IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JESUS TREJO-PEREZ,

Appellant,

v.

ARRY'S ROOFING/BUILDERS INS. GROUP,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-1889

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Opinion filed June 3, 2014.

An appeal from an order of the Judge of Compensation Claims.
Doris E. Jenkins, Judge.

Date of Accident: February 28, 2012.

Bill McCabe, Longwood, and Joey D. Oquist, St. Petersburg, for Appellant.

David K. Beach and Nicolette E. Tsambis of Rissman, Barrett, Hurt, Donahue & McLain, P.A., Tampa, for Appellees.

MARSTILLER, J.

In this workers' compensation appeal, Jesus Trejo-Perez ("Claimant") challenges the denial of his request for referral to a Spanish-speaking psychologist

as recommended by his authorized treating physician. He argues the Judge of Compensation Claims ("JCC") erred by denying the request despite unrebutted medical testimony that a Spanish-speaking psychologist is medically necessary. Because the JCC, on this record, permissibly rejected the testimony as insufficient to establish medical necessity, we affirm the order on appeal.

Claimant suffered a closed head injury, among other injuries, when he fell from a ladder—a 30- to 40-foot drop—while working for a roofing company. The Employer/Carrier ("E/C") accepted the accident and injuries as compensable and authorized treatment from several doctors, including Dr. Angelo Alves, a neurologist. Dr. Alves recommended that Claimant undergo neuropsychological evaluation with a Spanish-speaking psychologist. Claimant's primary language is Spanish; it is unclear whether, and to what extent, he understands and can communicate in English. The E/C selected and authorized a psychiatrist, Dr. Forman, to perform the recommended evaluation, and made a translator available for any office visits. Claimant refused to attend the first scheduled visit, and subsequently filed a petition for benefits seeking, *inter alia*, authorization for a Spanish-speaking neuropsychologist.

The medical testimony at issue is that of Dr. Alves. He testified by deposition about Claimant's physical injuries and the effects of his head injury. Dr. Alves saw

Claimant three times; his patient notes were entered into evidence. They stated, in pertinent part:

> [October 11, 2012]
>
> [Claimant] needs to be evaluated further with a "Neuropsychological Evaluation" regarding his memory and cognition, as well as his emotional state, with particular attention to the PTSD. . . . [H]e needs to have the neuropsychological evaluation first with a Spanish-speaking neuropsychologist, and then, based on that, he needs cognitive and behavioral therapy.
>
> [November 26, 2012]
>
> The interview was conducted in both Spanish and English, because he does not really understand a lot of English. He needs to have a neuropsychological evaluation done by a Spanish speaking psychologist, and I think there is more than one in Tampa that could do the job for him.
>
> [February 19, 2013]
>
> He still does not understand any English, but his wife who speaks fairly good English, served as an interpreter, although I was able to communicate with him directly in Spanish, as I usually do. . . . I still think that he needs to have that neuropsychological evaluation, in detail with a Spanish speaking psychologist, and this is a must in this case so that he can exactly evaluate the degree of memory and cognitive impairments that he has.

When told that the E/C had made a translator available for Claimant's psychiatric evaluation with Dr. Forman, Dr. Alves responded:

> A. You know, it is not the same. You know why?
> Q. Okay.

> A. Because you could get the wrong information. You have to communicate with the patient. Psychiatric interview is very important. The same way I requested a neuropsychological evaluation as well to document the areas of deficit and, you know, again, it hasn't been allowed. Now, in Tampa there are several psychologists and psychiatrists that speak Spanish, you know.

The doctor gave no further testimony about the need for a Spanish-speaking psychologist to perform the recommended evaluation. But he affirmed he had formed this and other opinions about Claimant's condition and treatment needs "within a reasonable degree of medical certainty."

In the final order denying Claimant's request, the JCC found "Dr. Alves' insistence on a Spanish-speaking psychiatrist and neuropsychologist is based solely on the possibility that one 'could get the wrong information' [and] does not equate to medical necessity."

Discussion

Claimant argues the JCC ignored Dr. Alves' unrebutted medical opinion testimony about the medical need for a Spanish-speaking psychologist to perform the neuropsychological evaluation. However, the question here is not whether the testimony was unrebutted, but whether it was sufficiently persuasive to the finder of fact, in the first instance, to establish medical necessity.

As this court has specifically recognized, in the workers' compensation realm, "the [JCC's] determination of reasonable medical certainty *depends on the substance*

of the evidence, rather than the use of the 'reasonable medical certainty' terminology, or any other so-called 'magic words,' by a medical witness." *Closet Maid v. Sykes*, 763 So. 2d 377, 383 (Fla. 1st DCA 2000) (emphasis added).

> [T]he evidence should not be turned into a game of semantics. Instead, *the resolution of such factual issues remains within the adjudicatory function of the judge based on the substance of the evidence presented*, as measured against the specific statutory requirements regarding the evidentiary standard applicable to the determination.

Id. (emphasis added). Here, Dr. Alves used the "magic words," but, based on the JCC's permissible evaluation of this evidence, the substance of his testimony failed to establish reasonably medical certainty. To be sure, his testimony, as permissibly interpreted by the JCC, failed to substantiate the statement he made in Claimant's patient record after the February 19, 2013, office visit, that a Spanish-speaking psychologist "is a must." Rather, a fair reading of Dr. Alves' testimony is that a Spanish-speaking psychologist would be merely preferable under the circumstances. Preferable, perhaps; but section 440.13(2)(a), Florida Statutes (2011), requires that recommended treatment be medically necessary if the employer is to pay for it. The JCC permissibly determined that Dr. Alves' testimony failed to satisfy this statutory requirement as to the recommendation for a Spanish-speaking psychologist, and for that reason, the JCC did not err in rejecting the testimony.

In any event, unrebutted medical testimony *can be* rejected, so long as there is a reasonable evidentiary basis for doing so. As our supreme court explained in *Wald v. Grainger*, 64 So. 3d 1201 (Fla. 2011), a reasonable basis for the fact finder to reject medical opinion testimony "can include conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the medical expert an accurate or complete medical history, [or] *conflicting lay testimony or evidence that disputes the* [ ] *claim*[.]" 64 So. 3d at 1206 (emphasis added). Thus, the fact that medical opinion testimony is unrebutted does not preclude the fact finder from rejecting it, so long as there is some reasonable basis in the record that casts doubt on the testimony. *Wald* preserves the well-settled and longstanding principle that it is in the fact finder's province to weigh the evidence presented, resolve evidentiary inconsistencies, and judge the credibility of witnesses.

The JCC here took into account evidence of Claimant's ability to communicate in English and communicate successfully with his physicians,[*] and his reason for not attending the appointment with Dr. Forman. As to the latter, Claimant

[*] Claimant testified he has translators for his medical appointments, but that Dr. Alves speaks some Spanish. Notably, he also testified his wife, who helps him understand the documents he receives related to his case, speaks "little Spanish, whatever she has been able to learn with me." We also observe that Dr. Alves' patient notes, excerpts of which are quoted above, contain conflicting statements regarding the extent of Claimant's ability to communicate in English.

testified (through an interpreter), "I didn't want to do it through an interpreter because for me to see a psychologist or a psychiatrist is to talk about my intimate life, and I don't want to talk about my intimate life to another person." The JCC concluded:

> Claimant's explanation for his refusal to attend the appointment with Dr. Forman [is] inadequate and unpersuasive. . . . Claimant seems to have had no difficulty making himself understood by any of the other physicians who treated him. While there is no evidence that all of Claimant's authorized treating physicians speak Spanish, Claimant did testify that Dr. Alves speak[s] "a little" Spanish, which allowed them to communicate successfully. Simply put, the undersigned does not believe Claimant's explanation for why he needs a Spanish-speaking psychiatrist and neurologist, but does not need a Spanish-speaking physician to treat his physical injuries. . . . While it may well be reasonable for Claimant to prefer a Spanish-speaking physician, a careful reading of Dr. Alves' testimony on this issue fails to yield any evidence of medical necessity.

Unrebutted though Dr. Alves' testimony may have been, Claimant's statements cast doubt on the testimony in that they reveal a non-medical, patient-driven reason for the doctor's recommendation. The JCC found and articulated a reasonable evidentiary basis—Claimant's own testimony—on which to reject the doctor's testimony as to the need for a Spanish-speaking psychologist. This was permissible under *Wald*.

Accordingly, the final order on appeal is AFFIRMED.

MAKAR, J., CONCURRING WITH OPINION. THOMAS, J., DISSENTING WITH OPINION.

MAKAR, J., concurring.

An ongoing challenge to the delivery of health care services nationwide and in Florida is the broadening and deepening range of the workforce that speaks different primary languages. Language access for persons of limited English proficiency (LEP) seeking health care services is governed by a continually evolving legal framework,[1] one that includes federal civil rights and disability laws (which generally prevent discrimination against persons whose primary language is not English in federally-funded health and human services programs) as well as state laws (which range from comprehensive language laws (e.g., California) to discrete laws addressing situations such as mandating interpreters for commitment proceedings (e.g., Illinois)).[2]

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[1] See generally Alice Hm Chen et al., The Legal Framework for Language Access in Healthcare Settings: Title VI and Beyond, 22 J. of Gen. Int. Med. 362 (Supp. 2 2007) (providing a general overview of federal and state laws related to language rights in the health care market) (last visited May 8, 2014).

[2] See generally Jane Perkins & Mara Youdelan, Summary of State Law Requirements Addressing Language Needs in Health Care, National Health Law Program at 4 (Jan. 2008), available at http://www.healthlaw.org/publications/summary-of-state-law-requirements-

Making health care services more accessible to LEP patients, as one might expect, is a Herculean and glacial task. One reason is the sheer multiplicity of languages. About 337 languages are spoken in the United States, twenty-four of which have over 200,000 speakers;[3] Florida's language diversity is equally impressive.[4] Attempting to accommodate access to health care information and services to this wide-ranging landscape of languages is of obvious difficulty, requiring complicated policy decisions at the federal and state levels that take time to analyze, make, and then implement.

A related reason is the determination of how language access is to be achieved, a factor driven to some extent by the cost and supply of health care resources. Claimants justifiably want medical providers with whom they can communicate effectively in their primary languages, but the supply of and cost for meeting this demand can be limited and prohibitive, respectively. In an ideal world with unlimited resources, patients would have health care information published in their own

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addressing-language-needs-in-health-care (compiling and providing "citation to and a short description of each state's statutes and regulations regarding services to LEP persons in health care settings.") (last visited May 8, 2014).

[3] See Languages of the United States, Wikipedia, http://en.wikipedia.org/wiki/Languages_of_the_United_States#Main_languages (last visited May 8, 2014).

[4] See Florida, Wikipedia, http://en.wikipedia.org/wiki/Florida (last visited May 8, 2014).

primary languages, and their health care service providers would speak their primary languages. Because this ideal is unattainable, the trajectory of the language access movement in the United States currently has gravitated to the use of translators (for written communication) and interpreters (for verbal communication) in the medical context; typically—but not always—translators and interpreters convert communications in the English language into the primary language of the patient, which is consistent with language demographics. For example, 73% of Florida's population speaks English at home as its primary language and about 75% of those whose primary language is not English speak English "very well" or "well."[5] Even then, states have focused primarily on improving language access in communications involving patient education, informed consent, and specific medical conditions.[6] "Less commonly, states have enacted laws mandating provision of language assistance services [including translators and interpreters], typically either through specific types of facilities, or as a condition of licensure."[7] This expansion over time of the use of translators and interpreters has led to the

[5] See Modern Language Association Language Map Data Center, http://www.mla.org/map_data (search of Florida for the year 2010) (last visited May 8, 2014).

[6] Chen, supra note 1, at 364.

[7] Id.

deployment of continuing education programs that focus on language access and cultural awareness issues that impact the provision of health care services; it has also spawned a movement toward certification of health care interpreters.[8]

All this said, not a single law or program, federal or state, appears to create an entitlement for LEP patients to a health care provider who speaks the patient's primary language. Instead, it appears that the governing standard is that an interpreter is used when required to ensure non-discrimination in the delivery of medically necessary health care services.

This standard prevails in the workers' compensation context in Florida, which distinguishes between what is medically desirable versus what is "medically necessary," the latter being the statutory standard that applies to determine whether a particular medical service is justified. The statute states that claimants are entitled to services that are "medically necessary" or a "medical necessity" both of which are defined to mean:

> any medical service or medical supply which is used to identify or treat an illness or injury, is appropriate to the patient's diagnosis and status of recovery, and is consistent with the location of service, the level of care provided, and applicable practice parameters. The service should be widely accepted among practicing health care providers, based on

[8] See Alvaro DeCola, Making Language Access to Health Care Meaningful: The Need for a Federal Health Care Interpreters' Statute, 24 J.L. & Health 151, 154 (2010) ("Language access barriers will not be overcome unless new statutory guidance is enacted that addresses both national standards for medical interpreters and translators, and procedures to strictly enforce current federal laws related to language access.").

> scientific criteria, and determined to be reasonably safe. The service must not be of an experimental, investigative, or research nature.

§ 440.13(k), Fla. Stat. (2014). Determining medical necessity is a multi-factored inquiry, but one that emphasizes: (1) consistency with practice parameters in the profession, and (2) whether the medical service is "widely accepted among practicing health care providers." Id.

In this case, Mr. Trejo-Perez—who suffers from severe injuries—needs a psychiatric evaluation. The services of a qualified psychiatrist and a Spanish language interpreter have been made available for this purpose. He has rejected those services, however, claiming that he is entitled statutorily to a psychiatrist who speaks his primary language based on the testimony of Dr. Angelo M. Alves, who asserts an evaluation by a Spanish-speaking psychiatrist is a "must" in Mr. Trejo-Perez's case.

The sole legal question is whether Dr. Alves's testimony compels the provision of the Spanish-speaking psychiatrist as "medically necessary" under the statute. Undoubtedly, patients and physicians desire to speak in a common language to avoid potential miscommunication; this commonality is highly desirable whether the physician is a gastroenterologist, ophthalmologist or a psychiatrist. Linguistic desirability, however, is not medical necessity absent a specific showing that the use of an interpreter is inconsistent with prevailing practice parameters and that a linguistically-compatible psychiatrist is a widely accepted practice among those

practicing in this field.

In this regard, no evidence in the record addresses whether use of a linguistically-compatible interpreter is incompatible with prevailing practice parameters in the provision of health care services generally or psychiatric services specifically. Likewise, the record is silent on whether the field of psychiatry has adopted—as a widely accepted practice—a requirement that patients are entitled to a primary-language-speaking psychiatrist. On this basis alone, it was proper to conclude that the provision of a qualified psychiatrist, coupled with an interpreter, met prevailing standards of care.

Dr. Alves's testimony addressed neither of the two statutory requirements. While saying it is "a must in this case" to "exactly evaluate the degree" of memory loss and cognitive impairments, his justification was that using an interpreter could result in "the wrong information" because "[y]ou have to communicate with the patient." But this rationale is one that applies to any medical specialty. Nothing in the record shows that the use of an interpreter in this context is sufficiently different from other specialties to conclude that a linguistically-compatible psychiatrist is medically justified. Physicians have to communicate with patients, and accurate information is important; but Dr. Alves's testimony falls short of establishing the "medical necessity" of his recommendation.

That said, Dr. Alves recommendation of a Spanish-speaking psychiatrist is

not a mere velleity. Linguistic nuances may have greater medical importance in the psychiatric context versus other medical specialties; circumstances may exist where a linguistically-compatible psychiatrist is so important in a particular context as to be "medically necessary" within Florida's statutory definition. But medical necessity must be based on more than linguistic desirability under the existing statutory standard, which requires a practice be widely accepted and prevailing in the medical community. With these observations, I concur in Judge Marstiller's opinion.

THOMAS, J. DISSENTING.

I dissent, because in this case of first impression the majority opinion incorrectly denies a Spanish-speaking Claimant a medically necessary evaluation by a Spanish-speaking psychiatrist, a treatment which Claimant's authorized treating neurologist specifically recommended that Claimant receive. No medical testimony supports the JCC's view that the Spanish-speaking psychiatric evaluation is not medically necessary. In fact, as Claimant rightfully asserts, there is no contrary medical testimony at all on this point—the JCC simply rendered her own unqualified and unsubstantiated medical opinion, which is contrary to section 440.13(2)(a), Florida Statutes.

But the majority opinion disregards this lack of medical testimony to contradict the treating neurologist's testimony, and Claimant's testimony, that the presence of a non-psychiatric interpreter would interfere in the sensitive nature of the psychotherapist-patient relationship. In fact, the relationship between a patient and psychotherapist is so important that the Florida Legislature accords those communications an evidentiary privilege, provided in section 90.503, Florida

Statutes. Furthermore, and perhaps even more significant, is the majority opinion's adverse practical impact, although surely not its intent, which establishes a precedent by which Spanish-speaking employees can be required to accept a lesser standard of medical care in Florida than English-speaking employees, who could not be required to accept the presence of a third-party layperson during medically necessary, intimate psychotherapist-patient treatment sessions.

The majority's holding requiring the participation of an interpreter in Claimant's undisputedly necessary medical treatment is supported by neither chapter 440 nor case law. In fact, the very Florida Supreme Court opinion relied on by the majority rejects the majority's view. See Wald v. Grainger, 64 So. 3d 1201, 1205-06 (Fla. 2011) ("[T]he jury's ability to reject [expert] testimony must be based on some *reasonable* basis in the evidence." (emphasis added)). Here, the JCC failed to give a "reason" for rejecting the neurologist's unrebutted testimony that Claimant needed an evaluation by a Spanish-speaking psychiatrist—the JCC simply disagreed with the conclusion, without evidentiary support *of any kind, expert or lay.*

In this regard, it must be noted that the majority opinion concludes on a contradictory basis that, because the JCC doubted Claimant's testimony that he relies on Spanish to communicate, this was a "reasonable evidentiary basis—Claimant's own testimony—on which to reject the doctor's testimony as the need for a Spanish-speaking psychologist." But if this were true, why have a translator at all? Either

Claimant's primary language is Spanish, or it isn't. Obviously, the E/C and the JCC must have thought that Claimant's primary language was Spanish, or a translator would not have even been considered. So, doubting this fact cannot be a basis for rejecting unrebutted expert medical testimony, if the very reason a translator was offered was in fact *because Claimant's primary language is indeed Spanish.*

Thus, this case necessarily turns on the issue of whether a Spanish-speaking employee may be required to accept psychiatric evaluation by a non-Spanish speaking psychiatrist, against the medical opinion of a treating neurologist. The obvious answer in my view is no, because to do so is to deny medically necessary treatment in violation of Chapter 440.

The JCC is not permitted to disregard unrebutted medical testimony, without relying on some rationale evidence. See Vadala v. Polk Cnty. Sch. Bd., 822 So. 2d 582, 584 (Fla. 1st DCA 2002). In addition, "when medical evidence . . . is undisputed, unimpeached, or not otherwise subject to question based on the other evidence presented at trial, the jury is not free to simply ignore or arbitrarily reject that evidence and render a verdict in conflict with it." Grainger, 64 So. 3d at 1205. See also Long v. Moore, 626 So. 2d 1387, 1389 (Fla. 1st DCA 1993) (reversing judgment denying complaint for recission of contract based on mental incompetence and noting that "[t]he trial court should accept unrebutted expert testimony on highly technical matters, unless it is so palpably incredible, illogical

and unreasonable as to be unworthy of belief or otherwise open to doubt from some reasonable point of view"). It is true that "when facts sought to be proved by expert testimony are within the ordinary experience of the fact-finder, or disputed by lay testimony, the conclusion to be drawn from the expert testimony will be left to the fact-finder." Id. But it is not the case that translation from Spanish to English for purposes of psychiatric evaluations is within the ordinary experience of JCCs, who are not trained in medicine.

The Florida Legislature has unequivocally required that JCCs defer to medical testimony in resolving medical disputes. See §§ 440.13(9)(c) & 440.25(4)(d), Fla. Stat. Had the E/C provided *any* evidence of a conflict between medical experts, the JCC would not be authorized to simply choose which doctor to rely on, but must appoint an Expert Medical Advisor ("EMA") to provide an opinion which is presumed correct. Romero v. JB Painting & Waterproofing, Inc., 38 So. 3d 836, 838 (Fla. 1st DCA 2010) ("If there is a disagreement in the opinions of health care providers, the JCC *shall* appoint an EMA." (emphasis added)). Here, there was not a conflict, thus, the JCC had no authority to reject the unrebutted testimony of Dr. Alves that Claimant required evaluation by a Spanish-speaking psychiatrist.

Section 440.13(2)(a), Florida Statutes (2011), requires that the employer furnish such medically necessary treatment, care, and attendance for such period as the nature of the injury or the process of recovery requires. "Medically necessary"

means any medical service which is used to identify or treat an illness or injury, and is appropriate to the patient's diagnosis and status of recovery. § 440.13(1)(*l*), Fla. Stat. (2011). The term *treatment*, although undefined in the Workers' Compensation Act, is a "broad term covering all the steps taken to effect a cure of an injury or disease; *including examination and diagnosis* as well as application of remedies." Nunez v. Pulte Homes, Inc., 985 So. 2d 695, 696-97 (Fla. 1st DCA 2008) (quoting Black's Law Dictionary) (emphasis in original). Further, this court has commented that chapter 440's definition of "medical necessity" is broad, and could potentially include any medical service that is shown to be medically necessary. See Fla. Detroit Diesel v. Nathai, 28 So. 3d 182, 185 (Fla. 1st DCA 2010) (summarily affirming JCC's award of second opinion notwithstanding the absence of express right for same under chapter 440, by interpreting the statutory phrase "medically necessary" as broad phrase which "could potentially include 'any' medical service that is shown to be necessary"). Here, Dr. Alves's opinion that the psychiatrist must be Spanish-speaking is unrefuted.

The JCC's reason for rejecting Dr. Alves's opinion that the psychiatrist must be Spanish-speaking is without a reasonable basis; the "reason" given – specifically that "[p]rovision of an interpreter is sufficient to ensure that Claimant receives the care being recommended" – is really only mere contradiction, and is without evidentiary or rational foundation – which is the very type of fanciful factfinding

that this court is established to guard against. See Ullman v. City of Tampa Parks Dep't, 625 So. 2d 868, 873 (Fla. 1st DCA 1993) (en banc) ("The role of this court must be to guard against fanciful or arbitrary abuse of discretion in workers' compensation cases . . . ."). Here, whether we consider the issue on appeal as solely a matter of law, or a mixed question of law and fact, the JCC's ruling is without foundation in law or fact, and is a perfect example of an "arbitrary abuse of discretion." Id. Even applying a deferential standard of review, therefore, we should reverse.

The only medical evidence in the record – which the JCC gave no adequate reason to reject – is that a Spanish-speaking psychiatrist is medically necessary. Claimant is correct that the E/C is obligated to provide care for the compensable injury if that care is "medically necessary." It follows that the JCC reversibly erred in not ordering the E/C to authorize a Spanish-speaking psychiatrist.

We should therefore reverse and remand with directions to enter an order granting Claimant's petition for benefits and appointment of a Spanish-speaking psychiatrist, which may be one selected by the E/C.