

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TRACEY TIKHONOFF, *Applicant*

vs.

**THE HOME DEPOT, permissibly self-insured,
administered by HELMSMAN MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ10557068
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 28, 2021. By the F&O, the WCJ found that the utilization review (UR) decision was timely, depriving the Appeals Board of jurisdiction to act on the request for authorization (RFA) for home health care services. The WCJ further found that there was no basis to disturb the independent medical review (IMR) determination.

Applicant contends that defendant was put on notice of applicant's need for home health care assistance in 2017 and failed to fulfill its duty to investigate this need. Applicant further contends that defendant's failure to investigate this need grants authority to the Appeals Board to award home health care assistance despite the UR decision. Applicant also argues that the UR decision and IMR determination are invalid because the reviewers used the incorrect standard of review.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer 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 applicant's Petition.

FACTUAL BACKGROUND

The parties entered into Stipulations with Request for Award in 2019, wherein it was stipulated that applicant sustained injury to her right foot, lower extremity and in the form of complex regional pain syndrome (CRPS) on February 15, 2015 while employed as a flooring specialist by The Home Depot. (Stipulations with Request for Award, October 21, 2019, pp. 4-5.) The parties stipulated that the injury caused 100% permanent disability and that there is a need for medical treatment. (*Id.* at p. 6.) The Award was initially approved on October 21, 2019 and approved again (as amended) in December 2019.

Kamyar Assil, M.D. evaluated applicant as the pain medicine qualified medical evaluator (QME) and issued two reports in 2017. (Applicant's Exhibit No. 5, Medical report of PQME Kamyar Assil, M.D., May 2, 2017; Applicant's Exhibit No. 8, Medical report of PQME Kamyar Assil, M.D., December 5, 2017.) Applicant was also evaluated by two vocational experts, Paul Broadus and David Van Winkle, in 2019. (Applicant's Exhibit No. 6, LeBoeuf Analysis report of Paul Broadus, August 15, 2019; Applicant's Exhibit No. 9, Vocational report of David Van Winkle, March 26, 2019.)

On February 9, 2020, Lee Ann Harper, RN prepared an in-home patient care evaluation report "to evaluate the home care needs of" applicant. (Applicant's Exhibit No. 3, In-Home Patient Care Evaluation report of Lee Ann Harper, RN, February 9, 2020, p. 1.) The summary in the report states as follows in relevant part:

Mrs. Tikhonoff will continue to require assistance in her home, indefinitely. This includes personal care, meal preparation, housekeeping, laundry, shopping and transportation. I estimate the hours required are at least 19 hours per week.

(*Id.* at p. 3.)

Shahriar Pirouz, M.D. provides treatment to applicant as her primary treating physician (PTP). On August 25, 2020, applicant's attorney sent a copy of Ms. Harper's February 9, 2020 report to Dr. Pirouz and stated in pertinent part:

In her report RN Harper recommends that Ms. Tikhonoff be provided 19 hours of HHC per week on an ongoing basis.

Please speak with Ms. Tikhonoff about her HHC situation and once you are comfortable with your understanding of the impact of this injury on Ms. Tikhonoff's ADLs, if you are in agreement with RN Harper would you draft a report indicating your agreement and also complete an RFA requesting authorization for 19 hours of attendant care/homecare assistance provided to Ms. Tikhonoff as per the reporting of RN Harper.

(Defendant's Exhibit B, Letter by Applicant's attorney to PTP, August 25, 2020, p. 1.)

Dr. Pirouz conducted a telehealth follow-up visit with applicant on December 1, 2020. (Defendant's Exhibit A, Medical report of PTP Shahriar Pirouz, M.D., December 24, 2020.) The resulting report was appended on December 22, 2020 as follows:

Per the report by RN Harper I will request for 19 hours of attendant care/home care assist [sic] per week

(*Id.* at p. 9.)

The report contains no other discussion regarding home health care. Dr. Pirouz submitted an RFA for "Home Care/Attendant assistance" at "19 hours per week" on January 5, 2021. (Applicant's Exhibit No. 1, RFA of PTP Shahriar Pirouz, M.D., January 5, 2021.) This was identified as a new request and was not requested for expedited review. (*Id.*)

On January 9, 2021, defendant issued a UR decision non-certifying the request for home health care. (Applicant's Exhibit No. 2, Utilization review determination for home care/attendance assist, January 9, 2021.) Applicant submitted an application for IMR of the UR decision to DWC/IMR, Maximus Federal Services, Inc. (Applicant's Exhibit No. 4, Independent Medical Review Final Determination Letter for home healthcare supervision, February 22, 2021.)

Maximus issued a final determination letter on February 22, 2021 in response to applicant's IMR application. (Applicant's Exhibit No. 4, Independent Medical Review Final Determination Letter for home healthcare supervision, February 22, 2021.) The IMR determination (CM21-0010555) upheld the UR non-certification for home health care. (*Id.* at p. 1.) Medical records reviewed by the IMR reviewer included the following provided by the claims administrator: Lee Ann Harper, RN from 2/9/2020 and Pain Management Specialists (Dr. Pirouz's practice) from

4/2/2020 to 1/5/2021. (*Id.* at p. 2.) The IMR determination cited to the 2017 MTUS¹ and provided the following rationale for upholding the UR decision on this recommendation:

According to the documents available for review, the injured worker does not meet the aforementioned criteria for the use of home health. In particular, there is no clear objective documentation to indicate that the injured worker is unable to leave the home for healthcare services or has been medically advised to not leave the home for services. There are no exceptions documented to warrant superseding the guidelines. Therefore at this time the requirements for treatment have not been met, and medical necessity has not been established.

(*Id.* at pp. 3-4.)

Applicant timely appealed the IMR determination pursuant to Labor Code² section 4610.6(h) on March 8, 2021. Applicant's rationale for the appeal was stated in its entirety as:

The basis of the UR Denial and IMR Decision upholding the UR Denial is invalid and erroneous and the WCAB thus has jurisdiction [*sic*] to decide the issue.

(Petition Appealing Administrative Director's Independent Medical Review Determination, March 8, 2021.)

The matter proceeded to trial on May 4, 2021 regarding the following issues:

1. IMR appeal.
2. Invalid UR denial.
3. Whether home healthcare should be provided outside of the UR/IMR process pursuant to Labor Code Section 4600(h).
4. Jurisdiction.

(Minutes of Hearing and Summary of Evidence, May 4, 2021, p. 2.)

The WCJ issued the resulting F&O as outlined above.

¹ "MTUS" stands for the "medical treatment utilization schedule" guidelines, which are "presumptively correct on the issue of extent and scope of medical treatment." (Lab. Code, § 4604.5(a); see also Cal. Code Regs., tit. 8, § 9792.21(c).)

² All further statutory references are to the Labor Code unless otherwise stated.

DISCUSSION

I.

The employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.) Employers are further required to conduct UR of treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 236.) Section 4610.5 mandates IMR for “[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.” (Lab. Code, § 4610.5(a)(2); see also Lab. Code, § 4062(b) [an employee’s objection to a UR decision to modify, delay or deny an RFA for a treatment recommendation must be resolved through IMR].)

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*).) If a UR decision is untimely, the determination of medical necessity for the requested treatment may be made by the Appeals Board. (*Id.* at p. 1300.) 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”].) “All other disputes regarding a UR decision must be resolved by IMR.” (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1299.)

Applicant does not dispute that UR timely denied the January 5, 2021 RFA for home health care services.³ Rather, she contends that the UR decision was invalid because the UR reviewer applied the incorrect medical standard of review. As stated above, the Appeals Board’s jurisdiction regarding a disputed UR decision is restricted to whether the decision was timely. (*Dubon II, supra*.) Since the UR decision at issue here was timely, the Appeals Board has no jurisdiction to address any other dispute regarding the UR decision and applicant’s sole remedy to contest the decision was through IMR and the process to appeal IMR per section 4610.6(h).

³ The record supports the WCJ’s finding that the UR decision was timely. (Lab. Code, § 4610(i).)

Applicant argues that defendant's failure to investigate the need for home health care renders defendant liable for the care despite the UR decision. Applicant cites to the QME's 2017 reports, the two 2019 vocational experts' reports and applicant's deposition testimony,⁴ as evidence that defendant had notice of the necessity of this treatment, but failed to investigate whether it had a duty to provide it. It is acknowledged that the UR and IMR processes do not abrogate the claims administrator's duty to investigate whether benefits are due. (Cal. Code Regs., tit. 8, § 10109; see also *Braewood v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 161 [48 Cal.Comp.Cases 566]; *Romano v. The Kroger Co.* (April 16, 2013, ADJ1372133) 2013 Cal. Wrk. Comp. P.D. LEXIS 125.) Applicant argues that defendant was on notice of the need for home health care based solely on documentation of the injury's impact on her ability to perform activities of daily living (ADLs), although there is not actual evidence in the record of a request or recommendation for home health care by a physician prior to 2020.⁵ Although the QME Dr. Assil discussed the impact of applicant's injury on her ability to perform ADLs,⁶ neither of his 2017 reports in evidence contains an opinion by Dr. Assil regarding whether applicant is in need of home health care to assist her. Furthermore, Dr. Assil as the QME was prohibited from commenting on any disputed medical treatment issue as part of his evaluations. (Cal. Code Regs., tit. 8, § 35.5(g)(2) [the QME shall not provide an opinion on any disputed medical treatment issue for any evaluation performed on or after July 1, 2013].)

The record reflects that applicant sustained a significant injury resulting in permanent total disability with a corresponding serious impact on her daily life. However, in the absence of substantial evidence that the need for home health care was addressed by a physician prior to 2020, there is insufficient evidence in the record showing a failure by defendant to investigate whether

⁴ Applicant's deposition transcript is not part of the evidentiary record, but is cited in applicant's Petition as excerpted by applicant's vocational expert in his report. (Applicant's Exhibit No. 9, Vocational report of David Van Winkle, March 26, 2019.)

⁵ Applicant cites to portions of the reports from the two vocational experts regarding her ability to perform ADLs and work in support of her contention that defendant was on notice of the need for home health care. A vocational expert generally evaluates how the industrial injury affects the employee's amenability to vocational rehabilitation. (See e.g., *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119].) It is unclear why applicant believes the vocational experts in this matter are qualified to comment on medical treatment issues. Additionally, assuming arguendo the vocational experts' reports could constitute evidence in support of applicant's contentions, neither of the vocational experts opined that applicant needs home health care to be provided to her as part of her treatment.

⁶ In general, discussion of the injury's effects on an employee's ability to perform ADLs is part of what "should" be included in a physician's report. (See Cal. Code Regs., tit. 8, § 10682(b).)

this care was necessary as part of applicant's treatment.⁷ (See *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record]; see also Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310] [decisions of the Appeals Board must be supported by substantial evidence].)

Therefore, we have no jurisdiction to address applicant's contentions regarding the validity of a timely UR decision and applicant has not shown that defendant failed to investigate its duty to provide benefits.

II.

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the Administrative Director (AD). The section explicitly provides that the AD's determination is presumed to be correct and may only be set aside by clear and convincing evidence of one or more of the following: (1) the AD acted without or in excess of his or her powers, (2) the AD's determination was procured by fraud, (3) the independent medical reviewer had a material conflict of interest, (4) the determination was the result of bias based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (Lab. Code, § 4610.6(h).)

The IMR reviewer must resolve disputed medical treatment by applying the MTUS as adopted by the AD. (Lab. Code, §§ 4610.5(c), 5307.27.) The MTUS is set forth in the California Code of Regulations, Title 8, section 9792.20 et seq. and contains a set of guidelines that provide

⁷ Applicant cites to *Neri Hernandez v. Geneva Staffing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) in support of her contention that the UR process is irrelevant to whether defendant is liable for home health care. The *Neri Hernandez* decision expressly did not address UR or IMR with respect to requests for home health care per the following in a footnote:

Here, there is no evidence that defendant submitted applicant's request for home health care services to Utilization Review (UR). Therefore, we will not address circumstances where a request has been submitted to UR, and since no decision issued from UR, we will not address circumstances where Independent Medical Review (IMR) might apply. (See §§ 4610, 4610.5; see also § 4062.)

(*Id.* at p. 689, fn. 10.)

details on which treatments are effective for certain injuries, as well as how often the treatment should be given, the extent of the treatment, and surgical considerations. AD Rule 9792.21.1 outlines the “medical evidence search sequence for the evaluation and treatment of injured workers” starting with “[searching] the recommended guidelines set forth in the **current** MTUS to find a recommendation applicable to the injured worker’s medical condition or injury.” (Cal. Code Regs., tit. 8, § 9792.21.1(a)(1), emphasis added.)

In this matter, applicant contends that the IMR reviewer applied the incorrect standard because the reviewer did not apply the 2016 MTUS to the disputed treatment. The IMR determination reflects that the reviewer applied the 2017 MTUS. AD Rule 9792.21.1 requires the reviewer to use the current MTUS when evaluating treatment, which is precisely what occurred here. Review of the disputed treatment utilizing a prior MTUS in lieu of the current MTUS would be inconsistent with the Labor Code and the AD’s Rules for conducting IMR. Applicant thus did not meet her burden of proving one of the statutory bases to set aside the AD’s determination by clear and convincing evidence.

In conclusion, we will deny applicant’s Petition.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on August 28, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 19, 2021

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

**ALBERT AND MACKENZIE
HOURIGAN HOLZMAN AND SPRAGUE
TRACEY TIKHONOFF**

AI/pc

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