COMPENSATION REVIEW BOARD

CRB No. 12-106

ASIMA NJOMO,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,

Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. PBL 11-002, DCP No. 3009114587-0001

Jude C. Iweanoge, Esquire for the Petitioner
Shermineh C. Jones, Esquire, for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR and MELISSA L. JONES, *Administrative Appeals Judges*.

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the June 11, 2012, Compensation Order (CO) issued 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 denied the Claimant's request for reinstatement of temporary total disability from October 10, 2010 to May 18, 2011. We AFFIRM.

PROCEDURAL HISTORY AND FACTS OF RECORD

The Claimant worked for the Employer as a Youth Development Representative. On November 17, 2008, the Claimant suffered injuries to her right hip, thigh, and lower back and sought medical treatment with Dr. E. Masoud Pour, an orthopedic surgeon, for her injuries. The Claimant was

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

placed in a temporary total disability status. The Employer accepted the Claimant's injuries and paid disability benefits for a time thereafter.

Subsequently, in March of 2010 the Claimant was released to light duty which the Employer accommodated. In September of 2010, the Claimant's light duty job was to be reassigned to another location. The Claimant sought treatment after being informed of the light duty assignment and was placed in an off duty status by her physician.

In September 2010 the Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Robert Gordon. After performing a physical examination and taking a history of the accident and subsequent medical care, Dr. Gordon opined that the Claimant was at maximum medical improvement and could return to work fully duty without restrictions. In light of this medical report, the Employer sent the Claimant a Notice of Intent to Terminate Workers' Ccompensation Payments on November 10, 2010. The Claimant's temporary total disability benefits terminated on December 10, 2010.

The Employer submitted the IME report for comment to Dr. Pour. On December 31, 2010, Dr. Pour responded via letter and indicated that at no time did he limit the Claimant's ability to work during his treatment. On March 7, 2011, Dr. Pour opined that the Claimant had reached maximum medical improvement on September 28, 2010 and had been able to return to work full duty.

The Claimant sought medical treatment with her primary care physician, Dr. Joseph Nkwanyuo. Dr. Nkwayuo opined the Claimant was temporarily and totally disabled from March 18, 2011 to May 23, 2011 when he released her to light duty.

The Claimant requested a reconsideration of the Employers decision which was denied and the Claimant applied for a Formal Hearing which was held on April 15, 2011. The Claimant sought an award reinstating temporary total disability benefits from October 10, 2010 to May 18, 2011,. The sole issue presented for resolution was the nature and extent of the Claimant's disability, if any. A Compensation Order issued on June 11, 2012 which denied the Claimant's claim for relief.

The Claimant timely appealed on July 11, 2012. The Claimant argues it was in error to disregard the medical opinions of Dr. Pour in favor of Dr. Gordon. The Claimant also argues that Dr. Pour's December 31, 2010 letter to the Employer was mischaracterized and should not have been taken into consideration. The Employer opposes the Claimant's application for review arguing that the CO is supported by the substantial evidence in the record and should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law. Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq*. ("Act"). 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. *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

DISCUSSION

As a preliminary matter, we note that the Claimant attached several exhibits to her application for review including medical reports. The Claimant is reminded that 7 DCMR § 258.3, states,

> An Application for Review must include the following:
>
> (a) An original and three (3) copies of the Application for Review, and
>
> (b) An original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review.

No explanation is offered by the Claimant why the exhibits are attached. We remind the Claimant that the CRB does not have the authority to review a case *de novo*.[2] The attached documents will not be taken into consideration. Our decision will be based upon the record evidence submitted at the Formal Hearing.

We must also point out what appears to be a fundamental misunderstanding on the Claimant's part regarding the Formal Hearing. The Claimant argues that the Employer's evidence, and consequently what the ALJ relied upon, should be limited to documentation and evidence utilized in the notice of intent to terminate the Claimant's benefits. Specifically, the Claimant argues,

> A review of employer's notice of intent to terminate and the D.C. Disability Compensation Program final decision on reconsideration clearly show that employer's decision to terminate Petitioner's payment is based solely on the IME report from Dr. Gordon and not Dr. Pour's letter that was authored after the termination of TTD payment commenced. Second, Dr. Pour's letter dated December 31, 2010 is irrelevant in the instant case because the employer did not rely on the letter to reach its decision to terminate Petitioner's payment.

Claimant's argument at 7-8.

We remind the Claimant that although called "appeals," the proceedings before the Office of Hearings and adjudications are, in actuality, *de novo* proceedings and it is irrelevant whether the termination of benefits is rationally based or not. "The [ALJ] is to make an independent decision based on the evidence at the hearing."[3] Evidence at the hearing can, and often time does, include documents authored after the Employer terminated the Claimant's benefits. The Claimant fails to cite any authority for the proposition that the Employer's evidence at the Formal Hearing should be limited to only that relied upon in terminating the Claimant's benefits. We decline to follow this rationale. Employers, as well as the claimants, can submit evidence they feel is relevant to their

[2] 7 DCMR 266.1.

[3] *Blagmon v. D.C. Department of Public Works*, Dir. Dkt. No. 15-00, OHA No. PBL 99-49, OBA No. 001926 (February 9, 2001).

case, including medical documents authored after the Employer issues an intent to terminate benefits.

Turning to the appeal at hand, the Claimant first argues that the CO is in error as it failed to extend the treating physician preference to Dr. Pour in favor of Dr. Gordon. The Employer argues that the treating preference has been eliminated in public sector cases, relying upon Downing v. D.C. Public Schools, CRB No. 12-004 (April 4, 2012). We agree with the Employer that the treating physician preference has been eliminated in public sector cases. As the CRB has noted in prior decisions,

> Although for a brief time the Act did include a requirement that treating physician opinions be given an evidentiary preference where there is a conflict between the opinions of treating and AME physicians, that mandatory treating physician preference rule has been repealed in public sector cases. See, *Fiscal Year 2011 Budget Support Act of 2010*, D.C. Law 18-233, § 1062 (b), 57 D.C. Reg. 6242, deleting the sentence "In all medical opinions used under this section, the diagnosis or medical opinion of the employee's treating physician shall be accorded great weight over other opinions, absent compelling reasons to the contrary" from D.C. Code § 1-623.23 (a-2) (4). That legislative deletion did away with the mandatory application of a treating physician preference rule in public sector cases.

Smith-Johnson v. D.C. Dept. of Corrections, CRB No. 12-058, AHD PBL No. 10-009C (July 25, 2012).

Claimant's remaining arguments involve the weight the ALJ accorded to the medical opinion of Dr. Gordon above that of the other physicians, including Dr. Pour. While not explicitly stated in the CO, it is clear the ALJ found that the Employer had met its burden of adducing persuasive evidence sufficient to substantiate a modification or termination of an award of benefits through the IME of Dr. Gordon.[4] We find no error in this. Having found the Employer met this burden, the burden shifted to the Claimant to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. Again, while not explicitly stated, it is clear the ALJ found the Claimant had met her burden of showing through substantial medical evidence that her physical condition did not change and that benefits should continue. As the Claimant had met her burden, the medical evidence is then weighed to determine the nature and extent of disability, if any.

A review of the CO reveals a discussion of the various medical opinions, including Dr. Pour, Dr. Nkwayou, Dr. Grant, and Dr. Gordon. After a thorough review of the medical evidence, the ALJ concluded,

> Upon review and consideration of the evidence in the record, I accord the greater weight and find the most persuasive and consistent with the evidence in the record, the September 28, 2010 IME report of Dr. Gordon, that the Claimant had reached maximum medical improvement from her soft tissue injuries sustained at work on November 17, 2009, and was capable of returning to work at that time, and therefore

[4] *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996).

> accept the Employer's evidence, that the Claimant was no longer disabled or entitled to workers' compensation disability benefits after December 10, 2010.

Njomo v. D.C. Dept. of Youth Services, AHD PBL No. 11-002, DCP No. 3009114587-0001 (June 11, 2012).

The Claimant vehemently argues on appeal that the letter of Dr. Pour should not be taken into consideration as the letter does not flow rationally from the medical opinions of Dr. Pour. What the Claimant fails to consider is that the ALJ took into consideration the medical opinions submitted by both parties, including the reports and letter of Dr. Pour, and accorded more weight to Dr. Gordon's opinion. What the Claimant is asking us to do is re-weigh the evidence in her favor, a task we cannot do. As the decision is supported by substantial evidence, the denial of the request for reinstatement of disability compensation payments is in accordance with the law.

CONCLUSION AND ORDER

The denial of the request for reinstatement of disability compensation payments is in accordance with the law.

The Compensation Order of June 11, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

August 9, 2012
DATE