GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB (Dir.Dkt.) No. 05-43

OTIS MAHONEY,

Claimant – Petitioner

v.

D.C. HOUSING AUTHORITY,

Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA No. PBL 00-086C; DCP No. HCD001153

Jonathan M. Grossman, Esquire, for the Petitioner

Ross Buchholz, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

FLOYD LEWIS, *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).[1]

[1] 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, 32-1522 (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 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.

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 October 29, 2004, the Administrative Law Judge (ALJ) denied the request for continuing temporary total disability benefits subsequent to June 17, 2002 made by Claimant-Petitioner (Petitioner). Petitioner now seeks review of that Compensation Order.

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

ANALYSIS

As an initial matter, the scope 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 § 1-623.28(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. Dist of Columbia Dep't. of Employment Servs.* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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 that the ALJ's decision that Petitioner's present right ankle condition is not causally related to his March 31, 1999 work injury is not supported by substantial evidence. In addition, Petitioner contends that the ALJ failed to consider the aggravation ruled of compensable accidental injuries, failed to give substantial weight to the latest opinions of Petitioner's treating physicians, erred by determining that the "current and freshness" standard was not applicable, and ignored the rule that an employer bears the burden to substantiate the termination of a previous award.

Respondent counters by arguing that the ALJ's decision is supported by substantial evidence and that the ALJ properly considered the aggravation rule and found that there was no substantial evidence of a current work-related disability. Also, Respondent contends that Petitioner failed to meet his burden of proof that he has a continuing employment related disability and there was no duty on Respondent to present current and fresh evidence beyond the Independent Medical Examination (IME).

In denying Petitioner's request for restoration of his disability benefits, the ALJ relied on the July 12, 2000 IME opinion of Dr. Herbert Joseph (Repondent's exh. 7), who found that

Petitioner's ankle injury was a longstanding problem not related to his March 31, 1999 work related accident. Petitioner asserts that the ALJ erred by relying on Dr. Joseph's opinion, as this physician's opinion was outdated and inconsistent with the other evidence presented to the ALJ.

In this jurisdiction, it is widely accepted that the evidence to support a modification or termination of compensation benefits must be current and fresh, in addition to being persuasive and probative of a change in medical status. *Robinson*, ECAB No. 90-15 (September 16, 1992), *Chase,* ECAB No. 82-9 (July 9, 1992). While acknowledging this rule, the ALJ decided not to apply the current and fresh standard, stating:

> As stated previously, the tardy action of locating claimant's medical files, reasoned assessment and evaluation of Dr. Cohen's [sic] independent medical examination, and subsequent termination of claimant's compensation benefits award, amounted to that which the TPA would have accomplished in any typical case for compensation benefits. Thus, there is no need to apply the standard procedural protocol, as set forth in *Chase* and *Robinson, supra* to determine whether the employer's evidence achieved the "current and freshness" test typically required . . . Once Dr. Cohen's [sic] evaluation was located, and the IME's report was determined to be reliable, the second TPA took the correct step in terminating claimant's compensation benefits.[2]

Compensation Order at 8-9.

Initially, after reviewing the record in this matter and in light of the unusual circumstances with the files being lost, that in turn, led to the TPA providing interim benefits, this Panel agrees with Respondent that after it initially presented persuasive medical evidence to terminate Petitioner's benefits in the form of the IME, the burden then shifted back to Petitioner to provide proof of an employment related impairment following the termination of his benefits.

However, in presenting evidence to support his claim, it must be emphasized that Petitioner submitted letters from Dr. Lawrence Manning and Dr. Roger S. Parthasarathy, which the ALJ does not mention in the Compensation Order. In a letter, dated December 11, 2002, Dr. Manning, Petitioner's treating orthopedist, states:

> "I have treated [Petitioner] several times over the past two years . . . He cannot work full-duty because prolonged standing and walking aggravate the ankle sprain and swelling . . . [Petitioner's] present ankle sprain is related to the 3/32 injury . . . Tests in 1999 indicated an old fracture of the ankle. While the x-ray and MRI findings are not due to the 1999 sprain . . . [h]is condition was certainly exacerbated by the more recent sprain and therefore the 3/99 injury is causally related to his present disability.

Petitioner's exh. 1.

[2] As indicated by Petitioner, throughout the Compensation Order the ALJ incorrectly attributes the IME of July 12, 2000 to Dr. John Cohen, when, in fact, it was Dr. Joseph who performed the IME.

Dr. Parthasarathy, who treated Petitioner immediately after the March 31, 1999 injury, in a letter, dated January 2, 2003, states that "[t]o a reasonable degree of certainty, it is my medical opinion, that [Petitioner's] inability to perform his regular work activities and need for medical disability subsequent to 3/31/99 is causally related to his 3/31/work injury. . . ." Petitioner's exh. no. 2.

As such, the record contains medical evaluations, opining that Petitioner's current medical problems are causally related to his work injury, which were made more that two years after the July 2000 IME report of Dr. Joseph. This Panel agrees with Petitioner that the ALJ erred in relying on the IME report, without mentioning the opinions of Dr. Manning and Parthasarathy, which were far more "current and fresh" than Dr. Joseph's opinion. These exhibits from Petitioner's treating physicians are the most recent medical evaluations of Respondent and the ALJ erred by not evaluating Dr. Joseph's report under the "current and fresh" standard.

In addition, this Panel agrees with Petitioner that the ALJ, in ignoring and not mentioning these reports from Petitioner's treating physicians, seems to violate the treating physician preference. In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Dist. of Columbia Dep't of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dist. of Columbia Dep't. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992). Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers' compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the testimony of the treating physician. *Canlas v. Dist. of Columbia Dep't. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995).

Thus, after carefully reviewing the evidence of record, this Panel concludes that in evaluating and weighing the conflicting medical evidence of record, the ALJ erred by not explaining why the treating physician preference was not applied and by not giving any reasons for rejecting the opinions of Petitioner's treating physicians in favor of the IME. As a result, it was erroneous for the ALJ to rely on Dr. Joseph's report to conclude that Petitioner's ankle problems were not related to his March 1999 work injury and to deny his request for restoration of temporary total disability benefits from April 20, 2002 to the present and continuing.

Accordingly, the Compensation Order of October 29, 2004, which denied Petitioner's request for relief based on the IME report of Dr. Joseph, which was not evaluated under the "current and fresh" standard and did not explain the reasons for rejecting the opinions of Petitioner's treating physicians, is not in accordance with the law and must be reversed. This matter must be remanded to the ALJ for further findings of facts and conclusions of law to resolve Petitioner's request for disability benefits.

CONCLUSION

The ALJ's conclusion that Petitioner's right ankle condition is not related to his October 31, 1999 work injury is not in accordance with the law. The IME report of Dr. Joseph, which the ALJ relies on to support the termination of Petitioner's disability benefits, was not evaluated under the "current and fresh" standard and the ALJ did not give reasons for rejecting the opinions of the treating physicians.

ORDER

The Compensation Order of October 29, 2004 is hereby VACATED and this matter is REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

_____
FLOYD LEWIS
Administrative Appeals Judge

November 30. 2005
DATE