# GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-055**

**VINSON M. WASHINGTON, JR.,**
**Claimant–Petitioner,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,**
**Self-Insured Employer-Respondent.**

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 SEP 18 AM 10 59

Appeal from a May 21, 2013 Compensation Order on Remand of
Administrative Law Judge Linda F. Jory
AHD No.09-127B, OWC No. 633795

Michael J. Kitzman for the Petitioner
Sarah O. Rollman for the Respondent

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

JEFFREY P. RUSSELL for the Compensation Review Board.

## DECISION AND ORDER

### BACKGROUND[1]

On October 27, 2006, Petitioner Vinson M. Washington, Jr. sustained an injury to his right hand and thumb while employed as a bus driver by Respondent Washington Metropolitan Area Transit Authority (WMATA). On April 1, 2008, he underwent a carpal tunnel release surgery and surgical procedures involving the MP thumb joint and radial collateral ligament. In a Compensation Order

[1] 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.

issued May 29, 2009, Mr. Washington was awarded ongoing temporary total disability benefits and medical care based upon a finding that the injuries were work related. The Compensation Order was appealed to and affirmed by the Compensation Review Board (CRB). Thereafter, in a Compensation Order issued May 24, 2010, temporary total disability benefits were terminated based upon a finding that Mr. Washington could return to his pre-injury job as of February 17, 2010.

On September 2, 2010, the Office of Workers' Compensation (OWC) approved a stipulation awarding Mr. Washington a lump sum payment representing a 12% permanent partial disability to the right arm, which WMATA paid.

Mr. Washington continued to express complaints of pain and functional incapacity from the injury, and sought authorization to undergo a second carpal tunnel release. In connection with that request, Mr. Washington requested that his temporary total disability benefits be reinstated upon his undergoing the repeat surgery. WMATA had Mr. Washington evaluated by Dr. David Dorin for the purposes of an independent medical evaluation (IME), and had a Utilization Review (UR) undertaken by Dr. Richard E. Holladay, from HHC Group, a URAC certified utilization review provider. Both the UR and IME physicians contended that the contemplated carpal tunnel release was not medically reasonable and necessary. Based upon these opinions, WMATA declined both requests.

The disputes were presented for resolution at a formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on March 13, 2012. A Compensation Order was issued March 29, 2012, in which the requests were denied. Mr. Washington filed an Application for Review with the CRB, to which WMATA filed an opposition.

The CRB vacated the Compensation Order, concluding that the ALJ's factual determination that Mr. Washington's treating physician had not expressed the opinion that the requested surgery was reasonable and necessary was unsupported by substantial evidence. The matter was remanded for further consideration, with instructions that the ALJ weigh the competing medical evidence and determine whether Mr. Washington had met his burden of demonstrating the reasonableness and necessity of the requested surgery by a preponderance of the evidence.

On May 21, 2013, the ALJ issued a Compensation Order on Remand, again denying the claim. Mr. Washington filed an appeal of that Compensation Order on Remand, to which WMATA has filed an opposition. Because the ALJ failed to carry out the directive of the CRB, and again determined that that treating physician had offered no opinion concerning reasonableness and necessity, the Compensation Order on Remand was vacated, and the matter was again remanded for further consideration as directed therein and as directed in the prior Decision and Remand Order.

On April 7, 2014, the ALJ issued a second Compensation Order on Remand, again denying the requested surgery. Mr. Washington filed an AFR with the CRB seeking review of the ALJ's decision, to which WMATA filed an opposition. It is that appeal and opposition that we now review.

Because the ALJ weighed the evidence in a manner consistent with the law, the determination that Mr. Washington has failed to demonstrate that the requested surgery is reasonable and necessary by a preponderance of the evidence is supported by substantial evidence, and is affirmed.

## DISCUSSION AND ANALYSIS

Initially we address Respondent WMATA's first argument in opposition to this appeal, that being that it is untimely and should therefore be dismissed. WMATA asserts that the Compensation Order on Review was issued April 7, 2014, and that the Application for Review thereof was required to be filed on or before May 7, 2014 in order to be timely. WMATA asserts that the Application for Review was filed May 8, 2014, rendering it untimely.

WMATA does not cite the basis of its allegation that the Application for Review was not filed until May 8, 2014. However, review of the CRB administrative file reveals that the clerk's "Notice of Application for Review" was issued May 8, 2014, and states that the Application for Review was filed on that date.

However, review of the docket sheet indicates that the clerk noted the filing of the Application for Review on May 7, 2014, and issued the Notice on May 8, 2014. Further, review of the date stamped original Application for Review reveals that the date stamp reads "2014 MAR 7 PM 3:39", with the "R" slashed through by hand, and with "May" handwritten above "MAR". From this set of facts we conclude that the Application For Review was filed May 7, 2014, and that the clerk (1) erroneously put May 8, 2014 as the date it was filed in the body of the Notice of Application for Review, (2) the date stamp was set to the wrong month (March rather than May), and (3) the clerk corrected the erroneous date stamp by (i) including the proper date of filing on the docket sheet and (ii) replacing "MAR" with "May" by hand written revision.

Accordingly, the Application for Review was timely filed.

Turning to the merits of the appeal, the following extended quote from the first Decision and Remand Order sets forth the necessary factual background:

> The present claim is for authorization for a repeat carpal tunnel release, and for the resumption of temporary total disability benefits after the surgery is performed. See, Compensation Order, Claim for Relief; HT 11, line 22 – HT 12, line 6.
>
> Although the ALJ discussed what she viewed as shortcomings of the UR report [footnote omitted] (shortcomings which WMATA disputes), she specifically eschewed rejection of the report as a basis for denying the claim for the surgery. Rather, the ALJ reviewed the medical records and reports, and concluded that the record did not contain any expression of opinion that any physician has recommended that Mr. Washington undergo the repeat procedure at this time. The ALJ wrote:
>
>> [I]n the instant case, the undersigned is unable to ascertain when or if Dr. Berdia [Mr. Washington's treating physician] provided such an order for

> surgery or even an opinion that the surgery in question should be performed and why. [...] Review of [Dr. Berdia's] most recent narrative, as noted above, reveals that "We have been trying to treat him conservatively with this recurrence and requesting less hours per day to see if we can abate these symptoms without having to re-release his carpal tunnel."
>
> While the undersigned is mindful that Dr. Berdia may in fact come to a conclusion that a repeat release is in fact necessary, he has not stated the same and the understand cannot fill in the gaps left by his report by making a recommendation for him assuming that this is his desire, therefore, further discussion on this issue is premature and not warranted.

Compensation Order, page 4.

The sentence from Dr. Berdia is found in CE 2, which is a document addressed to "To Whom It May Concern", dated March 23, 2011, and signed by Dr. Berdia.

Although the ALJ did not use the phrase in the Compensation Order, we agree with WMATA's characterization of the decision: the ALJ found that the request for resolution of the disputes concerning provision of the surgery is not ripe. The decision was *not* premised upon a conclusion that Mr. Washington had failed to adduce a preponderance of the evidence that the surgery was needed, and thus failed in meeting his burden under *Dunston vs. DOES*, 509 A.2d 109 (D.C. 1986).

We have reviewed the medical records and reports, and they support the ALJ's determination that the record does not contain a report from Dr. Berdia recommending that Mr. Washington undergo a re-release of the carpal tunnel.

However, Mr. Washington asserts in his Memorandum of Points and Authorities in Support of Application for Review that Dr. Berdia has in fact made such a recommendation, and that the record contains reference to it: "First, Dr. Berdia has recommended as of 8/17/11, that the surgery be performed. *This is noted by the UR review itself.* EE-4." Petitioner's memorandum, unnumbered page 4 (emphasis added).

The UR report, EE 4, contains what purports to be a numbered list of the records reviewed by the author of the report, Dr. Robert E. Holladay. [footnote omitted]. Item 96 on that list is identified as being related to an August 17, 2011 office visit. EE 4, page 48. That list also refers to CE 2 as item 93.

In the body of the UR report one finds what purports to be a nearly verbatim summary of item 96. The passage reads as follows:

> 8-17-11 Sunjay Berdia, MD., [sic] the claimant comes in for followup. He is still having some numbness and tingling. He is getting sharp pain at the thumb. He is still working full time and unable to get into the light duty

> status. He is now thinking that he wants to have repeat surgery. The right hand reveals that he has a positive Tinel's and Durkin's compression test of the transverse carpal ligament. Impression: Right carpal tunnel syndrome. Plan: The claimant has had a recurrence of carpal tunnel. He tried a significant amount of conservative treatment and it continues to bother him, so he felt he ought to consider re-release. He explained the risks and benefits at length with him, and he wished to proceed. He will schedule this once it is approved by the Workman's comp carrier.

EE 4, page 43.

Where a Compensation Order is premised upon a fundamental error in fact, it can not be said to be based upon substantial evidence. Here, the UR report appears to establish that the fundamental factual premise upon which the surgery was denied in the Compensation Order—that Dr. Berdia has yet not recommended the repeat surgery—is in error. While the existence of this recommendation as a factual matter is not dispositive, the fact that Dr. Berdia authored a progress note in which the "Plan" included scheduling the requested surgery once it is approved by the workers' compensation carrier renders the ALJ's finding that no such recommendation has been made unsupported by substantial evidence.

Because of this error, we must vacate the denial of the surgery request and remand the matter for further consideration of the claim, taking into account the fact that Dr. Berdia *appears* on this record to have recommended that Mr. Washington proceed to obtain the surgery.

Having denied the surgery, the ALJ should have regarded the request for temporary total disability as moot, and thus consideration of the claim should not have been undertaken. 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).

Beyond vacating the entire Compensation Order, we express no view upon the portion of the Compensation Order dealing with temporary total disability, because upon further consideration it may be that the ALJ authorizes the additional surgery, and she might do so for reasons that are relevant to whether this case falls into an exception to the general rule in *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) that receipt of an award under the schedule terminates any entitlement to additional temporary total disability benefits.

Accordingly, we vacate the Compensation Order, and remand for further consideration of the claim taking into consideration the entire record as a whole.

Decision and Remand Order, pp. 2 – 4.

The CRB thereupon concluded and ordered as follows:

CONCLUSION

> The finding that Dr. Berdia has not recommended that Mr. Washington undergo a repeat carpal tunnel surgery is unsupported by substantial evidence, rendering the conclusion that the claim for said surgery is "premature" not in accordance with the law.

**ORDER**

> The Compensation Order is vacated and the matter remanded for further consideration in a manner consistent with the aforegoing Decision and Remand Order and considering the entire record as a whole.

Decision and Remand Order, page 5.

In the first Compensation Order on Remand, rather than weighing the evidence, the ALJ again explained that she does not view the record evidence allowed for a finding that Dr. Berdia has recommended the surgery. The ALJ wrote:

> While the undersigned agrees that Dr. Berdia's report of August 17, 2011 is quoted in the UR report, the undersigned does not agree that this passage, which is repeated again below, is a recommendation from Dr. Berdia that claimant undergo surgery.

First Compensation Order on Remand, page 6.

The ALJ then set forth the summary of Dr. Berdia's August 7, 2011 notes as contained in the UR report, italicizing for emphasis the two sentences contained therein in which the summary states that the claimant "thinks he ought to have repeat surgery" and that claimant "felt he ought to consider a re-release". Mr. Washington appealed the matter to the CRB again, to which appeal WMATA again filed an opposition.

The CRB again concluded that, reading the record as a whole, Dr. Berdia expressed his belief that surgery is reasonable and necessary and the CRB again remanded the matter for consideration under the proper standard. Specifically, the CRB ordered:

> The Compensation Order on Remand fails to carry out the directive of the prior Decision and Remand Order. For that reason and for the reasons set forth above and in the original Decision and Remand Order, the Compensation Order on Remand is vacated and the matter remanded to AHD for further consideration of the record as a whole, and if necessary, further consideration of the claim for additional temporary total disability benefits.

Compensation Order on Remand, February 25, 2014, p. 7, "Conclusion and Order".

As before, Decision and Remand Order left the ALJ free to *reject* the opinion and accept counter opinion, requiring only that legitimate reasons for the decision be enunciated.

On April 7, 2014, a second Compensation Order on Remand, the one now under review, was issued, in which the requested surgery was again denied. However, in the second Compensation Order on Remand, the ALJ accepted for the purpose of analysis that Dr. Berdia's opinion was that the surgery was reasonable and necessary. She thereupon weighed the UR report's conclusion against those of Dr. Berdia, and concluded that the UR report was more persuasive for numerous reasons, primarily because it contained a reasonable rationale: the requested carpal tunnel re-release is not justified in the absence of positive objective electro diagnostic studies, of which there are none in this record. Compensation Order on Remand, April 7, 2014, p. 7.

Mr. Washington's argument on appeal is that the UR report's references to the propriety of proceeding to perform a re-release in the absence of positive electro diagnostic studies are not referred to in the UE report as mandatory, but rather that the UR report merely suggests that the availability such positive results are preferable in considering whether to proceed with the surgery, but their absence is not stated therein to be disqualifying.

In essence, Mr. Washington believes that the ALJ placed too much weight on the UR report and misreads it. We disagree. The ALJ's stated reasons for accepting the report and rejecting the view of Dr. Berdia are rational and accurately reflect the content of the record. Mr. Washington seeks to have us re-weigh the evidence, and substitute our own assessment of it for that of the ALJ, which is something we cannot do.

## CONCLUSION AND ORDER

The denial of the requested carpal tunnel re-release is supported by substantial evidence and is in accordance with the law. It is therefore affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
*Administrative Appeals Judge*

September 18, 2014
DATE