidence of the record, claimant is authorized for a follow up examination by Dr. Cirillo to undergo removal of the right ankle hardware.[11] It is substantively equivalent to the Order rendered in that Compensation Order on Remand: "It is ordered claimant is authorized to undergo additional follow up treatment

[8] The permanent partial disability award affirmed in the December 22, 2011 Decision and Remand Order is not on review in this appeal.

[9] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (August 31, 2012), p.4.

[10] *Id*. at p. 5.

[11] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (May 22, 2012), p. 4.

with Dr. Cirillo for the limited purpose of hardware removal."[12] It is even more restrictive than the order in the January 30, 2012 Compensation Order on Remand: "It is ordered claimant is authorized to undergo additional follow up treatment with Dr. Cirillo for the limited purpose of hardware removal and a consequential surgical procedure, necessitated thereafter."[13]

Cash Management Solutions has not entered into any stipulations with Ms. Parran regarding medical care, and the original problem created by the ALJ almost a year-and-a-half ago cannot be resolved by this tribunal's reading words into the Compensation Order on Remand or by inferring a party's intent through a non-binding pleading. The language in the Compensation Order on Remand is the same, and the result should be the same.

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MELISSA LIN JONES
Administrative Appeals Judge

[12] *Id*.

[13] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (January 30, 2012), p. 3.