

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-079(R)

PATSY PARKER,
Claimant,

v.

HOWARD UNIVERSITY HOSPITAL and SEDGWICK CMS,
Self-Insured Employer and Third Party Administrator.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 1 PM 12 22

On Remand from the District of Columbia Court of Appeals
Amended Memorandum Opinion and Judgment
No. 13-AA-1319 (December 16, 2014),
AHD No. 11-044A, OWC No. 668948

Krista N. DeSmyter for the Claimant
William H. Schladt for the Self-Insured Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge* and LINDA F. JORY and
HEATHER C. LESLIE *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND REMAND ORDER

INTRODUCTION

On December 16, 2014, the District of Columbia Court of Appeals (“DCCA”) issued an Amended Memorandum Opinion and Judgment that affirmed in part and reversed in part the Compensation Review Board’s (“CRB”) October 29, 2013 Decision and Order. This Decision and Remand Order is in response to the DCCA’s Amended Memorandum Opinion and Judgment’s remand instructions.

FACTS OF RECORD AND PROCEDURAL HISTORY

On May 31, 2013, an ALJ issued a Compensation Order that held Claimant’s lower back pain and cognitive/neuropsychiatric conditions were causally related to her March 10, 2010 work injury, that the treatment protocols for these conditions were reasonable and necessary, that Claimant is totally disabled from performing any meaningful employment and that vocational rehabilitation services were not necessary or appropriate. The ALJ entered an award in behalf of Claimant for continuing temporary total disability benefits beginning January 11, 2013. *Parker v. Howard University Hospital*, AHD No. 11-044A, OWC No. 668949 (May 31, 2013).

The CRB affirmed each of the ALJ's holdings as well as the award for ongoing temporary total disability benefits. *Parker v. Howard University Hospital*, CRB No. 13-079, AHD No. 11-044A, OWC No. 668949 (October 29, 2013). Employer appealed to the DCCA. On December 16, 2014 the DCCA affirmed in part and vacated in part the CRB's Decision and Order.

The DCCA affirmed all but one of the ALJ's determinations. With respect to whether the ALJ correctly concluded that Claimant's lower back pain was causally related to the work injury, the DCCA determined that the ALJ erred:

Looking at the DOES ALJ's compensation order, we see no indication that the ALJ weighed all of the evidence presented regarding the provenance of Ms. Parker's lower back pain. Instead, the ALJ discontinued her analysis of causation with her determination that, at least as to Ms. Parker's lower back pain, Howard had failed to rebut the presumption of compensability. Accordingly, we remand Ms. Parker's claim to the CRB with direction to remand it to the DOES ALJ for weighing in the first instance of the evidence regarding the causal connection between Ms. Parker's lower back and her workplace injury.

Id. at 2-3.

The DCCA's decision also identified an issue that it wanted the CRB to address before remanding the case to the ALJ:

But before the CRB remands this case to the DOES ALJ, *it must address the admissibility of Howard's Exhibit 8*, a Maryland Consent Order reprimanding Ms. Parker's treating physician, which employer sought to use as impeachment evidence. In its briefs to this court, Howard argues that the DOES ALJ erred in declining to admit this exhibit. Howard's arguments to the CRB on this point were far less pointed but we conclude that it just barely avoided abandoning this issue. Given the opacity of Howard's arguments, we understand why the CRB might have overlooked this issue and failed to rule on it. The issue is nevertheless an important one. Moreover, it is one that the CRB should consider in the first instance because it implicates the CRB's interpretation of laws and regulations that pertain to the admission of evidence in DOES hearings. (Emphasis added.)

The DCCA affirmed the ALJ's and the CRB's other determinations and remanded this case with specific instructions:

For the foregoing reasons, we affirm the CRB's rulings as to (1) the connection between Ms. Parker's cognitive impairment and her workplace injury, and (2) Ms. Parker's consequent entitlement to temporary total disability benefits. However, on the issue of the causal connection between Ms. Parker's lower back pain and her workplace injury, we reverse the CRB's decision and direct it to remand this issue to the DOES ALJ to weigh the evidence in the first instance. Prior to remanding to the DOES ALJ, the CRB is to determine whether the DOES ALJ erred by failing to admit the employer's exhibit 8.

In a footnote, the DCCA stated that the parties had briefed this issue "more fully before this court that it was before the CRB. We leave it to the CRB to request supplemental briefing on this issue as it deems necessary."

On February 12, 2015, the CRB asked the parties to file additional briefs that responded to three questions which related to the issue of the admissibility of Employer's Exhibit 8.

EMPLOYER'S EXHIBIT 8

Employer's Exhibit 8 is an October 12, 2012 Consent Order, signed by the Executive Director of the Maryland Board of Physicians reprimanding Dr. Michael Franchetti, who is Claimant's treating orthopedic physician. The Consent Order involved several unnamed workers' compensation patients and concluded that Dr. Franchetti's actions in treating those patients:

constitute a failure to meet the appropriate standards for the delivery of quality medical care, in violation of H.O. §14-440 (a) (22); gross overutilization of health care services, in violation of H.O §14-440(a) (19); and failure to keep adequate medical records, in violation of H.O §14-404 (a) (40). The charges under H.O §14-404(a) (23) of willfully submitting false statements to collect fees for which services are not provided are dismissed.

Dr. Franchetti was reprimanded, placed on probation for 3 years, ordered to pay a fine, complete tutorial courses in medical ethics, medical recordkeeping, and conservative orthopedic pain management treatment and, upon completion of the tutorial courses, meet at least three times with a Board-approved mentor to review and evaluate 10 patient charts. He also was ordered to practice medicine in accordance with the Maryland Practice Act and all other laws, statutes, and regulations regarding the practice of medicine. Dr. Franchetti signed the Consent Order and agreed to be bound by the terms of the Consent Order.

Claimant's Motion to Strike and Employer's Response

On the day before the February 20, 2013 formal hearing, Claimant's counsel filed a Motion to Strike Employer's Exhibit 8. At the formal hearing, Employer's counsel filed his response and opposition to Claimant's motion.

The ALJ did not specifically rule on Claimant's argument that the Consent Order cannot be admitted into evidence. The Compensation Order did not identify the dispute involving Employer's Exhibit 8 nor did it contain any discussion or explanation by the ALJ as to why she did not admit the exhibit into the hearing record.

At the beginning of the formal hearing, the ALJ and the parties discussed Claimant's motion to strike the exhibit and Employer's response. The pertinent portions of this part of the hearing are as follows:

ALJ:

As I noted before we went on the record, Claimant filed a motion to strike Employer's Exhibit 8 on yesterday, regarding the consent order of the Maryland State Board of Physicians against Dr. Franchetti.

The Employer filed a response to that opposition, or that motion to strike. The Employer filed a response in opposition this afternoon, basically arguing that the consent order is a public document and that there was no ground for exclusion of that exhibit.

Do you want to present further argument on the record, or do you want me to rely on the written submissions?

Claimant's counsel:

Your Honor, I'd like to present further argument since I received their response today. The essence of Ms. Parker's argument is that offering this document into evidence would be in direct violation of Maryland law. I've seen the Employer's response today, that this isn't an order. I don't see any definition of "order" that they are setting forth in their argument. It's styled a consent order.

* * *

So I just wanted to add, in addition to the written motion that we've already submitted, that the use of this consent order, one, is in violation of Maryland law and should not be admissible here. There's major problems with that. But, two, its not proper impeachment evidence before this administrative body

Employer's counsel:

The first argument by Claimant's counsel is that this document, Dr. Franchetti's consent order, is inadmissible pursuant to Maryland law. Your Honor, that's not correct. This is a public document, page 21 of my exhibit package. So it's a public document. It's free for anyone and everyone to see.

What Claimant's counsel is referring to are what are called private reprimands. Those types of documents are not admissible. This is a public document. It's on the website. So it can come into evidence. There's no prohibition under Maryland law or any law to prevent it from coming into evidence.

The second argument of Claimant's counsel, you know, goes to the very issues that you need to decide today—the reasonableness and necessity of medical treatment to the low back.

You'll see when we get into more of the evidence, the treatment that this claimant had, she's had ongoing extensive treatment. That's our position, Your Honor. Thank you.

HT at 20-24.

The ALJ then made her decision. The ALJ, at first, indicated that the consent order would be admissible, subject to whatever evidentiary weight she would choose to give it:

I'm considering the arguments of both parties. I think they both have merit. The report or the order, consent order regarding Dr. Franchetti, I think the objection would go to the weight that I accord that document.

However, immediately after this statement, the ALJ, without any explanation, ruled that the document was inadmissible:

I'm going to sustain the objection. I'm going to return it.

HT at 24.

DISCUSSION

Pursuant to the DCCA's instruction, the CRB is tasked to determine whether or not the Consent Order is admissible. We note this is not the first time that a physician's reprimand has been before the CRB.

In *Moncrief v. D.C. Department of Public Works*, AHD No. 07-109, AHD No. PBL 03-008A, DCP No 761020-0002-1999-0005 (May 1, 2007), an ALJ denied a claim for disability benefits, finding that the claimant was capable of returning to his pre-injury job without restrictions. During the formal hearing, the Employer admitted into evidence treating physician Dr. Hampton Jackson's reprimand by the State of Maryland. The Compensation Order stated:

Employer asserts that the opinion of Dr. Jackson, cannot be relied upon because Dr. Jackson received a State of Maryland Reprimand and Probation Order wherein he was cited for his unprofessional medical practices and procedures, and that Dr. Jackson's recommendation of surgery relies on a false and questionable diagnosis. (EE 3&4) The undersigned also acknowledges Dr. Jackson's professional censure which has been acknowledged by this forum consistently of late as "a factor clearly of relevance in an adjudicatory proceeding such as this, where his reports constitute expert evidence rendering the professional shortcomings of the expert a matter of interest."

On review before the CRB, one of the arguments made by the claimant was "that the ALJ erroneously rejected Dr. Jackson's opinion because of a reprimand Dr. Jackson received from the State of Maryland." The CRB held that the ALJ did not reject Dr. Jackson's opinion based on the reprimand. *Moncrief v. D.C. Department of Public Works*, CRB No. 07-109, AHD No. PBL 03-008A, DCP No 761020-0002-1999-0005 (August 17, 2007).

Dr. Jackson's reprimand also was involved in *Eley v. Interpark Holdings, Inc.*, CRB No. 05-04, OHA No. 04-341, OWC No. 593820 (June 29, 2005). In *Eley*, an ALJ ordered an employer to provide the medical care that Dr. Jackson had recommended, percutaneous surgery. On review, the employer argued the ALJ erred by relying on Dr. Jackson's opinion regarding the surgery because of Dr. Jackson's reprimand. The CRB held

With regard to both of Petitioner's challenges on appeal, much emphasis is placed on the Reprimand and Probation Order that Dr. Jackson received and asserts it is a basis for rejecting Dr. Jackson's opinion in favor of the opinion of Dr. Hughes. On a review of the Compensation Order, it is evident that the ALJ considered the Reprimand. It is also evident, given his decision in favor of the Respondent, that the ALJ did not accord much weight to the Reprimand. An ALJ is entitled to draw reasonable inferences from the evidence presented, and the [CRB] discerns no reason to disturb the ALJ's decision with respect to the Reprimand.

In both of these cases, the evidentiary weight, not the admissibility, of the Consent Order was challenged.

Claimant raises two principle arguments for excluding the Consent Order; (1) that a Maryland statute prohibits the Consent Order from ever being admitted in Maryland proceedings and that District of Columbia is required to follow Maryland law and (2) the Consent Order is irrelevant to the issues presented in this case.

Claimant first asserts that irrespective of whether the information in the Consent Order is relevant and material, the Consent Order is inadmissible because the Maryland law which applies to Consent Orders prohibits its admission into evidence and all District of Columbia adjudicatory bodies are required to follow that law pursuant to the Full Faith and Credit Clause of the U.S. Constitution.

Employer argues in opposition that the CRB's decision is controlled by the D.C. Code which provides that an Administrative Law Judge ("ALJ") is not bound by common law or statutory rules of evidence and by the Municipal Regulations which state the ALJ shall receive all relevant and material evidence. Employer further argues that Maryland evidentiary rules do not apply to formal hearings in the District of Columbia since rules pertaining to admissibility of evidence are procedural rules and, because there is an overriding governmental interest in receiving relevant evidence, District of Columbia adjudicative bodies are not required to give full faith and credit to the Maryland statute.

After considering the arguments of the parties, the CRB agrees, in part, with Employer.

D.C. Code § 32-1525 (a) provides that in

...conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

7 DCMR § 223, titled "Conduct of Formal Hearings" provides in § 223.3:

The Hearing or Attorney Examiner shall inquire fully into matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. Under no circumstance shall the Memorandum of Informal Conference be admitted as evidence.

The D.C. Code § 32-1525(a) clearly and unambiguously states that an ALJ is not bound by statutory rules of evidence. Therefore, Maryland Health Occupations Code Annotated § 14-410(a), which we find is a statutory rule of evidence, does not govern here. As we conclude that the Maryland Health Occupations Code is a statutory rule of evidence and the ALJ is not bound by this statute, we agree with Employer that the Consent Order is admissible.

Moreover, we conclude a Consent Order reprimanding a treating physician (or an IME doctor) is relevant and material in a workers compensation case. The Consent Order has probative value as it may go to the credibility of the physician in question. Pursuant to 7 DCMR § 223, the ALJ *shall* receive in evidence the testimony of witnesses and *any documents* which are relevant and material to such matters. Therefore, the ALJ erred by excluding the Consent Order from the Employer's exhibits that were admitted at the formal hearing.

We say that we only agree in part with Employer because our finding that the Consent Order should have been admitted as an exhibit does not mean that the Consent Order must be given any evidentiary weight by the ALJ. We do not find, as the employer argues in its Response to

Claimant's Brief, that the Consent Order "demonstrates overutilization of health care services: or "undermines" Dr. Franchetti's credibility in this case. As we stated above, the Consent Order *may* go to the credibility of the physician in question and the admission of a Consent Order does not automatically undermine a physician's credibility in a case.

The CRB expresses no opinion as to whether the Consent Order impeaches Dr. Franchetti's credibility. It is for the ALJ in the first instance, to determine and explain what weight, if any, she gives the Consent Order in deciding the only remaining issue for her consideration—the causal connection between Ms. Parker's lower back pain and her workplace injury.

CONCLUSION AND ORDER

This case is remanded to the Administrative Hearings Division for a new decision consistent with this decision and the remand instructions from the DCCA.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr
LAWRENCE D. TARR
Chief Administrative Appeals Judge

April 1, 2015
DATE