

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-491

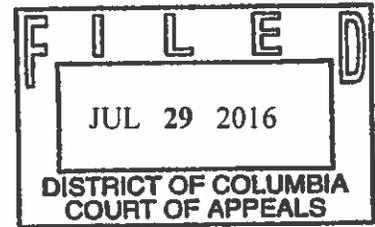
SODEXHO, INC., ET AL., PETITIONERS,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

BRUCE TULLOCH, INTERVENOR.



On Petition for Review of a Decision of the Compensation Review Board of the
District of Columbia Department of Employment Services
(CRB-137-14)

(Submitted April 5, 2016)

Decided July 29, 2016)

Before BLACKBURNE-RIGSBY and MCLEESE, *Associate Judges*, and
STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Sodexho, Inc. (hereinafter “Sodexho” or “employer”)¹ seeks review of a decision by the Compensation Review Board (“CRB”) affirming a compensation order awarding a former employee, intervenor Bruce Tulloch, temporary total disability benefits from December 17, 2010, to the present and continuing. Sodexho argues that the Administrative Law Judge’s (“ALJ”) order failed to make the necessary factual findings to support its decision to award benefits and, in any event, there was not substantial evidence in the record to support the award. For the most part, we disagree with Sodexho and conclude that the ALJ’s order contains the requisite findings of fact, supported by substantial evidence, to conclude that the back injury, independently, precluded

¹ The insurer, Gallagher Bassett Services, Inc., is also a party to the petition for review.

Mr. Tulloch from working. However, because we are unsure how the ALJ came to award Mr. Tulloch benefits beginning on December 17, 2010, we remand this case back to the CRB to direct the ALJ to make additional findings on that question. Further, because the unique facts of this particular case raise the interesting legal issue of first impression of whether compensation is appropriate for a claimant who has two independent disabling injuries, one that is work related and one that is not, we remand for the CRB to determine whether Sodexo has adequately preserved this legal issue and, only if preserved, do we ask the CRB to resolve the issue.

I.

On April 3, 2010, Mr. Tulloch injured his lower back while lifting boxes of beer at work. He received medical treatment for his injury and returned to work, with appropriate modifications, for a period of time. Beginning in November 2010, however, Mr. Tulloch complained of renewed back pain that radiated down his lower extremities. His treating physician, Dr. Michael W. Hasz, prescribed “lumbar epidural injections.” However, before treatment could begin, Mr. Tulloch suffered additional ailments, such as kidney stones, blood clots, and a kidney infection, culminating in multiple strokes that left him wheelchair bound and unable to return to work. His present condition also prevents him from receiving the injections needed to treat his lower back pain. Mr. Tulloch subsequently sought temporary total disability benefits; his primary argument before the ALJ was that the debilitating strokes were causally related to his work-related back injury. A hearing was held on January 29, 2013, where the ALJ heard from Mr. Tulloch, and the parties submitted into evidence Mr. Tulloch’s medical records and competing medical opinions on the issue of causation.

On October 29, 2014, the ALJ issued its compensation order; based on the evidence presented, the ALJ concluded that the blood clots and subsequent strokes were not medically causally related to the work-related back injury.² Yet, the ALJ

² Specifically, the ALJ credited the Independent Medical Evaluations of Drs. Allen Nimetz and David Johnson, who were secured by the employer, opining that there was no causation between the back injury and strokes, over the medical opinion provided by Mr. Tulloch’s treating physician, Dr. Hasz, who had concluded that they were causally related. The ALJ’s decision in crediting the employer’s physicians was detailed and well-reasoned, and we need not go in-depth into the nuances of that discussion because the parties do not appeal the
(continued...)

awarded Mr. Tulloch temporary total disability benefits from December 17, 2010, to the present and continuing, on the basis of the lower back injury alone.³ While the ALJ did not clearly explain how it concluded that benefits should be awarded on the basis of the back injury, in its findings of fact, the ALJ did note that, aside from the stroke, “[Mr. Tulloch] continues to have significant flare-ups of back and radicular leg pain secondary to his work injury that have *also* rendered him unable to resume his pre-injury duties.”⁴ (Emphasis added).

Employer appealed to the CRB. In its decision issued April 8, 2015, the CRB conceded that it “would have preferred the ALJ to provide some analysis as to what evidence” Mr. Tulloch presented to support the award of temporary total disability benefits, but it nonetheless affirmed the ALJ’s decision on the basis that there *was* evidence that Mr. Tulloch’s lower back injury, “the effects of the stroke notwithstanding,” prevented him from working (i.e., Dr. Hasz’s opinion, see *supra* note 4), and that there was no contrary medical opinion on this issue. Accordingly, the CRB concluded that “a remand for [additional] analysis would not change the

(...continued)

ALJ’s decision finding no medical causation. Nevertheless, the ALJ’s decision to discredit Dr. Hasz on the issue of causation does not preclude the ALJ from crediting his testimony on the different issue of the nature and extent of Mr. Tulloch’s disability resulting from the back injury. See *infra*.

³ The ALJ also awarded Mr. Tulloch medical treatment and medical expenses for the lower back injury.

⁴ In making that finding, the ALJ’s order cites to Dr. Hasz’s medical opinion, in which the doctor concluded that:

[Mr. Tulloch] currently is disabled from work. He is permanently disabled from work based on the stroke, hemiparesis [i.e., weakness on one side of the body], and overall fragility of this part of his medical condition. *He does have significant flare-ups of his back and leg pain, which would preclude any type of activities if he was to do this.*

(Emphasis added).

outcome, in light of the preference in this jurisdiction for the treating physician's opinion." This petition for review followed.

II.

This court reviews "the decision of the [CRB], not that of the ALJ." *Wash. Metro. Area Transit Auth. v. District of Columbia Dep't of Emp't Servs.*, 926 A.2d 140, 147 (D.C. 2007) (citation and internal quotation marks omitted). "In doing so, however, we cannot ignore the compensation order which is the subject of the [CRB's] review." *Id.* (citation and internal quotation marks omitted). "We affirm an administrative agency decision when (1) the agency made findings of fact on each contested material factual issue, (2) substantial evidence supports each finding, and (3) the agency's conclusions of law flow rationally from its findings of fact." *Georgetown Univ. v. District of Columbia Dep't of Emp't Servs.*, 971 A.2d 909, 915 (D.C. 2009).

Sodexo first argues that the CRB erred in affirming the ALJ's order because the ALJ failed to make factual findings on whether Mr. Tulloch's lower back injury was an independent source of his inability to return to work or articulate its basis for the award of temporary total disability benefits, and that the CRB's decision to nonetheless affirm was thus based on its own assessment of the record evidence, which it cannot do. *See Wash. Metro. Area Transit Auth., supra*, 926 A.2d at 147 (stating that the CRB "may not consider the evidence *de novo* and make factual findings different from those of the examiner") (citation and internal quotation marks omitted). We disagree. In the compensation order section titled "Findings of Fact," the ALJ expressly stated that "[Mr. Tulloch] continues to have significant flare-ups of back and radicular leg pain secondary to his work injury that have *also* rendered him unable to resume his pre-injury duties." (Emphasis added). The ALJ's citation to Dr. Hasz's medical opinion, *see supra* note 4, makes clear that the ALJ was crediting that portion of Dr. Hasz's report. The fact that the ALJ discredited Dr. Hasz's opinion as to the causal connection between the stroke and the back injury does not mean the ALJ cannot credit a different portion of Dr. Hasz's medical report. *Placido v. District of Columbia Dep't of Emp't Servs.*, 92 A.3d 323, 328 (D.C. 2014) ("The ALJ [i]s free . . . to decide which parts of the treating physician's testimony to accept and which to reject."). While we agree with the CRB that we certainly would have preferred the ALJ to have provided a more detailed discussion of its findings and analysis, the ALJ's order in this case is not wholly deficient for its failure to do so. The ALJ made findings of fact on the

issue of compensable disability, those findings have support in the record,⁵ and the ALJ's conclusion that Mr. Tulloch is disabled as a result of the back injury, alone, flows from those findings.⁶ See *Georgetown Univ.*, *supra*, 971 A.2d at 915.

Additionally, Sodexho argues that there is not substantial evidence in the record, even in the face of Dr. Hasz's report, to support the legal conclusion that Mr. Tulloch cannot work as a result of the back injury. "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Wash. Metro. Area Transit Auth.*, *supra*, 926 A.2d at 147 (citation and internal quotation marks omitted). It is "more than a mere scintilla" of evidence. *Wash. Hosp. Ctr. v. District of Columbia Dep't of Emp't Servs.*, 744 A.2d 992, 1000 (D.C. 2000). Further, it is well-established that the medical opinion of a treating physician is preferred over opinions of non-treating physicians. See *Jackson v. District of Columbia Dep't of Emp't Servs.*, 979 A.2d 43, 49 (D.C. 2009). Here, Dr. Hasz, Mr. Tulloch's treating physician, expressly concluded, based on his medical expertise and experience treating Mr. Tulloch's lower back problems, that Mr. Tulloch's "significant flare-ups of his back and leg pain" precluded "any type of activities if he was to do this." (Emphasis added). Dr. Hasz's opinion is supported by Mr. Tulloch's testimony, also credited by the ALJ as reflected in its order, that he is "in [sharp] pain all the time" as a result of his back, and that his back pain, on a scale of one to ten, is currently a "ten." The evidence thus supports the ALJ's finding that Mr. Tulloch cannot work as a result of his back.

⁵ See discussion *infra*.

⁶ Typically, "the claimant is not entitled to a presumption that his injury left him totally and permanently disabled." *Logan v. District of Columbia Dep't of Emp't Servs.*, 805 A.2d 237, 242 (D.C. 2002) (citation and internal quotation marks omitted). However, if the "claimant demonstrates inability to perform his or her usual job, a *prima facie* case of total disability is established, which the employer *may then* seek to rebut by establishing the availability of other jobs which the claimant could perform." *Id.* (emphasis added) (citation and internal quotation marks omitted). While the ALJ here did not expressly engage in this analysis, we need not remand on this issue because the evidence credited by the ALJ shows that Mr. Tulloch cannot return to work as a result of his lower back injury, and the employer has not attempted to rebut the *prima facie* evidence that he is totally disabled by establishing the availability of other jobs that he can perform.

We are not persuaded by Sodexho's counterarguments. It first argues that Mr. Tulloch had initially gone back to work following his back injury, which goes against his claim now that the back injury independently precludes him from working. Yet, this ignores the additional evidence that Mr. Tulloch returned to Dr. Hasz in November 2010 because of additional pain stemming from his lower back injury, and that Dr. Hasz had authorized additional treatment, which unfortunately Mr. Tulloch could not undergo as a result of his blood clots and stroke, and which, as the ALJ found, stems from Mr. Tulloch's "complicated medical history," including an abnormal condition where blood clots can develop, and that there was evidence he had a stroke earlier in 2009. *See, e.g., McCamey v. District of Columbia Dep't of Emp't Servs.*, 947 A.2d 1191, 1197-98 (D.C. 2008) (en banc) ("Preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, *or combined with the disease or infirmity* to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as it finds that employee." (quoting 9 Arthur Larson, *Larson's Workers' Compensation Law* § 9.02 [1] (2007))) (emphasis added). In any event, even assuming there was evidence supporting the conclusion that Mr. Tulloch can work, it is well-established that "[i]f substantial evidence exists to support the [ALJ's] findings, the existence of substantial evidence to the contrary does not permit the CRB [or this court] to substitute its judgment for that of the [ALJ]." *Wash. Metro. Area Transit Auth., supra*, 926 A.2d at 147 (citation, internal quotation marks, and original alterations omitted).

Next, Sodexho criticizes the CRB's interpretation of Dr. Hasz's report, arguing that Dr. Hasz was opining that Mr. Tulloch is disabled as a result of the stroke, not as a result of the back pain. Dr. Hasz's full opinion on this issue states as follows:

[Mr. Tulloch] currently is disabled from work. He is permanently disabled from work based on the stroke, hemiparesis [i.e., weakness on one side of the body], and overall fragility of this part of his medical condition. He does have significant flare-ups of his back and leg pain, which would preclude any type of activities if he was to do this.

We agree with the CRB's and the ALJ's reading of Dr. Hasz's opinion. Dr. Hasz concluded that Mr. Tulloch is disabled for two reasons: the stroke *and* the back and leg pain. Specifically, Dr. Hasz concluded that Mr. Tulloch is "preclude[d]"

from “any type of activities” as a result of his back and leg pain, so, clearly, that would include work-related activities, rendering him unable to work.

Lastly, Sodexho cites to the opinions of its two physicians, Dr. Johnson and Dr. Nimetz, see *supra* note 2, who both opined that Mr. Tulloch’s back injury was not causally related to his subsequent blood clots and strokes, and that the strokes restrict his ability to work. Although these two doctors did not render an opinion on Mr. Tulloch’s ability to work as a result of the lower back injury, Sodexho suggests that we should infer that the strokes were the sole cause of Mr. Tulloch’s disability based on their reports. Again, we disagree. Drs. Johnson and Nimitz did not expressly opine on whether the lower back injury, alone, precludes Mr. Tulloch from working, while Dr. Hasz did. Since there was no contrary opinion on this issue in the record, there is a strong preference for accepting Dr. Hasz’s treating physician opinion, absent some specific reasons that it should not be accepted. See *Golding-Alleyne v. District of Columbia Dep’t of Emp’t Servs.*, 980 A.2d 1209, 1213-14 (D.C. 2009). Neither the CRB nor this court can substitute its judgment for that of the ALJ. See *Wash. Metro. Area Transit Auth.*, *supra*, 926 A.2d at 147 (citation, internal quotation marks, and original alterations omitted).

III.

Based on these reasons, we affirm the CRB’s conclusion that Mr. Tulloch is rendered disabled as a result of the work-related back injury, independent from his non-work-related debilitating strokes. However, the ALJ’s findings of fact in its compensation order are unclear why, exactly, Mr. Tulloch’s benefits began to run on December 17, 2010, and not some other date. The CRB did not address this issue. Because the ALJ did not explain its reasoning in deciding to commence Mr. Tulloch’s benefits on December 17, 2010, we are unable to determine whether that decision was based on substantial evidence in the record. *Jones v. District of Columbia Dep’t of Emp’t Servs.*, 41 A.3d 1219, 1225 (D.C. 2012). Accordingly, we remand this case back to the CRB to direct the ALJ to make additional findings on the issue of the appropriate date of the commencement of Mr. Tulloch’s benefits.

We also remand this case for the CRB to address whether Sodexho has preserved the legal issue of whether it is appropriate for a claimant who has suffered two disabling injuries, one work related and one not, to nonetheless receive disability benefits, and only if the CRB concludes that Sodexho has adequately preserved the issue do we ask the CRB to consider the question.

Accordingly, we affirm the petition for review in part and remand in part for further proceedings.

ENTERED BY DIRECTION OF THE COURT:



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Clerk of the Court

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