GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-075

SHIRLEY G. LATTIMORE,

Claimant–Respondent,

v.

CVS PHARMACY, INC.,

Self-Insured Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 09-243D, OWC No. 641909

Joel E. Ogden, Esquire, for the Petitioner

Matthew Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] HEATHER LESLIE,[2] AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

In a Compensation Order issued October 22, 2010, Respondent Shirley Lattimore was awarded temporary total disability benefits and causally related medical care for injuries sustained to her neck and low back in a work related accident, the details of which are of no relevance to this appeal. Her employer, Petitioner CVS Pharmacy (CVS), paid the temporary total disability benefits awarded and provided the medical care as ordered. Thereafter, CVS instituted vocational rehabilitation services (VR) through a vocational services counselor (VSC).

[1] Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

[2] Judge Leslie was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

After a period of time, CVS determined that Ms. Lattimore's conduct in connection with the VR program was lacking in cooperation.

Also, Ms. Lattimore's treating physician, Dr. Reza Ghorbani, recommended a course of medical care to treat the neck and back injuries, which therapeutic course included cervical and lumbar steroidal injections and the use of a number of prescription medicines.

CVS declined to provide the requested medical care, based in part upon its belief, buttressed by an independent medical evaluation (IME) from Dr. Robert O. Gordon, that Ms. Lattimore's work related injuries had resolved. CVS's declining to provide the care was premised further upon the outcome of a Utilization Review (UR) process, which resulted in a UR report which declined to certify the requested medical care's medical necessity.

Ms. Lattimore's claim for provision of medical care, and CVS's request for (1) termination of benefits based upon the theory that the work related injuries had resolved, and (2) in the alternative, suspension of benefits based upon Ms. Lattimore's alleged non-cooperating with VR, were presented for resolution to an Administrative Law Judge (ALJ) in the District of Columbia Department of Employment Services (DOES) at a formal hearing conducted on March 15, 2012. Following that hearing, a Compensation Order was issued April 27, 2012, in which the ALJ granted Ms. Lattimore's claim for continuation of temporary total disability benefits, and granted her request for authorization for cervical and lumbar epidural steroidal injections.

CVS filed a timely appeal, to which appeal Ms. Lattimore filed a timely opposition.

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.

DISCUSSION AND ANALYSIS

At the outset we note that in the preliminary discussions at the time of the formal hearing, while medical causal relationship of the claimed disability to the work injury, and the nature and extent of disability were identified as issues in dispute,[3] the issue of reasonableness and necessity of medical

[3] It may be that all that was meant by "nature and extent" was CVS's claim that Ms. Lattimore's benefits should be suspended for non-cooperation with VR. There is some indication in the hearing transcript that CVS was about to contest whether Ms. Lattimore's condition has improved such that she is capable of performing her pre-injury job, and

care is not identified as an issue. HT 6 – 13. However, in both opening statements, counsel for the parties indicated that the issue of the reasonableness and necessity of epidural injections was before the ALJ. Further, utilization review (UR) had been undertaken, and the ALJ awarded the claimed medical care. See, HT 20, 32, and EE 6. Thus, we conclude that the issue was before the ALJ.

Further, the issue of whether Ms. Lattimore's current neck and back complaints are medically causally related to the work injury was before the ALJ, it being CVS's view that a new IME report by Dr. Robert Gordon established a change from the earlier Compensation Order, severing the previously established medical causal relationship. HT 12.

CVS has not appealed the ALJ's causal relationship determination in Ms. Lattimore's favor. Thus, we are faced with the issues relating to the reasonableness and necessity of additional medical care as recommended by Dr. Reza Ghorbani, and the question of whether Ms. Lattimore's benefits should be suspended for non-cooperation with vocational rehabilitation.

Reasonableness and Necessity of the Claimed Medical Care

We note that the District of Columbia Court of Appeals (DCCA) and the CRB have established that the opinion of the UR physician is to be accorded initial evidentiary weight equal to that of a treating physician's opinion. As such, if a UR recommendation is rejected, the reasons for that rejection must be spelled out to the same extent that rejection of the treating physician preference requires explanation under the treating physician preference rules in this jurisdiction. See, *Sibley Memorial Hospital v. DOES and Ann Garrett, Intervenor (Garrett)*, 711 A.2d 105 (D.C. 1998) and *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A (February 19, 2008).

In this case, the requested treatment includes two types of injections, cervical and lumbar epidural steroid injections, and the treating physician who recommends them states that they will be necessary every six months for the rest of Ms. Lattimore's life.

Although these injections are the only medical care that Ms. Lattimore addressed in her counsel's opening statement, and are the only care referred to in the award made by the ALJ, the UR report addressed four additional treatment recommendations, all in the nature of medication, which were based upon the treating physician's current treatment regimen: Oxycodone, Soma, Mobic and Trumicin cream. While approving the continued use of Oxycodone, the UR report rejected the Mobic and Trumicin cream recommendations as being not medically necessary, and approved a titrated reduction of Soma over the course of a month. And, review of the hearing transcript demonstrates that CVS also opposed the reasonableness and necessity of the additional ongoing medical care to the extent that the UR report did not certify it as being reasonable and necessary. HT 33.

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is hence no longer temporarily totally disabled. See, HT 6, line 19, to HT 17, line 4. However, they have not raised that issue in this appeal, so we need not address it.

In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 *et seq.*, (DCAPA), an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

First, because the Compensation Order is silent on the question of the ongoing provision of Soma, Mobic and Trumicin cream, it does not dispose of all the issues in dispute, and the matter must therefore be remanded to the ALJ for further consideration of the reasonableness and necessity of these recommended treatment modalities.

Second, CVS also complains that the award of the epidural injections "every six months for life" is improper, and we agree that it is improper, to make a prospective award of medical care that goes beyond the specific immediately anticipated but disputed medical procedure or care, based upon the present needs and condition of a claimant. An award may not be based upon predictions or surmise concerning what that condition might be at given points in time in the future.

The award of medical care reads "Claimant's claim for authorization for recommended epidural steroid injections for her lumbar and cervical spines is **GRANTED**." The award is not explicitly stated to be "every six months for life", but it is not limited in any way to anything other than that. The Claim for Relief set forth in the Compensation Order is similarly ambiguous. It is set forth as "Claimant seeks an award under the Act of continuing temporary total disability benefits and authorization for epidural injections and causally related medical expenses."

Therefore the matter must be remanded so that, if after further consideration an award is made authorizing epidural injections, the award must be described in sufficient detail so that it is possible to discern what has been awarded. Any such award must be limited in scope such that it does not constitute an overly broad order to provide a series of treatments indefinitely into the future. The entitlement to obtain medical care may only be premised upon the condition of a claimant at the present time, and any award of disputed medical care must be limited to address conditions as they currently exist. Accordingly, all that the ALJ can award *vis a vis* the disputed injection therapy would be the next series of injections contemplated. If authorized and undertaken, it would remain to be seen whether, thereafter, additional injections are reasonable and necessary, and if a dispute arises in connection with some future course of recommended care, it can be brought to the agency for formal or informal resolution at that time.

Third, there are other irregularities in the manner in which consideration of the need for the injections was undertaken.

The portion of the Discussion section of the Compensation Order which appears to consider whether the injections are necessary describes some of the UR report, some of the competing medical opinion evidence, and the fact that Ms. Lattimore did report improvement from a series of three lumbar injections undertaken between December 2010 and February 2011. It looks on the surface to be a discussion considering the relative merits of the parties' evidence on the issue of

reasonableness and necessity. However, the concluding two sentences of this portion of the Compensation Order read as follows:

> As such, Claimant's need for a series of future lumbar and cervical injections to ameliorate the pain and radiculopathy is well supported. In other words, Claimant has satisfactorily carried her burden of proving that her condition since the last compensation hearing has not changed to warrant any modification of the October 22, 2010 award.

Compensation Order, page 7 – 8. This sequence of sentences is inscrutable: the second sentence does not appear to relate to anything stated in the first sentence. Rather, they appear to express two completely distinct, possibly related, but independent thoughts. We don't know how to reconcile these two sentences, which purport to be saying the same thing, yet which do not.

Further, while the ALJ has given some explanation as to why he deems the injections reasonable at this time, including the fact that Ms. Lattimore has reported benefiting from them in the past, he bases the award in part upon an apparent misreading of the UR report.

The ALJ demonstrates some confusion concerning the content and meaning of the UR report and/or Dr. Ghorbani's records. The ALJ states that "The repeat epidural lumbar injections, *as recommended by the UR*, have demonstrated continued objective gains in the degree of Claimant's lumbar and right leg radicular pains, reduced from a the scale 8/10 to 5/10." Compensation Order, page 7. The injections that resulted in the reported reduction of pain from "8/10 to 5/10" were those performed with CVS's prior approval. See and *cf.* CE 14, Bates page 19, Dr. Ghorbani note February 2, 2011, and Dr. Ghorbani note, Bates page 31, December 29, 2010; see also, CE 14, Bates page 16, narrative summary of office visits, entry for November 18, 2010 referencing "W/c [worker's compensation] authorized her injections". These injections had occurred prior to the UR process, the report of which is dated February 23, 2012. EE 6.

The ALJ also wrote that "The general consensus recommendation under the UR was for no more than four blocks per region per year. The UR also stressed that repeat injections should be based on continued objective documented pain and function response". *Id.*

This appears to us to be a misunderstanding of the UR report. There is no portion of that report that contains a "general consensus recommendation" as described by the ALJ. Rather, it appears that the ALJ has interpreted a portion of the "Guideline/Reference Used: *Evidence citations for lumbar epidural steroid injection*" on EE 6, Bates page 87 of CVS's exhibits, being the 2nd unnumbered page of the UR report, as being a recommendation for treatment in this case. It is not. Rather, this portion of the UR report represents a distillation of the parameters in which, under the standards accepted by the UR report's author, lumbar epidural steroid injections would be appropriate, and conversely, situations under which they would not. It is explanatory material meant to elucidate the reader as to why Dr. Ghorbani's recommendations for epidural steroid injections, either at this time or "for life", are not certified.

Further, while the UR report does reference that Ms. Lattimore reports past benefit from lumbar epidural injections, nowhere in the UR report that we have seen, or to which we have been directed

by Ms. Lattimore or the ALJ, is it *recommended* that Ms. Lattimore receive injections. The report could not be clearer: they are *not* certified as being reasonable and necessary. Again, the ALJ's description of them as having been "recommended by UR" evinces a misreading of the UR report.[4] The heart of the UR rationale is found at point "(9)" on EE 6, Bates page 87 of the UR report: "Current research does not support a routine 'series-of-three' injections in either the diagnostic or therapeutic phase. We recommend no more than 2 [epidural steroid injections] for the initial phase and rarely more than 2 for therapeutic treatment." The same is the heart of the non-certification recommendation on the cervical steroidal injection issue. See, EE 6, Bates page 89, point "(9)".

As discussed above, UR opinion is entitled to the same level of deference as is treating physician opinion. In this case, the UR report unequivocally rejects the recommendations for additional lumbar and cervical epidural steroidal injections. The ALJ does not address the recommendations contained in the UR report, or explain why they are rejected. Further, the ALJ appears to misread the contents of the UR report, at least insofar as we can understand what the ALJ is stating relative to his understanding of the report and its contents. A conclusion that is based upon a mistake as to the meaning and content of the record is not based upon substantial evidence.

Accordingly, the award of the epidural steroidal injections is vacated as being not based upon substantial evidence, being overly broad inasmuch as it appears to grant a claim for future procedure on a speculative basis as to what Ms. Lattimore's condition might be in the future, and because the ALJ failed to adequately explain why the recommendations in the UR report were rejected.

Because the record can be read to support the position of either party, we must remand to the ALJ for further consideration. On remand, the ALJ must accurately assess and fully consider the contents of the relevant parts of the record, and explain why he finds the requested medical care reasonable and necessary, or not, as the case may be, including in his explanation why either UR or Dr. Ghorbani's opinions are accepted and rejected as the case may be. The ALJ shall state explicitly what care is being authorized, if any, and what care is being denied, if any, and state the reasons for the award or denial.

Non-Cooperation with Vocational Rehabilitation.

Regarding the level of co-operation with VR, the ALJ made the following finding of fact in the Findings of Fact section:

> Claimant substantially complied with the Employer's vocational rehabilitation efforts by applying to 46 out of 80 employment opportunities furnished by VSC. The record does not reveal a pattern of Claimant's willful act or omission in cooperating with the Employer sponsored vocational rehabilitation plans.

[4] Again, quite possibly, the ALJ is misreading the portion of the report's justification/explanatory references wherein the conditions and guidelines by which certification decisions are made are set forth. Those sections are rather tersely worded and might be read as being recommendations for treatment plans in the given case, as opposed to being descriptions of required scenarios for justification of a contemplated treatment regimen. Regardless, the UR report does not recommend any epidural steroid injections be certified.

Compensation Order, page 6. We shall assume that the ALJ meant the final sentence to read something like "The record does not reveal a pattern of Claimant's willful acts or omissions amounting to non-cooperation with the Employer sponsored vocational rehabilitation plans."

Although not discussed in the Findings of Fact section of the Compensation Order, the ALJ makes additional findings in the Discussion section. There he wrote:

> … Claimant applied for 46 employment opportunities within a four-month period, however, she received no offers of employment. (HT 115-16) The VSC also testified that although Claimant was tardy in showing up for 5 out of 13 meetings, she did attend the scheduled meetings. (HT 96-97). Further … Claimant informed the VSC whenever she could not keep up her appointments. The VSC testified that Claimant missed two meetings as scheduled. In one of those meetings, Claimant provided a doctor's appointment letter as an excuse and in another, she communicated to the VSC in advance that she could not make it because of her observance of Good Friday. (HT 7-99) [sic].

Thus, the ALJ has found that Ms. Lattimore failed to apply for nearly half of the positions identified as potentially suitable employment opportunities; the ALJ made no findings as to why Ms. Lattimore failed to apply for these 34 positions, and thus did not find that the failure to apply for them was for some valid reason. The ALJ, after quoting from D.C Code § 32-1570 (d), thereupon concluded:

> Review of the VSC testimony, including his various reports contained in EE 4 discloses a few instances of non-compliance with the established vocational rehabilitation protocols, where Claimant was either late in participating in the pre-scheduled meetings or simply did not show up at the meeting. Nonetheless, on those occasions where Claimant could not attend meetings, she presented a valid written excuse or other wise notified the VSC of her inability to attend the meeting.

Thus, the ALJ found that Ms. Lattimore was late to almost half of her vocational counseling meetings. Although the ALJ found that her reasons for failing to appear altogether at two additional meetings was reasonable, the ALJ made no findings as to the reasons why Ms. Lattimore was late to five out of thirteen meetings, and thus made no determinations that her lateness was for a good or valid reason. The ALJ went on:

> The undersigned is also mindful that certainly, it was error on the part of the Claimant to disclose her existing infirmities to a would-be employer before being asked to so disclose in a job interview. With such disclosure, any favorable consideration for employment would be foreclosed and would normally amount to her voluntary removal from the job market. (HT 101). Nevertheless, this singular act of indiscretion [footnote to be quoted, *post*] absent a pattern of non-cooperation with Employer's vocational efforts, does not rise to the level necessary to constitute unreasonable refusal or acceptance of the vocational rehabilitation within the meaning of §32-1507 (d).

In the footnote, the ALJ wrote "The record evidence demonstrates no specific incident or incidents where Claimant made the alleged disclosures to a would-be employer." Thus, while apparently finding that Ms. Lattimore did engage in some level of job interview sabotage, he didn't conclude that she did it frequently.

We are at a complete loss to understand how, having found that Ms. Lattimore had failed to apply to nearly half of the jobs that were identified as being suitable potential employment, that she was late to five out of thirteen counseling meetings, that she engaged in at least some degree of sabotage, and having made no additional findings explaining why these failures to adhere to the "protocol" occurred, the ALJ could characterize the level of compliance as containing but "a singular act of indiscretion".

Beyond this, the ALJ concedes that this "singular act of indiscretion" would normally call for suspension of benefits, yet he finds that such a sanction is not called for in this case because a "pattern of non-cooperation" is otherwise "absent".

This somewhat astonishing statement is a conclusion that does not flow rationally from the facts as the ALJ found them. Four months of late attendance, failure to apply for jobs, and conduct amounting to job search sabotage would, in any rational view and absent explanatory counter findings, constitute a pattern of non-cooperation.

And, the ALJ's analysis does not even take into account the other aspects of Ms. Lattimore's conduct as alleged by the VSC that he felt undermined the job search process: in addition to prefacing her employment interviews by advising the potential employers that she suffered from a disabling injury, she also is reported to have advised prospective employers that she didn't think she could perform the prospective jobs, and that she could not pass a drug screening test. HT 101. Further, the ALJ never discusses the VSC's testimony that Ms. Lattimore's self-directed job search, as evidenced by her job search logs, demonstrated that she was only inquiring to two potential employers a week, as opposed to the recommended five. Lastly, the ALJ completely ignores perhaps the most significant testimony from the VSC, that being that following receipt of a letter from him attempting to reschedule the Good Friday meeting, Ms. Lattimore called and advised that she "didn't want to be in rehabilitation counseling anymore" (HT 103), thereby ending rehabilitation efforts.

It is undeniable that under some circumstances a withdrawal by a claimant from the VR process is justifiable, but there must be a reason or a justification. Without more findings concerning the reasons for the withdrawal such a cessation of participation would, on its face, appear to amount to non-cooperation under the Act.

We recognize that Ms. Lattimore testified to a somewhat different version of the course of her VR program, including her view that the counselor "ridiculed" or "belittled her" on occasion, and that she was diligent in her job search. See, e.g., HT 80. However, the ALJ made no factual findings of that nature, and did not base his legal conclusion that Ms. Lattimore's participation level was not unreasonable on those allegations.

Rather, the factual findings that he did make concerning the process (which are supported by substantial evidence) do not lead to the rational conclusion that Ms. Lattimore was cooperative. Indeed, the ALJ's characterization of her participation as including but one failure to cooperate (in the ALJ's words, a "singular act of indiscretion") is (1) demonstrably wrong, given that there were at least 34 failures to apply for jobs, at least one act of job placement sabotage, and five late arrivals at meetings, and (2) inconsistent with the numerous failures that he identified in both the Findings of Fact and Discussion sections of the Compensation Order.

Again, in a contested case, in order to conform to the requirements of the DCAPA, an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings, and the failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins, supra*.

In this case, because the conclusion that Ms. Lattimore cooperated with VR does not flow rationally from the facts that were found by the ALJ, we must vacate that conclusion. Because the record is or may be capable of more than one conclusion in that regard, we must remand for further consideration of the issue and of CVS's request that Ms. Lattimore's benefits be suspended for the duration of her non-cooperation.

CONCLUSION AND ORDER

Because the Compensation Order is silent on the question of the ongoing provision of Soma, Mobic and Trumicin cream, it does not dispose of all the issues in dispute, and thus it is not in this regard supported by substantial evidence. The matter is remanded to the ALJ for further consideration of the reasonableness and necessity of these recommended treatment modalities.

The award authorizing the provision of the epidural steroidal injections is vacated as being not based upon substantial evidence, as being overly broad inasmuch as it appears to grant a claim for future procedures on a speculative basis as to what Ms. Lattimore's condition might be in the future, and because the ALJ failed to adequately explain why the recommendations in the UR report were rejected.

The matter is remanded to the ALJ for further consideration. On remand, the ALJ must accurately assess and fully consider the contents of the relevant parts of the record, and explain why he finds the requested medical care reasonable and necessary, or not, as the case may be, including in his explanation why either the UR or Dr. Ghorbani's opinions are accepted and rejected as the case may be. The ALJ should state explicitly what care is being authorized, if any, and what care is being denied, if any, and state the reasons for the award or denial.

Further the matter is remanded so that, if after further consideration an award is made authorizing epidural injections, the award must be described in sufficient detail so that it is possible to discern what has been awarded. Any such award must be limited in scope such that it does not constitute an overly broad order to provide a series of treatments indefinitely into the future. The entitlement to obtain medical care may only be premised upon the condition of Ms. Lattimore at the present time,

and any award of disputed medical care must be limited to address conditions as they currently exist.

Because the conclusion that Ms. Lattimore cooperated with VR does not flow rationally from the facts that were found by the ALJ, we vacate that conclusion, and remand for further consideration of the issue and of CVS's request that Ms. Lattimore's benefits be suspended for the duration of her non-cooperation.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____September 10, 2012_____
DATE