

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau



Office of Hearings and Adjudication
Administrative Hearings Division

(202) 671-2233-Voice
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In the Matter of)
)
DENICE LUCKETT-MARTIN,)
)
Claimant,)
)
v.)
)
DISTRICT OF COLUMBIA DEPARTMENT)
OF MOTOR VEHICLES,)
)
Employer.)

AHD No. PBL 07-080
DCP No. 761019-0001-2007-0001

Appearances

RICHARD LINK, ESQUIRE
For the Claimant

ANDREA COMENTALE, ESQUIRE
For the Employer

Before:

MELISSA LIN KLEMENS
ADMINISTRATIVE LAW JUDGE

COMPENSATION ORDER ON REMAND

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* (hereinafter "Act").

After timely notice, a full evidentiary hearing was held on November 6, 2007 before Melissa Lin Klemens, Administrative Law Judge. Ms. Denice Lockett-Martin (hereinafter "Claimant") appeared in person and by counsel.

The District of Columbia Department of Motor Vehicles (hereinafter "Employer") appeared by counsel. Claimant testified on her own behalf. Ms. Cara Pearson testified on behalf of Employer. Claimant Exhibit (hereinafter "CE") Nos. 1 - 9 and Employer Exhibit (hereinafter "EE") Nos. 1 - 4 described in the hearing transcript (hereinafter "HT") were admitted into evidence. The record closed on November 29, 2007, upon receipt of the HT.

Pursuant to *Lockett-Martin v. D.C. Department of Motor Vehicles*, CRB No. 08-069, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001

(May 22, 2008), “the March 29, 2007 and May 22, 2007 reports of Dr. Selya” are admitted into evidence as Agency Exhibit (hereinafter “AE”) No. 1.

BACKGROUND

In December 2006, Claimant was employed as a legal instrument examiner for the D.C. Department of Motor Vehicles. On December 12, 2006, when attempting to sit, Claimant missed the chair and fell to the floor.

Claimant’s neck, bilateral shoulder, mid-back, bilateral leg, and bilateral foot injuries were accepted as compensable by the Disability Compensation Program (hereinafter “DCP”). Wage replacement benefits were paid by DCP.

On March 27, 2007, the Office of Risk Management (hereinafter “ORM”) issued a Notice of Determination Regarding Temporary Total Disability wherein Claimant’s request for continuing benefits was denied. ORM relied upon the medical opinion of Dr. Robert Collins who had indicated Claimant was able to return to full duty work as of March 19, 2007.

Claimant requested reconsideration, and on July 13, 2007, ORM issued a Final Decision on Reconsideration. The original decision to deny ongoing benefits was upheld.

At the time of the formal hearing, Claimant had returned to employment with Employer in her pre-injury position. She, however, was not working full time.

PROCEDURAL POSTURE

On August 13, 2007, Claimant’s Counsel filed an Application for Formal Hearing. As a result, a hearing took place on November 6, 2007.

In a Compensation Order dated December 11, 2007, Claimant’s request for temporary partial disability benefits from March 22, 2007 to the present and continuing was denied. It was concluded that Claimant’s current impairment pre-existed the accepted work-related injuries and was unrelated to her employment.

Claimant filed an Application for Review with the Compensation Order Review Board (hereinafter “CRB”).¹ On February 25, 2008, Claimant filed a Supplement to the Application for Review with six (6) medical reports attached thereto.² *Lockett-Martin v. D.C. Department of Motor Vehicles*, CRB No. 08-069, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (May 22, 2008) at 2.

On May 22, 2008, the CRB issued a Decision and Remand Order. Pursuant to regulations governing the administration of the private sector workers’ compensation act of 1979, as amended, D. C. Code §32-1501 *et seq.* and based upon a series of assumptions put forth by the CRB (*See, Lockett-Martin v. D.C. Department of Motor Vehicles*, CRB No. 08-069, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (May 22, 2008) at 5), the CRB

¹§32-1521.01 of the Act and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 *et seq.* establishes a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letterhead used for decisions and orders refer to the entity as the “Compensation Review Board,” which is the shorter-form designation the Director of the Department of Employment Services used in Administrative Policy Issuance No. 05-01 (February 5, 2005).

²The six (6) reports purportedly are from Drs. Leonid Selya, Hampton J. Jackson, Jr., Jon D. Peters, and G. Hudson Drakes and are dated from June 7, 2007 to February 13, 2008. *Lockett-Martin v. D.C. Department of Motor Vehicles*, CRB No. 08-069, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (May 22, 2008) at 2.

remanded this mater for review and consideration of two (2) "reports of Dr. Selya."³

³While Claimant may index the May 22, 2007 medical report submitted to the CRB as a report of Dr. Selya and the CRB may refer to it as such, a review of that document reveals it is authored not by Claimant's treating physician but by a physical therapist with Capital Orthopedic Specialists, P.A. (AE1). Furthermore, this May 22, 2007 physical therapy report previously was admitted into evidence as part of CE4. See, *Lockett-Martin v. D.C. Department of Motor Vehicles*, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (December 11, 2007) at 4.

As for the remaining reports, because Dr. Jackson's June 7, 2007 report had been admitted into evidence as part of CE6, Claimant's request that it be considered was denied as moot. *Lockett-Martin v. D.C. Department of Motor Vehicles*, CRB No. 08-069, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (May 22, 2008) at 4. Then,

[w]ith respect to the December 14, 2007 of [sic] Dr. Jackson, the January 25, 2008 report of Dr. Drakes and the February 13, 2008 report of Dr. Peters, the Panel determines these reports are also material to the question of medical causal relationship. However, the [Claimant] did not proffer reasonable grounds for failing to present the reports at the November 6, 2007 formal hearing. Given these reports post-date the formal hearing, the Panel presumes, in the absence of evidence to the contrary, that to the extent they reflect evidence in some fundamental way different from or in conflict with the evidence on the [Claimant's] medical condition presented at the formal hearing, the reports should more appropriately be considered, if at all, in a modification proceeding under [the private sector workers' compensation act,] D.C. Official Code §32-1524 [sic]. The Panel denies the request to admit these reports for the ALJ's review and consideration. *Lockett-Martin v. D.C. Department of Motor Vehicles*, CRB No. 08-069, AHD No. PBL07-080, DCP No.

(AE1).

CLAIM FOR RELIEF

Claimant seeks an award under the Act of temporary partial disability benefits from March 22, 2007 to the present and continuing and payment of causally related medical expenses.⁴

ISSUES

1. Whether Claimant's current disability is causally related to her work-related injuries; and
2. The nature and extent of Claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated and I accordingly so find jurisdiction over this case vests in the District of Columbia; an employer/employee relationship exists; Claimant sustained accidental injuries on December 12, 2002 which arose out of and in the course of employment; Claimant provided timely notice of her injuries; the claim was filed timely; Claimant received continuation of pay from December 13, 2006 to January 31, 2007; and Claimant received temporary total compensation benefits from February 1, 2007 to March 19, 2007.

Based upon the record evidence, I make the following additional findings of fact:

761019-0001-2007-0001 (May 22, 2008) at 5.

⁴There was no evidence of any outstanding medical bills. See, *Thomas v. DOES*, 547 A.2d 1034 (D.C. 1988) (Absent any outstanding bills, this issue is not ripe for adjudication.).

On December 12, 2006, Claimant fell to the floor when a chair she was trying to sit on rolled. Prior to that date, Claimant suffered from migraine headaches and fibromyalgia. I find Claimant's migraine headaches and fibromyalgia prevented her from working full time.

On December 12, 2006, I find Claimant was examined at George Washington Hospital. I find she was released that same day with the recommendation that she continue taking the same medication she had been taking for her fibromyalgia.

I find Claimant began treating with Dr. Selya on December 21, 2006. I find Dr. Selya took Claimant off of work until January 15, 2007 for cervical pain and strain.

On January 18, 2007, Dr. Selya released Claimant to light duty avoiding bending, lifting, and prolonged standing. One (1) week later, Dr. Selya took Claimant off of work for a closed period of two (2) months. Then, on February 22, 2007, February 23, 2007, and March 29, 2007, Dr. Selya returned Claimant to light duty for half-days with restrictions against lifting and prolonged sitting. I find there are no medical reports from Dr. Selya accompanying the February 22, 2007 and February 23, 2007 disability slips.

I find that by March 29, 2007 as a result of physical therapy Claimant's symptoms did improve. I also find that at that time, Dr. Selya released Claimant to treatment on an "as needed basis."

On June 7, 2007, I find Claimant sought a second opinion from Dr. Jackson. I find that throughout the course of treatment he rendered, Dr. Jackson was unaware of Claimant's return

to work schedule which included full time. I also find Dr. Jackson was unaware of Claimant's pre-existing conditions which necessitated constant medication and which caused her to miss time from work before the work-related accident of December 12, 2006.

More than four (4) months after her prior visit to Dr. Selya, on August 2, 2007, Dr. Selya recommended Claimant work "intermittently" due to chronic back pain. I find the August 2, 2007 disability slip is unaccompanied by any contemporaneous medical report.

I find that from April 2, 2007 through July 20, 2007, Claimant returned to work full time. I find not all work days during that time period are full days, but I also find Claimant was unable to work full time because her medication (the same medication she had been taking for years for her migraine headaches and her fibromyalgia) made her tired.

I find although Claimant's fibromyalgia and migraine headaches complicate her situation, I find those pre-existing conditions were not aggravated by her work-related accident. Finally, I find if Claimant had not sustained her work-related injuries, she still would not be working full time due to her pre-existing fibromyalgia and migraine headaches.

DISCUSSION

The undersigned has reviewed and has considered the totality of the evidence as well as the argument presented by the parties on the issues presented for resolution.⁵ To the extent

⁵Although each documentary exhibit received in evidence is not specifically referenced herein, all evidence of record was reviewed as part of this deliberation.

an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it specifically is rejected.

Initially, once a claim for disability compensation has been accepted and benefits have been paid, Employer must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits. *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996). In the case *sub judice*, Employer relies upon the medical opinion of Dr. Collins.

On March 12, 2007, Dr. Collins examined Claimant on Employer's behalf. Dr. Collins diagnosed cervical and dorsolumbar strain superimposed on pre-existing fibromyalgia. (EE2). He also noted that migraine headaches and fibromyalgia complicated Claimant's present problem; "[s]he has a history of fibromyalgia and migraine headaches, which causes chronic pain, and a lot of her complaints are related to her fibromyalgia rather than to the injury of December 21, 2006." (EE2). He asserted Claimant had recovered sufficiently from her fall to return to regular work. (EE2).

Claimant candidly admitted under oath that prior to her work-related injuries, she suffered from migraine headaches and fibromyalgia. (HT p.25, 26, 27). On the day of the work-related accident, she was seen at George Washington Hospital. She was released that same day with the recommendation that she continue the same pain medication she had been taking for her

fibromyalgia.⁶ (EE1).

Dr. Selya first examined Claimant on December 21, 2006. He diagnosed cervical pain and strain. He asserted Claimant should be off of work through approximately January 15, 2007. (EE1).

Based upon a January 18, 2007 diagnosis of "[r]adiculopathy within C5 distribution due to herniation of nucleus pulposus at C4-C5, aggravation of degenerative disc disease at C5-C6, C6-C7," Dr. Selya recommended several treatment modalities. At that time, he released Claimant to light duty avoiding bending, lifting, and prolonged standing. (CE3).

Without explanation, Dr. Selya took Claimant off of work on January 25, 2007 for a closed period of two (2) months, but on February 22, 2007, he, again, returned her to light duty. This time, in addition to the restrictions against lifting and prolonged sitting, Claimant was only released to half days. The next day, Dr. Selya reiterated the light duty limitations including the part-time restriction, and he extended the applicable period from March 5, 2007 to March 22, 2007. (CE5).

Of note, there are no medical reports from Dr. Selya accompanying these disability slips. In addition, these disability slips all pre-date the period included in the claim for relief (CE5) and Claimant's return to work as a legal instrument examiner, a light duty job. (CE9; EE3; HT p.23).

Between March 22, 2007 and June 6, 2007, the medical evidence in the record at the time of the

⁶The December 12, 2006 report from George Washington Hospital has not been offered into evidence, but it is quoted in EE1.

formal hearing was a physical therapy referral slip (CE4), an MRI of the lumbar spine (CE2), and two (2) physical therapy reports (one of which is dated May 22, 2007, is authored by Richard Baskins, and indicates Claimant's reported "pain = 0 scale 0 - 10 t/o Back [sic] & neck today").⁷ (CE4; AE1).

In his March 29, 2007 report, Dr. Selya spends more time criticizing an independent medical examination report that "we did not review" (but with which he "categorically disagree[s]") than he does rendering any opinion regarding Claimant's work capacity and the medical causal relationship of any such incapacity to a work-related injury. Dr. Selya does address Claimant's then-current work capacity by stating that she should "maintain her restricted employment," presumably referring to Claimant's restrictions against lifting, prolonged sitting, and full time work as set forth in February 2007. (AE1; *see also*, CE5 and *Lockett-Martin v. D.C. Department of Motor Vehicles*, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (December 11, 2007) at 4); however, Dr. Selya's March 29, 2007 report does not change the facts— as a result of physical therapy Claimant's symptoms did improve, that "at this moment she is better than she was before," and that at that time, Claimant would be seen by Dr. Selya on an "as needed basis." (AE1). Furthermore, as set forth in detail *infra*, three (3) days later, Claimant actually did return to eight (8) hour work days

⁷It is this physical therapy report the CRB refers to as Dr. Selya's May 22, 2007 report. This report was admitted into evidence at the formal hearing as part of CE4 and specifically was considered in the December 11, 2007 Compensation Order. *See, Lockett-Martin v. D.C. Department of Motor Vehicles*, AHD No. PBL07-080, DCP No. 761019-0001-2007-0001 (December 11, 2007) at 4). Nonetheless, the CRB remanded this matter for consideration of this report.

for Employer.

On June 7, 2007, Claimant sought a second opinion from Dr. Jackson.⁸ Dr. Jackson saw no contraindication for Claimant's continuing with part-time, light duty. (CE6).

Following a June 25, 2007 EMG/NCV test, Claimant returned to Dr. Jackson on July 12, 2007. At that time, Dr. Jackson failed to render any opinion regarding Claimant's work capacity. (CE6).

Without any supporting report, on August 2, 2007, after a more than four (4) month gap, Dr. Selya requested Claimant be allowed to work "intermittently" due to chronic back pain. (CE5).

Then, on August 28, 2007, Dr. Jackson states "[w]e have been able to get her better enough to return at least to part-time duties, which she can do most of the time."⁹ (CE6).

Dr. Jackson seems to be unaware of Claimant's actual return to work schedule which included full time. He also seems wholly unaware of Claimant's pre-existing conditions which necessitated constant medication and which caused her to miss time from work before the December 12, 2006 work-related accident.

Claimant had returned to work on eight (8) hour days from April 2, 2007 through July 20, 2007. (CE9). Admittedly, not all work days during that time period are full days, but Claimant

⁸Employer did not raise the issue of unauthorized change of physician. (HT p.85).

⁹Claimant continued to treat with Dr. Jackson, but there is no medical evidence in the record that Dr. Jackson ever rendered an original opinion regarding Claimant's return to work capacity.

testified 1. She did not work full time pre-injury because of migraine headaches and fibromyalgia (HT p.24, 27-28, 70), and 2. she is unable to work full time because her medication (Flexeril and Neurontin) makes her tired. (HT p. 40-42, 47). The medication, however, is the same medication she has been taking for years for her migraine headaches and her fibromyalgia. (HT p. 26, 28, 35-36, 61, 71).

It is well established in the District of Columbia that when assessing the weight of competing medical testimony in workers' compensation cases, an attending physician ordinarily is preferred as a witness over a doctor who has been retained to examine the claimant solely for purposes of litigation, *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992).¹⁰ In weighing the medical evidence presented, I find Dr. Collins' opinions indefinite and contradictory. He contends Claimant's lost time from work "may" be related to her fibromyalgia as well as her headaches, and while he asserts Claimant "does not require additional medical treatment as a result of the injury of December 21, 2006," he also asserts "Dr. Selya is recommending epidural blocks for the neck and back pain, which I think would be a reasonable approach." (EE2). For these reasons, I reject the opinions of Dr. Collins.

On the other hand, the only treating physician to render a firsthand opinion regarding Claimant's

work capacity is Dr. Selya,¹¹ and although I afford greater weight to Dr. Selya's opinion, the evidence from Dr. Selya regarding Claimant's work capacity is unsupported by regular medical treatment and is belied by Claimant's actual return to work. Consequently, nothing in AE1 convinces me that Claimant's inability to work full time since March 22, 2007 is as a result of her work-related injuries as opposed to her pre-existing impairment unrelated to her employment, and I still reject Dr. Selya's opinion.

There is no presumption regarding the nature and extent of Claimant's disability. She has the affirmative duty to present substantial credible evidence of the level of benefits sought. Although Claimant's fibromyalgia and migraine headaches complicated her situation (EE2), there is no evidence in the record to suggest Claimant's work-related accident aggravated those pre-existing conditions; however, because of those pre-existing conditions, not even Claimant can assert that she could work full time if she had not injured her neck and back. (HT p.52-53). In this case wherein Claimant has chronic, pre-existing problems which permitted her to work only intermittently, without reliable, credible evidence that her work-related injury prevented her from returning to work full-time, finding in Claimant's favor would render Employer a guarantor of Claimant's health, a purpose contrary to that of the Act; there is no reliable evidence that establishes Claimant's current inability to work full time since March 22, 2007 is a result of her work-related injuries.

¹⁰Although *Stewart, supra*, is a private sector workers' compensation case, the District of Columbia Court of Appeals has ruled there is no reason why a public sector claimant should be treated any differently than a private sector claimant when it comes to assessing the credibility of a treating physician. *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004).

¹¹Dr. Jackson seems to concur with Dr. Selya's opinion regarding Claimant's work capacity; however, as detailed, *supra*, Dr. Jackson was uninformed as to Claimant's pre-injury work history and her post-injury return to work schedule.

CONCLUSIONS OF LAW

Based upon a review of the record evidence, I find and conclude Claimant's current

impairment pre-existed the accepted work-related injuries and, therefore, is unrelated to her employment.

ORDER

It is **ORDERED** Claimant's claim for relief be and hereby is **DENIED**.



MELISSA LIN KLEMENS
ADMINISTRATIVE LAW JUDGE

July 3, 2008

Date

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was sent this 3rd day of July, 2008
to the following:

Eugene Irvin, Esquire
General Counsel
Department of Employment Services
64 New York Ave., N.E., Third Floor
Washington, D.C. 20002

Hand Delivered

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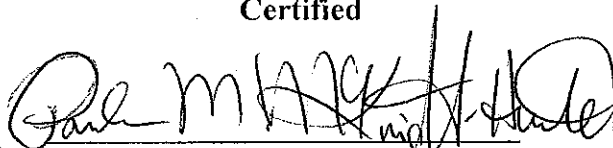
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Ms. Denice Lockett-Martin
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Certified


for **LINDA F. JORY**
CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE HEARING DIVISION

July 3, 2008
Date

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to Section 2102, Title XXIII of the D.C. Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139), as amended, D.C. Official Code § 1-623.1 *et seq.* Any party aggrieved by this Order may file an Application for Review with the Chief Administrative Appeals Judge, Compensation Review Board, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

**Compensation Review Board
Attn: Chief Administrative Appeals Judge
Department of Employment Services
64 New York Avenue, N.E., Third Floor
Washington, D.C. 20002**

The Application for Review must be filed with the Compensation Review Board (CRB) within 30 calendar days of the date of this Order, as provided in Section 2328(a) of the Act, D.C. Official Code § 1-623.28. *See* 7 DCMR § 118.2. Pursuant to 7 DCMR §§ 258.2, 258.3, 258.4 and 258.6, an Application for Review is perfected by filing with the CRB the following:

1. An original and three (3) copies of an Application for Review;
2. An original and three (3) copies of a Memorandum of Points and Authorities in support of the Application for Review;
3. An original and three (3) copies of the Compensation Order or final decision appealed; and
4. Certification that copies of the Application and Memorandum have been served by mail or delivery upon the opposing party(ies) and the Administrative Hearings Division (AHD).

For a copy of the CRB Rules of Practice and Procedure, go to the DOES website at www.does.dc.gov/does,

Once at the website, click on the link “**Worker Protection**”, then link “**Compensation Review Board**”, then link “**Notice of Final Rulemaking**”.