

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-071

PATTIE L. CRAWFORD,

Claimant-Respondent,

v.

NATIONAL REHABILITATION HOSPITAL,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand Verma
AHD No. 10-380, OWC No. 625645

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 AUG 26 PM 9 50

John C. Duncan III, Esquire, for the Petitioner

Eric M. May, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ MELISSA LIN JONES AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the employer for review of the Compensation Order on Remand issued June 29, 2011 by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ granted the claimant's request for authorization to undergo surgery on her right wrist and on her right thumb.

¹ Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 23, 2011).

BACKGROUND

The claimant, Pattie L. Crawford, was employed as a secretary in employer's hospital. On February 4, 2006, she slipped and fell on water in the parking garage, injuring her hip, right hand and right wrist. She filed a claim for benefits under the Act, which the employer, National Rehabilitation Hospital (NRH) accepted, and pursuant to which paid wage loss benefits and provided medical care. Ms. Crawford received that care from a number of physicians, ultimately coming under the care of Dr. Ricardo Pyfrom, an orthopedic surgeon specializing in hand surgery. After a period of treatment, Dr. Pyfrom recommended that Ms. Crawford undergo surgical intervention to alleviate symptoms in the right wrist that Dr. Pyfrom diagnosed as de Quervain's tenosynovitis, and surgical intervention for "trigger finger" in the right thumb.

NRH obtained an independent medical evaluation from Dr. Stephen Gunther, also an orthopedist specializing in hand surgery. It was Dr. Gunther's opinion that Ms. Crawford does not suffer from de Quervain's tenosynovitis, and that her thumb problems are unrelated to the work injury. NRH also submitted the medical records of the case to H.H.C. Health Insurance Consultants, an accredited utilization review provider for review. Dr. Michael P. Rubinstein, also an orthopedist and hand specialist, opined on behalf of H.H.C. that neither surgical procedure was reasonable and necessary. Based on these opinions, NRH declined to provide the requested medical care.

Ms. Crawford filed an Application for Formal hearing in order to obtain an award for that care. A formal hearing was held October 12, 2010, following which a Compensation Order was issued November 26, 2010, in which the ALJ found that the conditions were causally related to the work injury, and that the requested surgeries were reasonable and necessary.

NRH appealed the Compensation Order to the CRB, which affirmed the determination that the conditions are causally related to the work injury, but reversed and remanded the determination that the surgeries were reasonable and necessary, because it was determined by the CRB that the ALJ failed to apply the proper analytic approach as set out in *Gonzalez v. UNICCO*, CRB No. 07-005 (February 21, 2007) and *Haregewoin v. Loew's Washington Hotel*, CRB No. 08-068 (February 19, 2008).

On June 29, 2011, the ALJ issued a Compensation Order on Remand in which he again found the requested surgeries to be reasonable and necessary.

NRH timely appealed.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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.

DISCUSSION AND ANALYSIS

In the Compensation Order on Remand, the ALJ discussed his view of the utilization review (UR) report and what he interpreted as the basis for its recommendations against performing the requested surgeries:

On behalf of the employer, relying on the Official Disability Guidelines (ODG), Treatment Index, 8th Edition (2010), Dr. Rubinstein performed a utilization review of the reasonableness and necessity of the recommended surgery of the right wrist and right thumb on October 6, 2010. In that respect, he reviewed Drs. Drakes and Pyfrom's treatment notes, as well as the IME report of Dr. Gunther, who negated any causal connection between claimant's right thumb symptoms and the work injury of February 4, 2006. However, despite relevant provision in the ODG which favored surgery of the trigger finger after failed relief from steroid injections, *Dr. Rubinstein based his opinion solely upon Dr. Gunther's negative findings on causality and disallowed the surgery.* [...]

...

Employer also relies on the findings of the utilization review physician, Dr. Rubinstein whose conclusions on the reasonableness and necessity of de-Quervain's tenosynovitis without any physical examination of the claimant *were principally based upon the IME opinion of Dr. Gunther, who noted a negative causal connection between claimant's right wrist and her thumb symptoms and her employment, as well as a negative Finkelstein's test.*

...

Employer's IME physician, Dr. Gunther concurs in the need for the thumb surgery, albeit negating its causal connection to the [work incident]. [...] The utilization review physician, Dr. Rubinstein also *acknowledged the necessity of the right thumb surgery as favored by Dr. Gunther, but dismissed it on the ground it was unrelated to the original injury.*

Compensation Order on Remand, page 6 – 7 (emphasis added).

Review of the UR report, EE 5, reveals that it bears little resemblance to the ALJ's description. Rather:

Reason for Referral:

1. Is it reasonable and necessary for right wrist and right thumb surgeries which have been proposed by Dr. Ricardo Pyfrom?

Recommendation:

1. NON-CERTIFIED

Rationale:

[...]

The injured worker was evaluated on December 22, 2009, by Dr. Ricardo Pyfrom, but the report was handwritten and is essentially illegible. There was no specific detailing as to the treatment plan other than physical findings of a positive Finkelstein's sign and a 1 cm ganglion involving the thumb with positive triggering. No documentation of any specific clinical conservative care was available.

The injured worker was evaluated by Dr. Stephen Gunther, for an Independent Medical Evaluation (IME), on October 22, 2009. It was notable that the injury occurred on February 4, 2006, with the injured worker not complaining of problems involving the hand until 2008. With almost three years after the injury, Dr. Gunther believed the condition had nothing to do with the industrial injury. On examination Dr. Gunther noted the injured worker had a negative Finkelstein's sign as well as a nodule tear near the base of the (MP) metacarpal joint but no triggering was noted. Dr. Gunther felt that the condition involving the thumb may benefit from surgical intervention but had no relationship to the injury. It was also felt that there was no evidence of any findings of a de Quervain's condition. Dr. Gunther stated, "Apparently, Dr. Pyfrom has recommended release of the first extensor compartment for presumed de Quervain's tenosynovitis of the right wrist".

This reviewer does not feel that this would be a good idea. This reviewer does not believe that the patient's pain will go away as it always does if there truly is a de Quervain's tenosynovitis. One does not get tenosynovitis from an accident. The symptoms and signs were inconsistent in this case. She has a completely negative Finkelstein's test, which is a provocative test. Nonetheless, an evaluation on August 17, 2010, by Dr. Pyfrom, indicated that the injured worker had symptoms for which surgery was to be considered. Again, there was no specific documentation of conservative treatment. [...]

1. NON-CERTIFIED- Right wrist and right thumb surgeries which have been proposed by Dr. Ricardo Pyfrom.

The Current clinical information, particularly the IME report, indicated that there was a negative Finkelstein sign and negative findings to support the diagnosis of de Quervain's tenosynovitis. The ODG Forearm, Wrist and Hand Section states, "Trigger finger is a condition in which the finger becomes locked in a bent position because of an inflamed and swollen tendon. In cases where symptoms persist after steroid injection surgery may be recommended."

Regarding de Quervain's tenosynovitis surgery, the ODG state, "Recommended as an option if symptoms, signs and failed 3 months of conservative care with splinting and injection." There was no documentation of any specific splinting, no documentation of an injection for the trigger digit, ganglion mass and/or de

Quervain's condition. Certainly there were questions drawn by Dr. Gunther to consider surgery even without documentation of a relief of symptoms with cortisone injection. Cortisone injections are a reasonable treatment for these types of conditions. They may identify problems that may benefit and alleviate symptomatology. If this were documented to alleviate symptoms to an extent on a temporary basis, then a surgical procedure may be a consideration.

Nonetheless, without documentation of conservative treatment, there was no indication that any surgery should be appropriate or indicated, at this point in time. Therefore, the consideration for surgery had not been satisfied *due to lack of positive provocative clinical findings indicating a proper diagnosis as well as a lack of documentation of conservative care to support surgical indications, as stated within the guidelines.*

UR Report, EE 5 (emphasis added).

The ALJ's assertion that Dr. Rubinstein's opinion is premised upon causal relationship is clearly erroneous, as is the ALJ's assertion that Dr. Rubinstein agrees that the thumb surgery is reasonable and necessary. What the UR report states is that (1) Dr. Rubinstein, like Dr. Gunther, does not believe that the claimant has de Quervain's tenosynovitis, because of a negative Finkelstein's sign, and therefore she should not have the wrist surgery, because the surgery is to treat de Quervain's, a condition that is absent (in his opinion), (2) even if a patient does have de Quervain's, the ODG requirements of a specific course of conservative care prior to surgical intervention have not been met, and Dr. Rubinstein feels that in the absence of that care, surgery is not warranted, and (3) per ODG guidelines, Dr. Rubinstein believes that surgery on the thumb is not indicated until cortisone injections have been undertaken. He does not state an opinion relating to causal relationship,² and does not express the opinion that either of the proposed surgeries are reasonable and necessary.

Similarly, we note that nowhere in Dr. Gunther's IME report (EE 4) is it stated that the wrist complaints are unrelated to the work incident. While he questions the de Quervain's diagnosis as well as Ms. Crawford's veracity (e.g., "The sort of pains which Ms. Crawford claims simply do not remain unabated for three and one-half years. [...] I would point out that the fact that she alternately works 40 and 55-hour weeks and has been doing so for some time is not consistent with all these pains"), Dr. Gunther does not express a causation opinion regarding the wrist complaints. On this issue, both the ALJ and Dr. Rubinstein were in error.

In this appeal, NRH asserts that the ALJ "did not follow the instructions of the Compensation Review Board but, instead, challenges the Board's mandate". In support of this argument, NRH quotes four paragraphs from the Compensation Order on Remand. In those paragraphs the ALJ, relying upon a dissent from a CRB decision, repeated his own view that the UR process is not mandatory, and, despite the fact *Gonzalez* contains extensive discussion of the legislative history

² The sentence "One does not get tenosynovitis from an accident" is not a causal relationship opinion. Rather, it is evident that the doctor is making the point that there has been a mis-diagnosis. We note that it is not entirely clear whether this sentence and the others that follow which begin "This reviewer" are meant to convey Dr. Rubinstein's own views, are his paraphrasing the contents of Dr. Gunther's reports, or both.

and statutory intent, complains that the CRB's decision fails to take legislative history and statutory intent into account.

Ms. Crawford argues that, despite the ALJ's comments about the nature of the UR process and the authority of the CRB generally, the ALJ nonetheless followed the instructions of the CRB, and analyzed the matter in a manner consistent with *Gonzalez* and *Haregewoin*.

We agree with Ms. Crawford that the ALJ's inaccurate criticism of the CRB and its rulings in *Gonzales* and *Haregewoin* are irrelevant. Despite those complaints, the ALJ complied with the previous remand instructions. However, we still must vacate and remand the matter, because although the ALJ did as he was instructed, he did it wrong.

Where, as here, the fact finder so misapprehends the substance and meaning of a piece of evidence, and then relies upon that misapprehension as the principal basis of the ultimate decision, the decision can not be said to be supported by substantial evidence. NRH was and is entitled to a fair consideration of its evidence, and where, as here, that evidence is a UR report, if that evidence is rejected, there must be reasons enunciated and those reasons must be, at a minimum, actual. Here, the ALJ's reasons for rejecting the UR report are erroneous and based upon a clear misunderstanding of the UR report. For that reason, we reverse the award and remand for further consideration, taking into account the actual contents of the UR, IME and treating physician reports, as well as the entire record.

Lastly, because the ALJ will be reconsidering the matter anew, we do not rule upon Petitioner's arguments against, and Respondent's argument in support of, the ALJ's analysis to the effect that the ODG requirements for treatment of the de Quervain's tenosynovitis had been "substantially met" by treatment rendered by Dr. Tristan Shockley between July 6, 2009 and March 25, 2010 and the attendant prescription medications and application of voltaren gel. Compensation Order on Remand, page 7. We do advise, however, that on remand, if the ALJ seeks to rely upon that analysis, he should identify any record medical evidence that, as a medical matter, those treatment modalities are substantially equivalent to the ODG requirements.

CONCLUSION

The determination that the requested medical care is reasonable and necessary contained in the Compensation Order on Remand of June 29, 2011 is not supported by substantial evidence.

ORDER

The award of the requested medical care contained in the Compensation Order on Remand is vacated, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

August 26, 2011
DATE