

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

CRB No. 12-131

**DONNA PARKER,
Claimant–Respondent,**

v.

**GEORGETOWN UNIVERSITY HOSPITAL,
Employer – Petitioner.**

Appeal from a July 5, 2012 Compensation Order by
Administrative Law Judge Joan Knight
AHD No. 10-569A, OWC No. 661617

William Sands, Esquire, for the Petitioner
Michael Kitzman, Esquire, for the Respondent

Before HEATHER C. LESLIE, MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*,

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the July 5, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for carpal tunnel surgery. We VACATE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was a patient registration clerk for Employer. On May 13, 2009, the Claimant developed bilateral carpal tunnel syndrome.

The Claimant filed an application for formal hearing requesting medical treatment and right carpal tunnel release surgery. The Employer raised several defenses, including whether or not the carpal tunnel release was reasonable and necessary. After a full evidentiary hearing, a

Compensation Order was issued on June 7, 2011.¹ In that Order, the ALJ concluded the Claimant's right-hand carpal tunnel condition was causally related to her employment and authorized the Claimant to treat with the medical providers at Phillips and Green. The ALJ also found the Claimant entitled to causally related medical expenses. On the claim for surgery, the ALJ concluded the requested right carpal tunnel release was not reasonable or necessary. The Claimant did not appeal the order.

The Claimant continued to treat with the doctors at Phillips and Green who continued to recommend right carpal tunnel release surgery. After further treatment, the Claimant filed a subsequent Application for Formal Hearing again seeking authorization for right carpal tunnel release surgery.

A Formal Hearing was held on March 5, 2012. At the Formal Hearing, the Employer argued there has been no change in Claimant's condition to warrant a modification of the prior Compensation Order and maintained the surgery is not medically necessary. A Compensation Order was issued on July 5, 2012 granting the Claimant's request for authorization of right carpal tunnel release surgery and for causally related medical expenses.

The Employer timely appealed. On appeal the Employer argues that the Claimant failed to meet her burden of proving there was a reason to believe a change in condition had occurred since the June 7, 2011 Compensation Order. More specifically, the Employer argues the ALJ was in error in not considering the evidence submitted at the June 7, 2011 to analyze whether or not a change in condition had occurred.

The Claimant opposed the Employer's argument. The Claimant acknowledges the requested authorization for medical treatment was not subject to the modification statute, but asserts the ALJ's analysis of this issue was harmless as ultimately the compensation order is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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. *See* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("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 must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

¹ *Donna Parker v. Georgetown University Hospital*, AHD No. 10-569, OWC N. 661617 (June 7, 2011).

DISCUSSION AND ANALYSIS

In the case at bar, the Claimant filed the present application for Formal Hearing seeking authorization for carpal tunnel release, a procedure that had been denied in a prior Compensation Order as not being reasonable and necessary at that time. In the Joint Pre-Hearing Statement submitted prior to the second hearing, the Employer listed as contested issues of fact and law, 1) *res judicata*, 2) necessity of medical treatment, and 3) change in condition. At the Formal Hearing, the parties and ALJ proceeded to treat the claim for relief and issues raised as a request for modification pursuant to D.C. Code § 32-1524. We find this to be in error.

D.C. Code § 32-1524 states in pertinent part,

(a) At any time prior to 1 year after the date of the last payment of *compensation* or at any time prior to 1 year after the rejection of a claim, . . . the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:

(1) The fact or the degree of disability or the amount of *compensation payable* pursuant thereto; or

(2) The fact of eligibility or the amount of *compensation payable* pursuant to § 32-1509.

(b) A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which directly addresses the alleged change of conditions.

(c) Upon the completion of a review conducted pursuant to subsection (a) of this section, the Mayor shall issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such *compensation*

(Emphasis added).

In the instant matter, the claim for relief was authorization for medical treatment, not payment of compensation. As the CRB has held previously, medical benefits are not, in and of them, "compensation" until such time as they have been paid for by a claimant and are subject to being reduced to a known dollar amount. *See, Tagoe v. Howard University Hospital*, CRB No. 10-009 (July 30, 2010) (*Tagoe II*), and *Tagoe v. Howard University Hospital*, CRB No. 08-187 (February 13, 2009) (*Tagoe I*). These cases adopted the views expressed in *Lazarus v. Chevron*, 958 F.2d 1297 (5th Cir. 1992) and *Marshall v. Pletz*, 317 U.S. 383 (1943), to the effect that:

If an employer furnishes medical services voluntarily, by paying a health care provider for its services, it does not pay "compensation" within the meaning of the Act. Compensation includes only money payable to an employee or his dependents . . . not payments to health care providers on an employee's behalf. If,

however, the employer refuses or neglects to furnish medical services, and the employee incurs expense or debt in obtaining such services, an award of medical expenses obtained by an employee in a suit against the employer is compensation.

Lazarus, supra, at 1301.

Thus, the requested medical care is not compensation subject to the modification requirements of the Act and we decline to extend the provisions of § 32-1524 concerning modification to requests for authorization for medical treatment that had been previously denied.

Moreover, re-litigating the issue of reasonableness and necessity of the same medical treatment is not *res judicata*, or subject to collateral estoppel. The issue at the second hearing was the reasonableness and necessity of surgery *at that time*, not when the prior hearing was held. Medical care and treatment can change over time depending on the Claimant's medical condition, treatment, and the opinions of medical care providers. What may not be reasonable and necessary in one year, may be later on.

Thus, we are forced to vacate and remand the case for further findings of fact and conclusions of law as to whether the request medical treatment is reasonable and necessary. As the Employer raised the "necessity of medical treatment" as an issue to be adjudicated, the resolution of this case requires submission of a utilization review report.² The record before us does not reflect that a utilization review report was submitted by either party. Upon remand, the ALJ may re-open the record or reconvene a Formal Hearing to allow the parties to submit additional evidence, including a utilization report, and further testimony as to whether or not the requested surgery is reasonable and necessary.

² With regard to whether the claimed medical care is reasonable and/or necessary, the Claimant is not entitled to a presumption. Regarding his claim for on-going medical care by his treating physician, Claimant has the burden of demonstrating that it is reasonable and/or necessary. *Stewart v. DOES*, 606 A.2d 1350 (D.C 1992). In cases where reasonableness and necessity of a requested medical treatment is at issue, Utilization Review is mandated by the Act. D.C. § 32-1507(b)(6)(A) states in relevant part,

In order to determine the necessity, character, or sufficiency of any medical care or service furnished or scheduled to be furnished under this chapter and to allow for the performance of competent utilization review, a utilization review organization or individual pursuant to this chapter shall be certified by the Utilization Review Accreditation Commission.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the July 5, 2012 Compensation Order are VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

February 27, 2013
DATE