

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-031**

**DEWAYNE JACKSON,  
Claimant–Petitioner,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Self-Insured Employer/Insurer-Respondents.**

Appeal from a January 28, 2015 Compensation Order by  
Administrative Law Judge Douglas A. Seymour  
AHD No. 14-070, OWC No. 697614

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 JUL 7 AM 11 59

(Decided June 7, 2015)

Michael J. Kitzman for the Claimant  
Mark H. Dho for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, and LINDA F. JORY, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On October 10, 2012, Claimant was injured when he was involved in a motor vehicle accident while driving a bus. Claimant sustained injuries to his neck, left ring finger, and back.

Claimant came under the treatment of Drs. Mark Cohen and David Dorin. Dr. Cohen diagnosed Claimant with a cervical strain, lumbar radiculopathy, history of prior back problems, and sprain of the left small finger, right ring finger, and left big toe. Conservative treatment was recommended, including medication and physical therapy. Claimant also underwent chiropractic care with Dr. Denise M. Ross.

Claimant was kept off of work for a period of time and was paid temporary total disability benefits from October 11, 2012 through January 17, 2013. Claimant returned to work full duty.

On May 23, 2013, Dr. Cohen opined that Claimant's diagnosis of lumbar radiculopathy and cervical strains were related to the work injury. Dr. Cohen further opined that Claimant suffered from 10% impairment to the cervical spine and 22% impairment to the lumbar spine. In an addendum dated July 19, 2013, Dr. Cohen stated Claimant suffered from 10% impairment to his left upper extremity and 20% impairment to his right lower extremity.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Stanley Rothschild on October 2, 2013. Dr. Rothschild took a history of Claimant's accident, reviewed medical reports, and performed a physical evaluation. Dr. Rothschild opined Claimant did not have any permanent impairment as it relates to the October 10, 2012 work accident.

A full evidentiary hearing was held on February 5, 2014. Claimant sought an award of 10% permanent partial disability to his left upper extremity and a 20% permanent partial disability to his right lower extremity and interest on accrued benefits.<sup>1</sup> The issues to be adjudicated were whether Claimant's left upper extremity and right lower extremity conditions were casually related to his work injury of October 10, 2012 and the nature and extent of Claimant's disability. A Compensation Order (CO) was issued on January 28, 2015, denying Claimant's claim for relief, finding the left upper extremity and right lower extremity conditions were not medically casually related to the work injury.

Claimant timely appealed. Claimant argues the CO erred in concluding the left arm and right leg complaints are not medically causally related to the work injury and erred in rejecting the opinion of the treating physician. Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

#### THE STANDARD OF REVIEW

The scope of review by the CRB is generally 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.* at 885.

#### DISCUSSION AND ANALYSIS

Claimant first argues the CO erred in concluding the left arm and right leg complaints are not medically causally related to the work injury. In support of his argument, Claimant refers to several medical records of Dr. Ross, Dr. Cohen, and Dr. Dorin while attacking the opinion of Dr. Rothschild.

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<sup>1</sup> The Compensation Order states the claim for relief is 10% permanent partial *impairment* to his left upper extremity and a 20% permanent partial *impairment* to his right lower extremity and interest on accrued benefits. As the Act only allows award for permanent partial *disability*, we will assume that any references to impairment is a drafting error.

A review of the CO reveals the ALJ, relying on *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995) found Claimant had presented evidence to invoke the presumption of compensability that the left arm and right leg conditions were medically causally related to the work injury and that Employer had rebutted this presumption through the IME of Dr. Rothschild. With the presumption rebutted, the evidence is weighed and Claimant must show, through a preponderance of the evidence, that the left arm and right leg condition is medically causally related to the injury. The ALJ, when analyzing the respective medical opinions and documents presented, stated:

I next address the weight to be given to the conflicting medical opinions. Claimant is relying on the opinions of Dr. Cohen, one of his two treating physicians. I do not find persuasive Dr. Cohen's July 19, 2013 Addendum to his May 23, 2013 report, in which he opined that claimant sustained a 10% permanent partial impairment to his left upper extremity and a 20% permanent partial impairment to his lower right extremity related to his October 10, 2012 accident. Dr. Cohen's only reference to radiculopathy, prior to his July 19, 2013 Addendum and May 23, 2012 reports, can be found in his initial report of October 12, 2012. Thereafter, Dr. Cohen's diagnosis is one of lumbar and cervical strains until his May 23, 2013 report, in which he notes a diagnosis of both a cervical strain and lumbar radiculopathy. There are no findings of cervical radiculopathy in any of his reports. Dr. Cohen notes no focal deficits in both claimant's upper and lower extremity neurological findings in that report. Dr. Cohen also noted that the January 17, 2013 MRI revealed a small bulging disc at L5-S 1.

Dr. Cohen, after a seven month gap in treatment, fails to provide an explanation, especially in view of the claimant's extensive history of back injuries and radiculopathy, for his conclusion that claimant's permanent partial impairment ratings to the left upper extremity and right lower extremity are related to the October 10, 2012 accident, other than simply stating that they are related. In conclusion, I find Dr. Cohen's opinions neither well substantiated nor well documented, and thus worthy of little, if any, weight.

By way of contrast, claimant's other treating physician, Dr. Dorin, treated claimant from December 14, 2012 to January 17, 2013. During that time, Dr. Dorin diagnosed claimant with a sprain of the neck and lower back related to the October 10, 2012 accident. In his December 28, 2012 report, Dr. Dorin also diagnosed radiculopathy to the right lower extremity. There are no findings of cervical radiculopathy in any of Dr. Dorin's reports. In his final report of January 17, 2013, Dr. Dorin noted that the January 17, 2013 MRI showed a small bulging disc at L5-S1 but with no nerve root compromise. Dr. Dorin found good range of motion of the lower back and no radiculopathy resulting from straight leg rising. Dr. Dorin found the claimant's lower back improved and released claimant back to full duty as a bus driver. Dr. Dorin concludes that no further medical treatment was needed and he did not address permanent partial impairment related to the October 10, 2012 accident.

CO at 6-7.

Claimant argues that any “gap” in treatment the ALJ was concerned about is covered by the chiropractic notes of Dr. Ross and that the medical records show Claimant did have ongoing complaints of radicular symptoms. While this may be true, what the Claimant is asking this panel is to reweigh the evidence in his favor, a task we cannot do. As stated above, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion.

Claimant next argues the ALJ erred in rejecting the opinion of the treating physicians. Specifically, Claimant argues “none of the reasons cited by the Compensation Order and none of the evidence in the record supports a rejection of the opinion of the treating physician.” Claimant’s argument at 4. Claimant also argues that the “Compensation Order provides no additional explanation as to why the present complaints are not in part related to the work injury.” *Id.* We reject both arguments.

In the District of Columbia, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes.<sup>2</sup> *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *see also Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). However, even with this preference, the trier of facts may choose to credit the testimony of a non-treating physician over a treating physician. *Short, supra*. And where there are persuasive reasons to do so, a treating physician's opinions may be rejected. *Stewart, supra*. Among the reasons that have resulted in such a rejection are sketchiness, vagueness and imprecision in the reports of the treating physician. *Erickson v. Washington Metropolitan Area Transit Authority*, H&AS No. 92-63, OWC No. 181489 (October 28, 1993), *aff'd*. Dir. Dkt. No. 93-82 (June 5 1997).

In rejecting the treating physician opinions the ALJ, as noted above, found Dr. Cohen’s opinion lacked any substantiation or support after reviewing the medical records. The ALJ noted with skepticism that Dr. Cohen’s opinion is devoid of any reason why Claimant’s leg and arm complaints are related to the injury, especially after a failure to document any radicular complaints for several months. The ALJ also noted that the other treating physician, Dr. Dorin, released the Claimant on January 17, 2013, noting Claimant had recovered, needing no additional treatment and was returned to work full duty. In contrast, the ALJ found:

Dr. Rothschild, employer's IME physician, after reviewing claimant's history, his subjective complaints, physical findings, diagnostic studies and medical records, opined that claimant sustained no permanent partial impairment related to the October 10, 2012 accident. Dr. Rothschild could find no definitive shoulder pathology and no objective deficits. Dr. Rothschild opined that claimant's current problems were not necessarily related to any one of his previous six to eight prior

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<sup>2</sup> We note that the CO does not reference the treating physician preference. However, the Claimant does not argue that the CO erred by not applying the treating physician preference, but in the rejection of the treating physician opinion.

injuries to his neck and low back, the most recent one being three years prior to this accident. Dr. Rothschild concluded that claimant had reached maximum medical improvement and had no permanent partial impairment to his left upper lower extremity, or to his right lower extremity, related to the accident of October 10, 2012.

Accordingly, based on Dr. Rothschild's well substantiated conclusions and Dr. Dorin's findings, I find that claimant's left upper extremity and right lower extremity conditions are not causally related to his October 10, 2012 accident.

I further find claimant has failed to prove by a preponderance of the evidence that his left upper extremity and lower right extremity conditions are related to his October 10, 2012 accident.

CO at 7.

We affirm the ALJ's rejection of the treating physician. After having rejected the treating physician's opinion, and having found the opinion of Employer's IME more persuasive, the ALJ denied the claim. Without more, the ALJ found through the evidence presented that Claimant failed in his burden, that of a preponderance of the evidence, in proving his arm and leg complaints were medically causally related to the work injury. As the District of Columbia Court of Appeals has stated, "in some cases, rather, the weakness of the proponent's proof... may be enough to defeat a claim." *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009).

### CONCLUSION AND ORDER

The January 28, 2015 Compensation Order is supported by the substantial evidence in the record and in accordance with that law. It is AFFIRMED.

*So ordered.*