WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ORLANDO RODRIGUEZ, *Applicant*

vs.

MANAGED MOBILE, INC., PROCENTURY INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11532204
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Managed Mobile, Inc., insured by ProCentury Insurance (defendant) seeks reconsideration of the March 2, 2020 Findings of Fact and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a mechanic on November 11, 2016, sustained industrial injury to his head and brain. The WCJ found that applicant is in present need of home health care and has needed such healthcare since September 27, 2018. The WCJ further determined that the lack of material change in applicant's condition obviated defendant's September 19, 2019 utilization review (UR) determination. Accordingly, the WCJ ordered defendant to provide ongoing home healthcare as described by applicant's treating physician.

Defendant contends that the evidentiary record establishes material change in applicant's condition such that defendant's UR decision was appropriate and binding on parties, and because defendant's UR was timely, that the Workers' Compensation Appeals Board (WCAB) lacks the jurisdiction to hear the instant medical treatment dispute.

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[1] Commissioners Lowe and Sweeney, who were previously members of this panel, no longer serve on the Workers' Compensation Appeals Board. Other panelists have been assigned in their place.

Defendant has also filed a Request for Leave to File a Supplemental Petition for Reconsideration, and a corresponding Supplemental Petition for Reconsideration (Supplemental Petition). (Cal. Code Regs., tit. 8, § 10964(b).) We have granted the request pursuant to WCAB Rule 10964 and have reviewed the Supplemental Petition herein. (Cal. Code Regs., tit. 8, § 10964(a).)

We have received an Answer from applicant. 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 Supplemental Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&O.

FACTS

Applicant sustained injury to his head and brain while employed as a mechanic by defendant Managed Mobile, Inc., on November 11, 2016. Applicant sustained a traumatic brain injury secondary to a fall from a trailer while working as a diesel engineer. Applicant sustained multiple skull fractures and underwent decompressive craniectomy surgery and removal of his left temporal skull bone. (Ex. 15, Report of Yong Lee, M.D., dated October 25, 2018, at p. 1.) Applicant's medical course following the injury included treatment at the Casa Colina Transitional Living Center (TLC) with Yong Lee, M.D., acting as applicant's treating physician. (Ex. 8, Request for Authorization (RFA), dated September 12, 2019, at p. 2.)

In addition to various rehabilitation modalities, defendant authorized a home health aide 12 hours per day, seven days per week, commencing in September, 2018. (*Ibid*.; Petition, at p. 3:2.) Treating physician Dr. Yong issued an RFA on May 30, 2019, seeking home health aide services 12 hours daily, seven days per week for six weeks. (Ex. 21, Outpatient Progress Note and RFA of Yong Lee, M.D., dated May 23, 2019.) Defendant's UR certified the request on May 30, 2019. (Ex. H, UR Determination, dated May 30, 2019, at p. 1.) Dr. Lee again requested authorization for home health services on August 15, 2019, which UR certified as medically necessary on August 22, 2019. (Ex. 24, Outpatient Progress Note and RFA of Yong Lee, M.D., dated August 15, 2019; Ex. H, UR Determination, dated August 22, 2019, at p. 32.)

On September 12, 2019, treating physician Dr. Lee again requested authorization for, inter alia, continued home health aide services, 12 hours per day, seven days per week for six weeks. (Ex. 8, RFA report of Yong Lee, M.D., dated September 12, 2019.)

On September 19, 2019, defendant's UR provider recommended that the defendant non-certify the requested home health care services. (Ex. 7, UR Determination, dated September 19, 2019.)

On February 3, 2020, the parties proceeded to an expedited hearing, and framed issues of the WCAB's jurisdiction to determine additional home healthcare, applicant's entitlement to ongoing health care, the timeliness of UR, and the validity of the underlying home health care prescription. (Minutes of Hearing (Expedited) and Summary of Evidence, dated February 3, 2020, at p. 2:15.) The WCJ heard testimony from case manager Karla Makarian and from applicant's attorney's office manager Wilbur Fabian, and ordered the matter submitted for decision the same day. (*Id.* at p. 1:22.)

On February 5, 2020, the WCJ ordered the submission vacated, and ordered the parties to file additional RFAs and UR reports from September 27, 2018 to September 12, 2019. (Order Vacating Submission; Opinion and Order to Develop the Record; Notice of Trial, dated February 5, 2020, at p. 2.)

On February 24, 2020, the parties filed additional exhibits in conformity with the WCJ's order for development of the record, and the WCJ ordered the matter submitted for decision.

On March 2, 2020, the WCJ issued the F&O, determining in relevant part that applicant's need for home health services was "continual and ongoing since [September 27, 2018]," and that the UR report of September 19, 2019 was moot "since the need for home health care was ongoing and continual." (Findings of Fact No. 7 & 8.) The WCJ further found that "no substantive medical evidence was presented to suggest a change in Applicant's present need for home health care." (Finding of Fact No. 9.) The WCJ's Opinion on Decision discussed the significant panel decision in *Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910 [2014 Cal. Wrk. Comp. P.D. LEXIS 98] (*Patterson*) (significant panel decision),[2] and framed the issue as whether "the

[2] A significant panel decision is a decision of the Appeals Board that has been designated by all members of the Appeals Board as of significant interest and importance to the workers' compensation community. Although not binding precedent, significant panel decisions are intended to augment the body of binding appellate and en banc decisions by providing further guidance to the workers' compensation community. (Cal. Code Regs., tit. 8, § 10305(r).)

provision of home health care herein constitute[s] an ongoing and continual need for care," and if so, whether defendant had established a material change in circumstances that would require a new determination of medical necessity. (Opinion on Decision, at p. 1.) After a comprehensive review of the submitted medical evidence, the WCJ concluded that "there is no doubt whatsoever that the ongoing need for continual home health care was provided by Dr. Lee and that the claims administrator continued to provide the benefit voluntarily for over one year." (*Id.* at p. 3.) The WCJ noted that the facts presented were similar to those considered in *Warner Brothers v. Workers' Comp. Appeals Bd.* (*Ferrona*) (2015) 80 Cal. Comp. Cases 831, 832-834 (writ denied), wherein the Appeals Board panel affirmed the trial judge's finding that the reasoning in *Patterson* applies to assistive home care. The WCJ acknowledged that "if the RFA represents a new or renewed or variable change in a course of treatment then the holdings in *Patterson* and *Ferrona* might not apply." (*Id.* at p. 4.) However, "any change in condition must be proved by substantive medical evidence," and finding no persuasive evidence of substantive change, the WCJ ultimately concluded that "[t]he law is that the benefit should continue rather than terminate when the benefit is ongoing without actual evidence that there is a change in conditions." (*Id.* at p. 5.)

Defendant's Petition avers the medical reports in evidence show that the applicant had a change in condition pursuant to *Patterson, supra,* 79 Cal.Comp.Cases 910, between September 2018 and September 2019, prompting the evaluation of the medical necessity of home health care by UR. (Petition, at p. 4:27.) Defendant further contends that the team reports in evidence include the reporting of treating physician Dr. Lee, and that because defendant issued a valid and timely UR determination, the WCAB lacks the jurisdiction to decide this medical dispute. (*Id.* at p. 11.)

Applicant's Answer asserts that pursuant to *Patterson, supra*, defendants may not unilaterally cease to provide home health aide services for a catastrophically injured applicant when there is no documented change in the applicant's circumstances or condition showing that the care is no longer reasonably required to cure or relieve the applicant from the effects of the industrial injury. Applicant asserts that the present record does not substantiate a material change in his condition that would permit reevaluation of a treatment modality that was previously determined to be medically necessary. (Answer, at p. 7:7.)

The WCJ's Report weighs the evidence of interval change in applicant's condition as described in the team conference reports on the one hand, against the reports and treatment recommendations submitted by treating physician Dr. Lee on the other. The WCJ again concludes

that the evidentiary record does not substantively establish that applicant's condition has altered, or that there has been a material change in applicant's ongoing need for home health care services. (Report, at pp. 5-7.)

Defendant's Supplemental Petition asserts that Dr. Lee was an integral participant in the team conference notes, and that the notes support defendant's assertion of material improvement in applicant's condition. (Supplemental Petition, dated April 3, 2020, at p. 2:3.)

DISCUSSION

I.

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).[3] In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.[4] Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020.

In addition, former Labor Code[5] section 5909 provided that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

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[3] The March 16, 2020 DWC Newsline may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-18.html.

[4] The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-29.html.

[5] All further references are to the Labor Code unless otherwise noted.

On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.[6] Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days.

Here, the WCJ issued the F&O on March 2, 2020, and the defendant filed its Petition for Reconsideration on March 20, 2020. The WCAB issued its Opinion and Order Granting Petition for Reconsideration on June 10, 2020. Therefore, the order granting reconsideration on June 10, 2020 was timely as it issued within 120 days of March 20, 2020.

II.

Section 4600(a) provides that an industrially injured worker is entitled, at their employer's expense, to medical treatment that is reasonably required to cure or relieve the effects of the industrial injury. (§ 4600(a).) The coverage of section 4600 extends to any medically related services that are reasonably required to cure or relieve the effects of the industrial injury, even if those services are not specifically enumerated in that section. (*Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 41 [49 Cal.Comp.Cases 454].)

In *Patterson*, *supra*, 79 Cal.Comp.Cases 910, the Appeals Board held that an employer may not unilaterally cease to provide treatment authorized as reasonably required to cure or relieve the effects of industrial injury upon an employee without substantial medical evidence of a change in the employee's circumstances or condition. The panel reasoned:

> Defendant acknowledged the reasonableness and necessity of [the medical treatment at issue] when it first authorized [that treatment], and applicant does not have the burden of proving [its] ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the [treatment] is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new Request for Authorization and starting the process over again.

(*Patterson, supra*, at p. 918.)

[6] Governor Newsom's Executive Order N-68-20 may be accessed here: https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf. (See Evid. Code, § 452(c).)

In *National Cement Co. v. Workers' Comp. Appeals Bd.* (*Rivota*) (2021) 86 Cal.Comp.Cases 595, the Second District Court of Appeal upheld the Appeals Board's application of *Patterson* to award an applicant continued inpatient care, stating:

> [T]he principles advanced in [*Patterson*] apply to other medical treatment modalities as well. Here ... Applicant had continued need for placement at Casa Colina. Further, [applicant's witness] stated that there was no change in Applicant's circumstance and no reasonable basis to discharge Applicant from care. The WCJ ... concluded that Applicant's continued care at Casa Colina was necessary, without ongoing RFAs, to ensure Applicant's safety and provide him with a stable living situation and uninterrupted medical treatment.

(*Rivota*, *supra*, at p. 597.)

In upholding this application of *Patterson*, the *Rivota* court rejected the employer's attempt to distinguish it on the grounds that it had never authorized inpatient care for an unlimited or ongoing period, had never relinquished its right to conduct UR, and had never been subject to a finding that inpatient treatment was reasonable and necessary for the applicant under section 4600. (*Id*.)

In *Los Angeles County MTA v. Workers' Comp. Appeals Bd.* (*Burton*) 89 Cal.Comp.Cases 977 [2024 Cal. Wrk. Comp. LEXIS 55] (writ denied), applicant challenged defendant's UR non-certification of ongoing inpatient treatment, on the grounds that there had been no demonstrable change in applicant's condition such that a new UR determination was appropriate and necessary. The WCJ agreed and determined that applicant was entitled to continue her inpatient rehabilitation treatment until such time as defendant could establish a change in circumstance. The WCJ noted that "the whole point of *Patterson* is that a Form RFA is not required in certain circumstances involving care of an ongoing nature … [t]he decision is about when an RFA is required, and if one is not required in the first place, then there can be no valid UR therefrom, timely or otherwise." (*Id.* at p. 980.) Thus, defendant's submission of the RFA to UR was invalid without a precipitating change in circumstance. The Appeals Board denied defendant's petition for reconsideration without further comment, and defendant's subsequent petition for writ of review was denied by the Second District Court of Appeal and the Supreme Court. (See *Los Angeles County MTA v. Workers' Comp. Appeals Bd.* (2024) 2024 Cal. LEXIS 6103.)

In the present matter, applicant's need for home health aide services was originally authorized by defendant in September, 2018. (Ex. 10, RFA Report of Yong Lee, M.D., dated

September 27, 2018, at p. 1; Petition, at p. 3:2.) The home health services were subsequently determined to be medically necessary by defendant's UR provider on May 30, 2019. (Ex. H, UR Notice of Determination, dated May 30, 2019, at p. 1.) Therein, the physician reviewer noted that the submitted medical record sufficiently documented applicant's subjective complaints, and that applicant had been reevaluated by neurologist Dr. Wogensen, who concurred with Dr. Lee in the need for ongoing treatment through the TLC and ongoing home health care. The reviewer noted the medical necessity of the request for home health aide services was necessary to "overcome deficits in activities of daily living…." (*Id.* at p. 7.)

UR once again determined the home health aide services were medically necessary on August 22, 2019. (Ex. H, UR Notice of Determination, dated May 30, 2019, at p. 32.) The reviewer noted that the medical necessity arose out of the need to "overcome deficits in activities of daily living (ADLs)," and that the home health care services were provided as an adjunct to applicant's continued need for the TLC's day program and an ongoing multidisciplinary therapeutic regimen. (*Id.* at p. 38.)

Following this determination of medical necessity, applicant's treating physician submitted an RFA for continued treatment on September 12, 2019. (Ex. 1, Reports of Yong Lee, M.D., dated September 12, 2019.) On September 19, 2020, defendant's UR determination recommended non-certification of the ongoing home health aide services. (Ex. A, UR Report, dated September 19, 2019, at p. 6.) The stated rationale for denial of services was "no clear documentation of continued reassessment of the medical necessity of home health care services (which may include a repeat home evaluation) and that the patient continues to require home health services." (*Ibid*.)

However, as we held in *Patterson*, *supra*, 79 Cal.Comp.Cases 910, where a medical treatment authorized pursuant to section 4600(a) is determined to be medically necessary, defendant is obligated to continue providing that treatment until such time as there is a material change in circumstance. (*Id.* at p. 918.) We further noted that defendant cannot shift its burden onto applicant by requiring a new RFA and starting the process over again. (*Ibid*.)

Applying the *Patterson* analysis in the present matter, we observe that applicant's treatment in the form of home health aide services was determined to be medically necessary and that defendant duly authorized such treatment pursuant to section 4600(a). (Ex. H, UR Notice of Determination, dated May 30, 2019, at pp. 1, 32.) Thus, any change to the established need for medical treatment would necessarily involve a change in applicant's condition or circumstance,

such that a renewed review of the medical necessity of the requested treatment was appropriate and indicated. As the party with the affirmative of the issue, defendant would bear the burden of establishing the existence of a material change in applicant's medical condition or circumstance. (Lab. Code, § 5705.) Insofar as the UR determination of September 19, 2019 attempts to shift the burden to the applicant of establishing the need for services that have *previously been determined to be medically necessary*, the assertion is inconsistent with our analysis in *Patterson*, and with section 5705. (Ex. A, UR Report, dated September 19, 2019, at p. 6; Lab. Code, § 5705.)

Here, we agree with the WCJ that defendant has not carried its burden of proof. The WCJ's Report analyzed the issue as follows:

> Put simply, if the treating physician states that there is a change in condition relating to an ongoing prescription for home health care, then certainly UR applies.
>
> In this case there is no doubt whatsoever that the ongoing need for continual home health care was provided by Dr. Lee and that the claims administrator continued to provide the benefit voluntarily for over one year. As such the claims administrator could not unilaterally terminate the benefit without a showing by substantive medical evidence that there was a change in condition.
>
> In its petition, Petitioner did not challenge the finding of fact that home health care in this case is one continuous and ongoing claim. Hence the finding of fact (Finding of Fact #7) that Applicant's need for home health care was a singular undetermined and continual need was not contested. This finding of fact is a pre-condition to the remainder of the appeal. For if Dr. Lee's prescription could be construed as a new or renewed or different treatment than previously authorized then the UR review issued herein would be valid and the matter resolved. However the prescription for home health care herein was constant and always the same. The diagnoses were always the same. Dr. Lee always indicated that the need for home health care was "continuing."
>
> It is of some significance that the representative from Casa Colina testified that the repetitive prescription was needed in order for the home health care provider to be paid.
>
> Hence this decision is based upon the uncontested finding that the ruling in *Patterson* and *Ferrona* apply to this case unless there is proof of a change in Applicant's condition.

(Report, at pp. 3-4.)

Defendant contends that the medical reports in evidence show that the applicant had a change in condition pursuant to *Patterson* between September, 2018 and September 2019. (Petition, at p. 4:27.) In support thereof, defendant notes that the basis for the initial request for home health aide services arose when applicant began to experience seizures in September, 2018, and that those seizures were either resolved or quiescent as of September, 2019. (*Id.* at p. 5:16.) However, we note that the stated basis for the services requested by Dr. Lee, certified as medically necessary by defendant's UR provider, was not confined to care addressing the possibility of renewed seizures. Rather, applicant was noted to be experiencing a neurocognitive deficit with mild right hemiparesis, short and long-term memory loss, a seizure disorder, muscle twitching, and dizziness. (Ex. 21, Report of Yong Lee, M.D., dated May 23, 2019.) And as is noted above, the corresponding UR certified the request as medically necessary based in part on deficits in ADLs. (*Id.* at p. 17.) Thus, we are not persuaded that "the mere absence of seizures constitutes a change of condition pursuant to *Patterson*." (Petition, at p. 5:1.)

Defendant also contends that material change in applicant's condition is substantiated in the team conference notes authored by the medical staff at Casa Colina and the TLC. (Petition, at p. 5:4; Ex. G, Team Conference Reports, various dates.) While the specific authorship of each of the specific notes that have been amalgamated into the team conference report is not clear in the record (Report, at p. 6), we observe that the final pages of the "Transitional Living Center Team Conference Note" indicate that the report has been reviewed by the report signatories, including Dr. Lee and/or Dr. Patterson. (Ex. G, Team Conference Reports, various dates, at pp. 14, 39, 64, 90, 115.) Thus, it appears that Dr. Lee, as part of applicant's treatment team at Casa Colina/TLC, participated in the assessment of applicant's progress resulting from his therapeutic treatment regimen. (See Supplemental Petition, dated April 3, 2020, at p. 2:3.)

However, the WCJ also correctly notes that as applicant's treating physician, Dr. Lee continued to update his treatment notes throughout 2019 and identified a consistent array of some 22 medical diagnoses. Dr. Lee recommended continuing provision of multi-modality therapeutic rehabilitation in conjunction with home health aide services throughout 2019. (Report, at p. 4.) The RFAs authored by Dr. Lee on May 23, 2019, August 15, 2019, and September 12, 2019 all review applicant's subjective and objective indicia of progress, and nonetheless reiterate the physician's recommendation for continued, ongoing home health care as part of applicant's comprehensive rehabilitation program. In addition, the May 23, 2019 and August 15, 2019 RFAs

were reviewed and deemed medically necessary by two separate UR physicians. (Ex. H, UR Decisions, various dates, at pp. 1, 32.) We therefore concur with the WCJ's reliance on the medical opinions and corresponding RFAs of treating physician Dr. Lee as persuasive evidence demonstrating an ongoing and continuous need for home healthcare.

We also agree with the WCJ's observation that in the event of a change in applicant's circumstance or medical condition, defendant would rightfully need to consider whether to authorize the requested treatment or to evaluate the medical necessity of the treatment through the UR process. (*State Compensation Insurance Fund v., Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981].) However, pursuant to our holding in *Patterson*, *supra*, 79 Cal.Comp.Cases at p. 918, a change in circumstance is the *precipitating event that triggers the need to reevaluate medical necessity*. Defendant may not satisfy its burden of establishing such a material change in circumstance by offering a UR determination obtained after the fact. (*Id.* at p. 918.)

In summary, we agree with the WCJ that defendant has not met its affirmative burden of establishing a material change in applicant's medical treatment or circumstance that would otherwise require defendant to either authorize the requested treatment or submit the request to UR. Because there was no valid medical dispute arising out of a change in condition or circumstance, we concur with the WCJ's determination that defendant is obligated to continue to provide treatment in the form of home health care services, unless and until defendant demonstrates a material change in applicant's condition or circumstance.

We will affirm the F&O, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued on March 2, 2020, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

ORLANDO RODRIGUEZ
TINA ODJAGHIAN LAW GROUP
BRADFORD & BARTHEL

SAR/abs

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