GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-066

ELLIS MOORE,
Claimant-Petitioner,

v.

HOWARD UNIVERSITY,
Self-Insured Employer-Respondent.

Appeal from an April 30, 2013 Compensation Order By
Administrative Law Judge Amelia G. Govan
AHD No. 09-054A, OWC No. 640738

David J. Kapson, Esquire for Petitioner
Ashlee S. Turmelle, Esquire for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

In a Compensation Order issued June 26, 2009, a 375 pound Howard University Campus Police Officer, Ellis Moore, was found to have sustained an injury to his left knee on June 11, 2007 when he hyper-extended the knee while getting into the rear seat of a vehicle. In that Compensation Order Mr. Moore was awarded causally related medical care from Dr. Joel Fechter and Dr. Kyle Anders, and temporary total disability benefits from the date of the injury until October 20, 2007, the date upon which he returned to work.

In March 2012, Mr. Moore stopped working because of pain and swelling in his left knee. He returned to Dr. Fechter, who treated the condition initially with injections, and who then referred him to Dr. Anders for evaluation for a total knee replacement, which Dr. Anders recommended. Dr. Fechter agreed with the recommendation.

Howard University (Howard) had Mr. Moore evaluated by Dr. Louis Levitt for the purpose of an independent medical evaluation (IME). While Dr. Levitt agreed that Mr. Moore required the procedure, he disagreed with Dr. Fechter's opinion that the work injury of June 2007 had any connection to the required surgery, opining that it was the result of ongoing deterioration of the pre-existing arthritic condition of the knee, hastened by Mr. Moore's 100 pound weight gain experienced in the year leading up to the time the surgery was recommended.

Mr. Moore sought an award of temporary total disability and a total left knee replacement at a formal hearing before an Administrative Law Judge (ALJ) in the hearings section of the Department of Employment Services (DOES). On April 30, 2013, the ALJ issued a Compensation Order finding that the requested surgery was unrelated to the June 2007 work injury, and denied the claim. Mr. Moore appealed the denial to the Compensation Review Board (CRB), to which appeal Howard filed an opposition.

Because the ALJ gave adequate reasons for rejecting the opinion of Dr. Fechter, and because the opinion of Dr. Levitt which the ALJ accepted is consistent with her conclusion, which is supported by substantial evidence, we affirm.

DISCUSSION AND ANALYSIS[1]

In his Memorandum of Points and Authorities in Support of Application for Review (Memorandum), Mr. Moore makes a rather astonishing and unfortunately inaccurate statement concerning the law in this jurisdiction as it relates to what the CRB has held in connection with overcoming the presumption that a claimed current condition or injury is causally related to employment. The Memorandum states:

> The CRB has noted that for an IME report to be considered unambiguous, the IME must affirmatively state that the work accident *could not* have caused the disability. […] If the IME concedes there is a possibility, no matter how remote, that the claimant's disability is causally related to the work accident, the IME is insufficient as a matter of law to rebut the presumption.

Memorandum of Points and Authorities in Support of Application for Review, page 7 – 8 (italics added). The source citation for this inaccurate statement of the law is said to be *Romero v. V&V Construction Company,* CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011).

This is not the first time that *Romero* has been so mischaracterized, and we will merely quote at length from the most extensive of the CRB's attempts to disabuse counsel of the error, *Thomas v.*

[1] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will 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.

WMATA, CRB No. 11-121, AHD No. 10-092A, OWC No. 643201 (October 4, 2012). Before we do so, in order to make crystal clear that what follows is not a CRB decision that disagrees with *Romero*, it is a decision correcting counsel's mischaracterization of its holding, we note that the author of the *Romero* decision was a panel member in *Thomas,* and joined in the decision. Quoting from *Thomas*:

> She [Ms. Thomas] asserts that "The CRB has noted for an IME to be considered unambiguous, the IME must affirmatively state that the work accident *could not have caused* the disability", citing but not quoting from *Romero v. V&V Construction*, CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011). Claimant's Memorandum, unnumbered page 6 (emphasis added).
>
> It is not surprising that she does not quote *Romero***,** since it nowhere stands for the proposition for which it is cited. First, contrary to Ms. Thomas's apparent understanding, the physician in *Romero* was a treating physician, not an IME physician. Second, the physician in *Romero* stated (or at least implied) that he never examined the body part in question. Third, the physician in *Romero* did not express a considered medical opinion on whether the injury at issue in that case was or was not, in fact, causally related to the subject work incident at issue in that case. As the CRB stated in *Romero*:
>
> > In order to properly assess the ALJ's determination, it becomes necessary to evaluate the treating physician's letter to see if it meets the standard established by the D.C. Court of Appeals when seeking to rebut medical causation. That standard holds that an employer meets its burden to rebut the presumption when it proffers a qualified independent medical evaluator (IME) who, after examining the employee and reviewing his medical records, unambiguously opines that the work injury did not contribute to the disability. *Washington Post v. D.C. Dept. of Employment Services*, [and *Raymond Reynolds, Intervenor*] 852 A.2d 909 (D.C. 2004) [(*Reynolds*)].
>
> *Romero*, *supra*, (bracketed material added).
>
> We point out that, unlike Ms. Thomas in this appeal, the CRB in *Romero* accurately states that it is the expression of the opinion that the subject employment condition or incident *did not* cause the complained of condition, and not that it *could not* have done so that is the legal standard for adequacy in overcoming the presumption established by the DCCA in *Reynolds*. The CRB continued:
>
> > In his July 29, 2010 letter, Dr. Means prefaced his opinion by stating "[I] have not diagnosed Mr. Romero with any specific condition with regard to the left shoulder as he has not been formally evaluated for this yet". As to a causal connection he went on to say:

> "*It is possible that he could have developed some left shoulder symptoms from an avulsion fracture type injury, but I do not think this is very likely, and Mr. Romero did not note any of these symptoms until 10/22/2009, at least to us [i.e., his treating physician's office and staff]. Therefore, I think the possibility that it is related to the 2/13/2009 injury is a very remote possibility.*"
>
> If we apply the DCCA's standard, we first note that Dr. Means arguably has rendered an opinion without an express examination of the left shoulder and has stated that he has not diagnosed any specific condition to the left shoulder. We further note that by stating that there "is a very remote possibility" of a causal relationship between Petitioners's left shoulder symptoms and the work injury, Dr. Means has rendered an opinion that is anything but unambiguous. We are left to conclude using the test established by the DCCA, it was error for the ALJ to find that this evidence was comprehensive enough to rebut the presumption.

*Romero**,** supra*, (bracketed material added).

We stress the significance of the analytical error and the potential folly that ensues by confusing Dr. Means's identity. The ALJ in *Romero* relied upon this passage as evidence upon which to rebut the presumption of causation. In *Romero***,** if Dr. Means been an IME physician, the employer would have been required to elicit from him an opinion not on the *possibility* that the work conditions or incidents caused the complained of injury, but on the ultimate question of whether it did *in fact and in this case* cause *these conditions*. As it is, Dr. Means did not express an opinion that "the remote possibility" that he recognizes exists does not apply to this case. Indeed, he left it open, by prefacing that he hadn't ever actually formally examined the shoulder for any such purpose, and presumably had therefore not taken a shoulder-related history from Mr. Romero**,** performed x-rays or other studies upon the shoulder, or reviewed any pertinent medical records relating to the shoulder, any of which might have provided information making the possibility more or less remote.

Indeed, it is to avoid having these types of cursory, off-the-cuff remarks form the basis of a rebuttal of the presumption that the DCCA requires that such opinion be (1) from a qualified medical doctor, (2) following an actual examination of the patient (3) and a review of the pertinent medical records and that it (4) unambiguously states (5) that there is no such causal relationship in the case at hand. That is the point of *Romero***.** Dr. Means was not engaged to offer an opinion on this question in the context of resolving a legal dispute. Rather, he was asked what amounts to a hypothetical question to which he gave a hypothetical answer.

Thomas, supra, 3 – 5.

Inasmuch as this is not the first time that *Romero* has been so mischaracterized, and that we have had to go to extraordinary lengths to correct the misstatement, we strongly urge counsel to refrain from repeating this error.

And, before proceeding to addressing the appeal at hand, we will note that Mr. Moore's Memorandum contains an additional, albeit less extreme, error when discussing the evidence required to overcome the presumption. The Memorandum states:

> An Employer's IME report will be sufficient to break the presumption when that IME is one who possesses unchallenged professional qualifications, bases his opinions on a personal examination of the Claimant, and renders a firm and unambiguous medical opinion. *See Washington Post v DOES*, 852 A.2d 909, 914 (D.C. 2004)(*Raymond Reynolds, intervenor*).

Memorandum, page 7.

In fact, what the DCCA in *Reynolds* wrote was:

> We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.

Reynolds, supra, at 910.

There is no mention or requirement that the expert's qualifications be "unchallenged", and while the DCCA requires a lack of ambiguity as to the opinion expressed, it is silent on how "firmly" the opinion must be held. As with all expert medical opinion, one assumes that it is sufficient (and necessary) that the opinion be held "to a reasonable degree of medical certainty". Such a degree of certainty may well be very "firm" in the eyes of one beholder, and less so in another's eyes. Regardless, such a standard is certainly not nearly so stringent as to require the expert to "affirmatively state that the work accident *could not* have caused the disability" or to support the proposition that "if the IME concedes there is a possibility, *no matter how remote*, that the claimant's disability is causally related to the work accident, the IME is insufficient as a matter of law to rebut the presumption."

Turning now to the substance of this appeal, despite expending over five pages discussing legal concepts relevant to the presumption of medical causal relationship, Mr. Moore somewhat surprisingly does not argue that Howard has failed to adduce sufficient evidence to overcome that presumption. Rather, the only assertion of error that we can glean from the Memorandum is that, when the ALJ weighed the evidence without reference to the presumption, she failed to accord adequate weight to the opinion of the treating physician, Dr. Joel Fechter.

It is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See*, *Short v. DOES*, 723 A.2d 845 (D.C. 1998), and *Stewart v. DOES*, 606 A.2d 1350

(D.C. 1992); *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986).

The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician's reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

Additional reasons that have been found to be relevant to this determination are the fact that the IME physician had examined the claimant personally, had reviewed all the available medical reports and diagnostic studies, and had superior relevant professional experience and specialization. *Canlas v. DOES,* 723 A.2d 1210 (D.C. 1999). Indeed, the "mechanical application" of such a preference has been questioned by the Court of Appeals. See, *Lincoln Hockey, LLC v. DOES,* 831 A.2d 913, pages 919 – 922 (D.C. 2003).

Thus, it is our task to determine whether the ALJ gave adequate reasons to accept the opinion of Dr. Levitt over that of Dr. Fechter. After acknowledging the existence of the preference and the fact that Dr. Fechter expressed his opinion that the work injury aggravated Mr. Ellis's pre-existing degenerative arthritis, the ALJ explained her acceptance of Dr. Levitt's contrary opinion while rejecting Dr. Fechter's as follows:

> Even when viewed from the most generous perspective, Dr. Fechter's opinion cannot be deemed persuasive with regard to Claimant's position. Dr. Fechter did state that the 2007 work accident has contributed to the need for a total knee replacement. CX 6, p.48. He also stated he disagreed with Dr. Levitt's conclusions. CX 6, p. 54 – 57. However, he did not convincingly support the causal connection between the 2007 work injury and the current need for knee replacement surgery. For example, the testimony below was elicited from him by counsel, at his deposition regarding his examination of Claimant on June 11, 2012:
>
> > … I thought he was definitely going to need a total knee replacement;
> >
> > Q And, again, that – that would be at least in part related to the June 11, 2007 work accident?
> >
> > A I think so. CX 6, p. 51.
>
> Further, Dr. Fechter is very equivocal in addressing the issue of whether Claimant's 100+ pound weight gain was causally related to his worsened knee condition. CX 6, p. 68 – 69.

Dr. Fechter's one-paragraph written report is even less persuasive than his deposition testimony; in fact, it is unclear and contradictory. He writes:

> … The patient's diagnosis is left knee contusion and strain with aggravation of pre-existing degenerative changes. The patient did obviously have some pre-existing degenerative changes in his left knee but they were symptomatic according to the patient. The symptoms were reduced and worsened by the work injury and fall of 6-11-07. Objective signs of injury have included an effusion and crepitation. The symptoms the patient is experiencing are consistent with the diagnoses and objective findings. CX 1.

This makes no sense. The statement that Claimant's pre-existing degenerative changes "were symptomatic" does not support the claim. If the symptoms were "reduced" by the work injury and fall, they could not also have "worsened" because of it. Dr. Fechter's opinion, as the treating physician, is unworthy of the preference normally accorded and is rejected.

In this case, Dr. Levitt's deposition testimony and written opinion were accorded the most evidentiary weight. His conclusions were cogent and consistent with the other record evidence, as follows:

> … To be very clear, I do not believe this patient has arthritis that requires joint replacement on the basis of a 6/11/07 work trauma. I do not believe that work injury contributed in any manner to a decision that is being made today five years later to replace his joint. This patient is massively obese and has gained 100 lbs in the last year. His massive obesity and his age and not a simple jamming his knee when getting into a police car on 6/11/07 caused the level of arthritis to lead to total knee replacement. We also have a well established pattern of degenerative disease that was symptomatic from prior trauma before 6/11/07… . It is my strong opinion he is literally disabled from all forms of gainful employment but that disability is on the basis of his morbid obesity and on rather advanced arthritis likely involving both knees but is more symptomatic on the left than the right. He needs a knee replacement but the need for that joint arthroplasty has nothing to do with the work trauma of 6/11/07……RX 1, p. 3.

Claimant has not proven his case by a preponderance of the medical evidence, that there is a causal connection between his 2007 work accident and his current knee condition. Accordingly, there is no entitlement to the relief sought. Having so decided, no other issues will be addressed.

Compensation Order, pages 5 – 6.

While the reasons listed associated with Dr. Fechter's testimony are not the most compelling, it is undeniable that the written report is essentially meaningless, and it requires speculation that it

contains specific errors and misspellings to coax any meaning out of it. In contrast, Dr. Levitt's opinion is straightforward, and is easily understood as to both substance and rationale. We can not say that the acceptance of Dr. Levitt's opinion and rejection of Dr. Fechter's are not based upon adequate, substantial record evidence.

CONCLUSION AND ORDER

Because the finding that Mr. Moore's current knee condition is not causally related to the June 2007 work injury is supported by substantial evidence, the denial of the claim for relief is in accordance with the law, and the Compensation Order of April 30, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

JULY 23, 2013
DATE