

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-143

JACK STAYNER,
Claimant-Respondent,

v.

W. A CHESTER, INC.
and BROADSPIRE CO.,
Employer/Third-Party Administrator-Petitioner.

Appeal from a November 6, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 12-058B, OWC No. 136638

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 29 PM 12 21

Joshua A. Davenport for the Claimant
Tony D. Villeral for the Employer

Before: JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *CHIEF Administrative Appeals Judge*

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant sustained a work related herniated lumbar disc at L4-L5 on December 21, 1987. He subsequently underwent a discectomy, and later a fusion, which failed. Although given the option of a second fusion, Claimant declined. Since that time, Claimant has undergone extensive medical treatment and physical therapy.

In a Compensation Order issued April 29, 2014, Claimant's request that he be provided with non-generic Percocet, aqua therapy, and a Tempur-Pedic adjustable bed was granted as being reasonable and necessary medical expenses and care.

A dispute arose concerning whether Employer has complied with the Compensation Order, which dispute was heard by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) on October 15, 2014.

On November 24, 2014, the ALJ issued a Compensation Order (the CO), in which the claims for relief were stated to be that Claimant sought an order finding Employer to be in default and an award of penalties under D.C. Code § 32-1515.

The issue to be resolved was identified to be “Is employer in default of the April 29, 2014 Compensation Order?”

In the CO, the ALJ found that Employer had failed to provide the Tempur-Pedic bed in a timely fashion, that Claimant purchased a motorized base and Tempur-Pedic mattress for \$6,104.24, and that Employer had only reimbursed Claimant \$2,269.29. The ALJ determined Employer to be in default of the difference, rejecting Employer’s argument that a motorized bed had not been awarded. The ALJ reasoned that, in the absence of specialized evidence to the contrary, an “adjustable Tempur-Pedic bed” can reasonably be interpreted to be “adjustable because it is motorized”. The ALJ also awarded a 20% penalty calculated on the full cost of the bed, plus the remaining balance due on the difference between what Employer had previously paid and what the bed cost.

The ALJ also found that, although Claimant had not “cooperated” with Employer’s attempts to arrange aqua therapy through its vendor of choice, Align Networks, that Claimant’s desire to obtain the therapy through another facility was “reasonable”, and ordered Employer to provide the therapy through Claimant’s preferred provider, Virginia Mennonite Retirement Community (VMRC).

Lastly, the ALJ found that Claimant paid for pain management services out of his own pocket through “Altmed” for which he has not been reimbursed. However, she denied the claim for a default order for the pain management services, because the prior compensation order did not order Employer to reimburse Claimant any specific dollar amount. Nonetheless, the ALJ ordered that “Employer authorize the pain management in advance so that claimant is not required to pay for it himself....”

Employer appealed the CO by filing an Application for Review and Memorandum in Support thereof (Employer’s Brief) with the Compensation Review Board (CRB). In the appeal, the only issue Employer raises is with respect to the ALJ’s order that Employer “authorize the pain management at Altmed in advance”, arguing that said order is “arbitrary, capricious and an abuse of discretion.” Employer’s Brief, p. 4.

Claimant opposed the appeal by filing “Claimant-Respondent’s Opposition to Employer/Carrier-Petitioners’ Application for Review” and memorandum in support thereof (Claimant’s Brief). In his opposition, Claimant opposes the appeal, arguing that Claimant requires advance authorization to insure future compliance with the previously awarded medical benefits.

Because the order directing Employer to “pre-authorize” pain management with a specific provider is an issue that was not properly before AHD, it is vacated. The remainder of the CO has not been appealed and therefore remains in effect.

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 on Remand are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. See *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is 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

In the earlier Compensation Order, Claimant has already been awarded benefits including pain management and aqua therapy. Employer was not under an order to provide therapy at a place of Claimant's choosing. The ALJ found that Claimant was contacted by an "employee of Align [Networks] to schedule aquatic therapy and claimant told the representative he didn't know about the therapy and was going to call his attorney. Claimant refused to attend the aquatic therapy arranged by the adjuster" (CO, p. 2), and "refused to schedule the therapy with the clinic as advised by [claims adjuster] Javid" (CO, p. 5). The ALJ also found that "it is clear employer attempted to arrange for the aquatic therapy ordered in the Compensation Order, had Claimant cooperated and contacted the clinic to schedule the therapy" (*id.*).

The ALJ then found that it is "reasonable for claimant to have the therapy at the VMRC [Virginia Mennonite Retirement Community]. Accordingly employer is ordered to arrange for claimant to undergo the ordered aqua therapy at the VRMC" (*id.*), and to "authorize the pain management in advance so that claimant is not required to pay for it in advance and to arrange for claimant to have aqua therapy at the VCMR", (CO, p. 6).

Regarding the aquatic therapy, the ALJ addressed an issue that was not before her, *i.e.*, the reasonableness and necessity of Claimant being permitted to obtain aqua therapy at a specific facility. No utilization review evidence is contained in the record or referenced in the CO addressing this point, and there was no request for modification of the prior Compensation Order to specify that the aqua therapy be obtained through VCMR. Accordingly, the instruction to authorize aqua therapy at a specific facility was beyond the jurisdiction of AHD at this time, and is vacated. Employer remains obligated to provide the therapy, and unless there are legitimate reasons why the program offered to Claimant by Employer is inappropriate, they are permitted to select the provider, so long as they do so in a timely manner.

Regarding the "pre-authorization" for pain management, Employer is already under an order to provide pain management services. As the ALJ noted, under existing law, if Employer fails to

provide those services in a timely manner, Claimant is permitted to obtain those services on his own and have a default order and penalties awarded in the amount of the costs of those services. *See, Tagoe v. Howard University Hospital*, CRB No. 10-007, AHD No. 03-287, OWC No. 568310 (July 30, 2010) (*Tagoe II*). This Claimant has not done.

However, this is not the only remedy available under the Act. D.C. Code § 32-1522 (c) provides:

If any employer ... fail[s] to comply with a compensation order making an award that has become final, any beneficiary of the award or the Mayor, may apply for the enforcement of the order to the Superior Court of the District of Columbia for the enforcement of such order and upon a showing that such employer ... ha[s] failed to comply therewith, the Court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person ... compliance with the order.


It may be that an employer has failed to provide a medical service that it is under a legal obligation to provide pursuant to a compensation order. However, the remedies available under the Act are (1) a default order in an amount for the reimbursement of the costs incurred by a claimant to obtain those services on his or her own, under *Tagoe II*, plus an award of a 20% penalty, and/or (2) a Superior Court action premised upon D.C. Code § 32-1522 (c). Unlike the authority to declare an employer in default of *payments* of compensation, the Act bestows authority to determine and enforce other orders elsewhere.

Accordingly, the order directing Employer to “pre-authorize” medical services is vacated. Indeed, it is redundant: Employer is under an order to provide the services. “Pre-authorization” requirements which prevent a claimant from obtaining specific medical care in a timely manner may be the basis for a finding that an employer has not provided the services under the Act, but jurisdiction to order specific performance is solely vested in the Superior Court of the District of Columbia.

CONCLUSION AND ORDER

Because the order directing Employer to “pre-authorize” pain management with a specific provider is an issue that was not properly before AHD, that portion of the order is vacated. The remainder of the CO has not been appealed and therefore remains in effect.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

April 29, 2015
DATE