

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

JOSE SALAZAR

vs.

KAISER PERMANENTE, permissibly self-insured; SEDGWICK, *Defendants*

**Adjudication Number: ADJ15692843
Van Nuys District Office**

**OPINION AND ORDER GRANTING PETITION
FOR RECONSIDERATION AND DECISION
AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued on September 26, 2023, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part: (1) per the stipulation of the parties, applicant sustained injury arising out of and in the course of employment in the form of Covid-19 while employed as a pharmacy assistant by defendant on March 22, 2020; (2) per the stipulation of the parties, the Utilization Review (UR) determination issued on May 12, 2023 was untimely; (3) the reports Dr. Merman submitted regarding the provision of home health care to assist applicant with activities of daily living constitute substantial evidence; and (4) home health care to assist with applicant's activities of daily living of four hours per day, five days per week is medically necessary.

The WCJ awarded applicant home health care in accordance with these findings.

Defendant contends that the evidence fails to establish that applicant is entitled to home health care of four hours per day, five days per week.

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 reviewed the Petition and the contents of the Report. Based upon our review of the record and as discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&A and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On August 17, 2023, the matter proceeded to trial of the following issue:

Whether the denied treatment is medically necessary based on substantial evidence and the California MTUS.

(Minutes of Hearing and Summary of Evidence, August 17, 2023, p. 2:17.)

The WCJ admitted exhibits entitled “PTP PR-2 and RFA from Jan Merman, M.D. Dated March 16, 2023,” “PTP PR-2 and RFA from Jan Merman, M.D. Dated April 17, 2023,” and “Utilization Review Decision on Home Healthcare Dated May 12, 2023,” into evidence. (*Id.*, p. 3:14-19.)

The March 16, 2023 PTP PR-2 and RFA from Dr. Merman includes the following:

The patient still has problems with smell and taste. He also still has problems with concentration and memory. He is on memantine 5 mg which reduced his headaches by about 10%. His headaches are daily, last one to two hours. He can get to the point where he has to lie down.

NEUROLOGIC DIAGNOSES:

1. Previous history of sleep apnea.
2. COVID-19 infection.
3. Cognitive disorder secondary to COVID19 infection and/or depression.
4. Headache probably migraine like headache due to COVID infection.
5. Loss of smell and taste, secondary to COVID-19 infection.
6. Depression and anxiety.

DISCUSSION:

Given the patient's problems with his activities of daily living, I think he should get home health care four hours a day to start with. I am going to also increase his memantine to 5 mg twice a day. He can then return in one month's time.

PLAN:

1. Return in one month.
2. Memantine 5 mg b.i.d.
3. Home health four hours a day, five days a week.

The accompanying RFA seeks the treatment identified in the Report. (Ex. AA, PTP PR-2 and RFA from Jan Merman, M.D., March 16, 2023, pp. 2-4.)

The April 17, 2023 PTP PR-2 and RFA from Dr. Merman includes the following:

DISCUSSION:

After Mr. Salazar's review of his medical records, one finds that he has various stress and previous history of headaches prior to his March 10, 2020 injury. In fact, he has had a couple of injuries.

...

On May 29, 2020, he saw Dr. Ratnarathorn for telehealth appointment. This is doctor's first report of occupational illness. The illness was due to mental stress with the date of injury of March 10, 2020. He was also having fevers at that time and had a positive COVID test on March 22, 2020. He felt he had virus exposure at work.

The patient saw Dr. Teresa Luna, neurologist, on April 8, 2021. However, he told her prior to COVID, he had no headaches or at least sporadic and infrequent. His headaches were 20 to 25 days a month when he saw Dr. Luna mild-to-moderate. She diagnosed him with daily new persistent headache and started him on Elavil. She wanted to get an MRI scan of his brain which was done on August 19, 2021 which revealed numerous nonspecific punctate T2 hyperintense lesions with subcortical deep white matter which could represent demyelinating diseases versus vasculitis versus migraine headaches versus chronic microvascular ischemic changes.

...

After review of the records, there are some discrepancies. For instance, he told Dr. Luna that he has no headaches or occasional headaches. However, previous headaches are more frequent prior to COVID infection. He also had multiple areas of stress which included work-related stress probably from overworking 15 to 16 hours a day. However, he also had problems with his wife. He also had back injury possibly a knee injury from his employment, which could have cause stress. This was prior to his March 10, 2020 COVID infection.

...

Therefore, the diagnoses of January 5, 2023 report have unchanged except noting that he had a previous history of migraine headaches aggravated by COVID. Therefore, I started him on Nurtec and memantine, but his headaches were not totally under control; therefore, he was not permanent stationary for rating purposes on a neurologic industrial basis for his cognitive disorder and his headaches. He will need further treatment. I will defer his vocational rehabilitation status of disability including impairment rating apportionment back at this time. My plan is also to get him home health for four hours a day and sounds like his wife has significant problems which cause him to have a stress as well.

The patient may need cognitive therapy. He also probably needs to be evaluated by a psychiatrist and it might be helpful to get neuropsychological evaluation.

As far as apportionment is concerned, apportionment will become an issue when he is permanent stationary.

PLAN:

1. Neuropsychological evaluation.
2. Psychiatric evaluation for depression and anxiety.
3. Continue memantine 5 mg b.i.d.
4. Home health four hours a day, five days a week.

The accompanying RFA seeks the treatment identified in the Report. (Ex. CC, PTP PR-2 and RFA from Jan Merman, M.D., April 17, 2023, pp. 27-29.)

The October 13, 2022 Genex Utilization Review Decisions states:

Request for Authorization First Received: 3/17/2023

Specific Request: *Urgent* Home Health 5 days/4 hours day/ denied by physician advisor

...

REVIEW QUESTION(S):

1. Is Home Health 5 days/4 hours day medically necessary?

Home health 5 days/4 hours day is not medically necessary.

Based on the documentation provided, the California Medical Treatment Utilization Schedule (MTUS)/ACOEM Practice Guidelines, is not satisfied. In particular, there is no documentation that home health is needed on a short-term basis following hospitalization and major surgical procedures, or for those who would otherwise require inpatient care. Therefore, home health 5 days/4 hours day is not medically necessary.

(Ex. BB, Utilization Review Decision, May 12, 2023, pp. 1, 7.)

In the Report, the WCJ states:

The applicant sustained admitted Covid-19 on March 22, 2023. The PTP Dr. Merman submitted a Request for Authorization (“RFA”) dated March 17, 2023, for home health care four hours per day, five days per week.

A UR Determination denying the requested treatment was issued on May 12, 2023. However, as stipulated by the parties, the UR Determination was untimely.

The matter proceeded to trial before the undersigned on August 17, 2023 regarding the limited issue of whether the denied treatment is medically necessary based on substantial medical evidence and the California MTUS.

...

The undersigned issued the Findings and Award wherein it was found that the applicant is entitled home health care to assist with his activities of daily living four hours per day, five days per week, as per the opinion of Dr. Merman.

...

The applicant provided credible testimony at trial regarding his need for assistance with his activities of daily living. For example, the applicant testified that it is hard to control utensils when he holds them. It becomes scary for him to manage if he's cutting something, so he does not cut his hand. He does not have control because of pain. (MOH, September 19, 2023, pg. 2, lines 22-24).

He requires assistance cutting up his food. His wife helps cut his steak. His wife also helps him with every basic task. For example, his wife cuts food for meal preparation and helps get him up off the bed or the couch. She helps tie his shoes and takes him to appointments that are too far away for him to drive. She helps with shopping, and almost every aspect of his life that he needs help with because of the pain. (MOH, September 19, 2023, pg. 3, lines 3-9). He gets in and out of bed with assistance. He needs help from his wife. (MOH, September 19, 2023, pg. 3, lines 10-11). He is able to grocery shop with assistance. He uses his cane for support, or sometimes he uses the grocery cart as support. His wife comes to help. (MOH, September 19, 2023, pg. 5, lines 5-7). He is able to do laundry with assistance. (MOH, September 19, 2023, pg. 6, line 12).

He does not feel safe taking care of himself because of dizziness and light-headedness. If he does chores, he will run out of breath and he struggles. (MOH, September 19, 2023, pg. 7, lines 23-25). The applicant does not feel safe without someone around to help him because of his dizziness and light-headedness. He fears he will fall and get hurt. He's afraid to be alone and get hurt and have no one there to help him. (MOH, September 19, 2023, pg. 7, lines 23-25). He has dizziness or light-headedness at least one time a day. (MOH, September 19, 2023, pg. 6, lines 12).

When the defense attorney cross examined the applicant at trial regarding what the applicant wants to improve in his daily activities, he indicated "Everything." Primarily his shortness of breath, joint pain, memory problems, and brain fog are huge issues. With his brain fog, he cannot trust his own thoughts and his decision making. (MOH, September 19, 2023, pg. 9, lines 19-22).

Dr. Merman states in his report dated February 25, 2023 that regarding home health care, the patient's activities of daily living are generally interfered with by shortness of breath, his joint pains, and somewhat by his headaches. (Defendant's Exhibit C)

It is noted that QME Dr. Schlüsselberg found that the applicant's respiratory complaints are due to restrictive lung disease, which is 100% industrially related due to the Covid 19 infection. (Applicant's Exhibit 1, pg. 81). The Petitioner does not cite authority to support its assertion that Dr. Merman's opinions are invalid as the evaluation was performed via telemedicine.

...
[T] he undersigned found that there was substantial evidence to support the requested home health care, and that home health care services are reasonably required to cure or relieve the injured employee from the effects of the injury.
(Report, pp. 1-4.)

DISCUSSION

Defendant contends that the evidence fails to establish that applicant is entitled to home health care of four hours per day, five days per week. Specifically, defendant argues that Dr. Merman's reporting fails to assess applicant's symptomatology against applicable criteria such as the MTUS to support the determination that home health care is reasonably required to cure or relieve applicant of the effects of injury.

In *Sandhagen v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230 [73 Cal. Comp.Cases 981], the Supreme Court stated:

The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. Accordingly, notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5).
(*Sandhagen, supra*, at p. 990.)

Thus, it is applicant's burden to prove that he is entitled to the treatment sought by way of Dr. Merman's RFA, and applicant may meet this burden by presenting substantial medical evidence that the treatment is appropriate under the MTUS or, though at variance with the MTUS, reasonably required to cure or relieve him of his injury. (*Dubon v. World Restoration* (2014) 79 Cal.Comp.Cases 1298, 1312 (Appeals Board en banc); Lab. Code § 4604.5(a)¹ (providing that the

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

MTUS shall be presumptively correct on the issue of extent and scope of medical treatment, but may be controverted by a preponderance of the scientific medical evidence establishing that variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of injury); see also § 4600(b) (providing that medical treatment that is reasonably required to cure or relieve the injured worker from the effects of injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to § 5307.27); and see § 4610.5(c)(2) (defining "medically necessary" and "medical necessity" as treatment based on certain standards).)

Hence, notwithstanding that the parties framed the issue for trial as whether home health care of four hours per day, five days per week is medically necessary based on substantial evidence and the California MTUS, applicant may carry his burden of proof of entitlement to home health care either by demonstrating that he meets the criteria of the MTUS or presenting substantial medical evidence that the sought treatment, though at variance with the guidelines, is reasonably required. (Minutes of Hearing and Summary of Evidence, August 17, 2023, p. 2:17.)

Here, the record shows that Dr. Merman concluded that applicant requires home health care of four hours per day, five days per week, but his reporting does not explain how applicant's symptomology met criteria applicable for that determination. (Ex. AA, PTP PR-2 and RFA from Jan Merman, M.D., March 16, 2023, pp. 2-4; Ex. CC, PTP PR-2 and RFA from Jan Merman, M.D., April 17, 2023, pp. 27-29.)

In addition, although Dr. Merman concluded that applicant requires home health care, his reporting does not identify the type or duration of services applicant requires. (*Id.*; see also Report, pp. 1-4.)

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261, 264-265].)

Because Dr. Merman's reporting opines that home health care is required to treat or relieve applicant from the effects of injury without explaining how his symptomatology meets criteria applicable for that treatment and without specifying the type and duration of home health care

services, we conclude that the record should be developed as to the issue of whether and on what grounds applicant is entitled to home health care services.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&A and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on September 26, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings and Award issued on September 26, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial court for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 12, 2023

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

**JOSE SALAZAR
MVP LAW GROUP
RUSSELL LEGAL GROUP**

SRO/cs

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