

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-026

ANTHONY JOHNSON,  
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Self-Insured Employer-Respondent.

Appeal from a January 27, 2016 Compensation Order  
by Administrative Law Judge Lilian Shepherd  
AHD No. 15-378, OWC No. 718115

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 JUL 19 PM 12:39

(Decided July 19, 2016)

Mark H. Dho for Employer  
Justin M. Beall for Claimant

Before GENNET PURCELL and HEATHER C. LESLIE, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

GENNET PURCELL for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Anthony Johnson (“Claimant”) was a bus operator for Washington Metropolitan Area Transit Authority (“Employer”), a position he held for twenty-seven (27) years. Claimant's job duties were to drive and operate the bus safely including pulling into and out of bus stops, turning and stopping the bus.

On July 1, 2014, while operating a bus, Claimant was in the process of making a left turn when the front and rear tires of the bus sank into a hole in the road rocking Claimant from side-to-side and straining his lower back. Claimant was applying the brakes of the vehicle at the time of the incident and was traveling at an approximate speed of 3 to 5 miles per hour. After the incident, Claimant serviced the next bus stop, and finished his assigned route for the day.

On July 2, 2014, Claimant went to Kaiser Permanente where he was examined and treated by Dr. Hien Nguyen, his primary care physician. Dr. Nguyen's initial diagnosis of Claimant's symptoms was "back pain and neck strain." Dr. Nguyen also noted "no urinary or bowel incontinence, no radiations down arms or legs, and no difficulty walking." Claimant also underwent an x-ray, and was prescribed muscle relaxers and pain pills.

Claimant returned to Dr. Nguyen for follow-up visits on July 8, 2014, and on July 24, 2014, when he was referred to physical therapy and to several specialists including Dr. Steven Scherping, a spine surgeon, whom he saw on July 31, 2015. Dr. Scherping did not find anything "clearly worrisome" on his exam and noted "age appropriate-type range of motion of the cervical spine flexion as well as extension, no gross atrophy or fasciculations in the upper extremities, and no lower extremity clonus or focal weakness." Results from Claimant's 2014 MRI were reviewed and no evidence of any significant root compression, stenosis and pathological change were noted.

Claimant has an extensive history of low back problems dating back to 2012 and was treated by Dr. Nguyen for low back pain as recent as April of 2014. Findings from a February 14, 2012 cervical spine radiograph noted mild disc space narrowing at C5-C6, minimal retrolisthesis of C5 on C6 and small endplate osteophytes and moderate bilateral foraminal disc space narrowing at C5-C6. CE 1 at 17. Comparative findings from a July 28, 2014 cervical spine radiograph noted similar degenerative disc space narrowing at C5-C6 with a prominent circumferential disc osteophyte, minimal retrolisthesis of L4 into L5 with a mild circumferential disc osteophyte, anterior spurring at L3-4, and degenerative facet joint change on the right side at L5-S1. CE 1 at 20.

On August 1, 2014, Claimant filed for early retirement from Employer and retired as a bus operator.

On March 16, 2015, Claimant was evaluated by orthopedic specialist, Dr. Ian D. Gordon, who also treated Claimant's preexisting back problems prior to the July 1, 2014 incident. Dr. Gordon noted Claimant's continued complaints of right-sided back pain and noted that "radicular symptoms are not a major part of this problem." CE 1 at 95. Dr. Gordon noted further that Claimant's July 28, 2014 Magnetic Resonance Imaging ("MRI") was similar to his pre-injury MRI, and that the degenerative changes noted were "not impressive in terms of severity." Dr. Gordon diagnosed Claimant with lumbar disc degeneration. CE 1 at 94 - 96.

In preparation for a formal hearing at the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"), Employer had Claimant examined for an independent medical evaluation ("IME") from orthopedic surgeon Dr. Louis Levitt. Dr. Levitt opined that Claimant sustained a simple muscular strain and reached maximum medical improvement between 8 to 12 weeks of the original July 1, 2014 injury.

On January 27, 2016, an Administrative Law Judge ("ALJ") issued a Compensation Order ("CO") denying the Claimant's claim that his current condition was medically causally related to the July 1, 2014 work incident. *Johnson v. Washington Metropolitan Area Transit Authority*, AHD No. 15-378, OWC No. 718115 (January 27, 2016).

Claimant timely appealed the CO to the Compensation Review Board (“CRB”) by filing Claimant’s Application for Review and Memorandum of Points and Authorities in Support of Application for Review (“Claimant’s Brief”). In his appeal Claimant asserted that “[b]ecause the ALJ ignored . . . material evidence, the CO is not supported by substantial evidence. Claimant’s Brief, Argument I at 14.

Employer opposed the appeal by filing Employer’s Opposition to Claimant’s Application for Review (“Employer’s Brief”). In its opposition, Employer requested an affirmation of the CO and asserted that the Claimant failed to establish his claim for relief based on the preponderance of the evidence.

Claimant filed a reply brief (“Claimant’s Reply Brief” and together with Claimant’s Brief, “Claimant’s Briefs”) reasserting that the ALJ ignored material evidence which distinguished Claimant’s current condition from his pre-incident condition and improperly ignored the treating physician preference rule. (Claimant’s Reply Brief, Arguments I and II at 2-3).

#### ANALYSIS<sup>1</sup>

We begin by noting that the ALJ’s decision in this case was guided in part by her finding that the Claimant lacked credibility. While the ALJ’s characterization of Claimant’s lack of credibility was based on Claimant’s antagonistic attitude toward Employer’s counsel and penchant for commentary outside of the scope of the responses required during cross-examination, upon weighing the evidence, the ALJ determined Claimant’s focused combativeness indicative of a larger deficiency in his overall credibility.

Claimant’s Briefs make no mention of the issue of Claimant’s credibility and do not argue that the ALJ’s lack of credibility determination is unsupported by the record evidence. Neither do Claimant’s Briefs assert that the specific bases identified by the ALJ in the CO as being characteristic of a lack of credibility do not rationally support the ALJ’s finding that Claimant lacked credibility. An ALJ’s decision which is based on credibility findings deserves special weight, because the ALJ has the opportunity to observe the appearance and demeanor of the witness. *See WMATA v. DOES*, 683 A.2d 470 (D.C. 1996). As such, we defer to the ALJ’s credibility findings and excepting our analysis and affirmation of the legal conclusions reached by the ALJ, make no further assessment as to the matter of Claimant’s credibility in our review.

Claimant argues that the ALJ erred “in concluding that Claimant had failed to demonstrate by a preponderance of the evidence that a medical causal relationship existed between Claimant’s current lumbar condition and his July 1, 2014 work-related injury. Specifically, Claimant asserts

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<sup>1</sup> The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (“Act”) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code §32-1521.01(d)(2)(A). “Substantial evidence” as defined by the District of Columbia Court of Appeals (“DCCA”), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB is also bound to uphold 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 the members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

that the ALJ erred in concluding that there is no record evidence to distinguish Claimant's current medical condition from his preexisting medical condition." Claimant's Brief, Argument I at 9 - 10.

Claimant refers to the ALJ's assertion that "[i]n all of the medical records, they [sic] contain little to nothing to differentiate Claimant's pre-accident complaints of low back pain and radiculopathy and their causes from those reflected in Dr. Nguyen's records after the accident." CO at 7.

The ALJ's duty pursuant to the Act is not to distinguish a Claimant's injury, condition or symptomology from the characteristics of any similar or previous injury, condition or symptomology, even in the event where an aggravation or exacerbation injury is claimed. While a compare and contrast-styled analysis is useful to relate specific types of symptoms to specific chronic injuries, where the issue of medical causation is at bar, the ALJ's duty is to determine whether the evidence under review demonstrates that the work-related event, activity or requirement has the potential of resulting in, or contributing to, the injury, condition or symptomology at issue.

Speaking specifically to the issue of medical causation, and in accordance with her duties pursuant to the Act, upon her review of the record evidence, the ALJ noted the absence of any treating physician medical opinion supporting a medical causal link between the July 1, 2014 bus rocking incident and Claimant's current low back condition. She stated, "there are no objective findings by Drs. Gordon and Scherping to support Claimant's subjective complaints other than degenerative diseases." CO at 7.

Referencing her credibility determination, the ALJ explained further that while video of the bus accident verified the bus dipping into a hole in the roadway at a speed of 3 to 5 mph, "there [was] no indication in any of the medical records that Claimant described the [bus] accident as such." CO at 7. Continuing, the ALJ stated, "the video showed [that] the Claimant's body rocked back and forth and it appeared to be a gentle rock and not a jolt." CO at 7.

Finally, the ALJ considered testimony regarding the symptoms Claimant testified to experiencing on the day of the incident (*i.e.* loss of feeling in leg, incontinence due to nerve damage, right-side numbing) and noted that none of these symptoms, as testified to by Claimant, were supported by Claimant's medical records.

In analyzing the totality of Claimant's medical evidence, and the facts of the case, the ALJ applied the required analysis to support her determination that the work-related event, (*i.e.* the bus rocking incident), taking into consideration Claimant's testimony and the inconsistencies determined therein, did not have the potential of contributing to Claimant's current low back condition. We find no error in this analysis.

Claimant asserted further that the ALJ ignored material evidence in the record; "clear record evidence with which destroys the very foundation of the ALJ's decision to discount the opinion of Dr. Nguyen." Moreover, that the ALJ "briefly mentioned the treating-physician preference rule, before stating his [sic] justification for abandoning the rule and instead deferring to the opinion of Employer's physician...over Claimant's treating physician." Further, "[that] in light of Dr. Nguyen's clear and unambiguous medical opinion, it is difficult to understand the ALJ's

logic in abandoning the well-established treating physician preference in this case.” Claimant’s Reply Brief Argument II at 3–4. A review of the record evidence however does not prove this to be true.

Claimant’s argument refers to the treating physician rule, a principal long-applied in the District of Columbia providing that there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998), *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992). Notwithstanding the preference however, “the [ALJ] . . . acts as the judge of credibility,” *Harris v. DOES*, 746 A.2d 297, 302 (D.C. 2000), and “remains free to reject the testimony of a treating physician, [although] [s]he cannot do so without explicitly addressing that testimony and explaining why it is being rejected.” *Kralick v. DOES*, 842 A.2d 705, 711 (D.C. 2004) (internal citation and quotation marks omitted). If [ ] she decides to discount the treating physician’s opinion, the ALJ must “set [ ] forth specific and legitimate reasons for doing so.” *Olson v. DOES*, 736 A.2d 1032, 1041 (D.C. 1999).

In reaching her decision, the ALJ identified several legitimate reasons, all supported by the record, why she preferred the IME physician’s opinion:

1. Dr. Nguyen does not provide an opinion that the accident is the cause of Claimant’s continued neck and low back pain complaints. Dr. Nguyen puts his opinion about Claimants condition in the disability slips;
2. The medical records do not include any extensive notes from Dr. Nguyen, other than a comparison of the prior MRIs. The medical records do not provide any causal relation opinions from any of [Claimant’s] physicians;
3. Claimant’s orthopedist, Dr. Gordon, does not opine that Claimant’s condition is related to a work injury. Dr. Gordon opined that Claimant’s radicular symptoms are not a major part of his problem;
4. Dr. Scherping does not opine that Claimant’s condition is related to a work injury;
5. None of the subsequent reports by any of the other treating physicians provide an opinion as to the causal relationship and they go as far as to say it’s degenerative in nature and there is nothing in Claimant’s examinations that were worrisome.

CO at 8.

In weighing all of the record evidence, and again, through the lens of her credibility determination, the ALJ concluded that Claimant did not establish by a preponderance of the record that his disabling condition was causally related to the July 1, 2014 work injury.

We find that the ALJ properly analyzed the law and gave legitimate reasons for disregarding the treating physician preference in determining the evidence does not preponderate in establishing a medical causal link.<sup>2</sup> *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999); *Short, supra*.

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<sup>2</sup> We acknowledge that the ALJ stated she accorded Claimant’s treating physicians the preferential treatment required under the law, but then inconsistently accepted the “temporary exacerbation/degenerative condition” opinion of Employer’s IME physician. In light of the fact that the ALJ used the proper legal analysis however, and

Claimant's next argument centers on the nature of Claimant's injury. Claimant asserts that the injuries sustained in the July 1, 2014 incident are fundamentally different than any injuries sustained prior to that date, namely because Claimant has not been able to return to full-time work and has required continuous medical treatment since the date of the incident. Claimant's Brief, Argument I at 11.

While the fact of Claimant not having yet returned to full time work is undisputed, the underlying reason for this fact was contested by the parties.<sup>3</sup> The ALJ noted that none of Claimant's many treating physicians provided a medical causation opinion clearly linking his current condition to the July 1, 2014 incident. Rather, that the medical evidence supports that Claimant's complaints are related to Claimant's chronic lower back degenerative condition which were temporarily exacerbated as a result of the July 1, 2014 incident.

Claimant's argument that his complaints were uninterrupted since the date of injury is insufficient, when the evidence is weighed without the benefit of the presumption and the preponderance of the evidence is considered, and irrelevant, where his ongoing degenerative pre-existing back condition is objectively supported by the medical evidence, including Claimant's own treating specialists. The ALJ provided the specific and legitimate reasons required by law to reject the opinions of Dr. Nguyen and Claimant's other treating specialists. Any re-analysis of the record evidence to arrive at a conclusion different from what the ALJ determined would amount to a reweighing of the evidence and is outside of the scope of our review. *Marriott, supra*.

Finally, we consider the Claimant's last argument. Frequently cited as a general proposition, and in very broad terms, Claimant requests that we consider the humanitarian nature of the Act in our review of the ALJ's determination, and Claimant's entitlement to compensation thereunder.

Indeed, the purpose of workers' compensation laws, "which is to provide financial and medical benefits to employees injured in work-related accidents," is a humanitarian one. *Grayson v. DOES*, 516 A.2d 909, 912 (D.C. 1986). Thus, the District of Columbia Court of Appeals ("DCCA") follows the principle that "workers' compensation statutes should be liberally construed to achieve their humanitarian purpose." *Vieira v. DOES*, 721 A.2d 579, 584 (D.C. 1998); *see also Ferreira v. DOES*, 531 A.2d 651, 654 (D.C. 1987).

While the humanitarian purpose of the Act is not always limited to compensability issues, it is in that context that it has the greatest applicability. The DCCA has written:

When our cases speak of the "humanitarian purpose of the statute, they refer specifically to the to the presumption of compensability, D.C. Code § 36-321(1)(1998), which enables a claimant more easily to establish his or her entitlement to benefits and is intended to favor awards in arguable cases.

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identified several specific reasons why she was not persuaded by Claimant's treating physicians, we believe this was an inadvertent misstatement, and not reversible error.

<sup>3</sup> Claimant sought early retirement (as distinguished from disability retirement) on August 1, 2014, 30 days after the date of his injury and after initiating his workers' compensation claim however, prior to any documented medical determination of permanent disability by his treating physician. AHD Hearing Transcript at 39-41.

*See Ferreira, supra.*

The aggravation rule is yet another obvious example of meeting the humanitarian nature of the Act. “It is well-settled that an aggravation of a preexisting condition may [also] constitute a compensable accidental injury under the Act.” *Id.* “The fact that other, nonemployment related factors may also have contributed to, or additionally aggravated [Claimant’s] malady, does not affect [the] right to compensation under the ‘aggravation rule.’” *Id.*

In *Harris, supra*, 660 A.2d at 408, the DCCA distinguished the aggravation of a preexisting injury from a mere recurrence of the injury by requiring some intervening work-related event: “This is not a case, however, in which the ‘recurrence’ was the result of the natural progression of the condition, unaffected by any intervening work-connected cause.” *See id.* (internal citation and quotation omitted); *see also* 9 ARTHUR LARSON, LARSON’S WORKERS’ COMPENSATION LAW §153.02[3](2007)(“To find that there has been an aggravation, it must be shown that the second episode contributed independently to the final disability.”).

Claimant’s Reply Brief asserted that Dr. Levitt’s opinion stating that the July 1, 2014 incident temporarily exacerbated Claimant’s underlying lumbar condition is faulty as Claimant has yet to return to work and remains under active medical care for his symptoms. Claimant asserts further, that if the incident resulted in only a “temporary exacerbation” of Claimant’s preexisting symptoms, then Claimant would be fit to work today. Claimant’s Reply Brief, Argument I at 2.

We reject this rationale however. A claimant is obligated to demonstrate entitlement to a particular benefit by a preponderance of the evidence. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). The record supports that Claimant suffers from a preexisting degenerative lumbar condition; his present inability to return to work, to the extent this fact is at all dispositive, can be viewed as consistent with his ongoing preexisting condition. Claimant has not met his burden to prove compensability in this case; without an expert opinion on causal relationship, Claimant’s evidence fails to bridge the medical causal relationship gap. The ALJ’s determination that Claimant did not meet his burden of production is supported by substantial evidence and is in accordance with the law. Accordingly, we find no evidentiary or legal basis to disturb the ALJ’s determination with regard to the issues on appeal.

#### CONCLUSION AND ORDER

The ALJ’s determination that Claimant failed to meet his burden of establishing by a preponderance of the evidence that his current lower back condition is causally related to the work-related accident of July 1, 2014, is supported by substantial evidence and is in accordance with the law. The Compensation Order is affirmed.

*So ordered.*