WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANIELLE CASAROTTI, *Applicant*

vs.

CISCO'S MEXICAN RESTAURANT; STAR INSURANCE COMPANY; administered by ILLINOIS MIDWEST INSURANCE AGENCY, *Defendants*

Adjudication Number: ADJ9341102
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order Re: Treatment (F&O) issued on March 1, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) the August 4, 2020 Utilization Review (UR) determination which non-certified applicant's treating physician's July 7, 2020 Requests for Authorization (RFA) for a psychology consult for counseling services, home health assistance (HHA) services, transportation services to and from medical appointments, and medication in the form of one injection of 140 mg Aimovig per month for three months was untimely; (2) a psychology consult is reasonable and necessary to determine whether applicant requires counseling services; (3) HHA services of eight hours per day, seven days per week, are reasonable and necessary and should continue until a change in circumstances warrants further review; (4) transportation services to and from medical appointments are reasonable and necessary and should continue until a change in circumstances warrants further review; and (5) one injection of Aimovig 140 mg per month for three months is reasonable and necessary. The WCJ ordered defendant to authorize and provide applicant treatment in accordance with these findings.

Defendant contends that the orders to provide applicant with HHA services and medical transportation until a change of circumstances warrants further review are unsupported by substantial evidence considered in light of the entire record and unsupported by *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 [Significant Panel Decision]. Defendant also contends

that the order to provide one injection of Aimovig 140 mg per month for three months is not supported by substantial evidence.

We did not receive an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report.[1] Based upon our review of the record, and for the reasons discussed below and in the Report, which we adopt and incorporate herein, we will deny the Petition.

We concur with the opinion of the WCJ, as stated in the Report, that the finding that HHA services of eight hours per day, seven days per week, are reasonable and necessary and should continue until a change in circumstances warrants further review is supported by the evidence in the record without application of *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 [Significant Panel Decision]. (Report, p. 6.) More specifically, inasmuch as defendant asserts that it has not previously authorized or provided applicant with HHA services; applicant testified that Rehab Without Walls helped her by preparing her schedule and going places with her without suggesting that it performed additional services; and applicant's attorney objected to the admission into evidence of an April 1, 2019 UR determination denying a request from Dr. Patterson for Rehab Without Walls's services on the grounds that its services were of a "totally different type" than HHA services, we are unable to discern a dispute to which the *Patterson* requirement that defendant prove a change of circumstances warranting review of whether HHA services should be continued in order to present evidence and argument on whether HHA services are reasonable and necessary may apply. (Petition, p. 4:18-21; Expedited Minutes of Hearing and Summary of Evidence, January 14, 2021, pp. 6:23-24, 11:3-10.)

Accordingly, we will deny the Petition.

[1] Deputy Commissioner Schmitz has been appointed in place of Commissioner Brass.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order Re: Treatment issued on March 1, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 18, 2021

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

DANIELLE CASAROTTI
ODJAGHIAN LAW GROU
LAW OFFICES OF BRADFORD & BARTHEL

SRO/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Defendant Illinois Midwest Insurance Agency on behalf of Star Insurance Co. has filed through its counsel of record a timely, verified petition for reconsideration of the February 26, 2021 Findings and Order Re: Treatment. It was found and ordered that defendants authorize and provide the following treatment to applicant: (1) a psychology consult for possible counseling services; (2) home assistance (HHA) services of 8 hours per day, 7 days per week, continuing until a change in circumstances warrant further review; (3) transportation services to and from medical appointments, continuing until a change in circumstances warrant further review; and (4) Aimovig 140mg (1 SQ injection monthly, 3 months). The petition contends that surveillance video and discrepancies between the opinions of the Qualified Medical Evaluators (QMEs) in this case disprove treating physician Dr. Patterson's opinion that these items are medically reasonable and necessary. Defendants also contend that Dr. Patterson's opinion on this issue is not substantial, and that the reasoning of the significant panel decision in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 does not apply to this case.

At the time this report was prepared, no answer to the petition had yet appeared in FileNet, but an answer is anticipated given the fact that both sides submitted trial briefs.

II FACTS

Approximately four years ago, the undersigned issued a Findings and Order dated March 6, 2017 in this case, finding that Danielle Casarotti, while employed at 27 years of age on January 28, 2012 as a bartender, Occupational Group Number 322, at Thousand Oaks, California, by Cisco's Mexican Restaurant, insured by Star Insurance Company, sustained injury arising out of and in the course of employment to her brain, neck, back, head, psyche, sleep, and eyes when she fell off of a bar stool and struck her head on the floor. Reconsideration of that decision was denied on May 24, 2017 by a panel of the Appeals Board consisting of Commissioner Razo, joined by Commissioner Brass and Chairwoman Zalewski.

Ms. Casarotti's attorney filed a Declaration of Readiness to Proceed to Expedited Hearing dated October 27, 2020 regarding treatment disputes with no timely utilization review. On December 23, 2020, the expedited hearing was converted to an MSC by Presiding Judge Brotman and trial was set on January 14, 2021 before the undersigned, who had previously taken testimony. The disputed treatment issues were heard with testimony by videoconference on January 14, 2021, with continuing testimony on February 2, 2021. At the conclusion of these proceedings, the following issues were submitted for decision: (1) the timeliness of the Utilization Review (UR) decision dated August 4, 2020, per *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 566 (Dubon II); and (2) Medical necessity of treatment in the corresponding Request for Authorization (RFA), including home healthcare, transportation, and Aimovig 140 milligrams.

At the first day of trial, exhibits identified as Applicant's 14 through 18 and Defendant's U through MM (starting after the last number or letter used at the previous trial) were offered into evidence. In response to objections to evidence that were deferred at the time of hearing, it was found that Defendant's CC, the vocational rehabilitation report of Kelly Winn-Boaitley dated July 8, 2020, should be admitted into evidence over applicant's objection, which is overruled, because a proof of service filed by defendant in response to the objection shows that this exhibit was served, along with other exhibits, on December 18, 2020, prior to the expedited hearing that was converted to an MSC and at which trial was set on the treatment disputes. It was also explained in the opinion on decision that Defendant's MM, letters to Dr. David Patterson dated December 30, 2019 and August 1, 2019, remain marked for identification only, and applicant's objection to this exhibit is sustained, on the grounds that this exhibit appears to have been added to the Pre-Trial Conference Statement after the expedited hearing that was converted to an MSC. Defendants argued at trial that this additional exhibit was added before trial and is not prejudicial, but have not denied that this was added after applicant had signed the page, without asking applicant's permission to modify the signed page. Defendant's NN, the subrosa videos to which links were provided, was admitted into evidence with the exception of the video dated February 24, 2014, which was misidentified on the Pre-Trial Conference Statement as February 14, 2014, as to which portion of Defendants' NN applicant's objection is sustained, because the incorrect date constituted defective notice to applicantas she and her counsel prepared for trial. Defendant's OO, which appears to contain only the investigative report of Frasco Investigative Services dated February 25, 2019, remains marked for identification only, and applicant's objection to this exhibit is sustained on the grounds that the Pre-Trial Conference Statement does not identify this specific report.

The UR determination dated August 4, 2020, which non-certified Dr. Patterson's July 7, 2020 RFAs for a psychology consult for counseling services (10 visits), HHA services of 8 hours per day, 7 days per week (3 months), transportation services to and from medical appointments, and Aimovig 140mg (1 SQ injection monthly, 3 months), was found to be untimely, because it was not issued within five working days of the utilization reviewer's receipt of Dr. Patterson's RFAs. The notice of determination states: "Dear DAVID PATTERSON MD: Your RFA dated 7/7/2020 was first received on 7/7/2020 requesting medical treatment for the above named employee. RISING received the request on 7/9/2020 and a decision was made on 8/4/2020." (Defendant's U, UR decision from Rising dated August 4, 2020, p. 1.) For a prospective UR determination, the 28-day period between receipt of the RFAs and the issuance of a notice of determination is not timely under Labor Code section 4610. Pursuant to the *en banc* opinion of the Appeals Board in Dubon II, cited above, it was fond that medical treatment disputes could be heard based on the untimely UR determination, with reasonableness and necessity of treatment found by reference to the provisionsof the Medical Treatment Utilization Schedule (MTUS) contained in California Code of Regulations, tit. 8, sections 9792.20 et seq., unless the presumption of correctness of the MTUS is rebutted, or the MTUS does not address the particular kind of treatment sought to be authorized.

Based on the evidence provided, a February 26, 2021 Findings and Order Re: Treatment was issued, ordering that defendants authorize and provide the following treatment to applicant: (1) a psychology consult for possible counseling services; (2) home assistance (HHA) services of 8 hours per day, 7 days per week, continuing until a change in circumstances warrant further review; (3) transportation services to and from medical appointments, continuing until a change

in circumstances warrant further review; and (4) Aimovig 140mg (1 SQ injection monthly, 3 months).

III
DISCUSSION

Defendant's petition contends that surveillance video and discrepancies between the opinions of the Qualified Medical Evaluators (QMEs) in this case disprove treating physician Dr. Patterson's opinion that his recommended treatment is medically reasonable and necessary. The petition doesnot attempt to prove that the utilization review determination, which states that it was made 28 days after receipt of Dr. Patterson's prospective RFA, is timely.

The petition also does not seem to contest the finding that a psychology consult is reasonableand necessary. As noted by defendants' untimely UR, admitted as Defendant's U, a consult in psychology consult should have been authorized as reasonable and necessary to assess applicant's anxiety symptoms (UR Decision from Rising dated August 4, 2020, Defendant's U, p. 5). Because Dr. Patterson is not himself a psychologist or psychiatrist and the consultation with such a specialist has not yet been performed, it is beyond Dr. Patterson's expertise and premature to determine whether counseling services are necessary, as opposed to some other kind of treatment for anxiety, and how many sessions of those counseling services are needed. The request for 10 sessions of counseling is not ordered, because the psychologist or psychiatrist who performs the consult should determine and request appropriate treatment within that specialty, not Dr. Patterson. Accordingly, a consult in psychology or psychiatry should be authorized at this time.

With respect to home assistance (HHA) services of 8 hours per day, 7 days per week, that was found to be reasonable and necessary for the reasons set forth in Dr. Patterson's reports dated September 19, 2019 (Applicant's 16), June 25, 2020 (Applicant's 14), and January 11, 2021 (Applicant's 18), all of which support Dr. Patterson's July 7, 2020 RFA (Applicant's 17) as required by MTUS guidelines by identifying the medical condition that requires the assistance (traumatic brain injury, as an objective cause of cognitive and memory problems), the kinds of services required (assistance with essential daily activities such as reminders to take medications at appropriate times, organizing and remembering medical appointments, managing her schedule and mail, all of which have caused applicant difficulty due to her cognitive and memory problems and the fact that other family members are not consistently present to assist her), and the level of expertise required (attendant care).

Defendant's petition argues that the need for attendant care for cognitive and memory problems as identified by Dr. Patterson is rebutted by surveillance videos that show applicant driving, jogging, and running errands. The undersigned disagrees. The depiction of isolated incidents of travel, bodily movement, and going to stores is not enough by itself to disprove a diagnosis of unreliable cognitive function from a medical expert. If the video had been reviewed by Dr. Patterson and caused him to change his mind about treatment recommendations, the result would of course have been different. Instead, defendants rely on the medical expert opinions of the QMEs in this case as rebuttal of the treatment recommendations of treating physician Dr. Patterson. This reliance on QME opinion regarding treatment disputes is contrary to California Code of Regulations, title 8, section 35.5(g)(2), which dictates that "[f]or any evaluation

performed on or after July 1, 2013, and regardless of the date of injury, an Agreed Medical Evaluator or Qualified Medical Evaluator shall not provide an opinion on any disputed medical treatment issue…"

Furthermore, even if QME opinions on treatment disputes were permissible under the regulations, the selected portions of QME reports cited by defendant in their petition are general statements that do not effectively rebut Dr. Patterson's recommendations even if QMEs were permitted to opine on a treatment dispute. Defendants' petition cites the QME in psychiatry, Dr. Barnett, as having reviewed "social media evidence" and concluding that "applicant has a mild level of permanent psychiatric disability" that is not total on a purely psychiatric basis (Petition for Reconsideration dated March 19, 2021, p. 7, lines 10-14, citing Defendant's AA, PQME Report of Steven Barnett, M.D. dated December 19, 2018). General findings that applicant's condition is "mild" and "not total" is not enough to effectively rebut the very specific recommendation of Dr. Patterson of home assistance for cognitive problems that are consistent with Ms. Casarotti's diagnoses. Defendant's reliance on orthopedic QME Dr. Nussbaum's finding of zero percent whole person impairment and no work restrictions for the cervical and lumbar spine is even more inapposite, as the home assistance recommendation has nothing to do with Ms. Casarotti's spine. The petition also quotes the QME in neurology, Dr. Freundlich, who offers somewhat contradictory opinions that applicant is "fully capable of self-care" while "requiring some assistance from her mother" and "fully oriented" while experiencing "slight difficulty with time relationships" (Petition for Reconsideration dated March 19, 2021, p. 7, lines 21-28, citing Defendant's V, PQME Report of Robert Freundlich, M.D. dated March 26, 2020). These statements by Dr. Freundlich ultimately support Dr. Patterson's recommendation for daily assistance, insofar as Ms. Casarotti is "requiring some assistance from her mother" and having difficulty with time relationships. Dr. Freundlich's assessment of zero percent whole person impairment for loss of vision and headaches, like Dr. Nussbaum's assessment of the cervical and lumbar spine, does not rebut Dr. Patterson's recommendation for assistance for a different condition, to wit, unreliable cognitive functioning. Defendant's reliance on the opinions of its vocational expert is similarly misplaced, as the issue in dispute is Ms. Casarotti's ability to remember things and organize her affairs, not her earning capacity.

The above reasoning should be sufficient by itself to support the finding that home assistancefor unreliable cognitive functioning is reasonable and necessary. However, the opinion on decision did state that the RFA should not have required review in the first place, because according to Dr. Patterson applicant had a "home health aide who previously came 8 hours a day 7 days a week" (Report of Dr. Patterson 1/11/2021, Applicant's 18, p. 1, lines 4-5), helping her with all of the activities identified by Dr. Patterson as the basis for the request. The opinion found that thisconstitutes care of an ongoing nature that should continue until a change in circumstances warrants further review, consistent with the significant panel decision in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910. No such change in circumstances was demonstrated to justify either the termination of previously-provided home health aide services of eight hours per day, seven days per week, or the review of whether such services should continue. The petition asserts that the previous home assistance, from Rehab Without Walls, was not the same thing, although the petition does admit that Rehab Without Walls "helped create a schedule and organize applicant's mail" (Petition for Reconsideration dated March 19, 2021, p. 5, lines 3-4), which are consistent with the kind of assistance that Dr. Patterson has recommended. Notwithstanding this similarity, it may very well be the case that

the "Rehab Without Walls" program is dissimilar enough from home assistance that the reasoning in the *Patterson* case would not obviate the need for utilization review in this case. In any event, the unrebutted reasons found in Dr. Patterson's reports should be sufficient to support his request for assistance, particularly in a system that is under a state constitutional mandate to make adequate provisions without encumbrance (Cal. State Constitution, Art. XIV, section 4).

Transportation services to and from medical appointments were also found to be reasonable and necessary, and once established, should continue as an ongoing service until a change in circumstances warrants further review, consistent with the reasoning in the *Patterson* significant panel decision. Notwithstanding video showing that applicant has been driving a vehicle, Dr. Patterson's reports document that transportation is not consistently available (e.g., Report of Dr. Patterson 1/11/2021, Applicant's 18, p. 1, lines 14-15: "She was evaluated by optometry and hasnew glasses waiting for her however she has been unable to pick them up due to lack of transportation.") Driving is also a risky endeavor for Ms. Casarotti, given her condition, even if she has been observed driving on numerous occasions. Page one of Dr. Patterson's most recent report also documents chronic migraines and Posttraumatic Vision Syndrome, which suggests that even if Ms. Casarotti has been seen driving in surveillance, her industrially-caused and industrially-treated conditions could cause a compensable consequence injury at any time. Furthermore, page two of Dr. Patterson's January 11, 2021 report indicates that transportation has been "approved," which if true, means that transportation should continue to be approved absent a change in circumstances, consistent with the significant panel decision in *Patterson*. The point of the *Patterson* case is to avoid arbitrary and potentially inconsistent interruptions in ongoing types of treatment and care, which in the *Patterson* case involved Nurse Case Management services, but the rationale is equally applicable to both home care or transportation services.

Aimovig 140mg, 1 subcutaneous (SQ) injection monthly, for three months, was found to be reasonable and necessary for the chronic migraine headaches documented in Dr. Patterson's reports. Although the MTUS does not address this particular medication, ODG guidelines do, and are the next resource to be used in the medical evidence search sequence according to California Code of Regulations, tit. 8, section 9792.21.1. Criteria for use of Aimovig under ODG are met as follows: (1) confirmed diagnosis of chronic migraine, which Dr. Patterson has provided in his reports dated September 19, 2019 (Applicants 16) and January 11, 2021 (Applicant's 14); (2) Dr. Patterson has notindicated any past history of chronic cluster headache or hemiplegic migraine; (3) Dr. Patterson doesnot diagnose medication overuse headache or otherwise associate the migraines with medication use, and there is no indication that applicant is using opioids or triptans 10 or more days a month; (4) there have already been unsatisfactory trials for two different classes of preventive medications, documented in Dr. Patterson's reports as Botox and Fiorinal, which Dr. Patterson's reports of September 19, 2019 (Applicant's 16) and January 11, 2021 (Applicant's 18) show that applicant has continued to use for much longer than the required minimum of six weeks, with effects that are too limited, in Dr. Patterson's professional judgment, necessitating a trial of Aimovig; and (5) there is no indication that Onabotulinumtoxin A is being used concurrently. Defendant's argument to find to the contrary is an invitation to use the undersigned's lay opinion to independently assess the correctness of Dr. Patterson's expert opinion about the efficacy of other substances already tried, and the probability of benefit from Aimovig. In this case, Dr. Patterson's opinion does seem sufficiently consistent with ODG guidelines that it should not be overturned.

IV
CONCLUSION

It is respectfully recommended that the petition be denied.

DATE: 4/1/2021

Clint Feddersen
WORKERS COMPENSATION
ADMINISTRATIVE LAW JUDGE