WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LILIBETH GONZALEZ, ***Applicant***

vs.

ROSS STORES, INC.; ARCH INSURANCE COMPANY, administered by SEDGWICK, ***Defendants***

Adjudication Number: ADJ8945901; ADJ10860733
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the June 21, 2023 Joint Findings and Orders issued by the workers' compensation administrative law judge (WCJ), wherein the WCJ ordered a new Independent Medical Review (IMR) determination on the appropriateness of a surgery applicant requested, finding that the February 3, 2023 IMR denial was based upon a plainly erroneous fact. Defendant asserts that the WCJ erred in making that determination, arguing that the IMD reviewer's misstatement of applicant's symptoms does not mean that the IMR denial "when taken as a whole" was based upon a plainly erroneous fact. (Petition, at p. 3.)

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition for Reconsideration.

PROCEDURAL BACKGROUND

Applicant filed an Application for Adjudication in Case No. ADJ8945901, seeking compensation for an injury to her lumbar spine and knees sustained on April 21, 2013 while

employed by defendant.[1] The injury has been accepted, and some medical treatment has been furnished.

On January 12, 2023, applicant's request for a laminectomy and discectomy to address ongoing pain stemming from her industrial injury was referred to IMR based on a dispute between the parties as to the necessity of treatment. (See Ex. 6, at p. 1.)

On February 3, 2023, IMR upheld the denial of care, finding that applicant's request was not medically necessary or appropriate. (Ex. 6, at p. 1.) The "Clinical Case Summary" section of the Final Determination Letter states that "the injured worker reported worsening low back pain, particularly on the right side with mild pain on the left side," and that "[s]traight leg raise testing was positive bilaterally." (*Id.* at, p. 2.) However, in the course of finding the requested treatment not medically necessary, the IMR reviewer stated:

> In this case, the worker has ongoing low back pain that radiates [*sic*] the right leg. The examination shows decreased sensation with preserved strength and reflexes. MRI shows left-sided stenosis which does not correlate to symptoms. Based on this the request is not medically necessary. (*Id.*, at p. 3.)

Applicant appealed the IMR determination, and the matter came on for trial on June 6, 2023. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 6/6/23, at p. 3.) Evidence was admitted, and the matter was submitted for decision. (*Id.* at pp. 3–5.)

On June 21, 2023, the WCJ issued his Joint Findings and Orders, concluding that the IMR determination was invalid because it was based upon a plainly erroneous fact, and ordering the dispute resubmitted for a new IMR determination by a different reviewer. (Joint Findings and Orders, at p. 1.) In the Opinion on Decision, the WCJ explained that the denial of care was based upon the IMR reviewer's erroneous belief that applicant reported only right leg pain, whereas in fact the Clinical Case Summary referenced pain on the right and left sides, and that a straight leg raising test was bilaterally positive, i.e. on both the right and left sides. (Opinion on Decision, at pp. 3–4; Ex. 6, at pp. 2–3.) As such, the IMR reviewer's conclusion that the left-sided stenosis shown on the MRI did not correlate to applicant's symptoms was plainly erroneous. (Opinion on Decision, at pp. 3–4.)

This Petition for Reconsideration followed.

[1] Applicant's second Application for Adjudication, in Case No. ADJ10860733, is not relevant to the present dispute.

DISCUSSION

Employers are required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code[2], § 4600.) Employers are further required to conduct utilization review (UR) of treatment requests received from physicians. (§ 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." (§ 4610.5(a)(2); see also § 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].)

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 a plainly erroneous finding of fact not subject to expert opinion. (§ 4610.6(h).)

In upholding a challenge to the constitutionality of section 4610.6, the Court of Appeal held that IMR determinations are subject to meaningful review, even if the Appeals Board cannot change medical necessity determinations, noting that "[t]he Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1100 [80 Cal.Comp.Cases 1262].)

Here, we agree with the WCJ that the IMR denial was based upon a plainly erroneous fact that is not a matter of expert opinion. As noted by the WCJ, despite the fact that applicant reported bilateral low back pain radiating to both the right and left legs, and despite the presence of a positive bilateral straight leg raise test indicating such bilateral low back pain, the IMR reviewer summarized applicant's condition as "ongoing low back pain that radiates [*sic*] the right leg," then found that the applicant's right-sided leg pain did not correlate with the MRI findings, which

[2] Further references are to the Labor Code unless otherwise stated.

indicated left-sided stenosis. (Ex. 6, at pp. 2–3.) The IMR reviewer then went on to state: "*Based on this* the request is not medically necessary." (*Id.* at p. 3 (emphasis added).)

In light of the evidence that applicant was in fact experiencing low back pain that radiated to both sides, not merely to the right side as stated by the IMR reviewer, it is difficult to see how the IMR reviewer's findings can be characterized as a anything *other than* plainly erroneous. Moreover, the IMR reviewer explicitly states that that the denial of care was "based on" on this error. (*Ibid.*)

Indeed, defendant does not appear to contest that the IMR reviewer failed to notice that applicant was reporting bilaterally radiating low back pain. (See Petition, at p. 3.) Instead, defendant argues that the determination "when taken as a whole" was not plainly erroneous, because the care could still have been validly denied even if the IMR reviewer had recognized applicant's bilateral pain. (*Id.* at pp. 3-4). The Petition asserts:

> Given more significant left-sided MRI findings in juxtaposition to Applicant's self-reported mild left-sided pain and a lack of clinical detail as to what degree or level at which Applicant's SLR test became positive per side, it is not out of the realm of possibility to see how the IMR reviewer found a lack of medical necessity for a bilateral surgical procedure or how the IMR reviewer opined that the MRI does not correlate to Applicant's symptoms. (*Id.*, at p. 4.)

The problem with this argument is that it misstates the relevant legal standard. Assuming for purposes of argument that "it is not out of the realm of possibility" that the IMR reviewer could have upheld the denial of care and characterized the MRI as not correlating with the applicant's symptoms even with a correct understanding of those symptoms, the standard for review of an IMR determination is whether it was based upon a plainly erroneous finding of fact, not whether "it is within the realm of possibility" that the IMR reviewer could have reached an identical conclusion even without reliance on a plainly erroneous finding of fact.

Here, the IMR reviewer's finding that applicant was reporting only right-sided low back pain is plainly erroneous, and the IMR reviewer explicitly states that this erroneous understanding of applicant's symptoms is what led them to conclude that the denial of care was appropriate. Any theoretical possibility that the IMR reviewer might have reached the same conclusion even with a proper understanding of applicant's symptoms is irrelevant. Moreover, no expert opinion or knowledge is required to ascertain that the IMR reviewer's statement regarding applicant's

symptoms is erroneous; one need only examine the words within the four corners of the Final Determination Letter itself.

Finally, defendant notes that the sub-caption to the Joint Findings and Orders states, in parentheses, "Re IMR denial of homecare," and requests that the language in question be stricken. (Petition, at p. 4.) Although we agree with defendant that this language does not appear to pertain to the present dispute, the parenthetical sub-caption has no legal significance, and we therefore see no reason that the Order requires modification.

Accordingly, we will deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 8, 2023

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

LILIBETH GONZALEZ
COLEMAN CHAVEZ ENCINO
SCOTT SOLIS

AW/pm

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