

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dominic Dellaquila, :
Petitioner :
 :
v. : No. 1982 C.D. 2007
 : Submitted: March 14, 2008
Workers' Compensation Appeal :
Board (Chester County Fund and :
Penn National Insurance), :
Respondents :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: May 12, 2008

Dominic Dellaquila (Claimant) petitions for review of the September 28, 2007, decision of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) dismissing Claimant's petition for review of a utilization review determination for lack of subject matter jurisdiction. We affirm.

On January 19, 2000, Claimant suffered an injury in the course of his employment with Chester County Fund (Employer) and received benefits pursuant to a notice of compensation payable (NCP). On May 22, 2006, pursuant to section

306(f.1)(6) of the Workers' Compensation Act (Act),¹ Employer and its insurer, Penn National Insurance (Insurer), filed a request for utilization review (UR request), challenging the reasonableness and necessity of medical treatment provided to Claimant by Paul J. Wilson, III, D.O., (Provider) from May 12, 2006, and ongoing.

The UR request was assigned to a utilization review organization (URO), which determined that the medical care under review was not reasonable or necessary pursuant to 34 Pa. Code §127.464, based on Provider's failure to timely supply medical records. (R.R. at 6-7.) Accompanying the URO determination was a memorandum documenting: the URO's four unsuccessful attempts to obtain the medical records from Provider by the required due date; the URO's receipt of the records on July 10, 2006, bearing a postmark of July 7, 2006, eight days after the due date; and the URO's consequent return of the late records. The URO also included a copy of a certified letter, dated May 30, 2006, that was sent to Provider requesting the relevant medical records and a copy of a certified mail receipt, verifying that Provider's office signed for and received the request for records on June 1, 2006. (R.R. at 8-12.)

The regulation governing the URO determination, 34 Pa. Code §127.464, provides as follows:

Effect of failure of provider under review to supply records.

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §531(6).

(a) If the provider under review fails to mail records to the URO within 30 days of the date of request of the records, the URO shall render a determination that the treatment under review was not reasonable or necessary, if the conditions set forth in subsection (b) have been met.

(b) Before rendering the determination against the provider, a URO shall do the following:

(1) Determine whether the records were mailed in a timely manner.

(2) Indicate on the determination that the records were requested but not provided.

(3) Adequately document the attempt to obtain records from the provider under review, including a copy of the certified mail return receipt from the request for records.^[2]

(c) If the URO renders a determination against the provider under subsection (a), it may not assign the request to a reviewer.

Claimant petitioned for review of the URO determination (Petition), and the WCJ held a hearing on the Petition on October 4, 2006. At the hearing, Employer presented a copy of the URO determination and related documentation; Claimant submitted no evidence.

² The documentation accompanying the URO determination satisfied 34 Pa. Code §127.464(b).

The WCJ found that no dispute existed as to the facts and specifically found: that the URO complied with the appropriate regulations in trying to obtain Provider's medical records; that Provider failed to provide the records within the required thirty-day period; and that records subsequently submitted were returned by the URO. Based on these findings, the WCJ concluded that he lacked jurisdiction to hear Claimant's Petition, pursuant to our holding in *County of Allegheny v. Workers' Compensation Appeal Board (Geisler)*, 875 A.2d 1222, 1228 (Pa. Cmwlth. 2005), that "if a report from a peer physician is not prepared because the provider has failed to produce medical records to the reviewer, the WCJ lacks jurisdiction to determine the reasonableness and necessity of medical treatment."³ See also *Stafford v. Workers' Compensation Appeal Board (Advanced Placement Services)*, 933 A.2d 139 (Pa. Cmwlth. 2007); *Miller v. Workers' Compensation Appeal Board, (Pavex, Inc.)*, 918 A.2d 809 (Pa. Cmwlth.), appeal denied, 593 Pa. 735, 929 A.2d 646 (2007). Accordingly, the WCJ dismissed Claimant's Petition. On appeal, the WCAB affirmed, and Claimant now petitions this court for review of that order.⁴

³ We based our decision in *Geisler* on section 306(f.1)(6)(iv) of the Act, 77 P.S. §531(6)(iv), which requires that the utilization review report be part of the record before the WCJ and that the WCJ consider the report as evidence, although it is not binding. We explained that in situations where the URO renders a determination against a provider pursuant to 34 Pa. Code §127.464(a), based on the provider's failure to supply medical records, subsection 127.464(c) prohibits the URO from assigning the request to a peer reviewer, and, therefore, the report required for the WCJ's review is never generated. Without the required report, the WCJ has nothing to review and lacks jurisdiction to address the reasonableness and necessity of the subject medical treatment.

⁴ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Claimant acknowledges that the WCJ could not review the merits of the reasonableness and necessity of Provider's medical treatment. (Claimant's brief at 7.) However, relying on *Gazzola v. Workers' Compensation Appeal Board (Ikon Office Solutions)*, 911 A.2d 662 (Pa. Cmwlth. 2006), Claimant argues that he is entitled to challenge the validity of Employer/Insurer's UR request⁵ and present evidence establishing a reasonable excuse for Provider's failure to timely submit medical records to the URO. According to Claimant, the WCJ's determination to dismiss the Petition without consideration of these issues was a violation of his due process rights.⁶ We disagree.

⁵ Employer/Insurer's UR request described the treatment to be reviewed as: "any and all treatment including but not limited to office visits, pain management, physical therapy, medications, *referrals* and any other treatment and ongoing *into the near future*. 'prospective'." (R.R. at 2-3) (emphasis added). Section 306(f.1)(6)(i) of the Act allows for utilization review of prospective treatment, 77 P.S. §531(6)(i). Nevertheless, Claimant maintains that by including *future referrals* in the UR request, Employer violated section 306(f.1)(6)(i) of the Act, which limits disputes over medical care to the reasonableness and necessity of treatment by a health care provider. 77 P.S. §531(6)(i). Claimant contends that Employer bundled *other* medical providers in the UR request, and, as a result, "[C]laimant cannot seek the services of another physician or provider to whom Provider would refer him because of the UR determination that is left unreviewable." (Claimant's brief at 10.) Claimant asks, "[w]hat public policy is served by forcing [C]laimant to blindly seek out medical providers to treat his work injury without the guidance of his treating physician?" (*Id.*)

However, Claimant's argument incorrectly presumes that the legal effect of the URO determination here is to establish that no treatment from any health care provider to whom Claimant was referred by Provider will be considered reasonable and necessary. To the contrary, we recognize that Claimant may seek treatment with another health care provider, and he may find one who will be more responsive to Claimant's right to and continuing need for the treatment supplied. *See Stafford*.

⁶ As a threshold matter, Employer contends that Claimant has waived the issues of whether Employer/Insurer's UR request was invalid as being overly broad and/or vague and whether Provider had a reasonable excuse for failing to timely comply with the URO's request for records because Claimant never raised these issues in his appeal to the WCAB. Rather, the sole issue raised in that appeal was whether Claimant's due process rights were violated by the **(Footnote continued on next page...)**

In *Gazzola*, we confirmed that, under *Geisler*, a WCJ lacks jurisdiction to decide the merits of a URO determination, i.e., the reasonableness and necessity of the medical care under review, where the URO determination was based on the provider's failure to provide records. However, we recognized that a decision by the WCJ on the issues of the adequacy of the URO's pursuit of the records and the URO's compliance with 34 Pa. Code § 127.464(b) would not be a decision on the merits of whether the treatment was reasonable and necessary. Thus, we held that the WCJ has jurisdiction to decide those procedural issues and, based on the evidence, either uphold the determination based on the provider's failure to provide records or vacate the determination and order that the records be sent to a reviewer for a URO determination on the merits of whether the treatment in question was reasonable and necessary. Here, however, Claimant does not challenge the URO's attempts to obtain medical records from Provider, and Claimant does not dispute the fact that the URO fully complied with 34 Pa. Code §127.464(b); therefore, *Gazzola* is not applicable.⁷ *Miller* (stating that *Gazzola* is

(continued...)

WCJ's refusal to permit Claimant to establish a record by submitting Provider's medical records himself. (*See* Claimant's appeal to the WCAB, Employer's brief at Appendix A.) We agree that the issues raised by Claimant in the "Statement of Questions Involved" portion of his brief to this court do not appear in the appeal document filed with the WCAB; however, because the WCAB addresses both issues in its opinion, (WCAB's op. at 4-5; Claimant's brief at Appendix 1), we will consider these issues as well.

⁷ As indicated, the holding in *Gazzola* only recognized a WCJ's jurisdiction to determine whether the URO complied with 34 Pa. Code §127.464(b) in its attempt to obtain the provider's records. Like the WCAB, we do not read *Gazzola* as expanding the inquiry to a determination of whether the provider had a reasonable excuse for its failure to timely comply with the request for records or whether the UR request was overbroad.

not applicable where the issue of whether the URO properly requested the records is not before the court).

Moreover, we point out that, in *Gazzola*, “the parties submitted evidence [at the hearing before the WCJ] to demonstrate what efforts were made to obtain the medical records and what happened in response.” *Id.* at 665. Thus, we remanded the matter for the WCJ to make a decision on the claimant’s petition for review *based on that evidence*; we did not direct the WCJ to conduct a new hearing. In contrast, Claimant here failed to raise any challenge to the scope or specificity of the Employer/Insurer’s UR request at the WCJ’s hearing, and Claimant offered no evidence even suggesting that Provider had a reasonable excuse for his untimely submission.⁸ Having failed to present such evidence,

⁸ At the very beginning of the October 4, 2006, hearing, the following discussion took place between the WCJ and Claimant’s counsel.

WCJ: Let me be blunt and ask you why the matter should not be dismissed?

CC: I assume you’re referring to the ---?

WCJ: Yes, that’s what I’m referring to.

CC: Judge, I understand this matter’s pending before the Supreme Court on appeal of the Commonwealth Court decision. We wanted to make sure that we preserved the Claimant’s right in the event that a decision ---.

WCJ: If the Supreme Court should change the ruling.

(N.T. at 5.) During the remainder of the extremely brief hearing, the WCJ accepted the URO determination into evidence, (N.T. at 6), and verified that Claimant’s counsel agreed that “everything was done pursuant to the regulation.” (N.T. at 7.) The WCJ then asked the attorneys, “Is there anything else you wanted to put in?” (N.T. at 8.) Hearing nothing further, the WCJ informed the attorneys that he would dismiss the Petition on the basis of the law and concluded the hearing.

Claimant would not be entitled to a second hearing to address these issues, even if the WCJ had jurisdiction to consider them.

Finally, Claimant has failed to present a meritorious due process claim. In *Miller*, this court recognized that procedural due process requires that one have an identifiable property right or liberty interest, *Pennsylvania Interscholastic Athletic Association, Inc. v. Greater Johnstown School District*, 463 A.2d 1198 (Pa. Cmwlth. 1983), and we concluded that a claimant does not have a protected property interest in medical benefits not yet determined to be reasonable and necessary. Claimant here is in the same position as the claimant in *Miller*; he has established Employer's liability for his work injury via the NCP, but he has not yet established that Provider's course of treatment for that injury was necessary and reasonable. Until Claimant does so, he is not entitled to the continued receipt of these medical benefits, and they do not constitute a property right for purposes of his due process claim. *Miller*. Therefore, we do not reach the question of whether Claimant's alleged deprivation of these benefits denied him due process of law. *Id.*

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

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ORDER

AND NOW, this 12th day of May, 2008, the order of the Workers' Compensation Appeal Board, dated September 28, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge