WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EARL MOSS, *Applicant*

vs.

KAISER FOUNDATION HEALTH PLAN,
PERMISSIBLY SELF-INSURED AND ADJUSTED BY SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ4668467
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the September 12, 2022 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a technical manager on January 3, 2006, sustained industrial injury to his right upper extremity. The WCJ found that the February 3, 2022 Independent Medical Review (IMR) Final Determination Letter issued by Maximus Federal Services was based on a clearly erroneous finding of fact, which is a matter of ordinary knowledge, and ordered that the medical dispute be remanded to the Administrative Director for evaluation by a new reviewer.

Defendant contends that the WCJ conflated the determination of the Maximus Reviewer with that of the Utilization Review physician, and that the record does not support the WCJ's finding that the IMR decision was based on erroneous findings of fact.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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, which we adopt and incorporate, and for the reasons discussed below, we will affirm the September 12, 2022 F&O.

Applicant sustained injury to the right upper extremity while employed as a technical manager by defendant Kaiser Foundation Health Plan (defendant) on January 3, 2006. The underlying case in chief resolved via Findings and Award issued on April 13, 2011, including provision for open future medical care.

On December 15, 2021, applicant's treating physician Richard Shinaman, M.D. submitted a request for authorization (RFA) for right shoulder intra-articular injection with platelet-rich plasma and ultrasound. (Ex. XX, Request for Authorization and Office Visit Notes of Richard Shinaman, M.D., dated December 15, 2021, p. 1.)

On December 20, 2021, the requested treatment was non-certified by Utilization Review physician A. Nava, M.D., who observed that "[a]lthough the records show that the patient is unable to tolerate NSAIDS due to kidney disease, or no indication [sic] the patient has trialed and failed all noninvasive conservative measures." (Ex. C, Utilization Review Non-Certification, dated December 20, 2021, at p. 6.) The UR physician concluded that "medical necessity has not been established." (*Ibid.*)

Applicant requested IMR, and on February 2, 2022, the IMR reviewer issued a Final Determination Letter, upholding the UR decision of December 20, 2021. (Ex. B, IMR Determination of Maximus, dated February 2, 2022, at p. 3.) The IMR decision noted the records reviewed, including that of Pain Medicine Consultants, Sergio Elizondo, and Stanford Health Care. The review included a Clinical Case Summary that discussed applicant's prior treatment, including massage therapy, chiropractic manipulation, steroid injections, diagnostic testing, physical therapy, and surgery, as well as current medications and a review of applicant's previous surgical history, including a right shoulder rotator cuff repair and right arm nerve transposition in January 2009. (*Id*. at p. 2.) The IMR Rationale is reproduced here in its entirety:

> Regarding the request for right shoulder intra-articular joint injection with PRP, The California MTUS ACOEM Shoulder Disorders Guidelines do not provide recommendations for platelet rich plasma (PRP) injections. The Official Disability Guidelines state that PRP injections are not recommended for shoulder conditions including rotator cuff repair (RCR), impingement surgery, or treatment of tendinopathy or calcific tendinitis. Guidelines do not recommend platelet-rich plasma for ligament, tendon or muscle injuries.

> In this case, this 65-year-old male sustained an industrial injury on 01/03/2006, is seeking authorization for right shoulder intra-articular joint injection with PRP and ultrasound, and is undergoing treatment for pain in right shoulder, chronic pain due to trauma, myalgia, chronic pain syndrome, and arthralgia of shoulder unspecified laterality.
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> The utilization review denial rationale regarding the request for right shoulder intra-articular joint injection with PRP states the records show the patient has ongoing pain of the right shoulder. The range of motion of the shoulder abduction above 90 degrees is reduced. There is tenderness to palpation along the anterior right shoulder. Although the records show that the patient is unable to tolerate NSAIDs due to kidney disease, there is no indication the patient has trialed and failed all noninvasive conservative measures. Further, medical necessity for right shoulder intra-articular joint injection with PRP under ultrasound has not been provided. Overall, he presented on 12/14/21 with ongoing right upper extremity pain. He notes ongoing right shoulder pain that was rated 9/10 and was associated with decreased range of motion. He reported 80% pain relief with the use of their current pain medications. Exam of the right shoulder revealed range of motion was reduced with abduction at about 90 degrees causing pain. There was tenderness with palpation along the right anterior shoulder. He underwent a right shoulder rotator cuff repair and right arm nerve transposition in January 2009. MRI of the right shoulder from 6/2019 showed high-grade tendinosis of the supraspinatus, possible disruption of the bursal side of a small amount; degenerative change consistent with type I SLAP (superior labral anterior to posterior) tear of the superior labrum; biceps tendon intra-articularly has some tendinosis, some flattening as it enters the groove, and possible consistent with a longitudinal partial tear of the biceps.
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> However, ODG guidelines do not recommend platelet-rich plasma for shoulder ligament, tendon or muscle injuries. There is no compelling rationale presented or extenuating circumstances noted to support the medical necessity of this request as an exception to guidelines. Therefore, the request for Right shoulder IA (intra-articular) joint injection with PRP is not medically reasonable or necessary. (*Id*. at pp. 3-4.)

On February 21, 2022, applicant filed an appeal from the IMR determination pursuant to Labor Code section 4610.6(h), and on April 18, 2022, the parties proceeded to trial. Following submission, the WCJ determined that the underlying report and RFA giving rise to the UR and IMR determinations was not in evidence, and vacated the submission to obtain the missing reporting. (June 29, 2022 Findings and Orders.)

The parties subsequently submitted the reporting of Dr. Shinaman to the court, and on September 12, 2022, the WCJ issued his F&O. Therein, the WCJ determined that "[t]he February 3, 2022 Independent Medical Review Final Determination Letter issued by Maximus Federal Services is based upon a clearly erroneous finding of fact, which is a matter of ordinary

knowledge." (F&O, Findings of Fact No. 3.) The WCJ remanded the dispute to the Administrative Director for review by a different IMR physician. (F&O, Order, p. 2.)

Defendant's Petition for Reconsideration (petition) avers, "the WCJ misread the IMR determination and attributed a statement to IMR that was actually only made by UR, and thus erred in finding that IMR made a mistake of fact." (Petition, at 6:8.) Defendant further avers that IMR provided its own basis for the decision, based on the ODG guidelines, and that "whether or not all noninvasive conservative treatment was tried simply did not play a role in the IMR determination." (Petition, at 8:26.)

Applicant's answer avers incomplete service of defendant's Petition, as well as the underlying IMR documentation submitted to Maximus. (Answer, at pp. 2-3.) Applicant contends defendant's Petition concedes its UR decision was faulty, and that defendant is aware of applicant's medical history, including a history of failed prior conservative treatment modalities. (*Id*. at pp. 3-4.) Applicant further contends the petition for reconsideration constitutes an abuse of process. (*Id*. at pp. 4-5.)

The WCJ's report acknowledges defendant's assertion that because the clearly erroneous mistake of fact was committed by UR, rather than IMR, there is no basis for another IMR review. The Report states:

> This argument, however, would have the Appeals Board view the IMR determination in a vacuum, and without reference to the underlying UR determination which is, in turn, the basis of the IMR decision. This position would have the effect of allowing a clearly erroneous UR determination stand, as long as the IMR decision is written in such a way that it does not expressly re-state the clearly erroneous finding of fact set forth in the UR decision being reviewed by IMR. This would leave the aggrieved party without any recourse in a situation where, as here, the record contains a clearly erroneous finding of fact. (Report, at p. 3.)

We agree. Pursuant to section 4610.5(e), "a utilization review decision may be reviewed or appealed only by independent medical review." (Lab. Code, § 4610.5(e).) Following an appeal to IMR, the employer must within ten days provide copies of all relevant medical documentation, including the underlying RFA and utilization review decision. (Lab. Code, § 4610.5(l)(1)(C).) Section 4610.6 further provides that, "[u]pon receipt of information and documents related to a case, the medical reviewer or reviewers selected to conduct the review by the independent medical review organization shall promptly review all pertinent medical records of the employee, provider

reports, and any other information submitted to the organization or requested from any of the parties to the dispute by the reviewers." (Lab. Code, § 4610.6(b).) Thus, the original UR decision is an integral and indispensable component of any ensuing IMR review and decision, a decision that will ultimately uphold or overturn the underlying UR determination.

Defendant contends the February 2, 2022 IMR determination merely reviews the UR determination, but arrives at an independent conclusion based solely on the application of the Official Disability Guidelines. (Petition, at 8:27.) However, the IMR process involves a review of the underlying UR determination, and insofar as the UR determination is based on a mistake of fact in the first instance, the IMR physician must review and address the submitted records and any errors of fact therein. The February 2, 2022 IMR decision identifies no factual errors in the December 20, 2021 UR non-certification, nor does it substantively address applicant's history of prior noninvasive treatment, or attempt to characterize the degree of success of those modalities.

Additionally, the February 2, 2022 IMR decision to affirm December 20, 2021 UR non-certification does not attempt to distinguish its rationale for decision from that of the Utilization Review determination, which was based on clearly erroneous facts. Rather, the section entitled "IMR rationale" offers a verbatim citation to the utilization review determination, and based on the stated rationale, upholds the UR decision to non-certify the requested medical treatment.

Accordingly, we are not persuaded that the IMR decision merely made reference to the UR decision while arriving at its own independent conclusions. Nor are we persuaded the WCJ erred when he concluded that to the extent that the IMR determination is based on applicant not having "trialed and failed" all noninvasive conservative measures, the IMR decision was based on clearly erroneous facts not otherwise subject to expert opinion. (Lab. Code, § 4610.6(h)(5).) We will affirm the F&O, accordingly.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 12, 2022 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 25, 2023

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

EARL MOSS
ACUMEN LAW

SAR/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 ON PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition), defendant seeks reconsideration of the September 12, 2022 Findings and Order, wherein I found that the February 3, 2022 Independent Medical Review (IMR) Final Determination Letter Issued by Maximum Federal Services is based upon a clearly erroneous finding of fact, which is a matter of ordinary knowledge. As a result, I ordered the administrative director to submit the dispute to IMR by a different independent medical reviewer.

Defendant contends that any mistake of fact is found only in the Utilization Review Determination, and not in the IMR. Applicant was not provided with the Petition timely, but filed an Answer, disputing defendant's contention. I have reviewed the relevant record in this matter, defendant's Petition, and applicant's answer. Based upon my review, I recommend that defendant's Petition be denied.

FACTUAL BACKGROUND

The factual background of this case is set forth at pages 1-2 of the September 12, 2022 Opinion on Decision as follows:

> The sole issue for determination is whether there is a plainly erroneous mistake of fact in the February 2, 2022 Independent Medical Review (IMR) Final Determination. The IMR Determination upheld the December 20, 2021 Utilization Review (UR) Denial (Exh. C) of a right shoulder platelet rich plasma (PRP) injections to applicant's right shoulder. Applicant contends that there is a factual dispute in that there is evidence that applicant trialed and failed all non-invasive conservative measures.
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> An IMR decision is presumptively correct and may only be set aside by the WCAB by "clear and convincing" evidence that 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… and not a matter subject to expert opinion." (Lab. Code, § 4610.6, subd. (h)(5).)

As set forth in *Ussery v. Modesto Police Dept.* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 307 (Appeals Board Noteworthy Panel Decision), the issues to be determined upon an appeal of an IMR Final Determination are limited to factual disputes, and not medical disputes. The dispute of a medical question (for example, whether a particular procedure appropriate for the injured worker) is excluded from judicial review by the IMR process.

Here, the rationale for the IMR Determination is based (at least in part) upon the IMR reviewer's opinion that the requested procedure, a platelet rich plasma injection, is not medically necessary because this procedure is not recommended by either the MTUS, and is only recommended in certain limited circumstances not applicable in this matter, according to the Official Disability Guidelines (ODG). As part of its rationale, the IMR decision states at page 3 that "there is no indication that the patient has trialed and failed all noninvasive conservative measures." This is not borne out by reporting of Dr. Shinaman's December 14, 2021 report (Appeals Board Exhibit XX), wherein Dr. Shinaman at page 3 details applicant's treatment regimen for his shoulder condition of chiropractor treatment, massage, Tylenol, Tylenol with codeine, and lidocaine patches. Therefore, the determination of the IMR reviewer is incorrect, since applicant appear to have trialed and failed all noninvasive conservative measures.

Accordingly, I find that the February 2, 2022 IMR Final Determination is based upon a clearly erroneous finding of fact, which is a matter of ordinary knowledge. Therefore, I find that applicant is entitled to a new review by a different IMR reviewer.

DISCUSSION

My review of defendant's Petition does not cause me to change my opinion.

Defendant's contention is that the IMR reviewer did not make a clearly erroneous mistake of fact, and that any such mistake was on the part of the Utilization Review (UR) physician. Defendant further contends that, because it was not IMR's clearly erroneous mistake of fact, there is no basis for another IMR review. This argument, however, would have the Appeals Board view the IMR determination in a vacuum, and without reference to the underlying UR determination which is, in turn, the basis of the IMR decision. This position would have the effect of allowing a clearly erroneous UR determination stand, as long as the IMR decision is written in such a way that it does not expressly re-state the clearly erroneous finding of fact set forth in the UR decision being reviewed by IMR. This would leave the aggrieved party without any recourse in a situation where, as here, the record contains a clearly erroneous finding of fact.

RECOMMENDATION

Based upon the foregoing, I recommend that defendant's Petition for Reconsideration and/or Removal be DENIED.

Dated: November 17, 2022

JAMES GRIFFIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE