

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



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**CRB No. 06-53**

**BRENDA DAY,**

**Claimant - Petitioner**

**v.**

**D. C. DEPARTMENT OF HUMAN SERVICES**

**Self-Insured Employer - Respondent**

Appeal from a Compensation Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD PBL No. XX -864B, DCP No. LT4-DHS002929

Michael S. Steinberg for the Petitioner

Ross Buchholz, Esquire, for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL and SHARMAN J. MONROE, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

**DECISION AND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005)<sup>1</sup>.

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<sup>1</sup>Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

## BACKGROUND

This appeal follows the issuance of a Final Compensation Order (FCO) by the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudications (OHA). In that FCO which issued on May 9, 2006, the Administrative Law Judge (ALJ) determined Claimant-Petitioner (Petitioner) failed to show a medical causal relationship between her alleged current disability and her February 1, 1985 work injury. Petitioner's claim for temporary total disability (TTD) as of March 15, 2002 was subsequently denied.

In her Petitioner for Review, (AFR) Petitioner alleges that the record contains ample evidence demonstrating her entitlement to an award of TTD benefits; therefore the FCO is not supported by substantial evidence

Employer – Respondent (Respondent) filed its response to the AFR on April 11, 2003 asserting the Final Compensation Order is supported by substantial evidence and should, therefore, be affirmed.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (the Panel) as established by the Act and as contained in the governing regulations is limited to making a determination as to whether the factual findings of the 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, (the Act) D.C. Official Code §1-623.01, *et seq.*, at §1-623.28 (a). “Substantial evidence”, as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and the Panel are 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, in addition to asserting that she has submitted ample evidence to entitle her to TTD benefits, and outlining every piece of evidence she has submitted, Petitioner asserts the ALJ failed to afford deference to certain opinions of her treating physicians and simply ignored others. Specifically, Petitioner asserts the ALJ improperly rejected the reports of Dr. Leslie Fenton, internal medicine and neurology specialist, who the ALJ found had treated Petitioner most of her adult life as her primary care physician.

Petitioner asserts “the Final Order attempts to justify this bold rejection of a treating physician’s testimony by stating that Dr. Fenton’s disability slips for Ms. Day ‘provided no explanation as to the etiology of her impairment’”. FCO at 12. Petitioner agrees that this statement is true as the

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disability slips do not state the cause of Ms. Day's disability beyond short statements of her medical conditions. Petitioner asserts that the FCO however ignores the multiple reports by Dr. Fenton that fully explain "the etiology of the impairment".

A review of the FCO reveals that Petitioner is correct. With reference to Dr Fenton, the ALJ did in fact state:

Claimant also presented the disability slips of her recent treating physician, Dr. Fenton, which consist of disability certificates. The certificates of Dr. Fenton only indicate that claimant is "totally incapacitated," and provides no explanation as to the etiology of her impairment. Therefore, I rejected the reports of Dr. Fenton on their face.

FCO at 12. The ALJ made no other mention of Dr. Fenton in the FCO other than the above mentioned concession in his findings of fact that Dr. Fenton has treated Petitioner for most of her adult life. FCO at 7.

A review of the medical record reveals that contained in Claimant's Exhibit 10 are four letters addressed to Petitioner's counsel from Dr. Fenton. These letters are not merely disability slips but are narrative reports, ranging from one to three pages in length containing Dr. Fenton's opinion with regard to the causality of Petitioner's spinal surgery, as well as her neck and back pain. The reports are dated December 29, 2004, December 11, 2003, July 3, 2003 and July 10, 2002 respectively. Thus, we agree with Petitioner's contention that not only did the ALJ fail to consider all of the evidence of record especially Dr. Fenton's opinion regarding the "etiology of the impairment", he also failed to adequately address and apply the long recognized preference accorded to a treating physician's opinion in this jurisdiction.

The ALJ cited to the great weight that is to be accorded to the opinion of the treating physician and properly added that where there are persuasive reasons to do so, a treating physician's opinion may be rejected<sup>2</sup>. The ALJ's "persuasive reason" for rejecting Dr. Fenton's reports, i.e., that he provided no explanation as to the etiology of her impairment, we find, is contrary to the record evidence. As such, the Board cannot conclude that the ALJ's conclusion that the Petitioner failed to show a medical causal relationship between her current disability and her February 1, 1985 work injury is supported by substantial evidence.

Petitioner also asserts the FCO gave undue credence to Respondent's Independent Medical Examiner's and details specific opinions rendered by the IME examiners with Respondent's reasons why the ALJ should not have accepted the IME opinions over the treating physicians. Given that the ALJ completely omitted 4 reports of the treating physician Dr. Fenton, how and why he afforded more weight to certain IME opinions cannot be addressed, as it is unclear how the ALJ would weigh the opinions of Dr. Fenton had he included them in his analysis.

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<sup>2</sup>Citing *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845 (D.C. App 1998); *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350 (D.C. App 1992). See also *Shelda Kralick v. Dist. Of Columbia Dep't of Employment Services*, 842 A.2d 705 (February 26, 2004)(*Kralick*). Pursuant to the 2001 amendments to the Act the public sector has adopted the private sector's treating physician preference. See D. C. Code §1-623.23(4).

Petitioner also asserts that the ALJ ignored Respondent's concession "early on that [Petitioner's] disabling injuries are work-related". The Panel finds Petitioner's assertion without merit as it is based on an incorrect statement that Respondent now asserts Petitioner's work injuries were not work related. Review of the FCO reveals that the issue presented by the parties for resolution was whether or not Petitioner had any remaining disability as a result of the February 1, 1985 work injury and if so, the nature and extent thereof. In a footnote, the ALJ added the issues had been narrowed to only that of the claimant's right to wage loss benefits from March 15, 2002 and that the other issues were resolved prior to the formal hearing. The ALJ further included in his Findings of Fact that he incorporated the finding in the prior Recommended Decision that claimant sustained cervical and lumbar strains at work on February 1, 1985. Thus, notwithstanding the fact that Respondents retains the right to request a modification on an award and to challenge the causal relationship or ongoing disability at anytime, Petitioner's assertion is unfounded.

While the Panel need not go further with regard to Petitioner's appeal, in light of its determination that the FCO should be reversed and remanded to the ALJ for consideration of omitted evidence, the Panel finds it necessary to address Petitioner's other arguments including that the ALJ failed to recognize that a pre-existing condition is not an automatic block to an award of disability benefits. As Petitioner correctly points out it is well settled in this jurisdiction under both workers' compensation acts that an injured employee is entitled to compensation for a new injury even where the new injury is in the nature of an aggravation of a prior or pre-existing injury or condition. *See Anamalechi-Oladukon v. District of Columbia Public Schools*, CRB No. 04-009B, AHD No. PBL 02-008B (September 20, 2006) *citing Barron v. District of Columbia Dept. Of Employment Services*, CRB No. 06-054, AHD No. PBL 05-010, DCP No. MDMPED-0004151 (September 6, 2006). Accordingly, on remand, the ALJ should address in his analysis whether Petitioner's wage loss is due to an aggravation of a pre-existing condition.

Petitioner asserts that the ALJ also committed error by admitting post hearing an IME report dated February 8, 2005. Petitioner offered only that the ALJ "appears to have ruled that Respondent could not have submitted the February 2005 IME report prior to the Formal Hearing". However, review of the hearing transcript, reveals that the ALJ agreed to leave the record open to allow submission of an IME report in answer to Petitioner's last minute submission of the December 2004 reports of Dr. Fenton which the ALJ nevertheless did not consider. Thus while the Panel agrees the ALJ has the authority and duty to make a complete record and to keep the record open to allow submission of additional records and committed no reversible error by admitting post hearing the February IME report. *See generally Celane Darden v. District of Columbia Department of Employment Services*, 911 A.2d 410 (December 2, 2006)

Lastly, the Panel must comment on Petitioner's sixth point on appeal which is that the FCO improperly ignored the binding prior determination by Hearing Examiner Carolyn Roebuck that "when [Petitioner] was injured on February 1, 1985, she had no prior neck, shoulder or back problems when she fell and struck her head and other body parts". Contrary to Petitioner's assertion, the ALJ's rejection of this prior ruling did not constitute error as the Hearing Examiner's statement that Petitioner was not having any problems on the date of the injury does not necessarily mean that she had no pre-existing conditions in those areas. The statement

simply means what is says -- she had no problems with her neck and back at that particular time. The Hearing Examiner did not engage in any further discussion with regard to her pre-existing condition. Thus, we reject Petitioner's assertion and conclude that the ALJ was not precluded by this particular statement and the ALJ's revisiting of this issue was not error as alleged.

### **CONCLUSION**

The Final Compensation Order of May 9, 2006 is not supported by substantial evidence and is not in accordance with the law.

**ORDER**

The Final Compensation Order of May 9, 2006 is hereby reversed and remanded to AHD. Upon remand the ALJ should consider the all of the narrative reports of Dr. Fenton contained in CE 10; apply the treating physician's preference; rule out whether or not Petitioner's disability is the result of an aggravation of a pre-existing condition; and reconsider whether claimant's current disability it is causally related to the work injury of February 1, 1985, and if so, the nature and extent of said disability.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

March 8, 2007 \_\_\_\_\_  
Date