IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tina Satterwhite, Petitioner	:	
v.	:	No. 1119 C.D. 2008
Workers' Compensation Appeal Board (JC Penneys), Respondent	:	Submitted: September 19, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 23, 2008**

In this workers' compensation appeal, Tina Satterwhite (Claimant) asks whether the Workers' Compensation Appeal Board (Board) erred in affirming the decision of a Workers' Compensation Judge (WCJ) that denied her petition for review of utilization review (UR) determination. Claimant asks us to remand for a finding on whether her employer proved a change in condition since a prior, unappealed UR determination that approved the same treatment by the same provider into the future. Discerning no merit in this assertion, we affirm.

In June 2003, Claimant suffered work-related sprains and strains of her low back, both knees and right pinky finger, for which JC Penneys (Employer) issued a notice of compensation payable (NCP).[1]

[1] A WCJ subsequently amended the NCP to include an aggravation of degenerative lumbar disc disease and a herniated disc at C5-S1.

In December 2005, Employer filed a UR petition challenging the reasonableness and necessity of Claimant's treatment with Martin J. Repcsik, D.C. (Provider) from August 17, 2005 to November 8, 2005 and ongoing. A utilization reviewer subsequently issued a UR determination indicating the treatment was reasonable and necessary (First UR determination). Employer did not appeal this determination.

In June 2006, Employer filed a second UR request concerning Claimant's treatment with Provider from May 22, 2006 and ongoing. About a month later, a utilization reviewer issued a determination that Claimant's treatment was not reasonable and necessary because Provider did not submit Claimant's medical records for the review (Second UR determination). No appeal was taken.

In October 2006, Claimant filed a UR request seeking review of the reasonableness and necessity of treatment by Provider from May 23, 2006 and ongoing. A utilization reviewer issued a determination concluding such treatment was not reasonable and necessary (Third UR determination). Provider did submit Claimant's medical records for this review, but the adequacy of the records was an issue.

Claimant filed a UR petition seeking review by a WCJ of the reasonableness and necessity of Provider's chiropractic treatment from May 23, 2006 and ongoing.

Ultimately, the WCJ denied Claimant's UR petition. The WCJ determined the record established the chiropractic treatment provided to Claimant as of May 23, 2006 was neither reasonable nor necessary for the treatment of her work injury. The WCJ therefore concluded Employer was not responsible for payment of Claimant's treatment with Provider from May 23, 2006 onward. Claimant appealed, and the Board affirmed. This appeal followed.

On appeal,[2] Claimant argues the Board erred in affirming the WCJ's decision in light of the First UR determination that approved chiropractic treatment rendered by Provider into the future. She also asserts the Board erred in determining she waived her argument relating to the Second UR determination by failing to appeal that determination.

"It is well-settled that the employer has the never-shifting burden throughout the UR process of proving that the challenged medical treatment is unreasonable or unnecessary." City of Phila. v. Workers' Comp. Appeal Bd. (Smith), 946 A.2d 130, 137-38 (Pa. Cmwlth. 2008). Medical treatment may be reasonable and necessary even if it is designed to manage a claimant's symptoms

[2] Our review is limited to determining whether necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197 (Pa. Cmwlth. 2006).

In workers' compensation proceedings, the WCJ is the ultimate fact-finder. Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works), 862 A.2d 137 (Pa. Cmwlth. 2004). As fact-finder, matters of credibility and evidentiary weight are within his exclusive province. Id. A WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. Id. If the WCJ's findings are supported by substantial evidence, they are binding on appeal. Agresta v. Workers' Comp. Appeal Bd. (Borough of Mechanicsburg), 850 A.2d 890 (Pa. Cmwlth. 2004).

rather than to cure or permanently improve the underlying condition. Solomon v. Workers' Comp. Appeal Bd. (City of Phila.), 821 A.2d 215 (Pa. Cmwlth. 2003). Thus, treatment may be considered reasonable and necessary even if it is palliative in nature. Haynes v. Workers' Comp. Appeal Bd. (City of Chester), 833 A.2d 1186 (Pa. Cmwlth. 2003).

Claimant first contends the Board erred in affirming the WCJ's denial of her UR petition. She argues Employer did not meet its burden of proof in light of the First UR determination, which Employer did not appeal, that approved Provider's treatment into the future. Based on this prior, unappealed UR determination, Claimant asserts Employer was required to show a change in condition or treatment since the prior determination, which it failed to do. See Lewis v. Workers' Comp. Appeal Bd. (Giles & Ransome, Inc.), 591 Pa. 490, 919 A.2d 922 (2007); C.D.G., Inc. v. Workers' Comp. Appeal Bd. (McAllister), 702 A.2d 873 (Pa. Cmwlth. 1997). Claimant notes the WCJ here did not even mention the First UR determination despite the fact Claimant submitted it at the WCJ hearing. Claimant asks us to remand for a finding as to whether Employer proved a change in condition since the First UR determination. McAllister.

In McAllister, the employer filed its first petition, a petition to review claimant's physical therapy after November 1992. This first petition was assigned to a WCJ. Ultimately, the WCJ determined that the physical therapy was neither reasonable nor necessary. No appeal was taken.

While the decision on employer's first petition was pending, the employer filed a second petition, a UR request under the newly-effective Act 44,[3] arguing the claimant's treatments were unreasonable and unnecessary after August 1993. The UR reviewer concluded the treatment rendered was neither reasonable nor necessary. The claimant filed a petition to review the UR, which was assigned to a second WCJ.

Before the second WCJ, the employer argued the first WCJ's decision required a finding that the provider's treatment was unreasonable and unnecessary. Nevertheless, the second WCJ found the treatment rendered by Claimant's provider was reasonable and necessary. On employer's ultimate appeal to this Court, we considered whether the difference in the dates and frequency of treatment were sufficient distinctions so as to present different issues and prevent application of collateral estoppel. We found error in permitting the claimant to relitigate whether the same treatment was reasonable and necessary without showing a change in condition.

Citing McAllister, Claimant asserts the WCJ here made no findings as to the First UR determination, which determined the treatment rendered by Provider was reasonable and necessary. Claimant argues the WCJ's failure to address the First UR determination is critical because Employer had the burden of proving a change in condition since the First UR determination. Without any

[3] The 1993 amendments to the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2708, are commonly known as "Act 44." Act of July 2, 1993, P.L. 190.

findings as to the "baseline status" of her injury, Claimant contends, the WCJ could not properly evaluate whether Employer met its burden to show Claimant's condition changed. Thus, Claimant asserts, a remand is warranted.

Our decision in McAllister is distinguishable from this case in a very important way. In McAllister, collateral estoppel was raised during litigation of the employer's second challenge to medical treatment. Here, collateral estoppel was not raised at any time during resolution of Employer's Second UR request. The final resolution of that UR request separates the two proceedings which Claimant tries to link through her relitigation arguments. Under these circumstances, McAllister does not apply.

Claimant did not appeal the Second UR determination, which concluded Provider's treatment was not reasonable and necessary. Thereafter, Claimant sought the Third UR determination, which she lost on the merits. Claimant cannot undo both the unappealed Second UR determination and her merits-based Third UR determination under the guise of precluding relitigation.[4]

Claimant also argues the Board erred in concluding she waived her argument by not appealing the Second UR determination where no appeal could be

[4] Claimant also cites Lewis for the proposition that Employer was required to prove a change in condition since the First UR determination. In Lewis, our Supreme Court held an employer seeking to terminate benefits must present medical evidence of a change in physical condition, and where there have been previous petitions to modify or terminate benefits, the employer must show a change since the last disability determination. Lewis is inapplicable here. Unlike in Lewis, this case does not concern a series of termination petitions filed by Employer. Rather, in this case, Claimant filed the most recent UR petition.

taken from that determination based on our decision in County of Allegheny v. Workers' Compensation Appeal Board (Geisler), 875 A.2d 1222 (Pa. Cmwlth. 2005).

In Geisler, we held that if a report by a peer physician is not prepared because the provider failed to produce medical records to the reviewer, a WCJ lacks jurisdiction to determine the reasonableness and necessity of the treatment. Additionally, where the provider under review fails to tender any medical records, but the reviewer nevertheless issues a report, a WCJ still lacks jurisdiction to hear a UR petition from such determination. Stafford v. Workers' Comp. Appeal Bd. (Advanced Placement Servs.), 933 A.2d 139 (Pa. Cmwlth. 2007).[5]

As noted above, prior to Claimant's Third UR petition, Employer filed a UR request concerning Claimant's treatment with Provider from May 22, 2006 and ongoing. A utilization reviewer issued a determination that Claimant's treatment was not reasonable and necessary because Provider did not submit Claimant's medical records for the review. Claimant is correct that she could not appeal this prior determination based on our decision in Geisler. However, after the Second UR determination Claimant had two other available remedies: switch

[5] A WCJ can, however, rule on issues related to the adequacy of the URO's pursuit of the records, the URO's compliance with 34 Pa. Code §127.464(b), and whether the provider complied with the URO's requests. Gazzola v. Workers' Comp. Appeal Bd. (Ikon Office Solutions), 911 A.2d 662 (Pa. Cmwlth. 2006). If the WCJ determines the URO did not adequately request the records, or the provider complied with the request, the WCJ must vacate the determination and order the records be sent to a reviewer for a determination on the merits of whether the treatment was reasonable and necessary. Id.

Here, however, Claimant does not assert the URO in the underlying UR petition failed to properly request Provider's records, rendering Gazzola inapplicable.

providers, see Stafford, 933 A.2d at 142, or prevail on the merits of her subsequent UR petition. She did neither.[6]

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

Judge Smith-Ribner concurs in the result only.

[6] Claimant also contends the WCJ erred in failing to make a finding as to the credibility of a written statement she submitted to the UR reviewer in which she outlined the chiropractic treatment she received from Provider and indicated her desire to continue such treatment. Contrary to this assertion, the WCJ did, in fact, make a finding summarizing Claimant's written statement. WCJ Op., Finding of Fact No. 20. While the WCJ did make an express credibility determination on this statement, it is clear from the WCJ's opinion that he considered this statement and chose to afford it no weight. Rather, in issuing his decision, the WCJ chose to credit the UR reviewer's opinion that Provider's treatment was neither reasonable nor necessary. We discern no error in the WCJ's failure to make an express credibility determination on Claimant's written statement. See, e.g., Acme Mkts., Inc. v. Workers' Comp. Appeal Bd. (Brown), 890 A.2d 21, 26 (Pa. Cmwlth. 2006) (reasoned decision does not require WCJ to give a line-by-line analysis of each statement by each witness, explaining how a particular statement affected the ultimate decision).

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O R D E R

AND NOW, this 23rd day of December, 2008, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge