

**DISTRICT OF COLUMBIA COURT OF APPEALS**

No. 14-AA-1110

SALVADOR H. MARTINEZ, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

AND

FORT MYER CONSTRUCTION CORPORATION AND LIBERTY MUTUAL INSURANCE CO.,  
INTERVENORS.

On Petition for Review of an Order of the  
Compensation Review Board of the District of Columbia  
Department of Employment Services  
(CRB35-14)

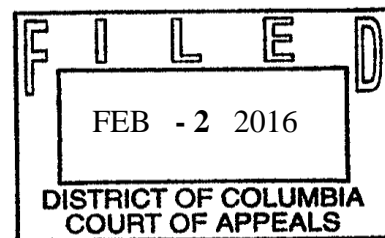
(Submitted October 6, 2014)

Decided February 2, 2016)

Before WASHINGTON, *Chief Judge*, BLACKURNE-RIGSBY, *Associate Judge*,  
and REID, *Senior Judge*.

**MEMORANDUM OPINION AND JUDGMENT**

PER CURIAM: Petitioner Salvador H. Martinez (“Mr. Martinez”) seeks review of a decision by the Compensation Review Board (“CRB”), which affirmed the Department of Employment Services’ denial of his claim for compensation under the D.C. Workers’ Compensation Act, D.C. Code § 32-1501 (1) (2012 Repl.). Following a formal hearing on Mr. Martinez’s claim, Administrative Law Judge Linda F. Jory (“ALJ”) determined that Mr. Martinez’s disability was not causally related to the injuries he sustained on November 12, 2010, or September 6, 2012, during the course of his employment with Fort Myer Construction Corporation (“Fort Myer”). Mr. Martinez timely filed his petition for review of the ALJ’s decision with the CRB. On September 12, 2014, the CRB affirmed the ALJ’s decision, finding that the ALJ’s factual findings were substantially



supported by the record and her legal conclusion, that Mr. Martinez’s disability was not caused by his work-related injuries, was in accordance with the law.

On petition to this court, Mr. Martinez contends that the CRB erred by: (1) concluding that the ALJ’s credibility determination was harmless error and (2) affirming the ALJ’s reliance on the medical opinion of Dr. Richard Conant, the independent medical evaluator (“IME”) in place of the opinions of Mr. Martinez’s treating physician, Dr. Peter Bernad. On review of the CRB’s decision, we see no error, and thusly affirm.

## I.

The scope of our appellate review of a decision by the CRB is limited to “determining whether [an agency’s] order is in accordance with law and supported by substantial evidence in the record.” *Murray v. District of Columbia Dep’t of Employment Servs.*, 765 A.2d 980, 983 (D.C. 2001) (citing *Dell v. District of Columbia Dep’t of Employment Servs.*, 499 A.2d 102, 106–07 (D.C. 1985)); see *James v. District of Columbia Dep’t of Employment Servs.*, 632 A.2d 395, 397 (D.C. 1993) (“Evidence is substantial where a reasonable mind might accept [the evidence] as adequate to support a conclusion.”). When reviewing an agency decision under this standard, we will determine: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings.” *Ferreira v. District of Columbia Dep’t of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995).

## II.

### A. Credibility Determination

Mr. Martinez first asserts that the CRB erred in upholding the ALJ’s credibility findings, which he contends were not supported by substantial evidence because they were “based only on a consideration of his demeanor and appearance without any evaluation of his testimony in light of its rationality, internal consistency and the manner in which it hangs together with the other evidence in the record.”

In the administrative context, “the proper judge of credibility is the hearing examiner.” *Lincoln Hockey, LLC v. District of Columbia Dep’t of Employment Servs.*, 831 A.2d 913, 918 (D.C. 2003) (citing *Short v. District of Columbia Dep’t of Employment Servs.*, 723 A.2d 845, 851 (D.C. 1998)). This court recognizes the “general rule that on credibility questions, the fact-finding of hearing officers is entitled to great weight. . . .” *Dell*, 499 A.2d at 106 (citing *In re Dwyer*, 399 A.2d 1, 12 (D.C. 1979)). Thus, on “review of the credibility determination of a hearing examiner in a workers’ compensation case, such determinations may only be rejected if they are unsupported by substantial evidence.” *Gunty v. Department of Employment Servs.*, 524 A.2d 1192, 1197 (D.C. 1987).

Applying the appropriate standard of review to the credibility determinations of the hearing officer and conferring the appropriate deference to her factual findings, we are satisfied, by the ALJ’s description of Mr. Martinez’s demeanor, her interpretation of his substantive responses as “embellished” and his testimony’s inconsistencies with the medical records admitted into evidence, that the ALJ’s credibility determinations apropos Mr. Martinez were substantially supported by other evidence in the record.<sup>1</sup>

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<sup>1</sup> Following this first work-related injury, Mr. Martinez was treated by Dr. Mark Scheer who reported consistent negative straight leg raising tests, the absence of muscle spasms and normal neurologic function. On December 6, 2010, Dr. Sheer indicated that Mr. Martinez had no pain in the lower back. Subsequent to April 2011, Mr. Martinez sought no medical treatment for over a year and a half, and returned to work, until he sustained a second injury on September 6, 2012. The medical reports regarding the first incident contradict Mr. Martinez’s testimony that his current lower back pain resulted from the aggravation of injuries sustained from the first incident.

The records following the second incident also contradict Mr. Martinez’s testimony that the first work-related injury resulted in substantial injury and right leg weakness. Mr. Martinez testified that he slipped from the back of the truck, hitting his back and right leg, however, the Concentra records made subsequent to his evaluation for the second incident report that he injured “his right shoulder, right elbow and left thigh,” and had full range of motion in his lower back. Moreover, Mr. Martinez testified that he received on-going treatment after his release from Concentra for noncompliance with physical therapy, but chose to omit these particular medical documents from the evidence presented at formal hearing. Lastly, the original reports of Mr. Martinez’s own treating physician, which stated

(continued . . .)

## B. Treating Physician Preference

Next, Mr. Martinez challenges the ALJ's decision not to confer a preference to the medical opinion of his treating physician, Dr. Peter Bernad, over the opinion of independent medical evaluator, Dr. Richard H. Conant.

This court established, in *Stewart v. District of Columbia Dep't of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992), a deferential preference for the medical opinion of a treating physician in relation to that of a doctor retained solely in preparation for litigation. Where conflicting medical testimony exists, as it does here, "[t]he hearing examiner, as judge of the credibility of witnesses, may reject the [opinion] of a treating physician and decide to credit the testimony of another physician . . ." *Jones v. District of Columbia Dep't of Employment Servs.*, 41 A.3d 1219, 1222 (D.C. 2012), "but only after explicitly addressing that [opinion] and explaining why it is being rejected." *District of Columbia Pub. Sch. v. District of Columbia Dep't of Employment Servs.*, 95 A.3d 1284, 1286 (D.C. 2014) (internal citations omitted).

Here, after her review of the evidence presented at formal hearing, the ALJ identified several material discrepancies in the medical reports presented by Dr. Bernad and aptly decided not to extend the preferential deference typically afforded to treating physicians. The ALJ found Dr. Bernad's December 2013 letter to be wholly inconsistent with his prior medical reports from April-July 2013.<sup>2</sup>

Most notably, the ALJ highlighted Dr. Bernad's reference to work-related

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that his pain began after the third non work-related fall, also contradict Mr. Martinez's testimony regarding causation.

<sup>2</sup> The ALJ also concluded that Dr. Bernad's December 2013 letter was an alteration of his prior report made in anticipation for formal hearing, which stated that Mr. Martinez experienced back pain from the *second* fall rather than the third non work-related fall, as stated in prior reports and that his "current pain" started after the *third* fall. (emphasis added) ("The undersigned concludes that Dr. Bernad's late attempt to relate claimant's disability to a work injury is confusing and obviously rendered in preparation for a formal hearing. . . . The undersigned is further of the opinion that this opinion is not entitled to any preference or greater weight than the reports of Dr. Bernad issued in April 2013 shortly after the slip and fall on ice and snow and after his personal examination.").

causality in his December 2013 letter, after making no reference to a work-related cause for any of Mr. Martinez's injuries during his nine prior evaluations of Mr. Martinez. Supported by these observations, the ALJ's decision to discount the medical opinion contained in Dr. Bernad's December 2013 letter on the basis of its inconsistency with his other reports and other evidence in the record was in accordance with the law and adequately explained pursuant to *Stewart*.

Moreover, we see no error in the ALJ's reliance on Dr. Conant's report, taken together with other substantial evidence in the record, such as Mr. Martinez's medical history and medical reports from Concentra and the secondary IME, Dr. Robert Gordon, to conclude that Mr. Martinez's disability was not causally related to his prior work-related incidents, as this conclusion "flowed rationally" from the evidence.<sup>3</sup>

### III.

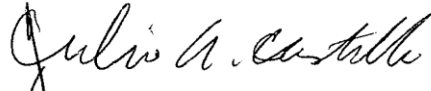
Given the inconsistencies in Dr. Bernad's reports, Mr. Martinez's medical history, the credible evaluation conducted by Dr. Conant, and the deference afforded to the credibility determination of the ALJ, we conclude that the ALJ's findings were supported by other substantial evidence in the record, leading rationally to her legal conclusions; and therefore, the CRB did not err in affirming the ALJ's decision in this case.

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<sup>3</sup> As a result of his evaluation of Mr. Martinez and his medical history, Dr. Conant concluded there was "no causal relationship between [those] events and the medical necessity for any treatment . . . on and after April 18, 2013." Dr. Conant stated Mr. Martinez sustained, "at most, a soft tissue injury to his back, with no spinal or neurological involvement" and concluded that Mr. Martinez was adequately treated for both injuries and "reached maximum medical improvement by January 7, 2011. . . with no permanent impairment of function," and "reached maximum medical improvement by September 17, 2012 . . . with no need for future treatment or any resultant permanent impairment of function . . ." respective to each incident.

*Affirmed.*

ENTERED BY DIRECTION OF THE COURT:

A handwritten signature in black ink, appearing to read "Julio A. Castillo". The signature is fluid and cursive, with the first name "Julio" being the most prominent.

JULIO A. CASTILLO  
Clerk of the Court

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