Compensation Review Board

CRB No. 12-094

CLARICE L. PARRAN,
Claimant–Petitioner,

v.

CASH MANAGEMENT SOLUTIONS and CAN INSURANCE COMPANY,
Employer/Insurer-Respondent

Appeal from a Compensation Order on Remand by
The Honorable Anand K. Verma
AHD No. 11-053, OWC No. 669891

David J. Kapson, Esquire, for the Claimant/Petitioner
Allan H. Kittleman, Esquire, for the Employer-Insurer/Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge,* for the Compensation Review Board.

JEFFREY P. RUSSELL, *concurring in part and dissenting in part*.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

OVERVIEW

This appeal follows the issuance on May 22, 2012 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that COR, Claimant was granted authority to undergo additional treatment for the limited purpose to remove hardware in her right ankle. For the reasons stated below, we again vacate and remand the COR.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

On January 8, 2010, Claimant broke her right ankle when she fell on ice which eventually led to a claim seeking an award of 28% permanent partial impairment of the right lower extremity, authorization for medical treatment, and causally related medical expenses. Following a formal hearing, Claimant was awarded 5% permanent partial impairment but denied additional treatment.[2] Claimant timely appealed.

In a December 22, 2011 Decision and Remand Order (DOR I), the CRB affirmed the award of 5% permanent partial impairment to Claimant right lower extremity. However, that portion of the July 19, 2011 Compensation Order denying additional medical treatment was vacated. The CRB specifically stated:

> The law requires we remand this matter for clarification as to the issue regarding authorization for additional medical treatment including surgery. Is the issue causal relationship which would require an analysis of the application of the presumption of compensability or is the issue reasonableness and necessity which would require an analysis of a utilization review report? On remand, the ALJ is directed to clarify the issue and provide the proper analysis of it.[3]

On remand, the ALJ issued a COR on January 30, 2012 where he again denied additional follow up treatment with Dr. Cirillo, except for the limited purpose of hardware removal and subsequent surgical procedure if needed.[4] Claimant filed another appeal, repeating her arguments challenging the 5% permanent impairment award which was previously affirmed and became the law of the case, and also arguing the ALJ ignored her subjective complaints of ankle pain as well as the medical reports that indicated she would benefit from additional treatment. Employer argued that the COR should be affirmed as the Act made it liable for medical benefits during the process of

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[2] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (July 19, 2011).

[3] *Parran v. Cash Management Solutions*, CRB No. 11-080, AHD No. 11-053, OWC No. 669891 (December 22, 2011), p. 7.

[4] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (January 30, 2012) (COR I).

recovery from an injury[5] and if additional treatment was recommended in the future, it could raise the issue of reasonableness and necessity.

In a Decision and Remand Order (DRO II) dated May 9, 2012, the CRB remanded again for clarification of the issue regarding authorization for additional medical treatment including surgery to the right ankle. The CRB determined that while the ALJ conducted a review of the medical evidence, the question raised and directed by the CRB in DRO I for resolution by the ALJ remained unanswered and required a further remand.

In the latest COR issued in response on May 22, 2012, the ALJ granted Claimant authorization for additional follow-up treatment with Dr. Cirillo for the limited purpose of hardware removal. Claimant timely appealed with Respondent filing in opposition. The arguments of both parties mirror those previously made on appeal of this matter to the CRB and need not be repeated.

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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[6] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are 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.

This matter has been returned twice to the ALJ for resolution of the issue of authorization of additional treatment raised by Claimant in her stated claim for relief after initially confirming on the record that the only issue was the nature and extent of her disability. As this issue was initially addressed in DOR I, the CRB noted that while the parties confirmed that the sole issue for resolution at the formal hearing was the nature and extent of Claimant's disability, when the claim for relief was stated, the issue of authorization for medical treatment was raised. It was the clarification of this issue that was requested.

In this latest COR, the ALJ admits the issue of additional medical treatment was raised at the formal hearing and that he definitely dealt with its denial by stating

[5] D.C. Code § 32-1507(a).

[6] "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

> Elaborating further on the need to seek additional treatment, claimant responded "So, I mean I just need to see him, I mean, the pain . . . ." (HT 33-34). On cross examination, claimant testified she suffers from back pain "three to four days a week," which is not unbearable "all the time." (HT 42). After reviewing her entire testimony, the undersigned is not persuaded that claimant continually suffers from the low back and ankle symptoms. Apart from her subjective complaints of continuing pain, the record demonstrates no objective indicia of the severity of the alleged pain warranting any additional medical intervention, particularly when claimant takes no regular prescription medication, undergoes no physical therapy and does no exercise at home as a palliative measure.[7]

The ALJ found the Claimant's testimony with regard to the need for additional treatment with Dr. Cirillo to be incredible due to her ambiguous response to the question on the authorization for medical treatment. This finding is not supported by the hearing record. Claimant was asked what treatment she was looking for and responded that she wanted to see the doctor "because of continuing pain."[8] We see no ambiguity in this response.

In referencing the question on remand that he was directed to clarify, the ALJ states that based on the Joint Pre-Hearing Statement (JPHS) and the hearing transcript, nature and extent of disability was the only issue presented for resolution, but nonetheless also manages to state:

> Because in the JPHS, both parties clearly stipulated the issue of medical causal relationship, even though it was erroneously recited at the hearing as a non-issue. Nonetheless, despite an incorrect recitation of this issue of medical causal relationship as a non-issue, if the parties wanted to have it addressed, they would have said so either at the hearing when asked to acknowledge the recited issues or earlier, on April 12, 2011, when they filed their JPHS.[9]

It is in this statement that we see the confusion of the ALJ in resolving the question that has been put to him.

While it is correct that the parties stipulated to medical causal relationship, that stipulation went to an agreement that Claimant's disabling condition was medically causally related to the work accident. However, when Claimant stated as part of her claim for relief that she was seeking authorization for continued medical treatment, ostensibly for pain management, that raised anew (1) the issue of causal relationship with the attendant presumption of compensability; or, (2) the issue of reasonableness and necessity of the requested treatment requiring utilization review with regard to authorization. We are at pains to understand why the ALJ is unable to discern the difference in the

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[7] CO at 7. In the ALJ's discussion repeated above, the complete quote from the transcript states: "So, I mean I just need to see him, I mean, the pain, I'm in tears and I don't think that that's fair."

[8] Hearing Transcript (HT), p. 33

[9] *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (May 22, 2012) (COR II), p. 3.

parties stipulating to causal relationship as to disability and that issue remaining one for resolution when authorization for treatment is requested. Maybe this third time will provide the needed comprehension.

The ALJ is of the opinion that insofar as the parties have already stipulated to medical causal relationship and have not independently raised the issue of reasonableness and necessity of treatment, he is precluded from doing so at this juncture. The ALJ fails to understand that in presenting a claim for relief, the claim,with the attendant testimony and argument, may subsume within it an issue not previously stated but whose resolution is required in order to grant or deny the claim. Such is the case here.

First, the ALJ has granted Claimant authorization for follow up treatment with Dr. Cirillo limited to the removal of the hardware in her ankle. This constitutes an award that Claimant has not requested and alone is grounds for reversal. In fact, the record shows that while Dr. Cirillo has counseled her on the benefits of hardware removal, Claimant has reservations on this course of treatment.[10]

More importantly, however, is the underlying reason the question for clarification remains unresolved. The ALJ requested and received clarification of the issue of authorization for continuing medical treatment at the hearing:

> Judge Verma: And also you said continuing medical treatment authorization?
>
> Ms. Griffith: Authorization. And if I could just explain. Ms. Parran - - we're requesting the authorization for medical treatment. We don't have a particular type of treatment that's being requested. At this time Ms. Parran is not receiving authorization to follow up with Dr. Cirillo, so that's the request for authorization that we're requesting.[11]

Then, when directing Ms. Griffith to begin her closing statement, the ALJ specifically asked her to address two issues:

> Judge Verma: Just focus on additional treatment. How - - is it necessary? If Ms. Parran needs her continuing medical visits with Dr. Cirillo and how she's entitled to 28 percent permanent partial and not lower.[12]

In arguing for continuing medical treatment, counsel stated

> Ms. Griffith: The lawyer contends that she's reach (sic) maximum medical improvement and there's really no dispute that she's reached non-hardware removal maximum medical improvement. …

[10] CE #2, p. 14; HT, p. 33-34.

[11] HT, pp. 12-13.

[12] HT, p. 49.

> Now, both doctors agree that possible hardware removal is appropriate. So, the argument of maximum medical improvement, obviously, there's additional treatment that can be given and both Dr. Collins and Dr. Cirillo agree on that point.
>
> However, at this point, Ms. Parran says she does not want the hardware removed. There's no case law that I could find that says she's not entitled to see her doctor because he has determined that there's no further treatment. There's no case law that I could find that says she's not entitled to see her doctor to help her control her pain.
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> * * * *
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> At this point, as I said earlier in the hearing, she's not requesting a specific treatment, she's not saying she knows of a treatment that will help her get better. She's saying she wants to the (sic) see the doctor so that she doesn't have to experience the pain that she's experiencing everyday (sic).[13]

The statement and argument of what Claimant is seeking, to see the doctor to help her control her pain, amounts to a request for authorization for pain management. To the extent that the ALJ has awarded permanent partial disability that included an element of continuing pain, it could be reasoned that this ongoing pain is subsumed in the medical causal relationship already stipulated to by the parties and therefore Employer would be liable for ongoing doctor's visits to manage this pain. To the extent any type pain management constitutes a new treatment plan, it could be challenged by Employer as to whether it is reasonable or necessary requiring that it be submitted to utilization review. Either way, it is for the ALJ to determine. Until he does, this matter will continue to be returned.

With all due deference to our colleague in dissent, we believe there is a "cognizable claim for medical care" before the ALJ for resolution that requires no conjecture on the part of the CRB. As noted above, Claimant's counsel clarified for the ALJ that at the time of the formal hearing Claimant did not have authorization for follow up visits to see Dr. Cirillo and was therefore requesting that authorization. In addition, as further clarified by Claimant's counsel in the quoted passage above from the HT, Claimant is seeking authorization "to see her doctor to help her control her pain." We have interpreted that to mean pain management. To the extent there is a need for clarity on this issue, as suggested by our colleague, it is the ALJ's job, based on the record created, to clarify the issues raised in order to rule on them. If the record remains unclear, the ALJ has the authority to re-open the record in order to fill in any perceived gaps. To do otherwise, is to allow the ALJ to abrogate his responsibility.

Finally, while there is no requirement under the Act for Claimant to identify a "specific medical course", the Act does allow her to obtain medical treatment during the course of her recovery. It is for the ALJ to determine, as we have decided here, whether that medical treatment is causally related or reasonable and necessary, as the case be.

[13] HT, pp. 49-52.

CONCLUSION AND ORDER

As the Compensation Order on Remand of May 12, 2012 makes an award that has not been requested and that is not supported by substantial evidence in the record, it is not in accordance with the law and is Vacated. In addition, the Compensation Order on Remand of May 12, 2012 fails again to provide clarification on the legal issue that was the reason for the CRB remands on December 22, 2011 and May 9, 2012, this matter is again remanded for further consideration consistent with this Decision and Remand Order and well as the previous ones.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

August 28, 2012
DATE

Jeffrey P. Russell, *concurring in part and dissenting in part.*

I concur in the CRB's decision to vacate the award of medical care. However, I must respectfully dissent from the decision to remand the matter yet again.

This case has been the subject of multiple remands, with the CRB seeking to obtain clarity regarding what the nature of the dispute or disputes is or are regarding the late arriving and inchoate claim for some variety of medical care. At this juncture it is apparent that neither the parties nor the ALJ are clear regarding whether there is a cognizable claim for medical care pending before the agency, what the nature of that claim might be, what the medical basis for the seeking the care is, or what reasons the employer has for opposing the provision of the claimed care, if there is any such claim. I can't tell whether there are issues relating to reasonableness and necessity which would bring into relevance the mandatory utilization review process, or medical causal relationship, or some other presently unidentified issue or issues.

I recognize that this is a seeming departure from our prior course in this case. However, there comes a point where seeking to obtain clarity becomes itself a pointless exercise: it appears there never will be clarity in this matter, because the parties and the ALJ have not provided it. Given claimant's counsel's acknowledgement that no specific care is being requested, I would now hold that claimant is not entitled to a hearing and determination on the issue. It has long been Agency policy that formal hearings and Compensation Orders are inappropriate where there is no specific claim for relief for identifiable benefits that is in dispute. See, *Powell v. Wrecking Corp. of America*, H&AS No. 84-540, OWC No. 051161 (Decision of the Director March 4, 1987), which was reviewed by

the DCCA and found to be reasonable, rational, and consistent with the Act in *Thomas v. DOES*, 547 A.2d 1034 (D.C. 1988).

I do not think that it is appropriate for the CRB to guess at what the claim for relief is, when no one has formulated one heretofore. How do we know whether the claim is for pain management? It might just as well be for physical therapy, or surgical intervention, or chiropractic care, or something different. In the absence of a specific claim for specific medical care, I am at a loss to understand what the ALJ could grant that would have any meaning. Indeed, the lack of a specific claim for the care that was awarded is the primary basis for vacating that award.

Lastly, even if, as the majority posits, the claim for medical care that is before the ALJ is identifiably one for "pain management", that does not resolve the problem that there is no telling what the basis of the dispute is regarding its provision. The most likely bone of contention would be the need for such additional care. If so, then it does not appear that the matter is ripe for presentation, given the lack of any evidence in this record that utilization review (UR) has been undertaken. Indeed, the breadth of categorization of the postulated sought after medical care—"pain management"—would appear to defy commencing the UR process. There are many varieties and methods of "pain management", but until there is some specificity as to the care being sought, UR seems impossible to undertake.

Accordingly, I would vacate the award of medical care in the compensation order, and make clear that at such time as claimant identifies a specific medical course that she seeks to obtain, if employer declines to provide it, claimant may return to the agency and obtain a determination as to whether she is entitled to such care under the Act, through either the informal or formal processes established for the purpose of resolving disputes regarding requests for specific benefits.

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Jeffrey P. Russell
Administrative Appeals Judge