

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**JITKA VAN DYNE PARMET, *Applicant***

**vs.**

**UNITED AIRLINES, permissibly self-insured;  
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ526691 (LBO 0329338); ADJ3636578 (VNO 0535001)  
Van Nuys District Office**

**OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration we issued on November 18, 2022, wherein we rescinded the workers' compensation administrative law judge's (WCJ) findings that (1) Dr. Stuart Kramer's March 2, 2022 Request for Authorization (RFA) is by the same physician for the same treatment and is not supported by a documented change in material facts from the prior, timely utilization review decision dated October 22, 2021; (2) AD Rule 9792.9.1(h) bars the treatment requested in the March 2, 2022 RFA, specifically, home health care in the form of CNA care for sixteen hours per day, seven days per week for six months and LVN care for eight hours per day, seven days per week for six months; and substituted findings that (1) a documented change to the facts material to the October 22, 2021 UR decision render it no longer effective with regard to the further recommendation by Dr. Kramer for LVN care; (2) the March 2, 2022 RFA request for CNA care does not constitute a further recommendation "for the same treatment" of care under AD Rule 9792.9.1(h); (3) the WCJ holds jurisdiction over the March 2, 2022 RFA on the grounds that a documented change to the facts material to the October 22, 2021 UR decision render it no longer effective with regard to the further recommendation by Dr. Kramer for LVN treatment and the RFA does not constitute a further recommendation for "the same treatment" of care under AD Rule 9792.9.1(h); and (4) the treatment requested by the March 2, 2022 RFA in the form of home healthcare of CNA care for sixteen hours per day, seven days per week for six months and LVN care for eight hours per day, seven days per week for six months is reasonably required to cure and relieve applicant from the effects of her injury; and ordered that defendant provide applicant CNA care for sixteen hours per

day, seven days per week for six months and LVN care for eight hours per day, seven days per week for six months.<sup>1</sup>

Defendant contends that the evidence demonstrates that the requested treatment is barred by AD Rule 9792.9.1(h). In the alternative, defendant contends that the requested treatment is unsupported by substantial medical evidence.

We received an Answer from applicant.

We have reviewed the Petition for Reconsideration and the Answer. Based upon our review of the record, and for the reasons stated below and in our November 18, 2022 Opinion and Decision After Reconsideration, which we adopt and incorporate herein, we will deny the Petition.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within sixty days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice. . . ." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312].) In *Shiple*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits. (*Shiple, supra*, 7 Cal.App.4th at p. 1106.) The Appeals Board had not acted on applicant's petition because, through no fault of the parties, it had misplaced the file. (*Id.*)

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shiple, supra*, 7 Cal.App.4th at p. 1107.) The Court emphasized that "Shiple's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shiple, supra*, 7 Cal.App.4th at p. 1107.) "Shiple's right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities." (*Id.*, at p. 1108.)

Defendant's Petition was filed in EAMS on December 12, 2022, and was timely. However, due to an internal processing error related to the Electronic Adjudication Management System (EAMS) used in the workers' compensation system, which was not the fault of any party in this

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<sup>1</sup> Commissioner Sweeney is no longer a member of the Workers' Compensation Appeals Board. Deputy Commissioner Garcia has been substituted in her place.

matter, the Appeals Board failed to act within sixty days of its filing. As a result of this error, the Appeals Board did not receive notice of the Petition until February 15, 2023.

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Thus, the time within which the Appeals Board has to act on the Petition was tolled until February 15, 2023, and we therefore may adjudicate the Petition within sixty days of that date. Accordingly, we address the merits of the Petition.

Defendant argues that Dr. Kramer's March 2, 2022 RFA is unsupported by a documented change in the facts material to the basis of the prior UR decision, rendering the October 22, 2021 UR decision effective for twelve months against a further recommendation by the same physician for the same treatment under Administrative Director Rule 9792.9.1(h). (Cal. Code Regs., tit. 8, § Rule 9792.9.1(h).) Specifically, defendant argues that Dr. Kramer's March 2, 2022 request for LVN care fails to show that (1) applicant had new subjective complaints or a change of symptoms since the October 22, 2021 UR decision demonstrating that her balance issues had progressively gotten worse and required her husband's assistance to ambulate; (2) applicant had a change in her ability to comply with medical dosage and frequency that placed her at increased risk based upon her husband's increased work and travel away from home; and (3) applicant's husband's inability to provide around-the-clock assistance placed her at imminent risk of harm based upon her serious cognitive impairment, dizziness, balance issues, risk of falling and daily need for medication management.

Here, as we previously discussed:

The March 2, 2022 RFA (with progress report) states:

...  
Patient continues to be very forgetful. She remains very clumsy and prone to falling. This patient has already been found to be totally disabled due to her fibromyalgia, central nervous system, psychological, neck, shoulder and musculature injuries from work. **The patient's husband is not able to provide around the clock assistance to his wife as it has had a devastating impact on his work and therefore livelihood. Without his assistance because of her serious cognitive impairment, dizziness, balance issues, risk of falling and daily need for medication management, the patient will be in imminent risk of harm.** Therefore, her requested care should be processed in an expedited manner.

...  
The patient's main complaints/issues are as follows:  
1) Vertigo and overall Poor Balance. **"I had a fall last week and hurt my Left wrist!** I asked the Ortho MD who evaluated me last week but was told to go to get

my wrist checked through ER or urgent care!" The balance issues have **progressively gotten worst** and **require the assistance of her husband to move around the home at all times**. Denies presence of any assistive device in home setting

2) Memory issues-both **short and long term memory deficits**. Poor attention span; Poor Decision making/judgments; Forgetful and claims to have occasional "Brain Fog" difficulty concentrating I while performing tasks. She has forgotten to turn off the stove. She is unable to drive because she has driven against traffic and at times "get stuck" and stops in the middle of ongoing traffic. Note **this actual assessment took over 2 hrs. due to several periods where patient had difficulty to respond, stalls, losses her train of thoughts, unable to recall or respond appropriately to SN's queries**. Majority of this assessment information required to be verified with husband when he is able to get away from his work demands which occurred multiple times.

...

SN reviewed and reconciled her medications; currently the husband assists with correct dosage and frequencies. **The husbands current job will require him to work outside of their home and at times travel out of State. Therefore this task will be at risk for compliance and accuracy.**

The treatment requested is marked as **"Medically Necessary."**

(Ex. 29, RFA Packet Consisting of Dr. Kramer 2/14/22 Progress Report, In-Home Health Assessment 2/17/22, Expedited Request 3/22, pp. 2-8.)

(Opinion and Decision After Reconsideration, November 18, 2022, pp. 3-4 [Emphasis added].)

On this record, it is clear that since the October 22, 2021 UR decision, applicant complained of a February 2022 fall and injury to her wrist, applicant came to need "the assistance of her husband to move around the home at all times," applicant's in-home health assessor found that she exhibited both short and long term memory deficits causing her to respond to inquiries inappropriately or not at all during a two-hour assessment, the nurse who reviewed and reconciled applicant's medications found that she was at future risk for compliance and accuracy with respect to her medication, and applicant's physician, Dr. Kramer, having (1) knowledge of applicant's clinical history, (2) conducted a telehealth examination of applicant on February 14, 2022, and (3) reviewed the reports of the in-home health assessor and nurse case manager, opined that it had become medically necessary for applicant to receive daily LVN care. (Ex. 29, RFA Packet Consisting of Dr. Kramer 2/14/22 Progress Report, In-Home Health Assessment 2/17/22, Expedited Request 3/22, pp. 2-8.)

Since Dr. Kramer requested daily LVN care in the March 2, 2022 RFA, the question becomes whether the October 21, 2021 UR decision remained in effect under Rule 9792.9.1(h) to

bar application of the March 2, 2022 RFA. Because the March 2, 2022 RFA contains a further recommendation by the same physician (Dr. Kramer) for the same treatment (LVN care), our task is to determine whether that further recommendation was supported by a *documented change in the facts material to the basis of the utilization review decision*. (Cal. Code Regs., tit. 8, § Rule 9792.9.1(h) [Emphasis added].)

In this regard, we note that the October 21, 2021 UR decision was to decline five of the six requested LVN visits and permit one visit over a six-month period based upon guidelines providing for “monthly monitoring of opioid medication” and applicant’s clinical history giving rise to Dr. Kramer’s request for a single LVN visit per month. (Opinion and Decision After Reconsideration, November 18, 2022, p. 8.) However, the above-noted changes in applicant’s clinical history occurring since the UR decision gave rise to a new opinion from Dr. Kramer: Applicant was “at imminent risk of harm” because her “balance issues have progressively gotten wors[e],” making “daily” medication from an LVN “medically necessary” for her to be cured or relieved from the effects of her injury. (Ex. 29, RFA Packet Consisting of Dr. Kramer 2/14/22 Progress Report, In-Home Health Assessment 2/17/22, Expedited Request 3/22, pp. 3-5, 8-9; Labor Code § 4600 (a).)

We thus view the changes in applicant’s clinical history and Dr. Kramer’s opinion thereon to constitute a change in the facts material to the basis for the October 21, 2021 UR decision. The materiality of this change is underscored by the irrelevancy of the guidelines for monthly monitoring of opioid medication applied in the October 21, 2021 UR decision to decide the issue of whether daily treatment is reasonably necessary to avoid an imminent risk of harm.

Moreover, we are unable to discern merit in defendant’s argument that because Dr. Kramer identified an “imminent risk of harm” to applicant arising from her husband’s unavailability to provide assistance in her “medication management” prior to the October 21, 2021 UR decision, there must not have been a change in facts material to that decision afterward. (Petition, p. 6:1-10.) In particular, Dr. Kramer’s identification of an “imminent risk of harm” associated with applicant’s balance and cognitive issues affecting her ambulation and medical management and requiring daily treatment is distinctly different from his identification of a risk associated with medication management requiring monthly treatment. (Ex. 29, RFA Packet Consisting of Dr. Kramer 2/14/22 Progress Report, In-Home Health Assessment 2/17/22, Expedited Request 3/22, pp. 3-5.) Accordingly, we conclude that defendant’s argument that Dr. Kramer’s March 2, 2022

RFA is unsupported by a documented change in the facts material to the basis of the October 21, 2021 UR decision is without merit.

We next address defendant's contention that Rule 9792.9.1(h) applies to render the October 22, 2021 UR decision a bar against the March 2, 2022 RFA for CNA care. Specifically, defendant argues that because Dr. Kramer's October 19, 2021 RFA sought "home health care visits to include housekeeping," the request may be construed to have sought CNA care, rendering the request for CNA care a further request for the same treatment by the same physician within the meaning of Rule 9792.9.1(h).

Rule 9792.9.1(h) states:

*A utilization review decision to modify, delay, or deny a request for authorization of medical treatment shall remain effective for 12 months from the date of the decision without further action by the claims administrator with regard to any further recommendation by the same physician for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.*  
(Cal. Code Regs., tit. 8, § Rule 9792.9.1(h)[Emphasis added].)

The October 21, 2021 UR decision states:

The request for home health care is not appropriate for this claimant. Guidelines do not support domestic care services when there is no skilled home health services being provided. In this case[] *housekeeping is being requested*, which is not supported by guideline recommendations. Based on the clinical history *and* guideline recommendations, the prospective request for 168 home health care visits to include housekeeping (8 hours/day, 7 days/week, for 6 months) *is non-certified*. (Ex. 33, Utilization Review, October 22, 2021, p. 2 [Emphasis added].)

Here, the October 21, 2021 UR decision denied "housekeeping" and, in doing so, did not modify, delay, or deny a request for CNA care. It follows that had the RFA actually requested CNA care, Rule 9792.9.1(h) still would not apply as a bar to such care. Accordingly, we are unable to discern merit to defendant's argument that Rule 9792.9.1(h) applies to render the October 22, 2021 UR decision a bar against the March 2, 2022 RFA for CNA care.

We next address defendant's contention that the record fails to show that the treatment sought by the March 2, 2022 RFA in the form of CNA care of sixteen hours per day, seven days per week, for six months, and LVN care of eight hours per day, seven days per week, for six months is supported by substantial medical evidence. Specifically, defendant argues that the record lacks an adequate explanation as to the amount of hourly care requested.

However, the medical reporting reveals that Dr. Kramer's request for twenty-four hours of care, seven days per week, was based on his reasoning that applicant's husband would be unable "to provide [the] around the clock assistance" required for applicant's ambulation and medication management over the next six months. (Ex. 29, RFA Packet Consisting of Dr. Kramer 2/14/22 Progress Report, In-Home Health Assessment 2/17/22, Expedited Request 3/22, p. 3.) Therefore, we conclude that Dr. Kramer's reporting adequately explains his reasoning. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687] (stating that an expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth reasoning to support the expert conclusions reached to constitute substantial medical evidence).) Accordingly, we are unable to discern merit to defendant's contention that Dr. Kramer's requests lack substantial medical evidence.

Accordingly, we will deny the Petition.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Opinion and Decision After Reconsideration we issued on November 18, 2022 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MARCH 22, 2023**

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

**JITKA VAN DYNE PARMET C/O ASVAR LAW  
ASVAR LAW  
MCNAMARA & DRASS**

**SRO/es**

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