

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-190

**LUIS ALVAREZ,
Claimant-Respondent,**

v.

**RESTAURANT ASSOCIATES CORPORATION, and
GALLAGHER BASSETT SERVICES
Employer/Insurer-Petitioners.**

Appeal from a November 8, 2012 Compensation Order By
Administrative Law Judge Gerald Roberson
AHD No. 10-343B, OWC No. 662108

John Noble, Esquire, for the Claimant
Julie Murray, Esquire for the Employer

Before HEATHER C LESLIE, HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND REMAND ORDER
OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the November 8, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for temporary total disability benefits from February 11, 2010 to the present and continuing. We REVERSE and REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant was employed by the Employer as a dishwasher. On July 25, 2009 the Claimant slipped and fell on a wet surface. The Claimant injured his left knee. After receiving treatment at the emergency room at Howard University Hospital, the Claimant came under the care of Dr. A. Roy Rosenthal and Dr. Andrew Siekanowicz. An MRI subsequently revealed a meniscal tear which required surgery on October 27, 2009.

The Claimant continued to follow up with Dr. Siekanowicz following surgery. Dr. Siekanowicz recommended physical therapy and prescribed medication post surgery. On February 24, 2010, Dr. Siekanowicz recommended work hardening and work conditioning over a course of eight weeks. Ultimately, Dr. Siekanowicz released the Claimant to light duty work only.

The Employer sent the Claimant for several independent medical evaluations (IME) with Dr. David Johnson. Dr. Johnson evaluated the Claimant on February 18, 2010, July 1, 2010, April 7, 2011 and March 16, 2012. At the last IME, Dr. Johnson opined that the Claimant could return to work as a dishwasher, an opinion he had expressed after the IME's of July 1, 2010 and April 7, 2011. Dr. Johnson also opined the Claimant was at maximum medical improvement and required no further care.

The Claimant did attempt to return to work on two occasions. On the first occasion, the Claimant was asked to wrap utensils in napkins. After 30 minutes, the Claimant was unable to perform this task and was asked to go home. In September of 2010, the Claimant attempted again to return to work, however, was unable to do so as the schedule presented was full duty.

A full evidentiary hearing occurred on September 17, 2012. The Claimant sought an award of temporary total disability benefits from February 11, 2010 to the present and continuing as well as authorization for pain management.¹ The issues raised were whether or not the Claimant's need for pain management was medically casually related to the work injury, the nature and extent of the Claimant's disability, and whether the Claimant voluntarily limited his income. A CO was issued on November 8, 2012 which granted the Claimant's claim for relief.

The Employer timely appealed. The Employer argues the ALJ's erred in not finding that the Claimant voluntarily limited his income in February 2010, and the ALJ erred in awarding temporary total disability and pain management in light of normal objective findings.

The Claimant opposes the application for review, arguing the CO is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

¹ Under the section of the CO titled "Claims for Relief," temporary total disability benefits from February 11, 2010 to the present and continuing is identified. However, it is clear when referring to the "Issues Presented" section as well as the "Conclusions of Law" that the Claimant also sought, as a claim for relief, authorization for pain management. We will treat the omission of authorization for pain management under the claim for relief section as an administrative error.

DISCUSSION AND ANALYSIS

We begin with the Employer's second argument, leaving discussion regarding the Employer's first argument, that the ALJ erred in finding the Claimant had not voluntarily limited his income, for last. The Employer argues that the ALJ erred in not crediting the medical opinion of Dr. Johnson over that of the treating physicians; first in finding the Claimant's current left knee condition and post traumatic arthritis is medically causally related to the work accident and secondly, in awarding temporary total disability benefits. It is well settled in the District of Columbia that that in situations where there are conflicting medical opinions, the opinion of the treating physician is preferred over those of physicians retained simply to examine the claimant for the purposes of litigation.² After acknowledging this preference, the ALJ went on to state,

In this case, the medical evidence coupled with Claimant's testimony medically causally relates the pain management treatment to the work incident of June 25, 2009. During his deposition, Dr. Siekanowicz explained Claimant definitely had prolonged symptoms for a longer time than most patients do after an arthroscopy. He attributed the severity of Claimant's symptoms to losing most of the meniscus and development of posttraumatic arthritis. Dr. Siekanowicz testified Claimant did not have evidence of arthritis on his initial x-rays, and he did not find any arthritis on the initial arthroscopy. EE 6, Depo at 31. Dr. Siekanowicz attributed the onset of the arthritis to the work injury. EE 6, Depo at 32. Dr. Siekanowicz testified he referred Claimant to pain management given his chronic ongoing pain, indicating the medications typically used in orthopedics such as antiinflammatories were not adequately controlling the pain, and Claimant required narcotic prescriptions, which would be better guided and written by a pain specialist. EE 6, Depo at 32. Dr. Siekanowicz testified the pain management specialist would address Claimant's continued ongoing symptoms. EE 6, Depo at 33.

In contrast, Dr. Johnson attributed Claimant's ongoing symptoms to symptom magnification, stating Claimant had an exaggerated pain response when touched anywhere. EE 1, p. 1. During the deposition, Dr. Johnson stated the arthritic changes may be the source of ongoing subjective complaints. EE 8, Depo at 57-58. In his testimony, Dr. Johnson acknowledged the diagnostic evidence showed arthritic changes in the lateral compartment. EE 8, Depo at 57. Therefore, the record establishes Claimant has arthritic changes, confirmed by diagnostic testing, and the arthritic changes have rendered Claimant symptomatic, requiring pain management treatment. Dr. Siekanowicz has medically related the arthritis to the work incident of June 25, 2009, and the record does not contain findings to the contrary. As such, the record medically causally relates the pain management treatment to the work incident of June 25, 2009.

CO at 8.

² *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

We find no fault in the above analysis and affirm the ALJ according the treating physician preference to Dr. Siekanowicz and finding the left knee condition and post traumatic arthritis is medically causally related to the work injury and awarding pain management.

The ALJ also found the opinion of Dr. Sikanowicz preferential over that of the Employer's IME physician, Dr. Johnson when awarding temporary total disability. Specifically,

The testimony and medical findings of Dr. Siekanowicz provide sufficient medical rationale to support entitlement to temporary total disability benefits. Dr. Siekanowicz has offered medical findings to establish Claimant had a significant meniscus tear as a result of the work incident, and the development of arthritis following the surgery caused residuals precluding the performance of pre-injury employment. The FCE also documented Claimant's limitations, and found he could only perform sedentary to light duty. While Dr. Johnson's assessment indicated Claimant could perform his regular employment as a dishwasher, Dr. Johnson failed to consider the severity of Claimant's injury and the development of post-surgical arthritis. Therefore, the medical evidence and Claimant's testimony support entitlement to temporary total disability benefits from February 11, 2010 to the present and continuing due to residuals related to the work incident of June 25, 2009.

CO at 12.

We find no fault with the above analysis. In essence, what the Employer is asking us to do is to re-weigh the evidence in their favor finding the opinion of Dr. Johnson more persuasive then that of Dr. Siekanowicz, a task we cannot do. As we stated above, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra*. However, any award of temporary total disability is dependent upon whether or not the Claimant voluntarily limited his income. Thus, we turn to the Employer's first argument.

Addressing the Employer's first argument, the Employer argues that the ALJ erred in finding the Claimant had not voluntarily limited his income. The Employer specifically argues that as it relates to the light duty job offered in February 2010 the Claimant,

admitted at the Formal Hearing that this job enabled him to sit however he wanted, stand when he needed to, and take breaks when he needed to. Despite all of this, Claimant alleged that he was unable to perform this job and that he had to leave after 30 minutes because of pain in his left leg.

Employer's argument at 7.

The Employer further points to the surveillance video as proof that the Claimant could have performed the job rolling silverware.

As the ALJ correctly pointed out,

Where an employee "voluntarily limits his or her income or fails to accept employment commensurate with the employee's abilities, the employee's wages after the employee becomes disabled shall be deemed to be the amount the employee would earn if the employee did not voluntarily limit his or her income."

D.C. Code §§ 32-1508 (3)(V)(iii) (2001). The burden is on an employer to demonstrate the availability of a job that an injured employee is capable of performing.

CO at 12.

Regarding whether or not the Claimant voluntarily limited his income on February 18, 2010 the ALJ stated,

Claimant argued Employer has not met its burden to establish he voluntarily limited his income. Claimant contends he remained totally disabled for the period in question, and Employer did not offer him employment consistent with his medical restrictions. HT p. 15. Claimant maintains the treating physician indicated he could perform light duty in 2009, and the work given was not what he could do. HT p. 15. Alternatively, Employer argued Claimant failed to perform the sedentary employment beginning February 18, 2010 which involved rolling silverware into a napkin while seated. HT p. 61.

During the hearing, Claimant testified he attempted to perform the light duty for 30 minutes in February 2010, and he became incapacitated. Claimant testified he could not do it anymore, and Employer asked him to go home. HT p. 25. Claimant explained he needed to sit with his leg extended away from the seat. HT p. 30.

The ALJ based his decision, in part, on the fact that the Claimant needed to extend his leg as necessary. A review of the hearing transcript reveals that the Claimant testified to the following:

- Q. But the job was just sitting in a chair at a table rolling silverware where you could extend your leg like you're sitting here today extending your leg?
- A. Yes. But right now I can tell you I need to stand up because I can't stand the pain, I'm going to have to stand up in a little bit.
- Q. Ok. There was nothing in that job of rolling silverware that prevented you from sitting with your leg extended or occasionally standing up if you needed to right?
- A. Yes. Yes.

Hearing transcript at 30.

Thus, by the Claimant's own testimony, while there was a need to extend his leg on occasion due to discomfort, he had the ability to do so at the light duty job presented to him in February 2010. The ALJ does not reconcile this in the CO. Thus, we cannot say the ALJ's conclusion that the Claimant did not voluntarily limit his income in February 2010 is supported by the substantial evidence in the record in light of the Claimant's testimony that he could extend his leg or stand up occasionally when needed at the light duty job provided by the Employer. Upon remand, the ALJ is to reconcile the Claimant's need to extend his leg in light of his testimony that he could extend his leg and stand, as necessary. If the ALJ continues to find that the Claimant did not voluntarily limit his income, then he is to identify why based upon the evidence and testimony before him.

CONCLUSION AND ORDER

We affirm the November 8, 2012 Compensation Order's conclusion that the left knee condition and post traumatic arthritis and corresponding need for pain management is medically causally related to the work injury and that the Claimant is restricted to light duty employment pursuant to the opinion of the treating physician.

We reverse and remand that portion of the order that concludes that the Claimant did not voluntarily limit his income in February 2010 as it is not supported by the substantial evidence in the record or in accordance with the law, consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE

Administrative Appeals Judge

August 14, 2013

DATE