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OPINIONS AND ORDERS

REHEARING ORDER

ORDER OF THE SUPREME COURT OF COLORADO DENYING PETITION FOR WRIT OF CERTIORARI (JULY 29, 2019)

COLORADO SUPREME COURT

LORI MADDEN-GRAMMER,

Petitioner,

v.

COLORADO HOSPITAL ASSOCIATION TRUST, POUDRE VALLEY HOSPITAL, and INDUSTRIAL CLAIM APPEALS OFFICE,

Respondents.

Supreme Court Case No: 2019SC45

Certiorari to the Court of Appeals, 2017CA2066
Industrial Claim Appeals Office, WC3928088

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 29, 2019.

MANDATE OF THE COLORADO COURT OF APPEALS (AUGUST 1, 2019)

COLORADO COURT OF APPEALS

LORI MADDEN-GRAMMER,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE, POUDRE VALLEY HOSPITAL, and COLORADO HOSPITAL ASSOCIATION TRUST,

Respondents.

Court of Appeals Case Number: 2017CA2066

Industrial Claim Appeals Office UR 1605
Industrial Claim Appeals Office WC3928088

This proceeding was presented to this Court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

ORDER AFFIRMED

Polly Brock
Clerk of the Court of Appeals

Date: August 1, 2019

OPINION OF THE COLORADO COURT OF APPEALS (DECEMBER 13, 2018)

COLORADO COURT OF APPEALS

LORI MADDEN-GRAMMER,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO; POUDRE VALLEY HOSPITAL; and COLORADO HOSPITAL ASSOCIATION TRUST,

Respondents.

Court of Appeals No. 17CA2066
Division II

Industrial Claim Appeals Office of the State of Colorado WC No. 3-928-088

Before: DAILEY Judge, LICHTENSTEIN and VOGT*, JJ.

¶ 1 This workers' compensation claim asks us to review the procedures governing appeals of medical utilization reviews (MURs) under section 8-43-501,

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

C.R.S. 2018. Since sustaining injuries in a work-related accident thirty years ago, claimant, Lori Madden-Grammer, has been receiving on-going medical maintenance benefits. Her employer, Poudre Valley Hospital, and its insurer, Colorado Hospital Association Trust (collectively employer), requested an MUR to challenge the reasonableness and necessity of some of the treatment claimant underwent. An administrative law judge (ALJ) and the Industrial Claim Appeals Office (Panel) upheld the MUR panel's recommendation for a change of provider. We likewise affirm.

I. Procedural and Factual Background

¶ 2 The record and procedural history in this case are lengthy and complex. For purposes of this appeal, we will limit our background discussion to those facts relevant to the issue currently before us.

¶ 3 Claimant sustained multiple, admitted, work-related injuries secondary to a 1988 automobile accident. She later developed complex regional pain syndrome (CRPS) as a result of those injuries. Her symptoms subsequently worsened, and, by 2008, she was no longer able to work.

¶ 4 Thereafter, claimant moved to Nevada where, beginning in January 2009, she came under the care of Dr. Brian Lemper. Dr. Lemper treated claimant with platelet rich plasma (PRP) injections. In 2014, he testified that he had performed over 100 PRP injections on claimant. Both he and claimant praised the injections, which Dr. Lemper characterized as a "significant success" that enabled claimant to "walk with a normal appearing foot and stop using her narcotic medications." According to Dr. Lemper, there

"was noted improvement of [claimant's] right ankle range of motion as well as considerable improvement of her right ankle swelling."

¶ 5 However, in 2013, employer questioned the reasonableness and necessity of so many PRP injections and applied for a hearing to challenge the treatment. As employer points out, the Medical Treatment Guidelines only authorize three PRP injections: "If PRP is found to be indicated in these select patients, the first injection may be repeated twice when significant functional benefit is reported but the patient has not returned to full function." Colo. Dept. of Labor, Med. Treatment Guidelines, Rule 17, Ex. 6, Lower Extremity Guidelines, Sec. F(6)(d), pp. 150-151.

¶ 6 After conducting a two-day hearing on the issues raised by employer, ALJ Allegretti found that claimant does indeed suffer from CRPS, but that "the benefit of the PRP therapy is temporary and not long-term. . . . [I]t is found that overall, [c]laimant's condition has deteriorated from the time period prior to when she first received PRP injections to the present." Based on this finding, ALJ Allegretti ruled that the PRP injections were not "reasonably necessary to cure or relieve the effects of [claimant's] work injury." Her order terminated the treatment.

¶ 7 Despite ALJ Allegretti's order, Dr. Lemper continued administering PRP injections to claimant. To challenge Dr. Lemper's continued use of the treatment, employer then requested an MUR pursuant to section 8-43-501. Three physicians were selected to conduct independent reviews of Dr. Lemper's post-order treatment of claimant: Dr. Lynne Fernandez, Dr. Joseph Fillmore, and Dr. J. Ethan Moses.

¶ 8 All three physicians opined that the PRP treatments Dr. Lemper administered were not reasonably necessary and were "excessive." Dr. Fernandez supported her conclusion with two primary observations: (1) that any relief claimant received from the treatment was temporary, lasting "6 to 8 weeks" after which "the pain returns to pre-injection levels"; and, (2) that Dr. Lemper's and claimant's self-reported improvement with the treatment was not corroborated by other physicians, whose records indicated that claimant's condition had deteriorated during the time period in question. Likewise, Dr. Moses surmised that

> Dr. Lemper's clinic note on 8/5/15 is where he begins to diverge from reasonable and necessary treatment. He states that Ms. Madden-Grammer was "pleading for PRP injections," and despite the 22 previous PRP injections into the low back and 19 into the ankle that provided no long-term benefit, he decides to move forward with even more PRP injections into multiple body parts.

Each MUR physician, having personally reviewed claimant's medical records, independently concluded that Dr. Lemper should not be permitted to continue treating claimant.

¶ 9 Noting that "the members of the reviewing committee unanimously recommended that a change of provider be made . . . [and] that the payment of fees be retroactively denied," the Director of the division of workers' compensation ordered a change of provider and retroactive denial of payments to Dr. Lemper. Claimant admits that, in compliance with section 8-

43-501(4) of the MUR statute, employer then referred her to other physicians for treatment.[1]

¶ 10 Claimant appealed the Director's decision to an ALJ. ALJ Felter reviewed the record—which included thousands of pages of medical records, as well as the opinions of the MUR panelists, and claimant's and Dr. Lemper's written statements—but he did not conduct a hearing because the MUR statute does not provide for one. After considering the voluminous documentary evidence, ALJ Felter ruled that claimant had not met her burden of clearly and convincingly overcoming the Director's decision adopting the MUR committee's recommendations. He found that all three physician members of the MUR panel recommended a change of physician, and that "it is highly likely, unmistakable, and free from serious and substantial doubt that Dr. Lemper's treatment of [c]laimant was not reasonably appropriate according to professional standards to cure and relieve [c]laimant of the effects of the December 23, 1988 work-related injury." ALJ Felter therefore upheld the Director's order to change providers and relieve employer of the obligation of paying "for any of Dr. Lemper's medical services after August 20, 2015."

¶ 11 On review, the Panel affirmed his decision. The Panel rejected claimant's contention that ALJ Felter employed the wrong standard and thus misapplied the law, holding instead that claimant was

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[1] Indeed, in her statement opposing the MUR panel, claimant identified at least three physicians she saw after Dr. Lemper's care was terminated, Drs. Robert Odell, Michael Yudez, and Joshua Prager. We have not, however, found reports of those visits in the record, and neither party has pointed us to them.

confusing the test for post-MMI medical maintenance benefits with the burden of proof applicable in MUR reviews. The Panel also held that it could not disturb ALJ Felter's order because substantial evidence in the record supported it.

¶ 12 Claimant now appeals from the Panel's decision.

II. Due Process

¶ 13 Claimant first contends that the MUR statute, section 8-43-501, unconstitutionally violates her right to due process by depriving her of a protected property interest—her workers' compensation benefits—without a hearing. Specifically, claimant contends that section 8-43-501 deprives her and other litigants of due process because it omits an avenue for a claimant to request a hearing to challenge an MUR panel's recommendations. We are not persuaded, however, that claimant suffered any deprivation of her constitutional rights.

A. Law Governing Due Process Analysis

¶ 14 "The fundamental requisites of due process are notice and the opportunity to be heard by an impartial tribunal." *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995). "The essence of procedural due process is fundamental fairness." *Avalanche Indus., Inc. v. Indus. Claim Appeals Office*, 166 P.3d 147, 150 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *see also Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009) (Due process "requires fundamental fairness in procedure.").

¶ 15 A claimant asserting that a statute violates his or her rights must demonstrate that the statute "is unconstitutional beyond a reasonable doubt." *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 265 (Colo. App. 2004). And, when analyzing the statute's constitutionality, we must presume "that the statute is valid." *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474, 477 (Colo. App. 2006).

B. Claimant Cannot Establish That She Was Deprived of a Right

¶ 16 To pursue a due process claim, a claimant must first meet the threshold burden of establishing a due process violation.

> "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" It is necessary to consider whether a property right has been identified, whether government action with respect to that property right amounted to a deprivation, and whether the deprivation, if one is found, occurred without due process of law.

Whatley v. Summit Cty. Bd. of Cty. Comm'rs, 77 P.3d 793, 798 (Colo. App. 2003), (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)).

¶ 17 Claimant cannot meet this burden. The Colorado Supreme Court previously held that no workers' compensation claimant has a property interest in receiving a particular type of treatment from a specific physician. *See Colo. Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 719 (Colo. 1994). There, the supreme court held that an injured worker is not entitled to a de novo

hearing where the worker's benefits "have been changed, not terminated." *Id.* As the supreme court explained, even though workers' compensation benefits are a protected property interest, *see Whiteside v. Smith*, 67 P.3d 1240, 1247 (Colo. 2003), an injured worker "has no protected property interest in receiving care from a specific health care provider or in receiving a particular type of treatment." *Nofio*, 886 P.2d at 720.

¶ 18 In *Nofio*, the injured claimant "received approximately 1,000 chiropractic treatments." *Id.* at 715. Finding that excessive, the employer invoked the MUR process. Two of the three MUR panelists "concluded that chiropractic care should have been concluded within three to six months of the injury, and recommended a change of physician and a retroactive denial of payments." *Id.* at 716. The Director adopted the majority panel's recommendation and ordered both a change in medical providers and retroactive denial of medical bills. The claimant questioned the loss of his chiropractic treatment without a hearing, but the supreme court rejected his argument and held that the claimant was not entitled to a de novo hearing because his benefits had only been changed but had not been terminated. *Id.* at 720. The supreme court concluded that the claimant therefore had not been deprived of a protected property interest. *Id.*

¶ 19 *Nofio* is dispositive here. As in *Nofio*, the compensable care claimant received from a treater—Dr. Lemper—as well as one type of treatment—PRP injection—have been ordered to cease. But, nothing in the order denies claimant treatment from other providers or other types of therapy; her access to other medical treatment has not been cut off. Indeed, claimant admitted that employer sent her to other

physicians for care. She contends, rather, that only Dr. Lemper's care provided her with the relief she sought, and that only PRP injections alleviated her pain. Thus, claimant does not assert a loss of all medical benefits, but rather the loss of this specific care and these specific benefits. Under *Nofio*, though, no party has a property interest in specific care or specific benefits. *Id.* at 720. Consequently, claimant cannot meet her threshold due process burden of establishing that she was deprived of a protected property interest.

¶ 20 In so concluding, we necessarily reject claimant's assertion that, unlike in *Nofio*, cutting off Dr. Lemper's care equated to a termination, not just a change, in her benefits. As the MUR panelists observed, particularly Drs. Fernandez and Moses, contrary to claimant's positive description of the treatment, the medical records indicate that her condition deteriorated while undergoing PRP injections with Dr. Lemper. In addition, although claimant implies that she is being deprived of treatment, she admitted other physicians have treated her since the MUR decision. And, the Medical Treatment Guidelines adopted by the Division of Workers' Compensation include an entire section, Rule 17, Exhibit 7, addressing the diagnosis and treatment of Complex Regional Pain Syndrome. *See* Colo. Dept. of Labor, Med. Treatment Guidelines, Rule 17, Ex. 7, Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy Medical Treatment Guideline. The treatment guidelines incorporate nearly 75 pages of options for the treatment of CRPS, including other injections such as nerve blocks or epidural infusions; conservative measures such as interdisciplinary rehabilitation programs, aquatic

therapy and gait training; and more invasive procedures such as neurostimulation, implantation of root ganglion stimulators, intrathecal drug delivery, and sympathectomy. The record does not clarify which, if any, of these treatments claimant's physicians have tried since the MUR panel's recommendation, but it is clear that treatments other than PRP injections are available to claimant and that she continues to be entitled to compensable medical care.

¶ 21 Finally, we cannot, as claimant suggests we do, simply adopt the reasoning Justice Lohr set forth in his *Nofio* dissent. We are bound to follow the precedent set by the *Nofio* majority. *See In re Estate of Ramstetter*, 2016 COA 81, ¶ 40 ("[T]he court of appeals is 'bound to follow supreme court precedent.'") (quoting *People v. Gladney*, 250 P.3d 762, 768 n. 3 (Colo. App. 2010)).

¶ 22 Accordingly, we conclude that claimant has failed to establish that application of section 8-43-501 violated her right to due process.

III. ALJ Felter Did Not Misapply the Applicable Legal Standard

¶ 23 Claimant next contends that ALJ Felter misapplied the law by requiring her to show that the PRP injections provided her "functional gains." She maintains that, under *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988), she only had to show that the treatment was "reasonably necessary to relieve [her] from the effects of the work-related injury." *Id.* at 711.

¶ 24 Claimant is correct that she is entitled to treatment "reasonably necessary to relieve [her] from the effects of the work-related injury." But as noted in

the previous section, numerous types of treatments are capable of relieving her from the effects of her work-related injury.

¶ 25 "[T]he purpose of the [medical] utilization review process authorized in this section is to provide a mechanism to review and remedy services rendered pursuant to this article which may not be reasonably necessary or reasonably appropriate according to accepted professional standards." Section 8-43-501(1). The focus of the process is, then, on the application of accepted medical standards. As we read ALJ Felter's order, when he referred to "functional gains," he was merely echoing the medical guidelines offered by the MUR physicians in their assessments of the effectiveness of PRP injections.

¶ 26 Paraphrasing the physicians' statements, ALJ Felter reiterated that the PRP injections "were excessive and were not providing any functional gain, which is the standard for the continued use of PRP therapy." The physicians, in turn, drew the term from the accepted Medical Treatment Guidelines. As Dr. Moses wrote:

> The Colorado Medical Treatment Guidelines are written from an evidence-based review of the medical literature. It is clear from the current state of the medical literature that, from a physiologic basis, . . . the method by which PRP re-initiates the healing process should produce some lasting benefit in functional gains or subjective pain relief after the first three injections. Ms. Madden-Grammer has received greater than 22 PRP injections in multiple areas, and she has not demonstrated any long-term benefits whatsoever.

> Thus, continued PRP injections are not reasonable or appropriate according to accepted professional standards given the lack of any long-term benefit to the patient.

(Italicized emphasis added.) ALJ Felter's use of the phrase therefore did not constitute a misapplication of the law; rather, it was a recognition of the terminology used by the medical profession to assess the success of PRP injections.

¶ 27 More importantly, a close reading of ALJ Felter's Conclusions of Law makes clear that he did not apply the "functional gains" standard as a legal test. Rather, he used it merely to define the medical standard to which Dr. Lemper needed to be held. In explaining his holding, ALJ Felter concluded that claimant "failed to prove, by clear and convincing evidence, that Dr. Lemper's treatment of [her] was appropriate according to accepted professional standards." (Emphasis added). Thus, the legal standard ALJ Felter followed was whether claimant had shown, by clear and convincing evidence, that the MUR panel incorrectly concluded that Dr. Lemper had not followed accepted medical standards. And, it was that medical standard which assessed the success of PRP injections by analyzing whether a patient experienced functional gains as a result of those injections.

¶ 28 ALJ Felter was statutorily bound to adhere to this legal test. Section 8-43-501(5) mandates that the reviewing fact finder defer to the MUR panel's recommendations and only deviate from them if the challenging party overcomes them "by clear and convincing evidence."

¶ 29 We therefore conclude that ALJ Felter appropriately followed the statutory test by deferring to the MUR panel and requiring claimant to show by clear and convincing evidence that the MUR panel erred in its recommendations. *See* § 8-43-501(5). Accordingly, we agree with the Panel that ALJ Felter did not misapply the law or hold claimant to an improper burden of proof.

IV. Substantial Evidence Supports the ALJ's Findings

¶ 30 Last, claimant contends that "what little evidence" is contained in the nearly five thousand pages of medical reports comprising the record, illustrates that "the only treatment that 'relieved' [her] CRPS symptoms was the PRP therapy provided by Dr. Lemper." She argues that consequently, substantial evidence does not support the ALJ's factual finding that "Dr. Lemper's treatment was not relieving [her] from the effects of the industrial injury." We disagree.

A. Standard of Review

¶ 31 Under the MUR statute, a claimant may seek review of an MUR panel's recommendation and a Director's order before an ALJ. However, claimant implies that she only needed to establish that Dr. Lemper's treatment relieved her of the effects of her injury to overcome the MUR panel's recommendations. This is incorrect. The "conclusions of the MUR committee are 'afforded great weight.'" *Franz v. Indus. Claim Appeals Office*, 250 P.3d 755, 757 (Colo. App. 2010) (quoting § 8-43-501(5)(a)). And, by statutory mandate, the "party disputing the finding of such utilization review committee shall have the burden of

overcoming the finding by clear and convincing evidence." § 8-43-501(5)(a).

¶ 32. We must uphold the factual determinations of the ALJ—including whether a claimant has overcome an MUR by clear and convincing evidence—if the decision is supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2018; *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256 (Colo. App. 2007) ("We are bound by the factual determinations of the ALJ, if they are supported by substantial evidence in the record."); *see, e.g.*, *Justiniano v. Indus. Claim Appeals Office*, 2016 COA 83, ¶ 19 ("Whether a party has met the burden of overcoming a [division-sponsored independent medical examination] by clear and convincing evidence is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence."). The reviewing court is bound by the ALJ's factual determinations even if the evidence was conflicting and could have supported a contrary result. It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo. App. 2001); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for that of the ALJ).

B. Analysis

¶ 33 Here, all three MUR panel members unanimously recommended a change of provider. All three agreed that Dr. Lemper's care, and, in particular, the frequent PRP injections he administered, veered from and exceeded the Medical Treatment Guidelines.

Their opinions must be "afforded great weight." § 8-43-501(5)(a).

¶ 34 To counter their opinions, claimant offered her own personal statement, Dr. Lemper's statement, and additional medical records. In those statements, both she and Dr. Lemper argued that his PRP treatments relieved her from the effects of her work-related injury. But the ALJ determined that the evidence claimant offered did not amount to the clear and convincing evidence necessary to overcome the MUR panelists' unanimous opinions that Dr. Lemper used PRP injections excessively. ALJ Felter correctly expressed that the MUR panelists' opinions must be given "great weight," and concluded that because "there is no clear and convincing evidence to overcome the recommendation, the Director's order must be affirmed." *See* § 8-43-501(5)(a). And, because the weight to be assigned expert medical opinions and reports is squarely within the ALJ's discretion, "we may not substitute our judgment for that of the ALJ" where the decision is supported by substantial evidence in the record. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002).

¶ 35 Because the MUR panel's unequivocal opinions substantially support the ALJ's factual finding that claimant failed to clearly and convincingly overcome the Director's order for a change of provider, we are bound by it and cannot set it aside. *See* § 8-43-501(5)(a); *Justiniano*, ¶ 19; *Franz*, 250 P.3d at 757; *Leewaye*, 178 P.3d at 1256.

V. Conclusion

¶ 36 The order is affirmed.

JUDGE LICHTENSTEIN and JUDGE VOGT concur.

OPINION OF THE INDUSTRIAL CLAIM APPEALS OFFICE (NOVEMBER 14, 2017)

INDUSTRIAL CLAIM APPEALS OFFICE

IN THE MATTER OF THE REQUEST FOR UTILIZATION REVIEW:

CHA TRUST,

Insurer,

v.

LORI MADDEN-GRAMMER,

Claimant,

CONCERNING THE CARE PROVIDED BY:

BRIAN LEMPER, D.O.,

Provider,

Case Number: 2017CA2066

The claimant seeks review of an order of Administrative Law Judge Fetter (ALJ) dated May 3, 2017, that affirmed an Order of the Director of the Division of Workers' Compensation (Director) in this Medical Utilization Review (MUR) proceeding. The Director ordered a change of provider in accordance with § 8-43-501(3)(c)(I), C.R.S., ordered payment of the medical

bills issued by Brian Lemper, D.O. be retroactively denied after August 20, 2015, in accordance with 8-43-501(3)(c)(11), C.R.S., and ordered that the respondent insurer is not obligated to pay for any of Dr. Lemper's medical services rendered after August 20, 2015, in accordance with § 8-43-501(3)(e), C.R.S. We affirm.

In April 2016, the respondents sought a MUR of the medical care provided to the claimant by Dr. Lemper. The Director appointed a three-member MUR Committee to review the medical records pursuant to 0-43-501, C.R.S. These Committee members were Level-2 Accredited Physicians and included Lynne Fernandez, M.D., Ethan Moses, M.D., and Joseph Fillmore, M.D. Based on the unanimous findings of the MUR Committee, the Director issued an Order on September 30, 2016, ordering a change of provider under § 8-43-501 (3)(c)(I), C.R.S., retroactively denying payment of Dr. Lemper's medical bills after August 20, 2015, under § 8-43-501(3)(c)(II), C.R.S., and ordering the respondent insurer not obligated to pay for any of Dr. Lemper's medical services rendered after August 20, 2015, in accordance with § 8-43-501(3)(e), C.R.S. The Director found that the Committee members agreed that Dr. Lemper's care was not reasonably necessary to cure and relieve the claimant of the effects of the work-related injury. The claimant appealed the Director's MUR Order and the matter was referred to the Office of Administrative Courts.

Pursuant to 8-43-501(5), C.R.S. the ALJ subsequently performed a record review of the matter to determine whether the claimant had overcome the Director's MUR Order, by clear and convincing evidence.

The ALJ subsequently found that the claimant was involved in a work-related automobile accident on December 23, 1988. The claimant sustained multiple injuries in the accident. By 1990, the claimant was diagnosed with Reflex Sympathetic Dystrophy, which is now known as Complex Regional Pain Syndrome (CRPS). The claimant was placed at maximum medical improvement (MMI) on November 27, 1990.

The claimant eventually moved to Nevada, and she began treating with Dr. Lemper on January 12, 2009. Dr. Lemper is a Doctor of Osteopathic Medicine who practices in Las Vegas. Dr. Lemper began giving the claimant Platelet Rich Plasma (PRP) injections in 2012. PRP injections involve blood being drawn from the patient and then the red blood cells are separated so that only a concentration of platelets and undifferentiated white stern cells remain. The claimant believed the PRP injections worked and she felt like a different person.[1]

The ALI found that Dr. Fernandez determined Dr. Lemper's care was not reasonably appropriate. Dr. Fernandez opined that Dr. Lemper continued to treat the claimant well outside of the Colorado Medical Treatment Guidelines (Guidelines), disregarded the

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[1] The respondents subsequently sought a hearing on whether additional PRP injections were reasonable and necessary, or related to the 1988 work-injury. On August 25, 2014, ALJ Allegretti found that the number of PRP injections already performed by Dr. Lemper was excessive and no further PRP injections were reasonable or necessary. On appeal, the Panel affirmed ALJ Allegretti's order in *Madden-Grammer v. Poudre Valley Hospital,* W.C, No. 4-928-088-03 (Jan. 8, 2015). No further appeals were pursued. Our Order in *Madden-Grammer* is incorporated herein.

advice of multiple peers, and disregarded ALJ Allegretti's prior Order which determined that the number of PRP injections already performed by Dr. Lemper was excessive and that no further PRP injections were reasonable or necessary. Dr. Fernandez further opined that Dr. Lemper's use of PRP injections was excessive and was continued without documentation of any functional or sustained improvement. Dr. Fernandez was concerned that Dr. Lemper reported improvement whereas records from other medical professionals showed that the claimant's course had steadily declined. Dr. Fernandez stated that Dr. Lemper's administration of PRP injections and inhalation PRP therapy would be considered controversial, at best, especially in light of the claimant's failure to show sustained or functional improvement.

The ALJ also found that Dr. Moses opined that Dr. Lemper's treatment began to diverge from reasonable and necessary in August 2015 when the claimant was "pleading for PRP injections." He explained that despite giving the claimant 22 previous PRP injections into the low back and 19 into the ankle that provided no long-term benefit, Dr. Lemper decided to move forward with more PRP injections into multiple body parts. Dr. Moses felt that the PRP inhalation therapy was inappropriate and also commented that trigger point injections with PRP were "unusual." Dr. Moses opined that the claimant's response to the PRP injecttions appeared to be non-physiologic and that Dr. Lemper had far exceeded the maximum number of PRP injections, which is generally three. He also opined there was no documentation or evidence of long-term functional improvement. Dr. Moses was also concerned

that Dr. Lemper showed no consideration for the Guidelines or the legal process.

The ALJ further found that Dr. Fillmore opined that Dr. Lemper practiced outside of accepted professional standards, particularly in relation to inhalation PRP therapy and epidural PRP injections. Dr. Fillmore believed the treatment provided by Dr. Lemper was excessive and no long-term functional benefit was achieved. He stated that there was no reason that the claimant should continue to be treated by Dr. Lemper due to the excessive procedures that exposed her to unnecessary risks.

Based on these three Committee members' opinions, the ALJ determined that Dr. Lemper's treatment of the claimant was not reasonably appropriate or consistent with accepted professional standards "to cure and relieve the Claimant of the effects of the December 23, 1988 work-related injury." Additionally, as pertinent here, when addressing the claimant's argument that the MUR Committee members erred when mentioning "cure" in their reports since her conditions and CRPS cannot be cured, the ALJ held in pertinent part as follows:

> No physician has stated that the PRP injections should be discontinued because they were not curing the CRPS. What they are saying is that the PRP injections which were administered by Dr. Lemper were not only administered in unusual manners and to unusual body parts, they were excessive and were not providing any functional gain, which is the standard for the continued use of PRP therapy.

The ALJ therefore concluded that the claimant failed to establish it was highly likely, unmistakable, and free from serious and substantial doubt that the Director's MUR Order was incorrect and should be overturned. He held that the claimant failed to satisfy her burden of proof by clear and convincing evidence.

I.

On appeal, the claimant argues that the ALJ's order is not supported by applicable law, and/or the ALJ applied an incorrect legal standard when reviewing the Director's MUR Order. The claimant specifically objects to the ALJ's use of the term "functional gain" when explaining whether Dr. Lemper's PRP injections should be continued. The claimant contends that whether the PRP injections provided "functional gains" is not the standard or law that is applicable when determining whether post-MMI maintenance medical care is reasonable and necessary. Citing to *Grover v. Industrial Commission,* 759 P.2d 705, 711 (Colo. 1988), the claimant argues that since she was placed at MMI on November 27, 1990, the applicable standard is instead whether the medical treatment is "reasonably necessary to relieve the worker from the effects of the industrial injury or occupational disease." Similarly, the claimant argues the ALJ erred when determining that Dr. Lemper's treatment of the claimant was not reasonably appropriate to "cure and relieve" her of the effects of her work-related injury. The claimant contends that such a standard is inconsistent with the holding in *Grover.* We are not persuaded by the claimant's arguments.

A party may request a MUR to determine if the care provided to a claimant is "reasonably necessary"

or "reasonably appropriate according to accepted professional standards." Section 8-43-501(1), C.R.S.; *Franz v. Industrial Claim Appeals Office,* 250 P.3d 755 (Colo. App. 2010); *see also Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The Director has authority to appoint members to an MUR committee, who are charged with reviewing a claimant's care and determining, by majority vote, whether a change in provider should be ordered. Section 8-43-501(3)(a)-(c), C.R.S.; *Franz v. Industrial Claim Appeals Office, supra.* The conclusions of the MUR committee are "afforded great weight." Section 8-43-501(5)(a), C.R.S.; *see Carlson v. Industrial Claim Appeals Office,* 950 P.2d 663, 665 (Colo. App. 1997).

Additionally, § 8-43-501(5)(a), C.R.S. provides that any party may appeal the Director's MUR Order to an AU, and the party disputing the finding of the utilization review committee shall have the burden of overcoming the finding by clear and convincing evidence. Also, pursuant to § 8-43-501(5)(b), C.R.S., when the issue is the retroactive denial of fees or permitting an insurer or employer to deny payment for medical services or care pursuant to § 8-43-501(3)(e), C.R.S., then the health care provider may request a *de nova* hearing before an ALJ and, again, the findings of the committee shall be afforded great weight by the ALJ. A party disputing the finding of the committee in this regard, shall have the burden of overcoming the finding by clear and convincing evidence. Section 8-43-501(5)(b), C.R.S.

Initially, we note that Dr. Lemper did not request a *de novo* hearing before the ALT or appeal the ALJ's Order regarding the retroactive denial of his fees or regarding the insurer's right to deny payment for his

medical services or care pursuant to § 8-43501(3)(e), C.R.S.

Here, the claimant is confusing the law governing post-MMI maintenance medical treatment with the law governing an ALJ's review of the Director's MUR Order. It is true, as the claimant argues, that a claimant is entitled to receive Grover medical benefits if she demonstrates that the future medical treatment is or will be reasonably necessary to relieve her from the effects of the injury or to prevent deterioration of her condition. *Grover v. Industrial Commission, supra; see also* § 8-43-203(3)(b)(IX), C.R.S. However, the issue before the MUR Committee and the Director was whether the treatment provided by Dr. Lemper in the context of post-MMI maintenance medical treatment was reasonably necessary or reasonably appropriate according to accepted professional standards. Section 8-43-501(1), C.R.S. And, the issue before the ALJ here was not whether the claimant was entitled to post-MMI maintenance medical treatment. Instead, as noted above, the ALJ was determining whether the claimant satisfied her burden, by clear and convincing evidence, to overcome the Director's MUR Order. Section 8-43-501(5), C.R.S. In upholding the Director's MUR Order, the ALJ cited to the correct law and burden of proof, and found that the claimant failed to meet her burden in showing that it was unmistakable and free from serious or substantial doubt that the Director's Order was incorrect and should be overturned. Order at 7-9.

The claimant's argument notwithstanding, we do not perceive the ALJ's use of the term "functional gain" as error. The ALJ was merely referring to the MUR Committee members' use of the phrase or similar

language when explaining why Dr. Lemper's PRP therapy was not reasonable or necessary. In particular, in his MUR report, Dr. Moses explained that pursuant to the Guidelines, the PRP injections should provide "some lasting benefit in functional gains or subjective pain relief after the first three injections." He explained that since the claimant had received greater than 22 PRP injections in multiple areas and had not demonstrated any long-terms benefits, continued PRP injections were not reasonable or appropriate. Dr. Moses' Utilization Review at 3-5; *see also* Dr. Fernandez's Utilization Review at 10-11; *see also* Dr. Fillmore's Utilization Review at I ("no functional benefits, long-term, was achieved"). *See* Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy Medical Treatment Guidelines Department of Labor & Employment Rule 17, Ex. 7, 7 Code Colo. Regs. 1101-3. The Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act, and MUR Committee members are directed to consider them. Department of Labor & Employment Rule 10-7(B), 7 Code Colo. Regs. 1101-3; *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005).

Similarly, we do not perceive the ALF s use of the phrase "cure and relieve" in his Order as reversible error. The ALJ was not requiring the claimant to demonstrate that Dr. Lemper's PRP injections would cure the claimant's CRPS and other conditions. Rather, in his Order, the ALJ merely recited well settled Colorado Workers' Compensation Law for the proposition that in the context of medical benefits, the respondents are only responsible for medical treatment that is reasonably necessary to cure and relieve the

effects of the industrial injury. *See* Order at 7 ¶ d; Order at 8 ¶ f. The ALI recognized that the claimant made this very same argument in her previous appeal of ALJ Allegretti's Order. The ALJ quoted our prior Order explaining that to "cure and relieve" was not the applicable standard that ALJ Allegretti was requiring when determining whether the claimant was entitled to additional PRP therapy in the context of post-MMI maintenance medical benefits. *See Madden-Grammer v. Poudre Valley Hospital, supra.* Rather, when reviewing the Director's Order, the ALJ here used the appropriate standards set forth in § 8-43-501(1), C.R.S. and (5), C.R.S. and stated that the claimant failed to demonstrate, by clear and convincing evidence, "that Dr. Lemper's treatment was appropriate according to accepted professional standards." Order at 8 ¶f. He agreed with the determinations of the MUR Committee members that "Dr. Lemper's services in this case were no longer reasonably appropriate or necessary" and that the Director's MUR Order was correct and should not be overturned. Order at 9 ¶ f. Since the ALJ applied the appropriate law under § 8-43-501, C.R.S., we may not disturb the ALJ's Order on this ground. Section 8-43-301(8), C.R.S

Regardless, even if the ALJ's use of the phrases "functional gains" and "cure and relieve" were in error, we conclude that such error is harmless. Section 8-43-310, C.R.S. (harmless error to be disregarded). The ALJ is not held to a crystalline standard in expressing findings of fact and conclusions of law. In any event, as noted above, when reviewing the Director's MUR Order, the ALJ applied the correct burden of proof and the pertinent law regarding whether the services rendered by Dr. Lemper were "reasonably necessary"

or "reasonably appropriate according to accepted professional standards." Section 8-43-501(1), C.R.S. Further, it is sufficient for the ALJ to make findings concerning that evidence which he considers dispositive of the issues, which he did here. *Magnetic Engineering, Inc, v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Consequently, we have no basis to disturb the ALJ's Order on these grounds.

II.

The claimant next argues that the ALJ's Order is not supported by substantial evidence. She contends that there is no evidence that would support the ALJ's determination that Dr. Lemper's treatment was not relieving her from the effects of her industrial injury. Again, we are not persuaded by the claimant's argument.

We must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). In particular, we note that the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Here, to the extent the claimant argues the ALJ erred in determining that Dr. Lemper's treatment was not "relieving" her from the effects of her industrial injury, we are not persuaded there is any reversible error. Again, the claimant is confusing the law governing post-MMI maintenance medical treatment

with the law governing an AL.I's review of the Director's MUR Order. The ALJ here was not deciding whether the claimant was entitled to post-MMI maintenance medical treatment. Rather, he was determining whether the claimant satisfied her burden, by clear and convincing evidence, to overcome the Director's MUR Order. Section 8-43-501, C.R.S. The ALJ's order in this regard is supported by substantial evidence. All three of the Committee members opined that Dr. Lemper's treatment of the claimant was not reasonably appropriate or consistent with accepted professional standards. Dr. Fernandez stated that Dr. Lemper had continued to treat the claimant well outside of the Guidelines, disregarded ALJ Allegretti's prior order, and disregarded the advice of multiple peers. She also explained that Dr. Lemper's care had been excessive since he had completed 27 PRP injections without documentation of sustained improvement. Dr. Fernandez further explained that Dr. Lemper reported improvement in the claimant's condition, but the medical records and notes of other medical professionals showed the claimant's course had moved steadily downhill. *See* Dr. Femandez's Utilization Review at 10. Similarly, Dr. Moses opined that the claimant had received greater than 22 PRP injections in multiple areas but had not demonstrated any long-term benefits whatsoever. He explained that continued PRP injections were not reasonable or appropriate given the lack of any long-term benefit. Dr. Moses' Utilization Review at 5.[2]

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[2] The Guidelines specifically discuss PRP injections in W.C. Rule 16, Exhibit 6, Lower Extremity Injury, pg. 150-51 (Rev. Jan. 19, 2016). The criteria for a second or third injection requires an indication that the first injection provides "significant functional benefit". There is no suggestion this criteria would be inapplicable when the injections are also used to maintain the claimant's

Additionally, Dr. Fillmore opined that Dr. Lemper's treatment of the claimant was excessive and he practiced outside of accepted professional standard particularly as related to PRP injections. Dr. Fillmore's Utilization Review at 1. Accordingly, we will not disturb the ALJ's Order on this ground. Section 8-43-301(8), C.R.S.

III.

The claimant also argues that the MUR process, as provided in § 8-43-501, C.R.S. et seq., deprives her of her statutorily created property interests without due process of law, in violation of the Fourteenth Amendment. She therefore argues it is facially unconstitutional. It is well settled, however, that administrative agencies do not have the authority to pass on the constitutionality of statutes. That function may be exercised only by the judicial branch of government. *Kinterknecht v. Industrial Commission, 175* Colo. 60, 485 P.2d 721 (1971). Thus, we have no basis for interfering with the ALJ's order on this ground.

While we may review the constitutionality of an ALJ's order as applied, we agree with the respondents' argument that the Colorado Supreme Court in *Colorado Compensation Insurance Authority v. Nolo, supra,* determined a claimant does not have a protected property interest in the receipt of medical care from "a particular medical provider or to receive a particular type of treatment." *Id.* at 891. Accordingly, the claimant's rights to due process are not implicated by the MUR order in this matter which only withdraws authorization for a particular physician, but not her statutory right to medical treatment.

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condition.

IT IS THEREFORE ORDERED that the ALJ's order dated May 3, 2017, is affirmed.

Industrial Claim Appeals Panel

David G. Kroll

Kris Sanko

ORDER OF THE COLORADO COURT OF APPEALS DENYING PETITION FOR REHEARING (JANUARY 10, 2019)

COLORADO COURT OF APPEALS

LORI MADDEN-GRAMMER,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO; POUDRE VALLEY HOSPITAL; and COLORADO HOSPITAL ASSOCIATION TRUST,

Respondents.

Court of Appeals No. 17CA2066

Before: DAILEY Judge, LICHTENSTEIN and VOGT*, JJ.

Petition for Rehearing DENIED

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.