WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MANUEL HERNANDEZ, *Applicant*

vs.

RC WENDT PAINTING, INC.;
CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY, *Defendants*

Adjudication Number: ADJ11449146
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, except as noted below, and for the reasons stated below, we will deny reconsideration.[1]

We do not adopt or incorporate the "Verification/Signature" section of the Report which is located in the Discussion section.

The utilization review (UR) process is mandated by section 4610, which is defined as the function that "prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to [Labor Code][2] Section 4600." (Lab. Code, § 4610(a).)

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[1] Commissioner Sweeney, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

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

In *Dubon v. World Restoration, Inc*., (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), we reiterated that if a UR denial is untimely, the determination of medical necessity of the disputed medical treatment may be made by the Workers' Compensation Appeals Board (WCAB) based on substantial medical evidence consistent with section 4604.5. (See also *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 240-241, 242 (73 Cal.Comp.Cases 981] [injured worker bears the burden of proof to show that medical treatment is reasonably required].) As noted by the WCJ in the Report, defendant does not dispute the WCAB's jurisdiction to determine the medical necessity of the October 28, 2021 Request for Authorization (RFA) issued by primary treating physician David Patterson, M.D. Moreover, for the reasons stated by the WCJ in the Report and the Opinion on Decision, we agree that, despite the opportunity to develop the record, applicant did not meet his burden to prove by substantial medical evidence that the medical treatment requested is reasonably required. To constitute substantial evidence, a physician's report must be well-reasoned, not speculative, it must be based on an adequate history and examination, and it must set forth the reasoning behind the physician's opinion. (*Granado v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 27, 2023

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

MANUEL HERNANDEZ
TINA ODJAGHIAN LAW GROUP
DORMAN & SUAREZ

PAG/abs

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation:	Painter
	Applicant's Age:	51 at DOI
	Date of Injury:	August 20, 2023
	Parts of Body [Injured]:	Head, neck, upper extremities, and lower extremities; other parts of body in dispute
2.	Identity of Petitioner:	Applicant
	Timeliness:	Yes
	Verification:	Unclear
3.	Date of Order:	August 30, 2023
4.	Petitioner's Contentions:	That Applicant's evidence, largely discussing "similar" treatment and not the specific treatment at issue, is sufficient to prove medical necessity of the disputed treatment

II
STATEMENT OF THE CASE AND FACTS

The matter previously proceeded to trial on May 25, 2022 before the Honorable Judge Siqueiros.[1] At that time, the issues for determination were the timeliness of Utilization Review (UR) decisions and the medical necessity of the treatment contained in the Requests for Authorization (RFA), dated October 28, 2021 and February 11, 2022. After Defendant's Petition for Reconsideration, dated June 30, 2022, and the judge's Report and Recommendation (R&R), dated July 15, 2022, the Appeals Board issued an Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Order Granting), dated August 28, 2022. Through that sequence of events, Defendant no longer contested the Board's jurisdiction to determine medical necessity and the parties were directed to engage in discovery to further develop the medical evidence on the issue of medical necessity.

The parties returned for further proceedings on August 7, 2023, indicating to the undersigned that the only remaining issue was the October 28, 2021 RFA. The parties submitted the matter to the undersigned on August 7, 2023 on the documentary evidence alone. The undersigned then issued a Finding and Order on August 30, 2023 finding that Applicant failed to sustain his burden of proof in proving the medical necessity of the RFA. Applicant, through counsel, filed a timely, but possibly unverified Petition for Reconsideration (Recon), dated September 22, 2023.

[1] Judge Siqueiros has since retired and the case has since been reassigned to the undersigned.

III
DISCUSSION

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Applicant did not sustain his burden of proof in proving medical necessity of the disputed treatment

An untimely UR does not mean that the Applicant is automatically entitled to the requested treatment. Applicant must still meet his burden of proof by a preponderance of the evidence to demonstrate that the treatment requested is medically necessary.[2] This burden is sustained by presenting substantial medical evidence.[3] It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions.[4]

The Recon asserts that the Applicant's evidence is sufficient to meet the burden to prove medical necessity of the underlying treatment in the RFA at issue. The undersigned notes that much of this argument appears to be by making comparisons between treatment modalities and "connecting the dots" between various reports, rather than addressing the necessity of the specific RFA itself. For example, the Recon points to Applicant's Life Care Plan obtained in November of 2019, two years before the RFA at issue, that "brain injury day treatment" would be necessary.[5] It should be noted that this is a "similar treatment modality" as the RFA at issue and not the treatment at issue itself, something the Recon itself acknowledges.[6] The undersigned does not place a great deal of weight to this evidence as it is not even discussing the same treatment at issue, let alone the RFA itself, but instead a "similar treatment modality." This is simply not persuasive nor substantial.

The Recon then points to Dr. Martinez's reporting, who appears to be a secondary physician, and discusses that treatment from Dr. Martinez has been requested and denied.[7] This argument is also not persuasive given that the reporting of Dr. Martinez is not addressing the RFA at issue, but a subsequent request and other issues. Again, the program discussed by Dr. Martinez is a "very similar program," but not the same program as the underlying RFA at issue.[8] None of this is on point for the disputed RFA.

The Recon does not direct the undersigned to any substantial reporting of Dr. Patterson, the PTP who issued the RFA, addressing the necessity of the RFA at issue. This further illustrates an issue that the undersigned raised in the Opinion and Decision in that the PTP is not adopting and incorporating the medical reporting generated by Dr. Martinez.[9] Notwithstanding substantive

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[2] Labor Code 5705, 3202.5

[3] Dubon v. World Restoration, 79 Cal. Comp. Cases 1298, 1312 (Cal. Workers' Comp. App. Bd. October 6, 2014)

[4] Place v. Workers' Comp. Appeals Bd., 3 Cal. 3d 372, 378-379

[5] Recon, Page 8, Lines 11-12

[6] Id. at 13.

[7] Id. at Page 9, Lines 3-14

[8] Id. at Page 10, Line 18

[9] Opinion on Decision, August 30, 2023, Page 2, Fn 4

issues, the medical reporting in this matter violates the Regulation.[10] Additionally, the Applicant's medical reports suffer from reliability issues.[11] The undersigned notes that the parties had approximately an entire year from the WCAB's Order mandating that the parties "engage in discovery in order to further develop the medical evidence."[12] It appears that Applicant's response to that Order is largely to introduce evidence that predates the original trial and was not originally introduced. Any evidence subsequently procured appears to be largely boilerplate reporting and non-responsive to the underlying RFA itself. The evidence introduced on behalf of the Applicant is not sufficient to sustain his burden of proof.

On the other hand, Defendant appears to have complied with the Order to develop the medical evidence. The prior proceeding pointed out that Applicant's medicals did not contain much in the way of appropriate medical analysis; however, Defendant's UR response contained medical analysis, but did not have a complete review of relevant material. Applicant has chosen to introduce medical reporting discussing "similar" medical treatment and nothing on the exact issue in the RFA itself. Defendant instead obtained an additional report from the UR reviewer, who appears to have cured the previously identified defect.

When weighing the Applicant's evidence on its own, the undersigned does not find it compelling nor sufficient to sustain the burden of proof. That is, even if no evidence were introduced by Defendant and Applicant's evidence were meant to stand on its own, the undersigned does not feel it reaches the preponderance standard. Additionally, the preponderance standard requires a weighing the opposing evidence as well.16 Assuming for the sake of argument that the undersigned has miscalculated the weight of Applicant's evidence and greater weight should be assigned to it, when the undersigned weighs that evidence against the Defendant's, Applicant still has not sustained his burden of proof.

IV
CONCLUSION

The undersigned respectfully recommends that the Petition for Reconsideration be DENIED for the reasons set forth above.

DATE: September 27, 2023

Michael Joy
WORKERS' COMPENSATION JUDGE

[10] CCR 9785 (e)(4)

[11] Opinion on Decision, August 30, 2023, Page 2, Fn 6

[12] Order Granting, August 29, 2022

OPINION ON DECISION

Procedural History

The matter previously proceeded to trial on May 25, 2022 before the Honorable Judge Siqueiros.[1] At that time, the issues for determination were the timeliness of Utilization Review (UR) decisions and the medical necessity of the treatment contained in the Requests for Authorization (RFA), dated October 28, 2021 and February 11, 2022. After Defendant's Petition for Reconsideration, dated June 30, 2022, and the judge's Report and Recommendation (R&R), dated July 15, 2022, the Appeals Board issued an Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Order Granting), dated August 28, 2022. Through that sequence of events, Defendant no longer contested the Board's jurisdiction to determine medical necessity and the parties were directed to engage in discovery to further develop the medical evidence on the issue of medical necessity. It is from this that the parties return for further proceedings, now indicating to the undersigned that the only remaining issue is now the October 28, 2021 RFA.

Need for Further Medical Treatment / Medical Necessity of the treatment in the October 28, 2021 RFA

An untimely UR does not mean that the Applicant is automatically entitled to the requested treatment. Applicant must still meet his burden of proof by a preponderance of the evidence to demonstrate that the treatment requested is medically necessary.[2] This burden is sustained by presenting substantial medical evidence.[3]

The undersigned notes that the prior R&R leading up to the Order Granting identified issues with the evidence presented by both sides. It was noted that the Applicant's medicals made no mention of Medical Treatment Utilization Schedule – American College of Occupational and Environmental Medicine (MTUS – ACOEM) guidelines and that the reporting of Dr. Patterson, the Primary Treating Physician (PTP), was potentially contradictory. It was also noted that the Defendant's evidence was based on a limited review of the medical file. In these subsequent proceedings, to perfect the record, it would be expected that the Applicant's medical reporting would provide more details in accordance with the foregoing and Defendant's evidence would contain a more thorough review of the medical records to date.

In these subsequent proceedings, Applicant has introduced 20 additional exhibits. The exhibits range from PTP reports to secondary doctor's reports, to PQME reports, and exam notes. It appears that nine of these newly introduced exhibits, less than half of what is introduced, are dated subsequent to the May 25, 2022 trial. The undersigned has looked closely at the reports of the PTP and noted that none of the reports appear to incorporate any of the other reports, at least

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Labor

[2] Labor Code 5705, 3203.5

[3] Dubon v. World Restoration, 79 Cal. Comp. Cases 1298, 1312 (Cal. Workers' Comp. App. Bd. October 6, 2014)

in any meaningful fashion, and these other reports would therefore be considered in violation of the regulations.[4] At times, it was difficult for the undersigned to review Applicant's exhibits due to multiple signatories and odd formatting.[5] Applicant's reports also suffer from additional issues, including many simply indicating that a Spanish language interpreter was present, but not explaining if they were certified to translate at medical appointments.[6]

Even in evaluating the procedural deficiencies above, the undersigned has concerns present with the substance of the Applicant's evidence. It is well established that the MTUS-ACOEM guidelines are presumed correct.[7] As noted in previous proceedings, the Applicant's evidence was lacking in MTUS-ACOEM citations and justification. Any new report submitted by the Applicant's PTP, Dr. Patterson, appears to largely be boilerplate and non-responsive to the Order Granting's mandate to develop the record. Applicant introduces the report of Dr. Sandra Martinez containing many citations to MTUS-ACOEM, but the undersigned again notes that this report is not incorporated by the PTP nor does the report seemingly address the medical necessity of the underlying treatment in any great detail.[8]

Since the prior R&R discussed the merits of Defendant's evidence and the Order Granting directed the parties to engage in discovery, the undersigned will provide a brief discussion of that as well. Defendant obtained a more detailed Peer Review report subsequent to the prior proceedings.[9] The report reviews additional medical records, addresses MTUS-ACOEM concerns, and still maintains the prior conclusions. It appears that this report "cures" the previously identified defects. The undersigned notes that it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions.[10]

[4] CCR 9785 (e)(4)

[5] Although the undersigned notes that Applicant's Exhibit 15 was labeled on the Pre-Trial Conference Statement and the Minutes of Hearing as a report of Dr. Marline Sangnil, in reality it is a report of Dr. David Patterson, the PTP. The undersigned believes this irregularity to be of no consequence to the substantial rights of the parties in accordance with CCP 475.

[6] *See*, *e.g.,* Applicant's Exhibit 13; this is compared with Applicant's Exhibit 15, where one of the doctor's medical assistants provided translation and not a certified interpreter.

[7] Labor Code 4604.5 (a), CCR 9792.21 (b)

[8] Applicant's Exhibit 22.

[9] Defendant's Exhibit 3.

[10] Place v. Workers' Comp. Appeals Bd., 3 Cal. 3d 372, 378-379

In summation, Applicant's evidence is not sufficient to sustain his burden of proving medical necessity of the treatment at issue. This conclusion is reached when evaluating Applicant's evidence with both the procedural and substantive concerns outlined above; however, this conclusion would also be reached absent any procedural issues. Moreover, Defendant's "rehabilitated" report also prevents Applicant's evidence from meeting the burden of proof as Applicant's evidence, when compared to Defendant's, would not have "more convincing force and the greater probability of truth."[11]

DATE: August 30, 2023

Michael Joy
WORKERS' COMPENSATION JUDGE

[11] Labor Code 3202.5