GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-002

NUBIA MONROY,
Claimant-Petitioner,

v.

NFCGC CAFÉ, LLC and
TRAVELERS INSURANCE COMPANY,
Employer/Carrier-Respondent.

Appeal from a December 7, 2016 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 16-265 OWC No. 723307

(Decided April 11, 2017)

David M. Snyder for Claimant
Scott E. Snyder for Employer

Before GENNET PURCELL, JEFFREY P. RUSSELL and HEATHER C. LESLIE, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Nubia Monroy ("Claimant") worked for NFCGC Café, LLC ("Employer") as a barista since January of 2011. On August 5, 2015, Claimant was injured when she slipped on a wet floor while carrying two trays, weighing about 2 pounds each. Claimant sought emergency care at Inova Alexandria Hospital where Dr. Sora Chung performed a physical exam, took x-rays and diagnosed Claimant with contusions of her left index finger without damage to her nail, her left elbow and her back, with an unspecified laterality.

On August 12, 2015, Claimant returned to the hospital with complaints of back pain and was diagnosed with right-sided low back pain without sciatica and a left elbow contusion.

On August 19, 2015, Claimant was seen by orthopedic surgeon, Dr. Nadim Hallal who diagnosed an elbow contusion and a lumbar strain. He opined that the elbow contusion did not need any further treatment; however he referred her to spine specialist, Dr. Robert Nirschl.

On September 17, 2015, after an examination, Dr. Nirschl opined that Claimant had pre-existing osteoarthritis of the lumbar spine, evidence of lateral tennis elbow with a small bony spur, bursitis at the tip of her left elbow olecranon, and a lumbar muscle strain. Claimant was given an injection in the right posterior iliac crest region, and ordered to undergo physical therapy rehabilitation, particularly for the low back but also for the elbow. Dr. Nirschl also opined that in approximately three weeks, he anticipated that she should be able to return to her usual activities.

By October 8, 2015, Dr. Nirschl opined that the bursitis of Claimant's left elbow had resolved.

Claimant was next referred to Dr. Alexander S. Mark, a radiologist, for magnetic resonance imaging ("MRI") of her lumbar spine. Dr. Mark's findings were that although the alignment was normal the spinal canal was congenitally large, and that the conus and vertebral bodies were normal. His overall impression was that the multi-level disc bulges apparent in the MRI were without spinal stenosis or extruded fragment.

Claimant was referred to Dr. Abraham Kader, a neurosurgeon, for an initial neurosurgical evaluation of her back condition. On December 8, 2015, Dr. Kader reviewed the MRI of Claimant's lumbar spine and gave Claimant transforaminal injections on the right, at the level of L5-S1. Dr. Kader gave Claimant a work excuse form for duration of four weeks, as she was unable to work due to pain. Claimant was also referred by Dr. Kader to Dr. Assaf T. Gordon for pain management.

On January 8, 2016, Claimant complained of lower back pain shooting down her right leg, and Dr. Gordon administered an epidural steroid injection in her back. . He held her out of work on March 8, 2016 for one month after which he gave her another injection.

A February 10, 2016, a repeat MRI of Claimant's elbow revealed a Grade 1 tear of the brachialis tendon at its insertion in the ulna, trace joint effusion without bony edema or an osteochondral defect, but no evidence of a tear of the common flexor or medial collateral ligament.

On March 1, 2016, Claimant again saw Dr. Kader, who held Claimant out of work until her next evaluation on March 8, 2016. Dr. Kader, in his March 8, 2016 treatment plan, stated that he would follow-up with Dr. Nirschl to discuss the results of Claimant's left-elbow MRI and treatment options. In discussing surgical options for Claimant's back and right leg pain, Dr. Kader opined a 90% chance of significant improvement of her pain as a result of the recommended minimally invasive microdisectomy at L5-S1 procedure.

At Employer's request, on March 17, 2016, Claimant underwent a spine-related IME with Dr. Dhruv Pateder, a neurological spine surgeon. Dr. Pateder opined that Claimant's symptoms should have resolved, that she was at maximum medical improvement ("MMI") and that she could return to full duty work.

On August 11, 2016, Dr. Pateder informed Employer had he read the deposition of Dr. Kader and that he disagreed that a microdiscectomy was necessary.

At Employer's request, on March 28, 2016, Claimant underwent a left-elbow-related IME with Dr. Richard W. Barth, an orthopaedic surgeon. Dr. Barth opined that the medical documentation supported a causal relationship between the accident and Claimant's left elbow pain. He further opined that Claimant required no further treatment, had reached MMI and could return to work as a barista without restriction.

On September 13, 2016, a Utilization Review ("UR") report prepared by Dr. Francis Rodkell stated that the surgery recommended by Dr. Kader was not reasonable or necessary.[1]

A dispute arose regarding Claimant's claim and entitlement to benefits and a full evidentiary hearing was held before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"). Claimant's claim for relief and the issues to be decided at the hearing, as described by the ALJ were:

> **CLAIM FOR RELIEF**
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> Claimant seeks temporary total disability benefits from January 22, 2016 to the present, authorization for medical care and treatment, and payment of causally related medical expenses.
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> **ISSUES**
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> 1. What is the nature and extent of Claimant's disability?
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> 2. Are Claimant's medical expenses reasonable and necessary?

Monroy v. NFCGC Café, LLC, AHD No. 16-265, OWC No. 732307, (December 7, 2016) ("CO") at 2.

The CO issued on December 7, 2016, denied Claimant's claim for relief. The Joint Prehearing Statement ("JPHS") signed by both parties and entered into the record indicates the issue of 'arising out of and in the course of/medical causal relationship' was marked as 'no contest'. The Claimant counsel's opening statements in the formal hearing transcript further clarify that the issue of medical causation not at issued between the parties and was not before the ALJ.

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum in Support of the Application for Review ("Claimant's Brief"). In her appeal Claimant asserts that the CO was arbitrary, capricious, was not based on substantial evidence and must be reversed. Claimant's Brief at 1.

Employer opposed the appeal by filing Employer and Insurer's Opposition to Claimant's Application for Review ("Employer's Brief").

ANALYSIS

[1] The Compensation Order incorrectly lists the date of the utilization review report as September 7, 2016.

Claimant's initial argument concerning the ALJ's determination that Claimant did not prove her entitlement to temporary total disability ("TTD") benefits hinges upon the assertion that the ALJ did not apply the correct legal analysis to determine the nature and extent of Claimant's disability, but instead analyzed the nature and extent issue using a medical-causal-based standard of analysis. Claimant's Brief at 8.

In support of this claim, Claimant argues that, "even if [medical] causation had been in issue, the Compensation Order erred because it did not perform the appropriate analysis of medical causal relationship when determining if [sic] medical causal relationship existed." Claimant's Brief at 6.

Our review of the JPHS and the formal hearing transcript reveals that the issue of medical causation was marked as 'no contest' by both parties prior to the date of the formal hearing, and again on the record at the formal hearing. Notwithstanding the ALJ's error in not ensuring the issue of medical causation was marked as 'stipulated' in the JPHS and in the relevant section of the CO, the formal hearing transcript testimony as well as Claimant counsel's opening statements make it clear that the issue of medical causation was uncontested and not before the ALJ.

Addressing then, the first part of Claimant's initial argument, in our review of the CO, we do note that apparently also in error, after detailing the facts of the case supporting Claimant's meeting the 'step one' of the, analysis mandated for establishing *prima facie* entitlement to workers' compensation benefits, the ALJ stated the following:

> Once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. **The presumption has been invoked.**

CO at 6. Italics in original. Emphasis added in bold.

Pursuant to the Act however, there is no presumption regarding the nature and extent of a claimant's disability. A claimant must prove by a preponderance of the evidence the nature and extent of their disability without the benefit of the presumption. *Dunston v. DOES,* 509 A.2d 109, 111 (D.C. 1986) ("*Dunston*") (the presumption "has no application to a determination of the nature and extent of petitioner's injury."); *Golding-Alleyne v. DOES,* 980 A.2d 1209 (D.C. 2009) *quoting Washington Metropolitan Area Transit Auth. v. DOES,* 926 A.2d 140 (D.C. 2007) (holding that plaintiff has the burden to prove the nature and extent of his disability by a preponderance of the evidence). Thus, Claimant must affirmatively show the "nature and extent" of his disability. *Logan v. DOES,* 805 A.2d 237. (D. C. 2002) ("*Logan*"), citing *Dunston.*

Notwithstanding what we determine to be a lapse in analysis, the ALJ nevertheless applied the correct 'step one' of the *Logan* analysis. The ALJ properly set forth the standard for establishing a *prima facie* case of the nature and extent of Claimant's disability as pronounced in *Logan* and we find no reversible error in the first step of her *Logan* analysis.

Once the Claimant demonstrates an inability to perform their usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the

availability of other jobs which the Claimant could perform. See *Logan, supra.* . The employer can also rebut a claimant's case by presenting opposing medical evidence as to the extent of claimant's disability. *Id.*

With regard to Employer's rebuttal evidence, Claimant asserts:

> The Compensation Order relied on Dr. Pateder's medical opinion to say that Ms. Monroy could return to work because "she has no significant injury as a result of the work [injury] of 2015. He stated that her symptoms did not have an organic basis, and was further supported by the imaging studies, which show only mild 'age appropriate and pre-existing degenerative changes at the L4-L5 and L5-Sl levels.' Dr. Pateder opined that the [injury] did not cause nor exacerbate these findings. His opinion rebuts the presumption." **This is a causal relationship opinion.** The Compensation Order is saying that because Ms. Monroy's injuries were not causally related to the work injury, she was not temporarily and totally disabled due to the work injury. Furthermore, Dr. Pateder's medical opinion, eventually relied upon by the Compensation Order, was based on the premise that "The accident did not cause nor exacerbate these findings." EE I at 2. However, the Employer had stipulated to the premise that Ms. Monroy's work injury is causing her current disability. JPHS at 5. The Compensation Order failed to mention this stipulation, and then proceed to ignore this stipulation when determining what evidence exists that Ms. Monroy can return to work despite her disability.

Claimant's Brief at 10 (emphasis in original, citation omitted).

We disagree with Claimant's assertion that the ALJ undertook a strict medical causal-based analysis in her discussion of the issue of the nature and extent of Claimant's disability. The ALJ misstated the standard to be used in a nature and extent analysis stating that Dr. Pateder's opinion 'rebuts the presumption.' Semantics aside, the ALJ's application of the correct standard of legal analysis under *Logan* is evident in the rationale and discussion by the ALJ regarding Employer's rebuttal of Claimant's *prima facie* claim. Notwithstanding the imprecise language of the CO, Dr. Pateder's opinion satisfies the *Logan* requirement. We affirm the ALJ's 'second step' analysis of Claimant's entitlement to TTD pursuant to *Logan.*

Claimant next asserts:

> The Employer did not provide any evidence that there was a job available for Ms. Monroy to perform. *See Joyner [v. DOES],* 502 A.2d [1027] at 1031 [(D.C. 1986)]. The Compensation Order did not discuss Ms. Monroy's residual work capacity by considering her complaints of pain. Instead, the Compensation Order *sua sponte* raised the uncontested issue of causal relationship to determine that Ms. Monroy's work incapacity was not related to the work injury in a number of improper ways.

Claimant's Brief at 10 (citation added).

While the CO did reference Dr. Pateder's opinion that Claimant had no lasting aggravation of her work-related injury and was at MMI, cleared to work full duty, and did not need any additional medical treatment, the ALJ did not discuss whether the Employer provided any evidence that there was a job for Claimant to perform pursuant to *Logan*. It is reasonable to assume that because Dr. Pateder's opinion was that Claimant could return to her full duty job at Employer, a discussion as to any other position or light duty job offered by Employer was not addressed. The ALJ was obviously aware that Dr. Pateder's opinion stated that as it relates to her work injury, Claimant could return to her former occupation, full duty as findings were made supporting these facts. While there are no findings of fact or discussion of Employer's offer of work or a return to work in the CO, as required by *Logan,* the ALJ did summarize Employer's opposing medical evidence as to the extent of claimant's disability--an alternative approach permissible when analyzing the nature and extent of a claimant's condition. *See Dunston, supra* at 111.

The ALJ also found that the opinions of treating physicians Drs. Kader, Gordon and Nirschl, who noted Claimant's unrelated history of anxiety-related symptoms and reflex sympathetic dystrophy secondary to lack of movement, were major components of Claimant's overall current condition. Dr. Nirschl also noted that the bursitis of Claimant's left elbow had resolved and that MRI's of Claimant's lumbar spine and left elbow, previously symptomatic, was normal and showed a normal alignment.

While not noted in the CO, the prevailing law dictates that in assessing the weight of competing medical testimony in workers' compensation cases, attending physicians are ordinarily preferred as witnesses rather than those doctors who have been retained to examine injured workers solely for purposes of litigation. *Stewart v. DOES,* 606 A.2d 1350 (D.C. 1992). Even with this preference however, the trier of fact may choose to credit the testimony of a non-treating physician over a treating physician. *Short v. DOES*, 723 A.2d 845 (D.C. 1998). . And where there are persuasive reasons to do so, a treating physician's opinions may be rejected. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

Accordingly, addressing the third prong of *Logan* whether the Claimant refuted Employer's rebuttal evidence, the ALJ rejected the treating physician opinions of Drs. Kader and Gordon, both whom opined that Claimant required further medical attention for her elbow and back. The ALJ then accepted the third treating physician opinion of Dr. Nirschl, who opined that there was no objective evidence of Claimant work-related injury, and upon further weighing of the evidence, also credited the opinions of Drs. Pateder and Barth.

The ALJ discussed the March 28, 2016 opinion of Dr. Barth who after taking a complete history opined that although the "medical documentation supported a causal relationship between the accident and Claimant's left elbow pain [,]" Claimant was at MMI and [Dr. Barth] "saw no reason why Claimant may not return to work, without restriction, as a barista." Dr. Barth noted further that Claimant's MRI was normal and that he could not find an anatomic reason for her ongoing complaints. CO at 6-7.

Concluding Claimant did not meet her burden to refute Employer's rebuttal evidence, the ALJ stated:

> [Dr. Kader] is the only physician who opined that the MRI of Claimant's spine showed a herniated disc impinging on the S1 nerve root. Dr. Nirschl, Dr. Pateder and Dr. Barth each opined that the MRI of Claimant's lumbar region and her left elbow were normal. Drs. Pateder and Barth opined that Claimant can perform her coffee shop supervisor pre-injury duties. There is no objective evidence showing that Claimant's symptoms are preventing her from returning to work. In the instant case, the weight of the evidence favors Employer, Claimant is no longer temporary [sic] totaled disabled.

CO at 7.

Indeed substantial evidence supports Claimant's inability to refute Employer's rebuttal of her *prima facie* case regarding the nature and extent of her disability. The ALJ's conclusions on this issue in the CO, although lacking analysis and precision in phrasing, flows rationally from the facts, are sufficiently premised on substantial evidence in the record and are otherwise in accordance with the law. The CO's conclusions with regard to the nature and extent of Claimant's injuries are affirmed.

Claimant next argues that the CO's acceptance of the UR report is erroneous as the ALJ did not analyze the utilization review report for defects and again, relied upon a medical causal relationship determination made therein. In support of this claim, Claimant cites to our decision in *Johnson v. WMATA*, CRB No. 09-110 (May 11, 2010), which determined that utilization reviews that base their conclusions as to the reasonableness and necessity of medical treatment by determining that the requested procedure is not medically causally related to the work injury are to be rejected as a matter of law. Claimant also cites to *Sibley Mem. Hosp. v. DOES*, 711 A.2d 105, 107 (D.C. 1998), stating that "when provided, a utilization review report must be specifically commented on by the Administrative Law Judge." *Id.*

In *Sibley*, the DCCA addressed the standards by which an ALJ is to review a UR report. In remanding a decision denying Claimant entitlement to benefits, the s, the DCCA reasoned:

> [. . .] 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.

Sibley Mem. Hosp. v. DOES, 711 A.2d 105, 107 (D.C. 1998)

In further support of this claim, Claimant asserts:

> The Compensation Order recited the conclusions of the utilization review, in which the UR found that the requested discectomy surgery was not causally related to the work injury, and was therefore not reasonable or necessary. The Compensation Order did not weigh that opinion with Dr. Kader's medical opinion and reject one or the other, as required by this Board. See *McCormick [v. Children's Nat'l Med Center,* CRB No. 09-016 (January 2, 2009)] , *supra* at *12. Instead, the Compensation Order accepted the UR report without any analysis because Dr. Kader had not requested reconsideration, a practice explicitly prohibited by this Board in *McCormick. See id.* at *15.
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> * * *
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> However, the Compensation Order cannot, as a matter of law, accept the UR report because it determined the surgery was not reasonable or necessary because the UR report concluded that the work injury did not cause Ms. Monroy's pain. See CO at 8. The UR reports is therefore making a causal relationship determination, which is not permitted by the precedents of this Board. *See Johnson [v. WMATA,* CRB No. 09-110 (May 11, 2010], *supra* at *10-11.

Claimant's Brief at 12 (full citations added).

Employer asserts in opposition generally:

> Dr. Rodkell clearly states, with supporting facts and opinion, why he feels that the surgery was not reasonable or necessary. Neither of the claimant's treating physicians, Dr. Kader or Dr. Nirschl provided comment in response to Dr. Rodkell's findings; therefore Judge Brown accepted the undisputed opinion of Dr. Rodkell.

Employer's Brief at unnumbered page 6.

In summarizing the UR report findings the ALJ stated:

> There is no comment from Dr. Kader or Dr. Nirschl regarding the September 7 [sic], 2016 UR; therefore, the opinion of Dr. Rodkell is accepted.

CO at 8.

The DCCA has specifically opined on the utility and legislative intent of the UR report provisions of the Act noting its role, and the safeguards to prevent abuse of the UR mechanism. In general, UR's are available to any party seeking a third-party opinion on the "necessity, character, or sufficiency" of medical care or service. D.C. Code § 32-1507 (b) (6)(B) ("When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual."). This can be done before, during, or after medical treatment. *Id.* The UR report is not dispositive however; and for this reason, unresolved disagreements between a UR report and a medical care

provider are submitted to the ALJ during the formal hearing process for resolution. *See* D.C. Code § 32-1507(b) (6) (D). *See also, Reynolds* v. DOES, 86 A.3d at 1163-1164.

We agree with Claimant's argument on this issue and determine that the ALJ erred in stating that Drs. Kader and Nirschl had not expressed opinions on the reasonableness and necessity of Claimant's back treatment surgical request. Although there was no request for reconsideration made by any of Claimant's treating doctors, and there are no findings of fact regarding any *explicit statements* from Drs. Kader and Nirschl referencing the UR report findings, absent clear evidence to the contrary, it is logical to conclude that Dr. Nirschl's continued referral of Claimant to Dr. Kader, a spinal neurosurgeon, is an implicit statement that the doctor believes it is at a minimum reasonable for Claimant to receive the requested back treatment surgical procedure recommended from that consultation.

Likewise, notwithstanding the ALJ's findings that Dr. Kader did not respond to the UR report findings, it is also logical to conclude that Dr. Kader's recommendation that Claimant undergo the surgical procedure, particularly as expounded upon in detail in his deposition testimony, serve as factual evidence in need of resolution given the UR report findings.

We cannot predict how the ALJ would have resolved this discrepancy between the medical opinions presented and the UR report. While the record may contain sufficient evidence on which factual findings could be made on the disputed issues in this case, it is the task of the ALJ to describe and identify the record evidence upon which a Compensation Order's legal conclusions are based.

And, as we often point out, we are not empowered to fill in the gaps in fact finding in a Compensation Order that comes before us on appeal. *See King v. DOES,* 742 A.2d 460 (D.C. 1999). We can no more fill in the gaps in our review of a Compensation Order than can the DCCA. *See also Brown v. DOES*, 700 A.2d 787, 792 (D.C. 1997) ("the agency is required to make basic findings of fact on all material issues. Only then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law" (citations omitted). "If the agency 'fails to make a finding on a material, contested issue of fact, this court cannot fill the gap by making its own determination from the record, but must remand the case for findings on that issue.'" *Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994) (quoting *Colton v. DOES*, 484 A.2d 550, 552 (D.C. 1984)); *Williams v. District of Columbia Public Schools*, CRB No. 13-100 (November 5, 2013); *Eze v. Children's National Medical Center*, CRB 16-007 (June 8, 2016).

We note that, as affirmed in this order, Claimant's ineligibility to receive disability benefits under D.C. Code § 32-1508 does not necessarily preclude her eligibility for medical benefits, including the payment of medical expenses under D.C. Code § 32-1507. The right to medical benefits is separate and distinct from the right to income benefits. Under the Act, medical benefits are not subject to the same limitations as are disability income benefits, but are to be furnished by the employer "for such period as the nature of the injury or the process of recovery may require." see *Santos v. DOES*, 536 A.2d 1085, 1089 n.6 (D.C. 1988); 2 A. LARSON, THE LAW OF WORKMENS' COMPENSATION § 61.11 (b), at 10-773 (1987).

CONCLUSION AND ORDER

The Compensation Order's conclusion that Employer's medical evidence was sufficient to rebut Claimant's *prima facie* case of temporary total disability and the Administrative Law Judge's determination that Claimant failed to prove her entitlement to temporary total disability benefits is supported by substantial evidence are AFFIRMED.

The Compensation Order's denial of Claimant's claim for surgical treatment for her back is VACATED and hereby REMANDED for a reevaluation of the Utilization Review report, consideration of Claimant's treating physicians' testimony, and reanalysis of Claimant's request for surgical treatment for her back as discussed herein.

So ordered.