

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. 08-045

DALE R. MCALISTER,

Claimant – Petitioner,

v.

FLIPPO CONSTRUCTION COMPANY AND PMA INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order on Remand of  
Administrative Law Judge Anan K. Verma  
AHD No. 03-314, OWC No. 585987

Benjamin T. Boscolo, Esq., for Petitioner

Jane J. Gerbes, Esq., for Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Review Panel; with JEFFREY P. RUSSELL, *Administrative Appeals Judge*, concurring:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and § 32-1522 (2004), 7 DCMR § 230 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

## OVERVIEW

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, D.C. Department of Employment Services (DOES), issued October 31, 2007. The instant appeal constitutes the third time this case has been before the CRB pursuant to Applications for Review taken from Compensation Orders issued AHD.

Based upon a work-related injury occurring on January 8, 2003, Claimant-Petitioner (Petitioner) seeks temporary total disability benefits from the date of his injury to June 16, 2003 when he secured employment with an employer in California, temporary partial disability benefits from June 16, 2003 to the present and continuing, and payment of causally-related medical benefits including a recommended MRI. Pursuant to the original Compensation Order issued in this matter (May 28, 2004), the presiding ALJ found that Petitioner's injury arose out of and in the course of his employment. The ALJ nevertheless denied all aspects of Petitioner's claim for relief beyond the award of temporary total disability benefits for the two day period immediately following his injury and the requested medical benefits. Relying upon the IME report of Employer-Respondent's (Respondent's) physician over the opinion of Petitioner's treating physician, the ALJ found that Petitioner was able to return to light duty employment which Respondent had made available within two days of Petitioner's injury, and thus rejected Petitioner's argument that he was unable to fulfill the light duty work that was offered because of his work-related injury. The ALJ rejected Petitioner's claim for temporary partial disability benefits based upon Petitioner's claim of partial wage loss after he secured employment outside of the Washington, D.C. area on the grounds that Petitioner's relocation was tantamount to a failure to accept employment commensurate with his abilities.

On appeal from the May 28, 2004 Compensation Order, the CRB reversed and remanded the case to AHD on the grounds that the ALJ's basis for rejecting the treating physician's opinion that Petitioner was unable to work in any capacity (*i.e.* that the physician's opinion was based upon Petitioner's subjective complaints only) was not based upon substantial evidence of record and not in accord with law. *McAlister v. Flippo Construction Company*, CRB No. 04-64 (February 23, 2006). The CRB held that for the ALJ to reject the treating physician's opinion, the ALJ would have to first make a determination that Petitioner's subjective complaints were not credible. The CRB also held that the basis for the ALJ's rejection of Petitioner's claim for temporary partial disability benefits following his relocation from the Washington, DC area did not, in and of itself, constitute failure to accept employment commensurate with his abilities or a voluntary limitation of Petitioner's income in the absence of a finding by the ALJ of no compelling reasons (financial, health or otherwise) necessitating his relocation.

Upon remand, the ALJ issued a second Compensation Order (July 30, 2007) in which Petitioner's claims for temporary total disability beyond January 10, 2003, and for temporary partial disability benefits beyond June 16, 2003 were again denied. In rejecting the treating physician's opinion that Petitioner was unable to return to work, the ALJ again relied upon the lack of any objective medical evidence upon which the doctor based his opinion, coupled with the ruling that the doctor's opinion was, in effect, a vocational determination as opposed to a medical opinion. In again rejecting Petitioner's claim for partial wage loss benefits subsequent

to his move to California, the ALJ cited the lack of any evidence offered by Petitioner demonstrating that his relocation was necessitated by compelling financial or health reasons.

Upon appeal of the ALJ's second Compensation Order, the CRB again reversed and remanded the case to AHD. *McAlister v. Flippo Construction*, CRB No. 07-154 (October 23, 2007). The CRB cited as reversible error the ALJ's continued disallowance of the treating physician's opinion because it was based upon Petitioner's subjective complaints without the ALJ having made the necessary credibility determination with respect to Petitioner's subjective complaints. In the absence of such determination, the CRB pointed out, the ALJ could not properly reject the treating physician's opinion and thus committed reversible error in relying upon Respondent's IME report to find that Petitioner could return to light duty employment. With respect to the issue of Petitioner's post-injury move to California, the CRB concurred with the ALJ's finding that the evidence of record did not support a finding of compelling financial or health reasons necessitating Petitioner's relocation. The CRB nevertheless held that in the absence of a finding supported by substantial evidence of record that Petitioner was physically able to return to the light duty employment that Respondent made available, both the conclusion that Petitioner voluntarily limited his income by rejecting that employment was premature and any determination regarding Petitioner's claim to partial wage-loss benefits upon his subsequently securing employment in California were premature.

Pursuant to the CRB's October 23, 2007 remand, on October 31, 2007 the ALJ issued the Compensation Order on Remand that is now before this Review Panel pursuant to an Application for Review filed with the CRB on November 29, 2007. The ALJ reaffirmed his finding that Petitioner sustained a compensable work-related injury, and affirmed the prior award of temporary total disability benefits from January 8 to January 10, 2003 plus payment of causally-related medical expenses. Again, the ALJ rejected both Petitioner's claim for temporary total disability benefits from January 10, 2003 until Petitioner secured employment in California, and his claim for temporary partial disability benefits thereafter. For the reasons hereafter set forth, the Compensation Order on Remand herein appealed is affirmed.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, 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. D.C. Official Code § 32-1521.01(d)(2)(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. 2003). Consistent with this scope of review, the CRB and this 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.

As noted, the instant appeal constitutes the third time this case is before the CRB pursuant to applications for review taken from Compensation Orders issued in this matter. As with the previous appeals, the ALJ's determination that Petitioner sustained an injury arising out of and in the course of his employment is not disputed. At issue is the nature and extent of Petitioner's resulting disability, if any, including whether Petitioner voluntarily limited his income by refusing to accept suitable alternative employment. As grounds for the instant appeal, Petitioner specifically asserts that the ALJ again failed to comply with previous CRB mandates thereby committing reversible error on several grounds: (1) that the ALJ rejected the treating physician's opinion without making the necessary finding as to Petitioner's credibility, without considering the entirety of the treating physician's record, and without considering the fact that the claim for relief included a request for authorization for diagnostic testing needed in order to determine the cause of Petitioner's symptoms; (2) that substantial evidence of record does not support the ALJ's finding that Petitioner unjustifiably abandoned the light duty employment that Respondent had made available to him: that Petitioner was wrongfully terminated for exercising his legal rights under the Workers' Compensation Act; (3) that substantial evidence of record does not support the ALJ's finding that suitable alternative employment was available to Petitioner in the D.C. labor market after January 10, 2003; and (4) that the ALJ misapplied *Joyner v. Dept. of Employment Services*, 502 A.2d 1027 (D.C. 1985) in rejecting Petitioner's claim for temporary partial disability because *Joyner* does not confine an employee to accepting suitable alternative employment within the geographical limits of the D.C. labor market area.

In addressing Petitioner's various challenges, it is worth repeating that the burden of proof is ultimately on Petitioner to show, by a preponderance of the evidence, both the nature and the extent of his disability. *Dunston v. District of Columbia Dep't of Employment Servs.*, 509 A.2d 109, 111 (D.C. 1986). Inasmuch as there is no dispute as to the temporary nature of Petitioner's disability, the ALJ was correct in proceeding to consider whether, and to what extent, Petitioner was still employable. As noted in *Logan v. D.C. Dept. of Employment Services*, 805 A.2d 237 (D.C. 2002), deciding the extent of disability in any case has both a procedural and a substantive component. The procedural component consists of a burden-shifting device whereby the claimant must establish in the first instance an inability to return to his usual employment. Where the claimant demonstrates an inability to perform his or her usual job, "a *prima facie* case of total disability is established." 805 A.2d at 242. At that point, the burden shifts to the employer to establish suitable alternate employment opportunities available to claimant considering his or her age, education and work experience. *Id.* This scheme, the court noted, is consistent with its prior holding in *Washington Post v. D.C. Dept of Employment Services*, 675 A.2d 37, 41 (D.C. 1996) that "the burden is on the employer to prove that work for which the claimant was qualified was in fact available," which the employer can establish "by proof short of offering the claimant a specific job or proving that some employer specifically offered claimant a job." 805 A.2d at 242-243. If the employer succeeds in presenting sufficient evidence of suitable job availability to overcome a finding of total disability, "the claimant may refute the employer's presentation -- thereby sustaining a finding of total disability -- either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment. Absent either showing by the claimant, he is entitled only to a finding of partial disability." *Logan*, 805 A.2d at 243.

In the instant case, the ALJ held that Petitioner offered sufficient evidence of his inability to return to his usual employment, thereby establishing a *prima facie* case of total disability. In accordance with *Logan*, the ALJ turned to an assessment of whether work for which Petitioner was qualified was nevertheless available. Citing Respondent's IME physician's release of Petitioner to light duty work, and Respondent's immediate offer of sedentary employment based thereon, the ALJ held that Respondent successfully established the availability of suitable alternate employment thereby rebutting Petitioner's *prima facie* showing of total disability, and that, thus overcoming a finding of total disability.

The foregoing determinations by the ALJ are not challenged. What is at issue is the ALJ's refusal to accord the opinion of Petitioner's treating physician, upon which Petitioner relied in challenging Respondent's evidence of suitable available employment, preference over the opinion of Respondent's IME physician. It is well settled in this jurisdiction that a treating physician's opinion is entitled to preference over that of a non-treating physician unless sufficient reasons are given for rejecting the opinion of the treating physician. See *Canlas v. D.C. Dept. of Employment Services*, 723 A.2d 1210, 1212 (D.C. 1999); *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845, 851 (D.C. 1998); *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350, 1353 (D.C. 1992). The ALJ's rationale for refusing to accord the treating physician's opinion any greater weight than that of the IME physician was the fact that the treating physician's opinion was based exclusively upon Petitioner's subjective complaints. However, as previous CRB Review Panels have ruled in this case, the mere fact that the treating physician's opinion was based upon Petitioner's subjective complaints is not in and of itself a sufficient basis for rejecting that opinion in the absence of a finding that Petitioner's subjective complaints were not credible. While "pain and suffering," an accepted element of tort damages, cannot, as such, serve as a separate basis for an award under the Act, this is not to say that there can be no disability (as defined by D.C. Official Code § 32-1501(8)) based solely on subjective complaints. *Murrell v. Dept. of Employment Services*, 697 A.2d 40, 42 (D.C. 1997). Thus, unless subjective complaints of physical pain and consequent suffering are found to be lacking in credibility, they may properly serve as a basis for an examining physician's medical determination of physical incapacity or impairment, unless the subjective complaints. See *Vallez v. Progressive Nursing Staffers*, Dir. Dkt. No. 01-45, OHA No. 98-531B (Dec. 6, 2001) (affirming the ALJ's rejection of the treating physician's restrictions based solely on the claimant's subjective complaints of pain, where the Director determined that that substantial evidence of record supported the ALJ's finding that the claimant's testimony regarding the nature and extent of his disability was not credible).

Whereas the ALJ failed to make any credibility determination regarding Petitioner's subjective complaints in the first two compensation orders issued in this case, in the Compensation Order on Remand herein appealed the ALJ expressly found "claimant's testimony as it concerns his low back pain and its consequences to be incredible and unworthy of belief . . . exaggerated, and at odds with any objective evidence." Comp. Order on Remand, at pg. 3. This credibility finding would thus appear to resolve in Respondent's favor the ALJ's refusal to accord the treating physician's opinion any greater weight than that of the IME physician, for it is well recognized in this jurisdiction that the credibility findings of an ALJ are entitled to considerable weight upon appellate review. However, as with other findings of fact, credibility findings must nevertheless be supported by substantial evidence of record. *Dell v. D.C. Dept. of*

*Employment Services*, 490 A.2d 102, 106 (D.C. 1985); *Murray v. D.C. Dept. of Employment Services*, 765 A.2d 980, 984 (D.C. 2001); *Nixon v. D.C. Water & Sewer Authority*, CRB No. 07-165, AHD No. 07-65 (Dec. 12, 2007); *Miner v. Washington Metropolitan Area Authority*, CRB No. 07-24, AHD No. 06-270 (April 2, 2007); *Russell v. Washington Metropolitan Area Authority*, CRB No. 03-241, OHA No. 03-241 (Sept. 28, 2005). See 4 Stein *et al.*, Administrative Law § 27.03 (2001 ed.). Thus, notwithstanding the special deference that is accorded an ALJ's credibility findings, the CRB has rejected such findings as not supported by substantial evidence of record where the ALJ has failed to comment upon the witness's demeanor and appearance or evaluate the witness's testimony in the light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence of record. *Russell v. Washington Metropolitan Area Authority*, *supra* (citing *Cohen v. A&A Hardward*, Dir. Dkt. No. 88-93, OHA No. 86-272A (July 2, 1990). *Accord*, *Nixon v. D.C. Water & Sewer Authority*, *supra*.

Consistent with this standard, we are compelled to reject the ALJ's credibility finding in the instant case as not supported by substantial evidence of record. Not only has the ALJ failed to address the necessary components of a proper credibility finding, we can find not even a scintilla of supportive evidence in the record. Again, the ALJ found Petitioner's testimony as it concerns his low back pain and its consequences to be "incredible and unworthy of belief . . . exaggerated, and at odds with any objective evidence." Petitioner's testimony at the formal hearing regarding his subjective complaints is fully consistent with the subjective complaints with which he presented to his treating physician. Petitioner testified that his neck no longer troubled him, that his neck was "fine", and that the area under his armpit about which he had originally complained to this treating physician bothers him "every now and then a little bit . . . but nothing really." HT at 53. Petitioner testified that both areas are currently "doing very well." *Id.* His only current complaints, he testified, were with respect to his lower back and his leg, the pain of which he rated on a scale of one to ten as "probably a four." HT at 54. This testimony can hardly be characterized as "exaggerated." Moreover, it is fully consistent with the subjective complaints with which Petitioner presented to his treating physician, *i.e.* complaints immediately following Petitioner's work injury of considerable pain and discomfort at numerous bodily locales including his neck, arm and upper back area, lower back and legs that progressively improved over the duration of his treatment. The physician's last progress note (2/19/03) notes that Petitioner presented with "significant improvement" regarding his neck, complaining only of the low back pain, which Petitioner described as "still quite painful" although with "slight improvement", and of "persistent" "right lower extremity radicular pain" that was "doing a bit better however." Claimant's Exhibit (CE) No. 1. There is nothing in the ALJ's "credibility" finding that comments upon the Petitioner's demeanor and appearance at the formal hearing, or that evaluates Petitioner's testimony for rationality, internal consistency, or with respect to the manner in which it "hangs together" with the other evidence of record other than the vague comment that Petitioner's testimony concerning his low back pain and its consequences is "at odds" with unspecified "objective evidence." The ALJ's purported "credibility" determination is nothing more than a weighing of Petitioner's testimonial evidence against other evidence of record, which is certainly within the ALJ's purview, but it does not constitute a credibility determination worthy of affirmation on appeal.

Notwithstanding rejection of the ALJ's credibility determination, we nevertheless affirm the ALJ's rejection of the treating physician's opinion in favor of that of the IME physician. This is so because, as the ALJ noted, the treating physician's opinion that Petitioner was "incapable of work" and "unable to work at this time" constituted a disability determination outside the scope of the physician's expertise in the absence of any explanation as to how Petitioner's work injuries interfered with and/or prevented him from returning to work in any capacity. As the Court of Appeals has explained, "[w]hether a claimant is disabled from doing any work is a legal or vocational issue, not a medical issue." *Darden v. Dept. of Employment Services*, 911 A.2d 410, 416 (D.C. 2006). Where unsupported by substantial evidence of record, as in the instant case, the non-medical opinion of a treating or examining physician that a claimant is "disabled" or "unable to work", has no special significance. *Darden, supra*, citing *Frank v. Barnhart*, 326 F.3d 618, 620 (5th Cir. 2003). Accordingly, we affirm the ALJ's determination, based upon his weighing of the medical and other pertinent evidence in disregard of the treating physician's unsupported assertion that Petitioner is, "totally disabled" and "unable to return to work", that Petitioner was capable of performing light duty employment.<sup>1</sup>

Petitioner's second argument on appeal is that that substantial evidence of record does not support the ALJ's finding that Petitioner unjustifiably abandoned the light duty employment that Respondent had made available to him; that Petitioner was wrongfully terminated for exercising his legal rights under the Workers' Compensation Act. Specifically, Petitioner asserts that he was terminated for exercising his legal right to seek medical treatment from a physician of his choosing which Respondent refused to allow. Petitioner's Memorandum in Support of Application for Review, pg. 10.

D.C. Official Code § 32-1542 states in relevant part:

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer . . . .

In construing the foregoing provision, the D.C. Court of Appeals has held that "an employee's attempt to make a claim under the Act is neither confined to the formal filing of a worker's compensation claim nor limited to claims for money." *Abramson Associates v. D.C. Dept. of Employment Services*, 596 A.2d 549, 552 (D.C. 1991). *Accord, Lyles v. D.C. Dept. of Employment Services*, 572 A.2d 81, 83 (D.C. 1990)). Arguably Petitioner's seeking of medical treatment from a physician of his own choosing, as the first step in attempting to file a claim, thus brought him within the protection of Section 32-1542, thereby in turn requiring a determination of whether Respondent's motivation for discharging Petitioner was due to his pursuit of his rights under the Act. *Lyles*, 572 A.2d at 84. It is on this point that Petitioner's argument utterly fails, for the hearing transcript to which Petitioner cites (IIF pp. 125:7 –

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<sup>1</sup> Nor are we persuaded by Petitioner's argument on appeal as to the relevance of the treating physician's opinion that further diagnostic testing (in the form of an MRI) was needed in order to determine the cause of Petitioner's symptoms. If anything, this suggests the uncertainty of the treating physician's diagnosis. In any event, the argument is significantly undermined by the fact that Petitioner has never submitted to the requested diagnostic testing notwithstanding that it has been almost four years since the ALJ ordered (pursuant to the Compensation Order of May 28, 2004) that the testing be undertaken at Respondent's expense.

126:10) in support of his argument that he was terminated for seeking medical treatment simply does not evidence the proposition Petitioner asserts. In addition to expressly refuting Petitioner's assertion that he was told by his immediate supervisor that he would lose his job if he sought treatment from his own doctor, the cited hearing transcript indicates that Respondent did not agree that Petitioner had a right to seek out his own medical provider; that if Petitioner was dissatisfied with the IME physician to which he had been initially referred, his right was to select from a panel of physicians that Respondent would provide. We thus reject Petitioner's argument on appeal that he was wrongfully terminated for exercising his rights under the Workers' Compensation Act for lack of even a modicum of proof in support of his assertion.

The ALJ found that Petitioner was offered suitable alternative employment in the form of sedentary light duty work commensurate with the light duty restrictions imposed by Respondent's IME physician, in valid disregard of the treating physician's opinion to the contrary (*see* discussion, *supra*). Substantial evidence of record further supports the ALJ's finding that Petitioner voluntarily limited his income by abandoning without justifiable cause the suitable alternative employment that Respondent had made available to him.

Petitioner's final argument on appeal is that the ALJ misapplied *Joyner v. Dept. of Employment Services*, 502 A.2d 1027 (D.C. 1985), in rejecting Petitioner's claim for temporary partial disability upon Petitioner securing employment in California because *Joyner* does not confine an employee to accepting suitable alternative employment within the geographical limits of the D.C. labor market area. We do not disagree with Petitioner's characterization of *Joyner*. However, Petitioner's argument is irrelevant given this Review Panel's affirmation of the ALJ's determination that Respondent provided suitable alternative employment within the District which Petitioner relinquished without justifiable cause, where Petitioner further failed to establish that his subsequent relocation to California was necessitated by compelling health or financial reasons. In light of these findings, which we have herein held to be supported by substantial evidence of record, the ALJ's denial of Petitioner's entitlement to temporary partial disability benefits upon securing employment in California is affirmed.

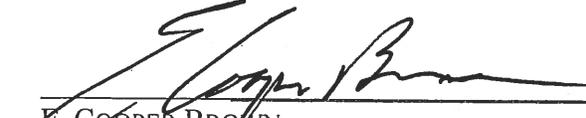
#### CONCLUSION

Pursuant to the Compensation Order on Remand herein appealed, substantial evidence of record supports the ALJ's findings that Petitioner was capable of returning to light duty employment, that Respondent provided Petitioner with suitable alternative employment, and that Petitioner voluntarily relinquished said employment without justifiable cause thereby voluntarily limiting his income. Accordingly, the ALJ's determination that Petitioner is neither entitled to temporary total disability benefits from the date he relinquished his employment with Respondent to the date he secured alternative employment beyond the jurisdiction of the District of Columbia, nor temporary partial disability benefits thereafter, is supported by substantial evidence of record and in accordance with applicable law.

ORDER

The Compensation Order on Remand issued in this matter on October 31, 2007 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
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E. COOPER BROWN  
Chief Administrative Appeals Judge

March 25, 2008

DATE

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, concurring:

While I agree with and concur in the majority opinion's resolution of this case, I do not agree with the discussion concerning the limitations upon an ALJ's discretion to find that a witness's testimony is not credible unless the credibility determinations are somehow supportable by reference to some extrinsic contradictory evidence. While I am sympathetic to and agree in principle with the modern trend in American jurisprudence which is shying away from permitting fact finders to make credibility determinations upon demeanor and other subjective testimonial characteristics, the District of Columbia has not, to my knowledge, joined this trend. I do not view it as within our power or role to alter the basic concepts of evidentiary evaluation in adversarial judicial and quasi-judicial settings. Such is the role of the District of Columbia Court of Appeals, and until they have taken a new position on this question, I decline to join in a departure from existing practice, which is one of great deference to the credibility findings of the fact finder, which in our arena, means the ALJ.