

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SHAUNA VAN BRUNT, *Applicant*

vs.

VCA ANTECH, INC.;
THE HARTFORD, administered by BROADSPIRE, *Defendants*

Adjudication Number: ADJ9077087
San Francisco District Office

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration or in the alternative removal of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on February 5, 2021. By the Findings of Fact, the WCJ found that the Appeals Board lacked jurisdiction to review the utilization review (UR) decisions or independent medical review (IMR) determinations at issue.

Applicant contends that the Appeals Board has jurisdiction to address whether defendant engaged in bad faith in denying her medications. Applicant also contends that UR may not be used to wean her from medication that had previously been authorized in the absence of a change in circumstances.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration on in the alternative for Removal (Report) recommending that we deny the Petition.

We have considered the allegations of applicant's Petition for Reconsideration/Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny the Petition as one seeking reconsideration.

FACTUAL BACKGROUND

We adopt and incorporate the facts as outlined by the WCJ in her Report:

Applicant sustained an admitted injury to the lumbar spine and left lower leg while working for defendant employer. She designated Dr. Toufan Razi as her

primary treating physician. Between July 9, 2020 and November 6, 2020, Dr. Razi submitted multiple requests for authorization, each for a quantity of 450 Buprenorphine pills. The requests for authorization were submitted for utilization review (hereinafter “UR”), which certified progressively reduced quantities of the Buprenorphine between July 15, 2020 and October 22, 2020, eventually denying certification of Buprenorphine in UR determinations dated November 16, 2020 and November 24, 2020.

Independent Medical Review (hereinafter “IMR”) was requested for the UR decisions dated September 22, 2020 and October 22, 2020. The former certified 360 Buprenorphine pills, and the latter certified 325 pills. Both were upheld in IMR determinations dated November 16, 2020 and November 24, 2020. There was no appeal of the IMR determinations.

The parties appeared at an Expedited Hearing on December 18, 2020. The issues were whether it was appropriate for defendant, through UR, to wean the applicant off a medication on which she is dependent, and whether there was jurisdiction for the Appeals Board to address this dispute.

On February 5, 2021, after considering the documentary evidence and applicable law, I issued my Findings of Fact and Opinion on Decision finding that the Appeals Board lacks jurisdiction to review the UR decisions and the IMR decisions submitted herein. All other issues were deferred.

(Report, March 1, 2021, p. 2.)

DISCUSSION

I.

Applicant sought reconsideration or in the alternative removal of the Findings of Fact. If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the

decision before the WCAB or court of appeal. (See Lab. Code, § 5904.)¹ Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

The Appeals Board has jurisdiction to determine whether a UR decision is timely. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298, 1299 (Appeals Board *en banc*) (*Dubon II*.) However, “where a UR decision is timely, IMR is the sole vehicle for reviewing the UR physician’s expert opinion regarding the medical necessity of a proposed treatment.” (*Id.* at pp. 1310-1311; see also Lab. Code, §§ 4062(b), 4610.5; *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1048 [83 Cal.Comp.Cases 1523] [IMR “is the exclusive mechanism for review of a utilization review decision”].) Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the Administrative Director (AD) pursuant to a verified appeal filed within 30 days of the date of mailing of the determination. (Lab. Code, § 4610.6(h).)

In *Allied Signal Aerospace v. Workers’ Comp. Appeals Bd. (Wiggs)* (2019) 35 Cal.App.5th 1077, 1084-1085 [84 Cal.Comp.Cases 367], the Court of Appeal held that the issue of whether the UR process or the Appeals Board has jurisdiction over a home health care dispute is a final order. In this matter, the WCJ determined that the Appeals Board does not have jurisdiction to address issues with the UR decisions or IMR determinations because applicant did not dispute the timeliness of the UR decisions or file an appeal of the IMR determinations per section 4610.6(h). The Findings of Fact determined jurisdiction over this dispute and terminated further proceedings before the Appeals Board regarding the disputed medical treatment. Therefore, the WCJ’s decision was a final order subject to reconsideration.

II.

We adopt and incorporate the following from the WCJ’s Report:

1. The Evidence Supports My Decision That There Is No Jurisdiction To Review The UR Dispute Herein Where There Is No Claim That UR Was Either Untimely Or Not Served As Required By Law, And Where The IMR Determinations Were Not Timely Appealed Or Even Subject To Appeal Pursuant To Labor Code Section 4610.6(h).

The Appeals Board *en banc* stated in its *Dubon II* decision, “There is no question that sections 4610 and 4610.5 provide that disputes over UR decisions shall be resolved by IMR.” *Dubon v. World Restoration, Inc. (Dubon II)* (2014) 79 Cal.Comp.Cases 1298, 1307. The Board held, in that decision, that utilization

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

review determinations are subject to independent medical review unless they are untimely. While legal issues regarding timeliness of a utilization review decision are to be resolved by the Workers' Compensation Appeals Board, all other disputes concerning a utilization review decision must be resolved through independent medical review. See *Dubon v. World Restoration, Inc. (Dubon II)* (2014) 79 Cal. Comp. Cases 1298.

The Appeals Board is only granted jurisdiction to review IMR decisions in limited circumstances, as set forth as follows in Labor Code section 4610.6(h):

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:

- (1) The administrative director acted without or in excess of the administrative director's powers.
- (2) The determination of the administrative director was procured by fraud.
- (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
- (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
- (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 pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

Applicant's remedy for what she considers to be an incorrect but timely and properly served UR decision is to file for IMR. Applicant's remedy for an incorrect IMR decision is to file a timely appeal to the Workers' Compensation Appeals Board, but only in certain limited circumstances, pursuant to Labor Code section 4610.6(h). Applicant contends that the Appeals Board has jurisdiction to address the parties' utilization review dispute, despite there being no issue regarding either timeliness/proper service of UR or any appeal of IMR determinations. No statutory or case law to support this assertion has been offered.

In the case at hand, there is no evidence that applicant requested IMR of the UR decisions denying certification of Buprenorphine. Nor did applicant appeal the IMR determinations which did issue. Although applicant sought IMR for 2 UR decisions reducing the dosage of Buprenorphine, the IMR was not appealed. Applicant has thus failed to fully avail herself of the remedies available to her, and has failed to provide any basis to establish jurisdiction over the UR and IMR dispute submitted at trial.

2. Even Aside From The Issue Of Jurisdiction, Applicant's Contentions Of Improper UR Are Without Merit.

As stated above, there is no jurisdiction to review the UR or IMR decisions which discontinue applicant's use of Buprenorphine. However, even if there was jurisdiction, applicant has failed to prove the existence of bad faith or improper behavior by a UR reviewer. Applicant argues that defendant acted in bad faith by using UR to wean her off Buprenorphine, asserting that a treating doctor's recommendations cannot be modified by UR if the treating doctor does not change his recommendations. Applicant also points to the fact that the UR decisions tapering off the Buprenorphine were made by more than one reviewing doctor, asserting this is improper. Applicant does not, however, cite to any legal authority that would confer jurisdiction upon the Appeals Board to review the UR and IMR decisions herein.

Applicant does not demonstrate in what way defendant's actions constitute bad faith. It is not disputed that upon receipt of a request for authorization of treatment, defendants are required to timely complete the utilization review process. Pursuant to Labor Code section 4610, UR is the statutorily defined process through which defendants may review requests for authorization of treatment.

In her petition, applicant refers to the California Supreme Court case of *Smith v. Workers' Comp. Appeals Bd.*, seemingly to support the argument that the purpose of UR is to respond to treatment requests and not to alter the treating doctor's recommendations. See *Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal. 4th 272.

On the contrary, the Supreme Court in *Smith* notes that "an employer's utilization review physician applying approved criteria can modify, delay, or deny treatment requests" *Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal. 4th 272, 279. The Court went on to discuss the addressing of UR disputes through IMR as follows:

Further, the utilization review scheme contains a procedure for resolving disputes over treatment requests that uses doctors, rather than judges, as the adjudicators. If an employee disagrees with the utilization review physician's decision to modify, delay, or deny treatment, the employee can request review by an independent medical evaluator who, after evaluating the evidence, decides whether the sought treatment is necessary.

Id. at 279-280.

Regarding applicant's assertion that the UR decisions tapering and then denying

Buprenorphine were improperly done by two or three UR doctors, she refers to California Code of Regulations, Title 8, section 9792.9.1 (e) (1), which states:

The review and decision to deny, delay, or modify a request for medical treatment must be conducted by a reviewer, who is competent to evaluate the specific clinical issues involved in the medical treatment services, and where these services are within the scope of the individual's practice.

However, the petitioner does not explain or cite to any authority for her argument that UR acted improperly. Despite the position the applicant has taken here, the statute does not state that all utilization review pertaining to a single patient or extended course of treatment must be conducted by the same reviewer. Rather, the plain language reading of this regulation states that a request for authorization is to be reviewed by a reviewer who is competent to evaluate the clinical issues involved in the requested medical treatment. There is no indication in the present case that each request for authorization was not appropriately reviewed by a qualified and competent reviewer, as required by this section.

(Report, March 1, 2021, pp. 5-8.)

With respect to applicant's contention that she had been taking Buprenorphine for years and there was no change in circumstances when additional requests for this medication were made, the Appeals Board has previously found that recurring prescriptions are not the sort of ongoing care that cannot be unilaterally terminated. (See *Mumm v. Workers' Comp. Appeals Bd.* (2020) 85 Cal.Comp.Cases 647 (writ den.) [defendant was entitled to conduct UR of new prescriptions of Norco even though it had authorized the medication for several years and the Appeals Board did not have jurisdiction to review defendant's timely UR decision denying a request for Norco].) Rather, each new prescription requires a new request for authorization that must be submitted to UR. Authorization of one prescription does not automatically mean that recurring prescriptions of that medication must be authorized indefinitely; the treating physician has an obligation to document the need for each recurring prescription, especially when the prescriptions are for heavily regulated opioid medications.

Therefore, we will deny applicant's Petition.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on February 5, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2021

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

**LAW OFFICE OF DAVID HART
SHAUNA VAN BRUNT
STOCKWELL HARRIS WOOLVERTON & HELPHREY**

AI/pc

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