GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-161

MICHAEL HAIRE,
Claimant–Respondent,

v.

FORT MYER CONSTRUCTION CORP.,
and GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Petitioners.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 MAR 3 PM 2 18

Appeal of an August 31, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 15-385, OWC No. 729755

(Decided March 3, 2016)

Allen J. Lowe for Claimant
Gerald J. Emig for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 15, 2015, Claimant was employed as a heavy equipment operator by Employer. On that date, Claimant was operating a backhoe when it was struck in the rear by a WMATA bus. Claimant injured his neck, right shoulder, right arm and left knee.

Claimant came under the care and treatment of Dr. Dennis A. Carlini. Dr. Carlini recommended conservative care, which included physical therapy and medication. Dr. Carlini also recommended an MRI for worsening cervical pain. The MRI revealed multilevel protrusions. Dr. Carlini recommended Claimant remain off of work due to his work-related injuries.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Robert A. Smith. Dr. Smith took a history of Claimant's work-related injury, medical treatment, and performed a physical examination. Dr. Smith opined Claimant's treatment had been reasonable and necessary to the date of his examination, October 8, 2014, but no additional treatment would be required

thereafter. Dr. Smith also opined Claimant could return to work to his pre-injury job without restrictions.

A full evidentiary hearing occurred on April 1, 2015. Claimant sought an award of temporary total disability benefits from October 9, 2014 to the present and continuing. The issue to be adjudicated was the nature and extent of Claimant's disability, if any. A Compensation Order (CO) was issued on August 31, 2015 which granted Claimant's claim for relief.

Employer timely appealed the decision. Employer argues that the ALJ erred by crediting the testimony of Claimant's over that of Dr. Smith and as such, the CO is not supported by the substantial evidence in the record and in accordance with the law. Specifically, Employer argues:

> ALJ Henderson was required to make a determination of the nature and extent of Claimant's disability based on substantial evidence which supports each finding and each conclusion of law. Here, ALJ Henderson improperly afforded Claimant's arguably self-interested testimony more weight than Dr. Smith's medical testimony with no reasoning beyond the fact that Claimant could describe his purported pain with specificity.

Employer's argument at 7.

Claimant opposed Employer's appeal. Claimant argues the CO is supported by the evidence in the record and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

ANALYSIS[1]

Employer argues that after rejecting the opinion of the treating physician, Dr. Carlini, and finding the opinion of the IME physician, Dr. Smith, more consistent with the MRI results, the ALJ erred in affording "a Claimant's testimony more weight than testimony from a Board Certified Orthopedic surgeon who testified that Claimant could return to full duty and is not disabled." Employer's argument at 7.

A review of the CO reveals the ALJ found the Claimant to be credible concerning the "location and nature of current symptoms." CO at 3. After rejecting the opinion of the treating physician, and concluding that the IME opinion was more consistent with the MRI and his opinions were explained, the ALJ noted Dr. Smith seemed to be critical of Claimant's responses during exam, commenting the doctor described Claimant's responses as exaggerated and embellished. The ALJ then concluded:

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[1] The scope of review by the CRB is generally limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01(d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

> To the contrary, I found Claimant to be credible in describing his symptoms. I was not under the impression that he was exaggerating his symptoms.
>
> Claimant has the burden to prove the nature and extent of his disability. *Golding-Alleyne* at 1213. In this case, Claimant has the burden to prove that he is disabled from his job as a heavy equipment operator. Claimant credibly testified that he has constant pain on the right side of his neck which goes down his arm into his thumb and index finger. HT at 39. The pain goes down into the fingers and "it turns numb and the whole hands [sic] turn tingly, and is like its sticking or ice cold." Although the pain and numbness happen in both arms, his symptoms are mostly on the right. HT at 40. Finally, Claimant's left knee continues to bother him, but I do not find his left knee pain disabling. HT 52-53.
>
> Although Dr. Smith found "no new herniations" and no "high grade stenosis," Claimant was working full-time, plus overtime, full duty as a heavy equipment operator at the time of the incident. Contrary to Dr. Smith's criticism, that Claimant's complaints were diffuse without a "specific anatomical pathway," Claimant identified the specific fingers in which his pain and numbness was focused, EE 2, p. 29. I credit Claimant's credible testimony over the opinion of Dr. Smith.
>
> Claimant is required to climb onto and into his vehicle in order to operate it, steer the vehicle, ride on a vehicle with poor suspension and wash the vehicle with a pressure washer. HT at and 24 and 29 - 30.
>
> I find that these symptoms would make it difficult if not impossible for him to steer a large vehicle which has little suspension or to climb on the vehicle to clean the outside of the vehicle with a pressure washer. HT at 24, 29 - 30. *Golding-Alleyne, supra.*
>
> Finally, I find that Employer has presented insufficient evidence that it has identified or offered suitable alternative employment for Claimant under *Logan* at 243.

CO at 5-6.

We are mindful of our decision in *Fuentes v. Willard Intercontinental Hotel,* CRB No. 11-149, (May 9, 2012) which stated,

> There is no requirement under the Act or in the case law that mandates that a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss-based award of benefits. Such written restrictions may make adjudication of disputed claims easier, and the lack of such a restriction certainly can, in some instances, be a legitimate basis for denying a claim. However where, as here, the ALJ finds as facts that the work injury is causing a claimant to be unable to work to the same degree that was being worked prior to the injury, and that the claimant is earning less post-injury because of that inability, the claimant is entitled to a partial

> disability award based upon that ongoing wage loss, until such time as the claimant becomes eligible for an award under the schedule.

In *Fuentes,* the claimant, after undergoing surgery, was unable to perform his duties at a second job due to his work-related injury. The ALJ had found the claimant to be a credible witness in describing the effect of his injury on his ability to work his second job, but denied the claimant temporary partial disability as the claimant's treating physician released him back to work without restrictions, thus leaving the ALJ no choice but to deny the claim as no "medical justification" had been presented. *Fuentes,* supra at 3. The CRB vacated the denial of benefits and remanded the case to the ALJ with instructions to award the claimant the temporary partial disability sought.

Thus, in limited circumstances the ALJ may award disability benefits absent medical documentation. We do not agree with Employer that "medical testimony of any kind would be obviated" if a claimant's testimony would be deemed to be sufficient. Employer's argument at 7.

As stated in *Fuentes*, the lack of any medical documentation could be the basis for a denial, while the submission of medical documentation or restrictions certainly make adjudicating such claims an easier task for the ALJ. Indeed, most cases that come before us fall under these two scenarios. However, when the ALJ finds a claimant credible and finds persuasive his or her testimony describing the effect of the injury on the ability to work, the lack of medical restrictions or clear medical documentation is not necessarily a bar to an award of disability. We caution however, the ALJ must give sufficient reasons to do so.

Such is the case before us. The ALJ disagreed with Dr. Smith's description of Claimant's credibility based upon her own observations and discounted his opinion for this reason. With Dr. Carlini's opinion discounted, the ALJ then turned to the other evidence presented, namely the testimony of Claimant. The ALJ found Claimant to be a credible witness, and found persuasive his description of the current problems he has because of his work injury. The ALJ was aware of Claimant's job duties and concluded that his current symptoms inhibit his ability to perform his pre-injury job. We find no error in the ALJ's conclusion that Claimant had satisfied his burden, that of a preponderance of the evidence, that his work-related conditions were causing his current disability.

CONCLUSION AND ORDER

The August 31, 2015 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.