

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-020

**ELLIOTT AUSTIN,
Claimant-Respondent,**

v.

**UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE CO.,
Employer/Carrier-Petitioner**

Appeal from a January 30, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 05-447B, OWC No. 703110

Justin M. Reiner for the Respondent
Donald P. Maiberger for the Petitioner

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges.*

HENRY W. MCCOY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as delivery driver. On February 20, 2012, Claimant treated with Dr. Peter Jay, an orthopedic surgeon, for left knee pain. An x-ray revealed tricompartmental arthritic changes that Dr. Jay treated with an injection that day and a follow-up injection on August 20, 2012. Claimant next treated with Dr. Emad Zeitounch, another orthopedist, on March 13, 2013, for left knee pain and instability, with the additional information

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 JUN 5 AM 11 40

that he had suffered a left knee injury as a child that was not medically treated. X-rays by Dr. Zeitounh revealed severe degenerative changes in the left knee, with a treatment plan consisting of an MRI and possible surgical intervention.

On March 26, 2013, while in the course of making a delivery, Claimant slipped and fell going up stairs and struck his left knee. Employer sent Claimant to Concentra where he was referred for physical therapy, told he could return to work with restrictions of no prolonged standing and walking, no squatting or kneeling, and no climbing stairs or ladders. An MRI on April 16, 2013 revealed an ACL tear of undetermined age. Claimant was advised by Concentra on April 19, 2013 to see an orthopedic surgeon.

Claimant started treating with Dr. Michael Wallace, an associate of Dr. Zeitounh, on April 22, 2013. Dr. Wallace assessed Claimant with a chronic anterior cruciate ligament tear. Claimant underwent left knee surgery on November 12, 2013 and has not returned to his pre-injury job.

Claimant filed a claim for temporary total disability benefits from March 26, 2013 to the present and continuing, with Employer contesting the causal relationship of Claimant's current left knee condition to the March 26, 2013 work injury. Following a hearing, an Administrative Law Judge (ALJ) found the current disability to be causally related and granted ongoing wage loss benefits.¹ Employer has filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues that the opinions expressed in a letter by Dr. Wallace were obtained expressly for litigation and should not be accorded the treating physician preference and the testimony of Dr. Wallace when compared to the independent medical evaluation (IME) of Dr. Ian Weiner is not persuasive enough to prevail in Claimant's favor. In opposition, Claimant asserts there is substantial evidence in the record to support the ALJ's decision and as such the decision rendered should not be disturbed.

STANDARD OF REVIEW

The scope of review by the CRB, 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.² See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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

¹ *Austin v. United Parcel Service*, AHD No. 05-447B, OWC No. 703110 (January 30, 2014).

² "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The initial issue for resolution in the case under review was whether Claimant's current left knee condition with attendant surgical intervention is medically causally related to the work-related injury sustained on March 26, 2013. In reaching a decision in Claimant's favor, the ALJ determined that once the presumption of compensability³ was invoked and subsequently rebutted⁴ by Employer, Claimant, without benefit of the presumption, proved the causal relationship by a preponderance of the evidence. It is the weighing of the medical opinion evidence that Employer takes issue with in the decision rendered.⁵

In challenging the ALJ's ruling, Employer argues that the medical opinions of Dr. Wallace, the treating physician, are "inconsistent, conflicting, ambiguous, and not worthy of credibility" when compared to the medical opinion of Dr. Ian Weiner, its IME physician. In addition, Employer argues that the final opinion of Dr. Wallace expressed in a December 11, 2013 letter was obtained expressly for the purposes of litigation and should not have been accorded the benefit of the treating physician preference. We disagree on both counts.

It is well-settled law in this jurisdiction that a preference is accorded the testimony of the treating physician over that of a physician retained for litigation purposes.⁶ However, as the ALJ noted, this preference is not absolute, because when there are specific reasons delineated for rejecting the opinion of the treating physician, the opinion of another physician may be given greater weight.⁷

In challenging the preference accorded Dr. Wallace's opinion by the ALJ over that of its IME physician Dr. Weiner, Employer stresses the absence of information provided to Dr. Wallace by Claimant regarding the work injury and the later perceived inconsistencies and contradictions in Dr. Wallace's diagnoses. In addition, Employer would have us classify Dr. Wallace's December 11, 2013 opinion as one rendered solely for the purposes of this litigation and thus not entitled to the greater weight accorded the standard treating physician opinion.

³ Pursuant to § 32-1521(1) of the Act, a claimant is entitled to a presumption, in the absence of evidence to the contrary, that his claim is compensable upon a showing that an injury was potentially cause or aggravated by work-related activity. *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000). This presumption has been expanded by the D.C. Court of Appeals to include the causal relationship between a current disabling condition and the work-related injury. *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

⁴ See *Waugh v. DOES*, 786 A.2d 595 (D.C. 2001).

⁵ In the case below, the contested issues were medical causal relationship and nature and extent of disability, if any. In the instant appeal, Employer has challenged only the ALJ's ruling on medical causal relationship and has not argued in the alternative the nature and extent of Claimant's disability.

⁶ *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004); see also, *Short v. DOES*, 723 A.2d 845 (D.C. 1998), *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992).

⁷ *Canlas v. DOES*, 723 A.2d 1210, 1211-12 (D.C. 1999)

Employer seeks to discredit the causal relationship opinion contained in Dr. Wallace's December 11, 2013 letter because it was obtained by Claimant's counsel after Dr. Weiner's deposition and ostensibly requested during the pendency of this case before the ALJ. Regardless of when the opinion in question was requested or obtained, it is the opinion of the treating physician and once admitted into evidence it is for the ALJ to accord it the appropriate weight. We find the ALJ has committed no error in according it the treating physician preference.

In addition, the ALJ addressed the shortcomings in Dr. Wallace's reports by reasoning:

Claimant relies on the report and deposition testimony of his treating surgeon Dr. Wallace to support his claim that the work injury of March 26, 2013 contributed to his disability when he fell onto his left knee. Although Dr. Wallace did not mention a work injury in his initial reports, Dr. Wallace issued a "To Whom it may Concern" letter on December 11, 2013 which claimant described as a "Special Report". See CE 6.

Dr. Wallace wrote:

It is impossible for me to determine whether or not he had an ACL tear prior to his March injury as I never evaluated him prior to his injury. It was evident to me at this initial evaluation in April that he did have instability with a 1 = Lachman on exam. X-rays and MRI were significant for degenerative changes of the knee and that likely had been present at the time of his injury in March.

In my mind and with a reasonable degree of medical certainty, there are 2 possibilities as to what occurred. #1. He had both a chronic ACL tear and degenerative changes prior to the fall that occurred on March 26, and the fall exacerbated and/or changed his symptoms. #2: [sic] he had chronic degenerative changes only, and the fall that occurred on March 26 made him sustain an acute ACL tear.

CE 6. At his deposition, Dr. Wallace testified under oath of the history provided to him by claimant;

He told me that he sustained an injury on March 26, but he also relayed that he had an injury at the age of 17 to his knee. He told me the injury at age 17 was not evaluated or treated. He functioned fairly well, just an occasional knee pain. He told me that he had an injury on March 26, where he was going down a set of stairs, slipped, fell sustained an injury and that changed his symptoms. He told me that in addition to pain which he had had on and off for some time, he was now having more instability, to the point where something was different that prior to the fall.

CE 7 at 9.

As noted in the findings of fact herein, Dr. Wallace did not mention the March 26, 2013 work incident on April 22, 2013 when Dr. Wallace first saw claimant and this omission was directly addressed by counsel for employer on cross-examination:

Your report is in evidence and you indicated that you first evaluated him on April 22 of this year and he described a work-related injury that occurred on March 26. This is in your report, special report. Yet on April 26, when I referred you to your note, office note, of that same day, you made - - there was no comment about even the happening of the accident, but yet in this report you state that on April 22 the patient told you that he had an accident when he fell on March 26 of this year. Did you get this information from the claimant's attorney as opposed to the patient about the happening of the accident?

Dr. Wallace's response was:

I don't recall.

CE 7 at 38.⁸

With this understanding of the evidence proffered by Claimant to establish causal relationship by a preponderance of the evidence and according Claimant's medical evidence the treating physician preference, the ALJ further reasoned and concluded:

While the undersigned found it questionable that Dr. Wallace did not mention a work injury on April 22, 2013, it is clear that Dr. Wallace does not question that the mechanics of the March 26, 2013 fall, as described, could have aggravated claimant's pre-existing degenerative arthritis or that he questioned why the matter has been claimed as a workers' compensation matter. Nevertheless, he responded with candor in his report that it is impossible to determine whether or not claimant had an ACL tear prior to the March injury, Dr. Wallace's adamant explanation that whether claimant tore his ACL on March 26th or not claimant's symptoms changed after that incident. As the undersigned has not found any reason to conclude claimant's testimony was not credible, Dr. Wallace's deposition testimony warrants the benefit of the treating physician preference over the IME physician's opinion (in his second addendum) that claimant's work injury did not aggravated [sic] his preexisting condition.⁹

⁸ CO at 5.

⁹ *Id.* at 5-6.

In making its various arguments that the testimony of the treating physician, Dr. Wallace, is at times inconsistent, conflicting, and ambiguous and should not be accorded the treating physician preference, Employer, in effect, asks us to reweigh the evidence and give decisional weight to evidence that would support a different result, one that would be in its favor. However, the CRB cannot reweigh the evidence but must affirm a CO that is supported by substantial evidence.¹⁰ The ALJ, in weighing the competing medical evidence, has taken into consideration the shortcomings in Dr. Wallace's testimony but found it more persuasive and this conclusion is supported by substantial evidence and will not be disturbed.

CONCLUSION AND ORDER

The ALJ's determination that Claimant has established by a preponderance of the evidence that his current left knee problems and surgical intervention is causally related to the March 26, 2013 work injury is supported by substantial evidence in the record. Accordingly, the January 30, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

June 5, 2014
DATE

¹⁰ See *Marriott, supra*.