CRB No. 12-019

TERRI ABBOTT,

Claimant–Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer–Petitioner.

Appeal from an Administrative Action of
Administrative Law Judge Anand K. Verma
AHD No. PBL 07-065B, DCP No. A984800 0667-0001

Pamela L. Smith, Esquire, for the Petitioner

Krista N. DeSmyter, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR and HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Terri Abbott (Respondent) slipped and fell while working as a bus attendant for the District of Columbia Public Schools (Petitioner) in April 2008. After a series of formal hearings, the details of which do not concern this appeal, she was awarded temporary total disability benefits from August 27, 2008 and ongoing, in a Compensation Order issued January 26, 2010. These benefits were paid by the Public Sector Workers' Compensation Program (PSWCP).

On July 14, 2011, the PSWCP issued a Notice of Intent to Terminate those benefits as of August 17, 2011, based upon the results of an Additional Medical Evaluation (AME) performed by Dr. Louis

[1] Judge Russell is appointed by the Director of the Department of Employment Services (DOES) as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

Levitt on June 7, 2011, in the report of which Dr. Levitt opined that Respondent could return to work full time and without restrictions. Respondent filed an Application for Formal Hearing seeking reinstatement of temporary total disability benefits, which resulted in a formal hearing being conducted by an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on December 6, 2011. Following that hearing, on January 17, 2012, the ALJ issued a Compensation Order awarding the reinstatement of those benefits. Petitioner appealed that Compensation Order to the Compensation Review Board (CRB), to which appeal Respondent filed an opposition.

JURISDICTION AND STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a written 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Act), at § 1-623.28 (a), and *Marriott International v. District of Columbia DOES*, 834 A.2d 882 (D.C. 2003).

DISCUSSION

This appeal concerns Petitioner's assertion that the ALJ erred when he accepted the opinion of Dr. James Gilbert, a treating physician, to the effect that Respondent is disabled for the period claimed due to her knee injury, over that of Dr. Louis Levitt, an AME examiner whose opinion to the contrary Petitioner seeks to have prevail.

Petitioner's argument is twofold: first, it argues that the ALJ erred as a matter of law in according a preference to Dr. Gilbert premised upon his status as a treating physician, because the Act has been amended and the amendment deleted the statute's previous mandating of the application of a preference for treating physician opinion; and second, that Dr. Levitt's opinion is in its view clearly more reliable, given its detail and rationality.

Regarding the first argument, while it is true that the statute has been amended so that it no longer mandates that the assessment of competing medical opinion entails providing a treating physician with a preference over non-treating medical opinion, the amendment does not *prohibit* the fact finder from using attributes of the status of treating physician as a reason to regard such opinion as being more reliable, in appropriate circumstances.

In this case, the ALJ discussed the underlying rationale for the treating physician preference as it exists, in mandatory form pursuant to District of Columbia Court of Appeals (DCCA) case law, in private sector cases arising under the District of Columbia Workers' Compensation Act, D.C. Code § 32-1501, *et seq.* He alluded to the fact that one might view a treating physician to be "less apt to be consciously or subconsciously biased by the litigation" and "more likely [to be more] familiar with the patient's condition because he or she has treated a patient over a substantial period of time" making the physician "likely to have more insight into the patient's condition than a doctor who has had only one or two interactions with a patient and who has examined the patient in the context of possible or actual litigation." Compensation Order, page 6.

These reasons are all legitimate bases for evaluating competing medical opinion, whether the case is a private sector claim where application of the preference is mandatory (and under which mandatory rule, rejection of such opinion requires the ALJ give specific and persuasive reasons for its rejection) or a public sector Act claim arising under D.C. Code § 1-623.01, *et seq.*, the Public Sector Worker's Compensation Act, which governs this claim. And, as Respondent points out, the CRB has already ruled that, despite the elimination of the mandatory application of the treating physician preference from the public sector Act, as follows:

> Given that assessing credibility remains an integral function of the fact finder, and given that a physician's relationship to a medical case generally and a given patient specifically are at least relevant to the quality of a medical opinion relating to that patient, ALJs are free to consider treating physician status as a factor in assessing competing medical opinion.

Lyles v. District of Columbia Department of Mental Health, CRB No. 10-200, AHD No. PBL 09-070A , , 2011 LEXIS DC Wrk. Comp. 287 (August 23, 2011), at 18.

However, beyond his brief discourse on the underlying rationale of the treating physician preference, the ALJ also wrote as follows:

> While an Administrative Law Judge ("ALJ"), as the trier of fact, is entitled to reject the testimony of a treating physician, he may do so only "if the examiner sets forth *specific and legitimate reasons for doing so.*" *Mexicano v. District of Columbia Department of Employment Services*, 806 A.2d 198, 205 (D.C. 2002)(emphasis added)(*quoting Olson v. District of Columbia Department of Employment Services*, 736 A.2d 1032, 1041 (D.C. 1999)).
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> **…**
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> Where an agency or hearing officer has not accorded preference to the opinion of a treating physician, and has failed to provide an adequate explanation for the decision not to do so, the court will not allow the resulting ruling to stand. *See, e.g.,[Kralick v. DOES,*842 A.2d 705] (reversing where the ALJ's explanation for rejecting the treating physician's opinion was based on a misapprehension of fact); *Mexicano*, 806 A.2d at 205 (holding that the hearing examiner rejected the treating physician's opinion for insufficiently persuasive reasons); *Clark v. District of Columbia Department of Employment Services*, 772 A.2d 198, 204 (D.C. 2001) (setting aside administrative decision because hearing officer failed to give adequate consideration to the deposition testimony of a treating physician); *Upchurch v. District of Columbia Department of Employment Services*, 783 A.2d 623, 629 (D.C. 2001) (setting aside administrative decision because "[e]ven assuming, *arguendo*, that the examiner did consider the [treating physician's] deposition, she failed to explain [satisfactorily] why she rejected his opinion, as explicitly mandated by the law in this jurisdiction").

Compensation Order, page 6 – 7.

His lengthy recitation of case law, in which each citation contains reference to the requirement that the ALJ explain why treating physician opinion is rejected or risk reversal, is not applicable to public sector claims. In eliminating the treating physician preference from the Act, the Council of the District of Columbia repudiated the notion that any special deference was required to be accorded to the opinions of treating physicians in claims brought under the public sector Act. Thus, it is no longer *de facto* reversible error to fail to explain why a treating physician's opinion was deemed inferior to that of an Additional Medical Examiner. We hasten to add, however, that it is, as a general principal, always the better practice to explain as fully as is practical the underlying reasons for all findings and conclusions that are reached in a Compensation Order. However, under the public sector Act, it is no longer error to fail to accord a preference to the opinions of a treating physician.

A Compensation Order that "reflects a misconception of the relevant law or the faulty application of law" cannot be affirmed. *District of Columbia Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011); see also, *Wilson v. Starbucks*, CRB No. 11-150 (April 27, 2012). Accordingly, we have no choice but to vacate the Compensation Order and remand the matter for further consideration of the claim applying the correct law.

While we do not reach the merits of Petitioner's second argument because the matter is being remanded for further consideration, we remind Petitioner that assessing the relative weight that should be accorded conflicting evidence is generally a matter for the fact finder, and in the absence of clear error we will not intervene.

CONCLUSION

The Compensation Order evinces a clear misapprehension of the relevant law on the part of the ALJ as it relates to the evaluation of competing medical opinion, and is thus not in accordance with the law.

ORDER

The Compensation Order of January 17, 2012 is reversed and vacated, and the matter is remanded for further consideration in a manner consistent with the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____August 15, 2012_____
DATE