

**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 (Dir.Dkt.) No. 04-64**

**DALE MCALISTER,**

**Claimant – Petitioner**

v.

**FLIPPO CONSTRUCTION COMPANY AND PMA INSURANCE COMPANY,**

**Employer/Carrier – Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
OHA No. 03-314, OWC No. 585987

Benjamin T. Boscolo, Esq., for the Petitioner

Jane J. Gerber, Esq., for the Respondent<sup>1</sup>

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

SHARMAN J. MONROE, *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 §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>2</sup>

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<sup>1</sup> At the formal hearing, the Respondent was represented by John P. Rufe, Esq. On December 27, 2005, Jane J. Gerber entered her appearance on behalf of the Respondent.

<sup>2</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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of

## BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on May 28, 2004, the Administrative Law Judge (ALJ) awarded temporary total disability benefits from January 8, 2003 to January 10, 2003 along with medical expenses, but denied temporary partial disability benefits continuing from June 16, 2003. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order.<sup>3</sup>

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not based upon substantial evidence and is not in accordance with the law.

## ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review 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 standard of review, the CRB and this Review Panel are constrained 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, Petitioner alleges the ALJ committed errors of law and of fact requiring that the decision to be vacated and reversed. The Petitioner asserts that, despite clear guidance, the ALJ failed to defer to the opinion of the treating physician and proffered inadequate reasons for not doing so. He asserts that after rejecting the opinion of the treating physician, the ALJ failed to weigh the competing medical evidence. The Petitioner argues that a determination not to accept the opinion of the treating physician does not, *ipso facto*, mean that the

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workers’ and disability compensation claims arising under the D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 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.

<sup>3</sup> Along with his Application for Review, the Petitioner requested additional time to submit a Memorandum in support thereof. Although the regulations previously governing appeals required that the memorandum be filed with the Application for Review, it was the policy of the Director, Department of Employment Services to routinely grant requests for extension of time to file a memorandum. However, the policy was abolished with the institution of the CRB, which assumed the appellate responsibilities of the Director, in light of the new statutorily imposed time constraints for issuing decisions. Nevertheless, as the Petitioner’s memorandum was received before this matter was assigned for review, the Petitioner’s request is granted and his Memorandum is accepted on its merits.

opinion of the other physician or physicians constitutes substantial evidence. Finally, the Petitioner asserts that the ALJ misapplied the law in finding that his relocation to California for financial reasons was tantamount to failing to accept employment commensurate with his abilities. After reviewing the record, the Panel agrees with the Petitioner.

It is well-settled in this jurisdiction that great weight is to be accorded to the opinion of the treating physician. There is a twofold rationale underlying this preference: a treating physician is less apt to be consciously or subconsciously biased by the litigation and more likely more familiar with the injured worker's condition because he has spent a greater amount of time with the injured worker. *Kralick v. D.C. Department of Employment Services*, 842 A.2d 705, 712 (D.C. 2004). However, an ALJ remains free to reject the opinion of a treating physician and must provide persuasive reasons for the rejection. In other words, an ALJ cannot reject the opinion of the treating physician "without explicitly addressing that testimony and explaining why it is being rejected." *Lincoln Hockey, LLC v. D.C. Department of Employment Services*, 831 A.2d 913, 919 (D.C. 2003). Some of the reasons for rejecting the opinion of the treating physician are sketchiness, unsupported by objective medical tests, unsupported by sufficient information on physical examination, and vagueness. See *Erickson v. WMATA*, Dir. Dkt. No. 93-82, H&AS No. 92-63, OWC No. 0181489 (June 5, 1997).

The record shows that Dr. Mark Davis saw the Petitioner on January 9, 2003. After examining the Petitioner, Dr. Davis released him to light duty work with apparent restrictions on standing, sitting, walking and lifting and a ban on lifting.<sup>4</sup> Employer Exhibit No. 1. Dr. Davis examined the Petitioner this one time only. The Petitioner returned to light duty, sedentary work, but left after a few hours complaining of back and leg pain. HT at p. 46.

The record shows that Dr. Joel Fetcher treated the Petitioner from January 10, 2003 to February 19, 2003 and issued a report following each examination. He opined, following his first examination of the Petitioner, that the Petitioner sustained a cervical and lumbosacral spine strain as a result of the January 8, 2003 work incident. Dr. Fetcher prescribed physical therapy and opined that the Petitioner was unable to work. On subsequent examinations, Dr. Fetcher reported that while the Petitioner showed some improvement in his physical condition, he still experienced persistent complaints of pain and spasm. Dr. Fetcher consistently recommended an MRI scan and opined that the Petitioner was unable to work. The evidence shows that the MRI has not been performed.

In denying the Petitioner's request for temporary total disability benefits after January 10, 2003, the ALJ rejected the Dr. Fetcher's opinion. The ALJ stated:

Although recommending limited activity, Dr. Fetcher opined claimant was "unable to work" without any indication whether claimant was unable to perform even sedentary duties or was totally incapacitated. . . . Thus, Dr. Fetcher's conclusion that claimant was "unable to work" without any elaboration of the extent of claimant's disability, or the nature of restricted work, clashes sharply with claimant's diagnostic findings as well as the findings of his examinations.

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<sup>4</sup> In his January 9, 2003 report, Dr. Davis wrote "1/9" in the box labeled "able to return to light duty work" and wrote the words "stand, sit, walk, no lift" above the same box.

Accordingly, the undersigned is constrained to find Dr. Fetcher's repeated reference to claimant's tenderness, spasm and pain in his progress notes seems to be predicated on claimant's subjective complaints of pain. For these reasons, Dr. Fetcher's opinion cannot be credited with any significant weight.

Compensation Order at p. 6.

The ALJ's reasons for rejecting the treating physician's opinion are not persuasive. While a blanket opinion of "unable to work" may be insufficient to support a finding of temporary total disability when compared to an opinion with stated limitations, on this record, it is not so. Dr. Davis returned the Petitioner to light duty work stating "stand, sit, walk and no lift". Employer Exhibit No. 1. Dr. Davis did not examine the Petitioner after he stopped the light duty position due to pain. In contrast, Dr. Fetcher, saw the Petitioner after he attempted to return to type of work prescribed by Dr. Davis. Dr. Fetcher conducted an examination of the Petitioner and, based upon physical findings, opined that he was unable to work. At subsequent examinations, the Petitioner showed some improvement, but still presented with physical complaints. The only objective test in the record was an x-ray taken on January 9, 2003. While it was unremarkable, it was clear that Dr. Fetcher felt that further testing via an MRI scan was necessary based upon his knowledge of the Petitioner's physical condition and the Petitioner's ongoing complaints of pain, tenderness and spasm. The MRI scan, to date, has not been performed. While the evidence shows that the Petitioner worked as a forklift operator for a short time after his injury, it also shows that he stopped working due to back and leg complaints. HT at 49. Although the ALJ rejected Dr. Fetcher's opinion because it was based upon the Petitioner's subjective complaints, the ALJ failed to find the Petitioner not credible. Thus, the ALJ's finding that the Petitioner was not disabled after January 10, 2003 is not supported by substantial evidence in the record. Likewise, the ALJ's subsequent finding that the wage loss the Petitioner suffered after January 10, 2003 was not a function of his employment is not supported by substantial evidence in the record.

The ALJ also found that the Petitioner's move to California was tantamount to a failure to accept employment commensurate with his abilities. Without more, this finding is not supported by substantial evidence in this record. The ALJ cited *Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027 (D.C. 1986) as legal support for the finding that the Petitioner failure to accept employment commensurate with his abilities. However, *Joyner* does not stand for the proposition that any time an injured worker relocates away from the Washington D.C. metropolitan area, the injured worker, by law, voluntarily limits his income or fails to accept suitable employment. Indeed, the court in *Joyner* noted that the reasons prompting a relocation, *ex. financial, health*, should be considered in deciding whether to discontinue an injured employee's benefits. In addressing this matter, the ALJ did not make a finding as to the reason (s) for the Petitioner's relocation to California or whether the Petitioner's continuing residence in California was reasonable if suitable alternative with the Respondent is available in the Washington D.C. metropolitan area.

CONCLUSION

The Compensation Order of May 28, 2004 is not supported by substantial evidence in the record, is not in accordance with the law and must be remanded for further findings of fact and conclusions of law consistent with the above discussion.

**ORDER**

The Compensation Order of May 28, 2004 hereby VACATED and REMANDED.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE  
Administrative Appeals Judge

February 23, 2006  
DATE