WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DENISE ARMTROUT, *Applicant*

vs.

PLEASANTON UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured, Adjusted by KEENAN ASSOCIATES, *Defendants*

Adjudication Number: ADJ162421 (OAK 0342761)
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant filed a Petition for Removal on November 29, 2021 regarding the November 2, 2021 Findings and Award issued by the workers' compensation administrative law judge (WCJ). We will treat the Petition for Removal as one seeking reconsideration from a final order.[1] Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

The employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code,[2] § 4600.) Employers are further required to conduct utilization review (UR) of treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.) Section 4610.5 mandates independent medical review (IMR) for "[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury." (Lab. Code, § 4610.5(a)(2); see also Lab. Code, § 4062(b) [an employee's objection to a UR decision to modify, delay or deny an RFA for a treatment recommendation must be resolved through IMR].)

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[1] The determination over an IMR dispute is a final order. (*Allied Signal Aerospace v. Workers' Comp. Appeals Bd.* (*Wiggs*) (2019) 35 Cal.App.5th 1077, 1084–1085 [84 Cal. Comp. Cases 367].)

[2] All further statutory references are to the Labor Code, unless otherwise noted.

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the Administrative Director (AD). The section explicitly provides that the AD's determination is presumed to be correct and may only be set aside by clear and convincing evidence of one or more of the following: (1) the AD acted without or in excess of his or her powers, (2) the AD's determination was procured by fraud, (3) the independent medical reviewer had a material conflict of interest, (4) the determination was the result of bias based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (Lab. Code, § 4610.6(h).)

In upholding a challenge to the constitutionality of section 4610.6, the Court of Appeal held that IMR determinations are subject to meaningful review, even if the Appeals Board cannot change medical necessity determinations, noting that "[t]he Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1100 [80 Cal.Comp.Cases 1262].)

In this case, the parties stipulated that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her legs in the form of Lymphedema. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 10/12/21, at p. 2:8-13.) Moreover, we agree with the statement in the WCJ's report that "[a]n expert opinion is not necessary to know that there is a difference between treating subjective complaints of pain and treating the applicant's objectively verified retention of considerable amounts of fluids." (Report, at p. 6.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 28, 2022

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

DENISE ARMTROUT C/O LIRA LAW GROUP
LIRA LAW GROUP
FLOYD SKEREN MANUKIAN LANGEVIN, LLP

PAG/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Applicant's Occupation:	Child Nutrition Specialist
Applicant's Age:	41
Date of Injury:	March 16, 2005 - March 16, 2006 Legs
Parts of Body Injured:	Legs
Identity of Petitioner:	Defendant
Timeliness:	Yes
Verification:	Yes
Date of Findings and Award:	November 2, 2021
Defendants' Contentions:	The reports from the agreed medical evaluators, the prior utilization review (UR) determinations, and the prior independent medical review (IMR) determinations should not have been admitted into evidence, and the June 3, 2021 IMR determination should be upheld as it does not contain findings of fact that are plainly erroneous as a matter of ordinary knowledge.

II.
STATEMENT OF THE CASE AND FACTS

BACKGROUND

During the period ending on March 16, 2006, applicant sustained an injury arising out of and in the course of employment to her legs in the form of lymphedema while employed by defendant as a Child Nutrition Specialist.

On October 12, 2011, David Suchard, M.D., the agreed medical evaluator (AME) for applicant's lymphedema stated that applicant had "marked lymphedema of both lower extremities." (Exhibit 4, p. 9.) As relevant herein, he made the following medical treatment recommendations, "[d]iuretics and simple compression stockings are not typically helpful for lymphedema. Physical therapy with massage directed towards augmenting lymphatic drainage is typically utilized, often in an approach called complete decongestive therapy, with lymphatic drainage massage combined with multilayer compressive bandaging, and at times use of pneumatic compression pumps." (*Id*. at p. 11.)

On August 13, 2013, Dr. Suchard evaluated applicant and issued a report stating in relevant part that,

> [Applicant] reports that she then had about 7 weeks of aggressive daily decompressive therapy for her lymphedema in a rehabilitation facility, and that this resulted in a loss of about 68 pounds of lymphatic fluid. During

> this aggressive lymphatic decompressive treatment, she developed some headache, probably due to fluid shifts.
>
> In December of 2012, Ms. Armtrout reports that she was started on a 5-day- per-week regimen of lymphatic massage, pump and laser treatment. She had additional fluid loss, and her weight decreased to 267 pounds (from reported maximum of about 340 pounds).
>
> Ms. Armtrout reports that further treatment for lymphedema was stopped and not further authorized after 4/24/13.
>
> She has subsequently reaccumulated about 20 pounds of lymphatic fluid and reached her current weight of about 288 pounds.
> (Exhibit 5 at pp. 2-3.)

Dr. Suchard further stated that, "[w]ith regard to the patient's treatment needs for lymphedema decompressive therapy, I must state that the currently applied Utilization Review process addressing massage for minor musculoskeletal conditions is simply inappropriate." (Exhibit 5 at p. 7.)

On August 8, 2014, defendant's utilization review (UR) provider issued a report stating in relevant part that, "[t]o treat this patient's lymphedema in the lower extremities with massage and wrapping is appropriate." (Exhibit 8, p. 3.)

On May 4, 2015, defendant's UR provider issued a report approving lymphedema treatments and stating that,

> although lymph drainage therapy is not recommended by the guidelines, it is well documented that this patient has a modest control of the patient's lymphedema with the lymphedema treatments. Manual lymphatic drainage therapy, as performed by massage therapists. Is intended to stimulate or move excess fluid away from the swollen area so that it can drain away normally. Therefore, the medical necessity of the request has been established as the records document the patient's Improvement with the lymphedema treatments. (Exhibit 10, pp. 1, 3; see also pp. 7-8.)

On March 11, 2021, Dr. Veiss, applicant's primary treating physician, issued a request for authorization (RFA) for lymphatic massage therapy. (Exhibit 19, p. 2.)

On March 18, 2021, defendant's UR provider requested additional information regarding the March 11, 2021 RFA. (Exhibit 20.)

On March 24, 2021, defendant's UR provider issued a report denying the request for lymphatic massage. (Exhibit 21 at p. 1.) In relevant part, the UR provider stated that,

> The California MTUS does not make recommendations regarding lymphatic drainage and further guidelines were searched. According to the Official Disability Guidelines, lymphatic drainage is not recommended. There is a lack of quality evidence to support its use.
>
> Lymphatic massage is not recommended. As a treatment for chronic pain, there is no quality evidence to support its use. A randomized controlled trial indicated that during the first 6 months of complex regional pain syndrome type I, manual lymphatic drainage provided no additional benefit when applied in conjunction with an intensive exercise program. In this case, although there is documentation of bilateral swelling in the legs, lymphatic massage is not recommended and therefore not medically necessary.
> (*Id*. at p. 3, see also p. 4.)

On April 9, 2021, applicant filed an IMR application in response to the UR non-certification of the lymphatic massage therapy. (Exhibit 22.)

On June 3, 2021, Maximus non-certified the requests for lymphatic massage therapy stating in relevant part that,

> The MTUS does not specifically address the request for lymphatic massage, therefore, the ODG was consulted. According to the ODG, lymph drainage therapy for pain is not recommended as there is no quality evidence to support its use.
>
> In this case, the injured worker does not meet the ODG criteria for use of the requested lymphatic massage therapy for 24 sessions. In particular, the ODG does not recommend lymph drainage therapy for pain as there is no quality evidence to support its use. There are no exceptions documented to warrant superseding the guidelines. Therefore at this time the requirements for treatment have not been met, and the request is not medically necessary. (Exhibit 31 at p. 2.)

On June 30, 2021, Dr. Suchard evaluated applicant and issued a report stating in relevant part that,

> I note that neither the MTUS or [sic] the ACOEM guidelines provide much of any relevant guidance with regard to long-term management of lymphedema, as is present in this case.
>
> I again note that use of diuretics and simple compression stockings are not typically helpful with lymphedema. Physical therapy with massage directed towards augmented lymphatic drainage is typically utilized in conjunction with multilevel compressive bandages and compressive

> garments, and pneumatic compressive pumping. Such treatment is typically required long-term, not intermittently nor periodically.
> (Exhibit 7 at p. 13.)

On October 12, 2021, the matter proceeded to trial on the issue of applicant's appeal of the Administrative Director's Independent Medical Review Determination. During the trial, applicant testified in relevant part as follows: In approximately 2011, she began treating her lymphedema, and in the last five years she has only received medical treatment for the lymphedema from Dr. Veiss and physical therapists. She currently uses a pump for three hours every day to treat her lymphedema. Her lymphedema requires her to wear compression garments during the day and special quilted garments during the night. She last had therapeutic drainage massage approximately three years ago. Since that time, she has gained thirty pounds in fluid weight. During that type of massage, the therapist opens her lymph nodes, pushes the fluid out of her joints, then wraps her in a bandage type material which she wears all night and which she believes caused neuropathy. The following day, she is unwrapped and she will expel lymphatic fluid by urinating. She knows it is lymphatic fluid and not urine because it is much thicker. She believes lymphatic massage is helpful and Dr. Suchard she would need it for the rest of her life.

Defendant's trial exhibit was a printout from the ODG stating in relevant part that,

> Manual lymphatic drainage therapy, as performed by massage or physical therapists, is intended to stimulate or move excess fluid away from the swollen area, to restore more normal drainage. As a treatment for chronic pain, there is no quality evidence to support its use. A randomized controlled trial indicated that, during the first 6 months of complex regional pain syndrome type I, manual lymphatic drainage provided no additional benefit when applied in conjunction with an intensive exercise program. (1) (EG 1) There was low to very low quality evidence in a Cochrane systematic review that manual lymphatic drainage combined with and compared to either anti-inflammatories and physical therapy or exercise has not been effective for treating CRPS I pain over the short-term. (2) (EG 1)
>
> (Exhibit A.)

On November 2, 2021, applicant's dispute with defendant's March 24, 2021 UR determination was remanded to the Administrative Director for Independent Medical Review by a different reviewer on the basis that the Administrative Director's June 3, 2021 determination contained findings of fact that are plainly erroneous as a matter of ordinary knowledge.

On November 29, 2021, defendant filed its Petition for Removal.

III.
DISCUSSION

The Petition for Removal Should be Treated as One Seeking Reconsideration

A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.)[1] A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Alternately, non-final decisions may be challenged by a petition for removal. The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955.)

Here, the Findings and Award contained final orders regarding employment and injury. Further, defendant is primarily challenging the order remanding the UR dispute regarding lymphatic massage therapy to the Administrative Director for IMR by a different reviewer. The challenged order is also a final order as impacts defendant's substantive right to rely upon the initial IMR determination. Accordingly, defendant's Petition should be treated as one seeking reconsideration, not removal.

Admissibility of Exhibits

Defendant contends that the medical-legal reports, previously issued UR reports and previously issued IMR reports should not have been admitted into evidence. In support, defendant argues that medical legal evaluators cannot supersede the IMR process and that the evidence regarding prior requests for lymphatic massage does not go towards the issue of whether the June 3, 2021 IMR determination contained a mistake of fact that is a matter of ordinary knowledge. However, the materials were not used as a basis to award the sought treatment. Rather, they were examined to determine whether the Administrative Director's determination contained a mistake of fact that is not subject to expert opinion. Further, defendant's objections go towards the weight these materials should be given, not their admissibility.

The Administrative Director's June 3, 2021 Determination Contains a Plainly Erroneous Finding of Fact that is a Matter of Ordinary Knowledge

As relevant herein, Labor Code section 4610.6(h) provides that,

> .... The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:
>
> ***
>
> (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review

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

> pursuant to Section 4610.5 and not a matter that is subject to expert opinion.
> (Lab. Code, §4610.6(h).)

Here, there is clear and convincing evidence reflecting that applicant has lymphedema. (Exhibit 4, p. 9; Exhibit 8, p. 3; Exhibit 10, pp. 1, 3; Exhibit 19, p. 2.) This lymphedema causes applicant to retain significant amounts of lymphatic fluid. In 2013, Dr. Suchard reported that applicant lost 68 pounds of lymphatic fluid and that she subsequently regained 20 pounds of that fluid. (Exhibit 5 at pp. 2-3; see also Exhibit 10, pp. 1, 3, 7, 8.) The evidence further reflects that the lymphatic massage is used to treat applicant's accumulated lymphatic fluid and not chronic pain. An expert opinion is not necessary to know that there is a difference between treating subjective complaints of pain and treating the applicant's objectively verified retention of considerable amounts of fluid. However, the Administrative Director's June 3, 2021 determination was based on the fact that the ODG does not recommend lymphatic massage for *pain*. (Exhibit 31 at p. 2.) Accordingly, the determination was based on a plainly erroneous finding of fact that is a matter of ordinary knowledge and not a matter subject to expert opinion. Thus, this case is distinguishable from the circumstances in *Ledesma v. Clow Valve Company* 2020 Cal.Wrk.Comp.P.D. LEXIS 4[2] in which the injured worker argued that the ODG guidelines could not be basis of a denial of treatment. This matter is similarly distinguishable from the circumstances in *Banks v. Wells Fargo* 2021 Cal.Wrk.Comp.P.D. LEXIS 74 in which there was a dispute regarding whether the Administrative Director should have relied upon the MTUS Guidelines or the ODG Guidelines.

Based upon the above, I recommend that Defendant's Petition be treated as one seeking reconsideration and that it be denied. In the event that it is determined that the Petition should be considered under the removal standard, removal should be denied as neither the cost of the second IMR nor the potential of providing applicant with medical treatment would constitute irreparable harm to defendant.

Date: December 2, 2021

Alison Howell
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

[2] Panel decisions are not binding precedent but they may be considered to the extent that their reasoning is persuasive. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Bank).)