GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-108

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2012 AUG 24 AM 11 28

NATALIE SINCLAIR
Claimant–Respondent,

v.

SCOPE SERVICES,

and

ACCIDENT FUND INSURANCE COMPANY,
Employer/Insurer - Petitioners.

Appeal from a Compensation Order by
The Honorable Joan E. Knight
AHD No. 12-083, OWC No. 677690

Joseph C. Tarpine III, Esquire for the Petitioner
Allen J. Lowe, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Petitioner) of the Compensation Order (CO) issued on June 25, 2012 by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2] Judge Russell is appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

Claimant's request for ongoing disability and casually related medical treatments. WE AFFIRM, in part and VACATE, in part.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant worked as an Electrical Technician for the Employer. On January 28, 2011, the Claimant was in a motor vehicle accident while working for the Employer. The Claimant suffered an injury to her back and left leg. The Claimant sought treatment with Dr. Leonid Selya. Dr. Selya initially recommended conservative treatment as well as objective testing, including an MRI. The Claimant subsequently was diagnosed with a L4 palsy and foot drop on the left which Dr. Selya opined was a result of the trauma. Dr. Selya recommended surgical intervention and opined the Claimant was disabled from work. Ultimately, because the surgery was not authorized within a certain timeframe, Dr. Selya opined surgical intervention was no longer needed as there would no longer be any benefit. Ultimately, Dr. Selya opined the Claimant could go back to work, with restrictions. The Claimant has not returned to work.

The Employer sent the Claimant for independent medical evaluations (IME) with Dr. Mark Rosenthal and Dr. Robert Smith and obtained a utilization review (UR). Dr. Rosenthal opined on March 1, 2011 that the Claimant suffered from a lumbar sprain with radiculitis as a result of the January 28, 2011 injury and could return to work light duty, an opinion he reiterated in an addendum on March 7, 2011.

On June 3, 2011, Dr. Robert Smith opined that the Claimant suffered a low grade radiculopathy that was consistent with the disc abnormality seen on the MRI scan. Dr. Smith opined the recommended epidural injection and physical therapy was appropriate and that at that time she could return to work light duty. After reviewing a 13 minute tape recording of the Claimant performing light activities, Dr. Smith opined on August 6, 2011 that the Claimant could return to work without restrictions and would not need any further treatment.

On April 10, 2012, a formal hearing was held. The sole issue presented was the nature and extent of the Claimant's disability.[3] The Claimant sought an award of temporary total disability benefits from August 3, 2011 to the present and continuing. On June 25, 2012, the ALJ issued a Compensation Order (CO) granting the Claimant's claim for relief as well as causally related medical treatment.

The Employer timely appealed on July 17, 2012 with the Claimant opposing. The Employer argues that the ALJ erred in finding the Claimant had met her burden of proof because: 1) the objective testing was not taken into consideration in the CO; 2) the surveillance video was ignored by the ALJ; and 3) the ALJ failed to consider the UR finding that further treatment was not reasonable or necessary.

The Claimant in opposition argues the CO is supported by the substantial evidence in the record and should be affirmed.

---

[3] The Employer also raised the issue of medical causal relationship but later withdrew that issue. Hearing transcript at 25.

THE STANDARD OF REVIEW

The scope of review by the CRB 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* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, ("Act") §32-1501 *et seq.* at §32-1521.01(d) (2) (A) and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that that ALJ "erred because she failed to consider the diagnostic tests, including the MRI and the EMG study." Employer's argument at 7. In support of this argument, the Employer relies heavily on the deposition of Dr. Smith. A review of the CO reveals the following discussion:

> It is determined the medical opinions of the treating physician are accepted and given greater weight than those of the IME reports of Drs. Rosenthal and Smith; and the UR reports of Dr. Hinkson. The record evidence establishes that Dr. Selya has treated the Claimant since February 17, 2011, and therefore is in a better position to give a medical opinion addressing the Claimant's condition. Dr. Selya's opinions are most consistent with the objective and diagnostic evidence in the record. Based upon the forgoing, the evidence supports a finding that the medical records of Dr. Selya are more persuasive and consistent with the objective medical evidence of record then those of Dr. Smith and Dr. Hinkson regarding the Claimant's ability to perform regular-duty work or the necessity of the treatment. Dr. Selya's opinions are substantiated with objective medical findings. Thus, the opinion of Dr. Selya is accorded the preference of a treating physician and is accorded greater weight.

CO at 7.

Contrary to the Employer's argument, the ALJ took into consideration the objective evidence in the record in conjunction with Dr. Selya's opinions and found them more persuasive, in accordance with the treating physician preference, then that Dr. Smith or Dr. Rosenthal.[4] We find no error in the ALJ's reliance on Dr. Selya's opinion of the Claimant's diagnosis, based on the objective testing presented to him. What the Employer is asking the CRB to do is to reweigh the evidence in its favor, finding the opinion of Dr. Smith to be more persuasive then Dr. Selya's opinion, a task we cannot do.

---

[4] It is well settled in this jurisdiction that in situations where there are conflicting medical opinions, the opinion of the treating physician is preferred over those of physicians retained simply to examine the claimant for the purposes of litigation. *Stewart v. DOES,* 606 A.2d 1350 (D.C. 1992).

The Employer next argues that the ALJ erred in ignoring the surveillance video submitted into evidence. Employer's argument at 10. We reject this argument. Contrary to this statement, the Employer does acknowledge that the ALJ did view and comment on the video in the CO. Specifically,

> Moreover, the video surveillance taken in July 2011 shows the Claimant putting oil in her car and walking her dog. The video is 13 minutes in length; and is not conclusory of the Claimant performing any task outside the limitations and restrictions prescribed by her treating physician, Dr. Selya.

CO at 7.

Thus, the Employer's assertion that the ALJ ignored the surveillance video is rejected. As with the previous assignment of error, the CRB cannot re-weigh the evidence as the Employer encourages this panel to do. We must affirm the CO if it is supported by the substantial evidence in the record, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion.

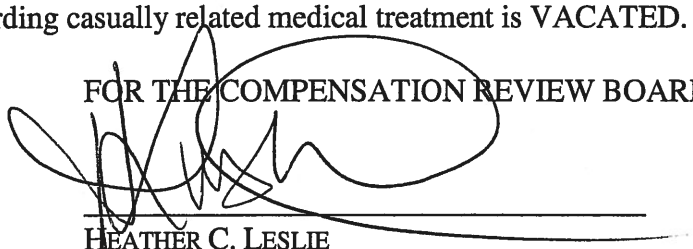
The third argument the Employer puts forth is that the ALJ erred in finding the Claimant had met her burden showing entitlement to medical treatment because the ALJ failed to consider the UR. We must agree with the Employer that the ALJ erred in awarding causally related medical treatment, but on different grounds. A review of the hearing transcript reveals that the Claimant did not seek an award of any medical treatment or any causally related medical expenses at the Formal Hearing. Indeed, the parties specifically agreed that any future ongoing medical treatment was not being contested at that time. Hearing transcript at 27-29. Further, a review of the joint pre-hearing statement reveals that the casually related medicals and interest were not raised as a claim before the ALJ. As such, that portion of the CO awarding casually related medical treatment is vacated as the issue was not a contested issue properly before the ALJ.

CONCLUSION AND ORDER

The Compensation Order of June 25, 2012 is AFFIRMED in part and VACATED in part. The award of temporary total disability benefits from August 3, 2011 to the present and continuing is supported by the substantial evidence in the record and is AFFIRMED.

That portion of the award awarding casually related medical treatment is VACATED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

August 24, 2012
DATE