

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. 18-03

MARTHA CORLEY,

Claimant-Petitioner

v.

DISTRICT OF COLUMBIA OFFICE OF CORPORATION COUNSEL,

Employer-Respondent

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
AHD/OHA No. PBL 02-029A, DCP No. LT4-LC001748

Gregory L. Lattimer, Esquire, for Claimant-Petitioner

Gail L. Davis, Esquire, for Employer-Respondent

Before: JEFFREY P. RUSSELL, LINDA F. JORY and SHARMAN J. MONROE, *Acting Administrative Appeals Judges.*

JEFFREY P. RUSSELL, *Acting Administrative Appeals Judge*, on behalf of the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR §118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code §32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on September 30, 2003, the Administrative Law Judge (ALJ) upheld the determination of Respondent denying disability compensation to Petitioner.

Petitioner's Petition for Review requests the following action be taken in connection with his appeal: reversal of the denial of compensation benefits.

In the Petition for Review, Petitioner identifies the grounds for this appeal as follows: the ALJ failed to accord proper evidentiary weight to the opinions of Petitioner's treating physicians, and failed to accord Petitioner a presumption that her claimed disability is causally related to her work injury.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522(d)(2)(A), *and* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, (the Act) at § 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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Compensation 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.

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. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, 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.

Turning to the case under review herein, Petitioner alleges numerous grounds of alleged error, but they can be summarized as being twofold: the ALJ failed to give Petitioner the benefit of a “presumption of compensability”, and the ALJ accepted the opinion of an independent medical evaluator (IME) over the opinions of Petitioner’s treating physicians without adequate justification, in light of the “treating physician’s preference” that is recognized in this jurisdiction in workers’ compensation cases.

We disagree with the first assignment of error, for the simple reason that, unlike the D.C. Workers’ Compensation Act which governs “private sector” claims, there is no such presumption under the “public sector” statute governing workers’ compensation claims brought under the Act. The basis of the presumption under private sector claims is the existence of a statutory provision creating such a presumption, found at D.C. Official Code § 32-1521 (1) and it is that provision which the Court of Appeals discussed in *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651 (D.C. 1985). No such provision is found in the Act governing this claim.

We also note Petitioner’s counsel’s claim, contained in footnote 2 of the “Memorandum of Points and Authorities in Support of Petition for Review”, that the case of *Newell v. District of Columbia*, 741 A.2d 28 (D.C. App. 1999) is an example of a case where “the presumption of compensability has been applied in compensation claims involving District employees”. Counsel’s reliance on that case is misplaced. *Newell* was a tort suit case, in which the Court of Appeals, in *dicta*, erroneously cited the private sector presumption statute as being applicable to a public sector compensation claim, in explaining why a workers’ compensation case determination that the pregnant Ms. Newell had slipped and fallen and sustained injuries on school property, was not *res judicata* in a subsequent wrongful death suit for the death of her prematurely born baby. The Court’s point was that there are different standards of proof in compensation cases than tort litigation, making the application of *res judicata* inappropriate. The Court did not “apply” the private sector presumption statute to a public sector compensation case.

However, we agree with Petitioner’s second contention, that the ALJ failed to adequately address and apply the long-recognized preference accorded to treating physician opinion in this jurisdiction, a legal rule that is applicable to both the private and public sector workers’ compensation statutes. Although Petitioner characterizes the ALJ’s error as being one of making a decision that is unsupported by substantial evidence and is not in accordance with the law, it must be stressed that the decision denying benefits was, in our view, at least insofar as it relates to the claim for current, ongoing disability, supportable by substantial evidence. There were two medical opinions from qualified orthopaedic surgeons who had examined Petitioner, examined medical records and reports, and concluded that Petitioner’s complaints were unrelated to the work injury under consideration.² However, because of the special rule concerning treating physicians

² It is also noted, however, that Petitioner’s point concerning the lack of any evidence in contravention of the claim for disability during the time prior to that period that each IME physician asserted Petitioner’s acknowledged work injury had resolved, is well taken, but is moot in light of the decision herein. If, on remand, the ALJ reaches the same conclusion regarding the rejection of the treating physician’s opinions and acceptance of the IME physician’s opinions as were reached in the Compensation Order under review herein,

opinions, in this instance, the Compensation Order was nonetheless not in accordance with the law.

In this case, despite the fact that Respondent may well have been within its rights to have denied the claim for disability at the time of the denial, in that there was at that time no medical report or disability slip asserting that Petitioner was unable to perform her regular, pre-injury job without modification, by the time of the formal hearing in this proceeding there were two such doctor's opinions presented. The first was contained in EE 1, a handwritten report from Dr. Joseph Randall, the physician found by the ALJ to have managed Petitioner's work related injury since its inception, in which he asserts disability due to the work injury from its inception, and EE 5, the records from Dr. Hampton Jackson, the treating orthopaedic surgeon under whose care Petitioner came as a result of a referral from Dr. Randall. These physicians not only asserted an inability to perform her job duties, they also asserted that the inability to so perform was the result of the work injury.

As noted by the ALJ, the fact finder is not necessarily bound by the treating physician's opinion, and may choose to accept the opinion of IME physicians under appropriate circumstances. *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. App. 1992). See also, *Erickson v. W.M.A.T.A.*, H&AS No. 92-63, OWC No. 181489 (October 28, 1993), *aff'd*. Dir. Dkt. No. 93-82 (June 5, 1997); and *Marriott International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). In this case, however, the ALJ cited "sketchiness" and "imprecision" in the reports of the treating physicians as the basis for their rejection Compensation Order, page 4.

Although the ALJ is entitled to deference in the assessment of the quality of the evidence under review, it is also true that an ALJ must not only assert reasons for rejecting the opinion of a treating physician, but those reasons must be "persuasive", part of which includes a requirement that they be ascertainable by resort to the record. See, *Mexicano v. District of Columbia Department of Employment Services*, 806 A.2d 198 (D.C. App. 2002).

The Compensation Order does not provide any examples of "sketchiness" or "imprecision" in the reports of Dr. Randall or Dr. Jackson, and we are therefore unable to assess whether these cited reasons are supportable by reference to the record, nor are we able to assess Petitioner's argument that the IME opinions and reports are equally "sketchy" or "imprecise". And, we note that the ALJ did not make a factual finding concerning, or refer in the discussion to, the general credibility of Petitioner, and thus we are unable to determine whether the reasons cited by the ALJ for rejecting the treating physician's opinions involved such considerations as part of the "sketchiness" or

the ALJ must also address this issue as well. It is also noted that Petitioner's assertions that there was no evidence to support the ALJ's finding that Petitioner had pre-existing arthritis and suffers from morbid obesity, and that those conditions account for her present complaints, is an inaccurate representation of the factual record. Dr. Hughes makes both statements in his IME report, and they are sustainable based upon the diagnostic reports also in the record, as well as the details of the numerous physical examinations performed.

“imprecision” to which he referred, which would obviously require that we give special deference to his ruling.

We conclude that, while a reasonable person could have concluded that Petitioner’s disability, if any, from the uncontested work injury had resolved within one or the other time frames as postulated by the IME physicians, the ALJ’s decision lacks sufficient detail and explanation for the reasons that the ALJ rejected the treating physician’s opinions for us to resolve the issue as to whether the decision is supportable under the Act.

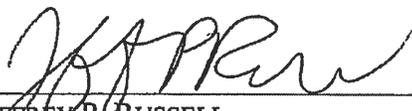
CONCLUSION

The Compensation Order of September 30, 2003 is not in accordance with the law, and is reversed and remanded with instructions to reconsider the evidence, and to more fully explain the factual record-based reasons for acceptance of the opinions of the IME physicians and rejection of the opinions of the treating physicians, if that is the ultimate decision of the ALJ upon remand. If, on remand, the ALJ reaches the same conclusion regarding the rejection of the treating physician’s opinions and acceptance of the IME physician’s opinions as were reached in the Compensation Order under review herein, the ALJ must also address the issue of Petitioner’s disability during the period of time prior to which the IME opinion evidence is relevant.

ORDER

The Compensation Order of September 30, 2003 is reversed and remanded with instructions to reconsider the evidence, and to more fully explain the factual, record-based reasons for acceptance of the opinions of the IME physicians and rejection of the opinions of the treating physicians, if that is the ultimate decision of the ALJ upon remand, and is further instructed to address the issue of Petitioner's disability status prior to the time period that the IME evidence addressed, if the ALJ again rejects the treating physician's opinions and accepts the opinions of the IME physicians.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Acting Administrative Appeals Judge

APR 11 2005

DATE