WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL ALVARADO, *Applicant*

vs.

PIERRE LAFOND & COMPANY;
CYPRESS INSURANCE COMPANY,
adjusted by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ12791863
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration or in the alternative removal of the Expedited Finding of Facts and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 24, 2020. By the F&O, the WCJ found that the utilization review (UR) determination was untimely and the WCJ has jurisdiction to act. The WCJ also appointed a regular physician per Labor Code[1] section 5701 to perform a UR determination of whether a right hip arthroplasty is reasonable and necessary. (Lab. Code, § 5701.)

Defendant contends that whether the UR decision was untimely is irrelevant because the recommended treatment was previously non-certified by UR within the last 12 months and defendant was consequently not obligated to conduct UR of the treatment request per section 4610(k). (Lab. Code, § 4610(k); Cal. Code Regs., tit. 8, § 9792.9.1(h).)

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration/Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking

[1] All further statutory references are to the Labor Code unless otherwise stated.

reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to the low back, right hip and digestive system on June 26, 2019 while employed as a cook by Pierre Lafond & Company. Defendant has accepted the low back and right hip as compensable, and provided some treatment to applicant. (Minutes of Hearing (Expedited), November 18, 2020, p. 2.)

Christopher Birch, M.D. is applicant's primary treating physician (PTP). On January 31, 2020, defendant issued a UR decision non-certifying Dr. Birch's request for reconsideration of the recommendation for a right total hip arthroplasty and related treatment. (Defendant's Exhibit A, Berkshire Hathaway utilization review, January 31, 2020.) The UR decision notes that this treatment was previously non-certified on December 18, 2019. (*Id.* at p. 5.) The UR decision further indicates that the request for authorization (RFA) was dated December 11, 2019, but was not received until January 24, 2020. (*Id.* at p. 1.) The corresponding RFA is not in evidence.

Applicant filed an application for independent medical review (IMR) of the original December 18, 2019 UR decision. IMR upheld the UR decision in its February 11, 2020 determination letter. (Defendant's Exhibit F, Independent Medical Review Final Determination Letter, February 11, 2020.)

A Notice of Dismissal of Attorney and Substitution of Attorneys were filed on August 3, 2020 replacing applicant's previous attorney, Manuel Martinez, with Wolff Walker Law Firm.

On September 28, 2020, Dr. Birch issued a Progress Report wherein he indicated a need for a right total hip arthroplasty. (Applicant's Exhibit No. 3, Medical reporting of Christopher Birch, M.D., September 28, 2020, p. 1.) On October 6, 2020, defendant issued a UR decision non-certifying this recommendation. (Applicant's Exhibit No. 2, UR denial of hip replacement surgery, October 6, 2020.) The UR decision states the RFA for this treatment recommendation was received on "9/29/29." (*Id.* at p. 1.) The corresponding RFA is not in evidence. Applicant has filed an application for IMR of this UR decision as well. (Applicant's Exhibit No. 1, IMR application regarding the October 6, 2020 UR denial, November 3, 2020.)

The October 6, 2020 UR decision was addressed to Dr. Birch and states that it was copied on applicant and "Applicant's Attorney: Manuel Martinez." (Applicant's Exhibit No. 2, UR denial

of hip replacement surgery, October 6, 2020, pp. 1-2.) Defendant's attorney forwarded the UR decision to applicant's current attorney via email on October 9, 2020. (Defendant's Exhibit E, Email to applicant's attorney regarding the UR denial dated October 6, 2020, October 9, 2020.) Although the UR decision lists "IMR application" under "Enclosures," neither exhibit with the UR decision has an IMR application attached to it and applicant avers that it was not enclosed with the UR decision. (*Id.* at p. 3; Applicant's Exhibit No. 2, UR denial of hip replacement surgery, October 6, 2020.)

The matter proceeded to an expedited hearing on November 18, 2020. The parties stipulated that Wolff Walker Law Firm filed their Notice of Representation/Substitution of Attorney on or about August 2, 2020. (Minutes of Hearing (Expedited), November 18, 2020, p. 2.) The disputed issues were identified as:

> 1. Applicant raises the timeliness of the October 6, 2020, UR denying the right hip surgery based on failure to communicate that denial to applicant's counsel and further failing to provide the appropriate IMR paperwork with the October 6, 2020, UR denial.
>
> 2. Defendant contends the October 6, 2020, UR denial is irrelevant because the same RFA was denied within a year previous to October 6, 2020, pursuant to 8 CCR 9792.9.l(h).
>
> (Minutes of Hearing (Expedited), November 18, 2020, p. 2.)

The WCJ issued the resulting F&O as outlined above, which included appointment of Dr. Peter Newton "pursuant to L.C. §5701 to perform a UR determination if the right hip arthroplasty is reasonable and necessary under the AECOM and MTUS guidelines." (F&O, November 24, 2020, p. 1.) An order was issued for "[p]otential further medical treatment." (*Id.* at p. 2.)

DISCUSSION

I.

Defendant sought reconsideration or in the alternative removal of the F&O. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the

course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue.

One of the issues at trial in this matter was the timeliness of the October 6, 2020 UR decision. The Appeals Board has jurisdiction to determine whether a UR decision is timely. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298, 1299 (Appeals Board en banc) (*Dubon II*).) If a UR decision is untimely, the determination of medical necessity for the requested treatment may be made by the Appeals Board. (*Id.* at p. 1300.) However, "where a UR decision is timely, IMR is the sole vehicle for reviewing the UR physician's expert opinion regarding the medical necessity of a proposed treatment." (*Id.* at pp. 1310-1311; see also Lab. Code, §§ 4062(b), 4610.5.) A determination of a UR decision's timeliness therefore implicitly determines which entity has jurisdiction to address medical necessity of the treatment request: the Appeals Board or the Administrative Director (AD) via IMR. Accordingly, we conclude that the F&O here is a final order subject to reconsideration because adjudication of the timeliness issue establishes jurisdiction over the disputed medical treatment. (See e.g., *Allied Signal Aerospace v. Workers' Comp. Appeals Bd.* (*Wiggs*) (2019) 35 Cal.App.5th 1077, 1084-1085 [84 Cal.Comp.Cases 367] [the Court of Appeal held that the issue of whether the UR process or the Appeals Board has jurisdiction over a home health care dispute is a final order].)

Therefore, we will treat defendant's Petition as one seeking reconsideration.

II.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d

274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, former § 10566, now § 10787 (eff. Jan. 1, 2020).) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, at p. 475.)

Whether a UR decision is timely is determined based on the date of receipt of the RFA. (Former Lab. Code, § 4610(i)(1), amended by Stats. 2019, ch. 647, § 6, eff. Jan. 1, 2020.);[2] Cal. Code Regs., tit. 8, § 9792.9.1(c)(1).) We are unable to address whether the WCJ's decision regarding the timeliness of the UR decision is supported by substantial evidence in the absence of the RFAs in dispute as part of the evidentiary record. Specifically, the record is incomplete without the RFAs from Dr. Birch recommending the right hip arthroplasty in 2019 and in 2020. (See Cal. Code Regs., tit. 8, § 9792.6.1(t)(1) [a request for authorization must be set forth in the DWC Form RFA unless accepted by a claims administrator in another document per AD Rule 9792.9.1(c)(2)(B)].) The December 18, 2019 UR decision and corresponding RFA are also not in evidence, which may be relevant to the issues in dispute.

Additionally, one of the disputed issues identified at trial was whether the October 6, 2020 UR decision was irrelevant because "the same RFA was denied within a year previous to October 6, 2020." (Minutes of Hearing (Expedited), November 18, 2020, p. 2.) Although this was listed as an issue to be adjudicated, the WCJ did not address this dispute in the F&O. Once additional evidence has been submitted into the record consistent with this opinion, the WCJ should address this issue in the first instance.

Upon return of this matter to the trial level, the trier of fact should create a complete evidentiary record regarding the issues in dispute and issue a new decision. Either party may then seek reconsideration of that decision.

[2] It appears possible based on the current record that the RFAs in this matter are subject to different versions of section 4610(i)(1), which was amended effective January 1, 2020.

III.

The WCJ's finding that Dr. Newton is appointed as a regular physician is an interlocutory decision and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (See *Gaona*, *supra*.)

The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence. (Lab. Code, § 5701; see also Lab. Code, § 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) However, when a WCJ determines that the medical record requires further development, "the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case." (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 142 (Appeals Board en banc).)

The WCJ here appointed a regular physician in order to address whether the recommended surgery is reasonable and necessary to cure or relieve from the effects of applicant's injury pursuant to the medical treatment utilization schedule (MTUS). (Lab. Code, §§ 4600(a)-(b), 4604.5(a), 5307.27(a).) Per *McDuffie*, if the medical record is found to be deficient, the preferred procedure to develop the record is to return to the existing physicians who have already reported in the case. Therefore, if the WCJ determines that he has jurisdiction to address the medical necessity of the disputed treatment, but there is insufficient evidence to address this question, further development of the record should first be attempted with the existing physicians including with applicant's PTP Dr. Birch.[3]

In order to expedite resolution of this matter, it is recommended that additional development of the record per section II of this opinion also include submission of any additional medical reporting required to address the necessity of the disputed treatment. Applicant bears the burden of showing entitlement to the treatment based on substantial medical evidence in the event the issue of medical necessity may be addressed by the Appeals Board. (*Dubon II*, *supra*, 79 Cal.Comp.Cases at p. 1312.)

Therefore, we will grant reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

[3] It is further noted that appointing a regular physician to "perform a UR determination" improperly provides for a second UR of the disputed treatment.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Expedited Finding of Facts and Order issued by the WCJ on November 24, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Expedited Finding of Facts and Order issued by the WCJ on November 24, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 9, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GOLDMAN MAGDALIN & KRIKES
MIGUEL ALVARADO
WOLFF WALKER LAW FIRM

AI/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *o.o*