GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 15-099

EFRAIN LOPEZ,
Claimant-Petitioner,

v.

C. J. COAKLEY CO, INC. and
ZURICH AMERICAN INSURANCE CO.,
Employer and Insurer-Respondents.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 NOV 17 AM 11 38

Appeal from a Second Compensation Order on Remand by
Administrative Law Judge Donna J. Henderson
AHD No. 01-149C, OWC 564522

Decided November 17, 2015

Michael J. Kitzman for Claimant
Antonio R. Lopez for Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

The facts and procedural history are set out in *Lopez v. C.J. Coakley*, CRB No. 11-114, AHD No. 07-149C (February 29, 2012)(hereinafter DRO):

> The claimant, Efrain Lopez, was employed as a carpenter by the employer, C.J. Coakley. On October 13, 2000, he injured his back and right knee while lifting and moving a box. The claimant was treated by several doctors and ultimately came under the care of Dr. Robert Layfield, who treated his knee, and Dr. Theresa Carlini, who treated the claimant's back. The current dispute centers on Dr.

Carlini's recommendation that the claimant receive lumbar steroid epidural injections.[1]

The history of the medical treatment for the claimant's back injury has been accurately stated in the ALJ's previous orders and will not be repeated here. It is sufficient to state that the claimant began treating with Dr. Carlini on October 13, 2005. Dr. Carlini has primarily treated the claimant with muscle relaxants, physical therapy, sacroiliac joint steroid injections and lumbar facet block injections.

The claimant had MRIs taken in 2001, 2006, and in 2009. Since January 30, 2001, Dr. Marc Danziger has conducted four IMEs of the claimant for the employer.

In 2009, Dr. Carlini prescribed lumbar steroid epidural injections, for which the employer refused authorization. On June 23, 2010, ALJ McNair held a formal hearing on the claimant's request for authorization to receive the injections. Because ALJ McNair could not issue a Compensation Order due to illness, the case was assigned to ALJ Newsome. On March 11, 2011, ALJ Newsome issued a Compensation Order that denied the claim, finding that the claimant's chronic lumbar pain was not medically causally related to the work injury and that the proposed injections were not reasonable or necessary.

The CRB vacated the ALJ's decision and remanded the case with the following instructions:

> On remand, the ALJ must first determine whether the disabling chronic low back pain, whether emanating for L3-4, L4-5 or both, is causally related to the work injury. If it is found to be, the ALJ can proceed to the issue of the reasonableness and necessity of the recommended treatment, which would require sending the matter to utilization review. If the disabling symptoms are not found to be causally related, the inquiry ends as the determination would be dispositive as to the claim for relief; rendering a decision on the requested treatment moot.

Lopez v. C.J. Coakley Co., Inc. CRB 11-027 (August 3, 2011) at page 5 (footnote omitted).

In the COR that is the subject of this review, the ALJ again denied authorization for the injections. The claimant timely appealed.

DRO at 1-2.

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[1] The injury to the claimant's right knee was held medically causally related to the injury at work in an earlier proceeding. *Lopez v. C.J. Coakley,* Dir. Dkt. No. 02-42 OHA No. 01-149 B (January 10, 2003).

After analyzing and addressing the arguments presented by both parties, the DRO vacated and remanded the case, concluding that the ALJ made inconsistent findings of facts not supported by the substantial evidence in the record.

A Second Compensation Order on Remand (COR2) was issued on May 21, 2015.[2] After reviewing the evidence and testimony, the ALJ concluded that Claimant had failed to prove by a preponderance of the evidence there was a medical causal relationship between the accidental injury and his back conditions, specifically, the disc degeneration and bulging at L3-L4 and Claimant's complaints of low back pain at L3-L4, L4-L5, L5-S1 and the sacroiliac joint.

Claimant appealed. Claimant argues that the ALJ erred in rejecting the opinion of the treating physician and erred in concluding Claimant's back conditions were not medically casually related to the work injury. Employer opposes, arguing that the ALJ's conclusion that the back condition is not medically causally related is supported by the substantial evidence in the record and the COR2 should be affirmed.

THE STANDARD OF REVIEW

The CRB's authority on review is limited to making a determination as to whether the factual findings of the appealed order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and D.C. Code §32-1521.01(d).

Consistent with this standard of review, the CRB must uphold an order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra.*

ANALYSIS

Addressing Claimant's first argument, Claimant argues the reasons for rejecting the opinions of the treating physician are not supported by the substantial evidence in the record. In support of his argument, Claimant points to specific instances in the record where Dr. Carlini opined that the back condition was caused by the work injury and the various treatment modalities to the injured areas.

As the ALJ acknowledges, in the District of Columbia, 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); *see also, Stewart v. DOES,* 606 A.2d 1350 (D.C. 1992). However, even with this preference, the trier of fact 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..*

[2] ALJ Belva Newsome was the ALJ who authored the two prior orders. ALJ Newsome left the agency and the matter was reassigned to ALJ Donna Henderson.

In rejecting Dr. Carlini's opinion regarding the treatment and cause of Claimant's L3-L4 condition, the ALJ stated:

> Dr. Carlini began treating Claimant five years after the injury and no prior physician identified L3-L4 as having been injured in the work-related accident on October 13, 2000. Although Dr. Carlini ascribes a medical causal relationship between the L3-L4 disc degeneration and disc bulge to the injury, only Dr. Carlini documents any complaints whatsoever at L3-L4. Dr. Carlini's records make only three references on exam to L3-L4, when Dr. Carlini performed epidural injections into the paraspinous muscles from L3 - L5 on December 22, 2005 and January 18, 2006 and on June 17, 2009. CE 1, p. 7, 48 and 51. Dr. Carlini rarely makes references to pain at L3-L4. If there was any injury to any disc, the injury was, according to Dr. Lotfi was at Claimant's sacroiliac joint (CE 2, pp. 77, 80, 84, 86, and 88) and, according to Dr. Carlini's records, to L4-L5, L5-S1 and Claimant's sacroiliac joint. CE 1. Dr. Carlini attributed Claimant's radicular pain to Claimant's L4-L5 radiculitis, not symptoms at or from L3-L4. CE 5, p. 19-20. Thus, the medical record evidence does not support an injury at L3-L4 as a result of the work-related accident on October 13, 2000.
>
> Using Dr. Carlini's logic on her reported examination findings, if it was the work-related injury and the chronic pain caused by inflammation that resulted in the degenerative bulging disc at L3-L4 (CE 5, pp. 13-14), then Claimant's long-term complaints of pain should have been at L3-L4: they were not. Dr. Carlini's explanation of the degenerative disc disease is rejected because her explanation of injury and pain causing premature degenerative disc disease (CE 5, p. 13) is unsupported by Claimant's subjective complaints at L4-5, L5-S1 and his sacroiliac joint. CE 1 and 2.
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> Dr. Carlini testified that his injections
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>> He has had - as I said, he's had temporary relief [from prior injections], I also have been giving him trigger point injections, which is injections into the muscle. He's had physical therapy. He has had extensive treatment. Most recently, when I saw him, I was suggesting that he get epidural injections.
>>
>> His MRI had demonstrated that he had a bulging disk and degenerative disk disease at L3-L4 and so because of his chronic pain, I wanted him to try some epidurals.
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> CE 5, p. 10. I find Dr. Carlini's testimony suggests that Claimant try epidural injections at L3-L4 to see if they relieve his pain, "So we just - - you are trying in a sense to try to figure out where the back pain is coming from by doing these injections" CE 5, p. 37. Claimant has already had right facet block/neurolysis on January 19, 2007 and left L3 facet block/neurolysis on April 23, 2007. These did not resolve his pain. CE 1, p. 22. To the extent that Dr. Carlini is trying to locate

> where the pain is coming from by the injections, Claimant has had trigger point and facet block injections with neurolysis at L3 without relief (EE 10, pp. 9 and 19 - 20) and, as noted in Dr. Carlini's examination notes, Claimant's complaints are only rarely from the L3-L4 area.
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> For each and all of these reasons, I reject Dr. Carlini's explanation of how the degenerative bulging disc at L3-L4 found on the 2006 and 2009 MRIs might be causally related to the work related injury on October 13, 2000.

COR2 at 11-12. (Footnotes omitted.)

The ALJ also rejected Dr. Carlini's opinion when determining whether Claimant's low back pain at L4-L5, L5-S1 and his sacroiliac conditions were medically causally related to the work injury, stating:

> Dr. Carlini testified that finding of "decreased pinprick in the right L5 dermatome," "[a]ctually does not correlate with the findings on the MRI." CE 5, pp. 16-17. Dr. Carlini's diagnoses are L4-L5 radiculopathy, sacroiliac dysfunction and myofascial pain. CE 5, pp. 17-18. Dr. Carlini admits in her testimony and I so find that Dr. Carlini, as a physical medicine and rehabilitation specialist, is treating subjective symptoms without objective findings. CE 5, 16-17, 19-20, 32-33. See also COR at 14. Dr. Danziger testified that the reason Claimant is not getting better is because Dr. Carlini is treating subjective symptoms rather than objective findings. EE 10, p. 9. *See also* discussion of the basis for Dr. Carlini's diagnosis of L4-L5 radiculopathy, *supra*.
>
> When asked specifically, about what the tenderness involving the lumbar spine and the lumbar paraspinal muscle "mean," Dr. Carlini testified that it meant "That is pain is coming from his spine and potentially a disk." CE 5, p. 17. However, the objective findings on all four MRIs were negative at L4-L5, L5-S1 and the sacroiliac joint. EE 6 - 9. Her impression after Claimant's "last visit" was that Claimant was suffering from "right L4-5 radiculitis," "lumbar disc bulge," "lumbar degenerative disc disease," right sacroiliac dysfunction," and "lumbar myofascial pain." CE 1, p. 2. Dr. Carlini testified that radiculitis meant that "the nerve root is irritated." CE 5, p. 17. Although the MRI findings did not demonstrate any impingement that would cause subjective sensory findings at L5 (CE 5, p. 16 - 17), Dr. Carlini's impression was that his complaints of radiating pain was the result of L4-5 radiculitis. CE 5, p. 19-20. Dr. Carlini explained that it was her opinion that standing and sitting can cause the disk to protrude out more and then cause pressure on the nerve. Dr. Danziger testified that "[i]f someone has a pinched nerve or herniated disc or a more serious back problem, usually, you will see motor weakness, we'll see sensory changes, we might see reflex changes. He had none of these on his exam." EE 10, pp. 11 - 13. Similarly, Dr. Carlini never documents diminished motor strength, weakness, reflex changes or sensory changes other than the diminished pinprick at L5 (which she testified was not the basis for her conclusion that he had impingement at L4-L5). CE 1 and CE 5, pp.

> 19-20 and 32-33. I find that Dr. Danziger's finding that Claimant had no evidence of impingement at L4-L5 is consistent with Dr. Lotfi's inability to locate any cause for Claimant's complaints of pain. EE 10, pp. 11-13, 18 and 35 and CE 2, pp. 77, 80 and 84.
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> * * *
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> Further evidence that Claimant's complaints of pain are not the result of a disc injury at any level is that the treatment that Dr. Carlini prescribed and which was performed did not result in relief of Claimant's pain. *See* Factual Statement, *supra*. Dr. Danziger testified that neurolysis is a treatment involving "inject[ing] a chemical into the nerve to kill the nerve ... with the presumption that the nerve is the generator of pain, theoretically, if you inject the nerve and kill the pain generator, it should take the pain away." Claimant had this treatment at on June 9, 2006 on his right L4, L5 and S1, on January 19, 2007 on his right L3, and on April 23, 2007 on his left L3 and L5, without long-term relief.
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> I reject Dr. Carlini's opinion as not supported by the objective evidence and not supported by the results from Claimant's previous injections. I accept Dr. Danziger's opinion because he began seeing Claimant shortly after Claimant's injury and examined him on three occasions within a year after injury on October 13, 2000. Dr. Danziger's diagnosis is consistent with Dr. Lopez's diagnosis of lumbar sprain insofar as he diagnosed a muscle injury rather than a disc or joint injury. EE 10, pp. 7, 15-17 and CE 2, p. 87(Dr. Lotfi's recitation of Dr. Lopez's diagnosis of Claimant's injury).

COR2 at 14-15. (Footnotes omitted.)

And finally, when rejecting Dr. Carlini's opinion regarding the source of Claimant's muscular strain, the ALJ stated:

> I find that Dr. Carlini is treating subjective complaints whose location is not always historically consistent. In addition to the lack of objective findings, there have been long periods without any treatment to the low back. Claimant's injury was on October 14, 2000. According to Dr. Lotfi, Claimant treated briefly with an occupational clinic before commencing treatment with Dr. Rafael Lopez where he was treated extensively for a lumbar sprain" for many months but not years. Claimant's first visit to Dr. Lotfi was on May 20, 2004. CE 2, p. 87. By December 2004, Dr. Lotfi was prescribing the last tests to determine the cause of Claimant's pain. CE 2, p. 80. Claimant did not return to Dr. Lotfi until June 1, 2005, when he was told that the bone scan was negative, x-rays are negative, and his labs were negative. Injections in his knee and right sacroiliac joints had not resolved Claimant's symptoms. Dr. Lotfi reported, "I have no further suggestions for therapy for him." Reporting that Claimant would follow-up on an as needed basis, Dr. Lotfi referred him to physical medicine and rehabilitation. CE 2, p. 77.

COR2 at 16.

Contrary to Claimant's assertion that the rejection of the treating physician is not based upon the substantial evidence in the record, the above quoted passages detail the reasons the ALJ rejected the treating physician's opinion, listing persuasive reasons for doing so based upon the record evidence pursuant to *Stewart, supra.* We affirm the ALJ's rejection of the treating physician, Dr. Carlini.

Turning to Claimant's second argument, Claimant argues the COR's finding that the current back condition is unrelated to the work injury is not supported by the substantial evidence in the record. In argument, Claimant relies on the opinion of Dr. Carlini. However, as noted above, Dr. Carlini's opinion was rejected by the ALJ, who found more persuasive the opinion of Dr. Danzinger. We need not recite all the reasons the ALJ found the opinion of Dr. Danzinger more persuasive, as it is outlined sufficiently in the COR2 and quoted in some detail above. We do, however, quote the ALJ's summary paragraph:

> I reject the opinion of Dr. Carlini and I accept the opinion of Dr. Danziger as more logical and cogent. The low back sprain which was attributable to the work-related injury resolved and Claimant's complaints of pain in the area of L4-L5, L5-S1 and the sacroiliac joint area are not causally related to the work-related accident and injury on October 13, 2000. Claimant's complaints of pain at L3-L4, L4-L5, L5-S1 and the sacroiliac joint are not medically causally related to the work-related accidental injury on October 13, 2000.

COR2 at 16.

We affirm the ALJ's conclusion that the back condition is not medically causally related to the work injury as supported by the substantial evidence in the record. In argument, what Claimant is requesting this panel to do is to reweigh the evidence in its favor, a task we cannot do. As stated above, the CRB 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.

CONCLUSION AND ORDER

The May 21, 2015 Second Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED..

So ordered.