GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-089

PHILLIP O. BATTLE,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.

Appeal from a June 17, 2016 Compensation Order
of Administrative Law Judge Lilian Shepherd
AHD No. 16-158, OWC No. 727404

(Decided November 4, 2016)

Krista N. DeSmyter for Claimant
Mark H. Dho for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, and GENNET PURCELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Phillip Battle ("Claimant") worked as a bus driver for Washington Metropolitan Area Transit Authority ("Employer"). While performing his duties as a bus driver, Claimant experienced pain in his back that radiated down his left leg. Claimant sought medical treatment for his back pain from Dr. Jonathan Rhee and Dr. Shrinivas Udapi on January 7, 2015. Dr. Udapi ordered a CT of the lumbar spine with IV contrast which was performed and showed no major abnormality. Physical therapy was prescribed. Claimant sought treatment from orthopedic surgeon Dr. Jerry Thomas on February 25, 2015. X-rays taken of the lumbar spine revealed moderate L5-S1 disc degeneration. Claimant was excused from working for various periods of intermittent days and provided disability slips from Drs. Rhee, Udapi and Thomas, which were provided to Employer.

On April 2, 2015, Dr. Thomas examined Claimant and reviewed his lumbar MRI which according to Dr. Thomas showed evidence of significant L5-S1 disc degeneration and disc bulging with possible nerve root impingement. At the request of Employer, Claimant was examined by Dr. Mark Rosenthal, orthopedic surgeon on October 8, 2015. Dr. Rosenthal was of the opinion that Claimant had mild lumbar degenerative disease and there was no job incident which could have caused Claimant's pathology or otherwise said, Claimant's current complaints are not related to his job as a bus driver.

In February 2016, Claimant experienced low back pain which resulted in a trip to an emergency room where he was treated for kidney stones.

On May 17, 2016, Dr. Thomas opined that the cause of the disc degeneration, low back pain, and left leg radicular symptoms cannot be identified with absolute certainty, numerous studies have confirmed that people engaged in a profession requiring prolonged sitting and driving are at increased risk of developing lumbar disc degeneration, especially at L5-S1. Dr. Thomas added that based on Claimant's prolonged driving history, it is likely that his job at least partially contributed to his condition and almost certainly aggravated his symptoms.

A dispute arose as to whether Claimant's lumbar spine condition was causally related to his employment and a formal hearing was held on May 19, 2016,

The issues presented to the administrative law judge ("ALJ") were:

1. Is Claimant's current condition for which he seeks medical treatment causally related to his work injury?

2. Did Claimant give Employer timely notice that he sustained a January 7, 2015, work injury pursuant to § 32-1513?

The ALJ concluded "Claimant's disability is not medically causally related to a work place injury on January 7, 2015. The remaining issue regarding timely notice is not discussed as it is moot". *Battle v. Washington Metropolitan Area Transit Authority*, CRB No. 16-089 (June 17, 2016)("CO").

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief"). In his appeal, Claimant asserts that the CO's rejection of Dr. Thomas's opinion in favor of the IME physician's opinion is not supported by substantial evidence and must be reversed.

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review ("Employer's Brief"). In its opposition, Employer requests an affirmation of the CO and asserts that the CO is in accordance with prevailing law and is supported by substantial evidence.

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code §32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB is also bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

As Employer was contesting the medical causal relationship of Claimant's request for recommended low back surgery, the ALJ properly provided Claimant the presumption of compensability afforded him pursuant to § 32-1521 of the Act. Claimant asserts the ALJ erred in finding Employer rebutted the presumption with the opinion of Dr. Rosenthal. In support of his position, Claimant asserts:

> . . . The Compensation Order specified that the Employer was able to sever the presumption through Dr. Rosenthal's medical evaluation, which stated that "there is no on the job incident which could have caused [Mr. Battle's] pathology." *Id.* This statement only accounts for one possible element of causation: if Mr. Battle had suffered a discrete work injury on a specific date at a specific location. *See McNeal*, 917 A.2d at 658. Dr. Rosenthal's statement, however, does not comment on whether or not Mr. Battle's cumulative trauma injury, which he is not alleging is the result of a discrete incident. *See King*, 742 A.2d at 468-469. Dr. Rosenthal does not address the theory behind a cumulative trauma, and thus does not offer a firm and unambiguous opinion that Mr. Battle is not currently suffering from a work-related cumulative trauma. *See Reynolds*, 852 A.2d at 914. The reliance on the statement that Mr. Battle did not suffer a discrete accident is therefore merely a superficial statement against causation, because it does not actually address Mr. Battle's theory of his disability. *See Baker, supra* at 9. Because the Employer and Insurer did not present any evidence to address Mr. Battle's theory of compensability, that his work injury was a cumulative trauma that first manifested on January 7, 2015, the Compensation Order's finding that the presumption was severed is in error and must be reversed. *See Jackson*, 955 A.2d at 732.

Claimant's Brief at 7, 8.

We are certainly mindful that, as it pertains to an aggravating injury, it is settled law that an injury resulting from cumulative trauma in the workplace is compensable under our Act. The difference between the typical case of a discrete accident causing an injury (including an aggravating injury) and a cumulative trauma case is merely that in the latter case it is not

possible to identify a discrete event occurring at a particular date and time that causes (or aggravates) the injury. Instead, the cumulative traumatic injury becomes manifest only after the body's repeated exposure to individually minor traumas, insults, or harmful employment-related conditions. *See King v. DOES*, 742 A.2d 460 (December 16, 1999).

The instant record lacks evidence that Claimant endured repeated exposure to a trauma or harmful conditions. The only mention of such was described, and we find correctly, by the ALJ as:

> Two days prior to the formal hearing, Dr. Thomas opined that while the cause of the disc degeneration, low back pain, and left leg radicular symptoms cannot be identified with absolute certainty, numerous studies have confirmed that people engaged in a profession requiring prolonged sitting and driving are at increased risk of developing lumbar disc degeneration, especially at L5-S1. *This opinion is not specific to the Claimant and not based on Dr. Thomas' examination but appears to be a general statement based on numerous studies.*

CO at 6, 7 (emphasis added).

Nevertheless, we disagree that Employer was required to present evidence to address Claimant's "theory of compensability, that his work injury was a cumulative trauma that first manifested on January 7, 2015, the Compensation Order's finding that the presumption was severed is in error and must be reversed". Claimant's Brief at 8. We further disagree with Claimant's characterization of Dr. Rosenthal's opinion and agree with Employer that:

> The ALJ correctly found that Dr. Rosenthal's opinion was specific and comprehensive to rebut the presumption. Dr. Rosenthal examined the claimant and reviewed claimants' treatment history. Dr. Rosenthal provide[sic] a specific opinion as to whether claimant's condition could have been medically causally related to any work duties involving bus operation. While claimant interprets Dr. Rosenthal's opinion that "there is no-on-the-job incident which could have caused [claimant's] pathology" lacks any reference to a possible cumulative trauma theory, the ALJ reasonably found it to be specific and comprehensive in its opinion as to the issue of causal relationship.

Employer's Brief at 8, 9.

We conclude the ALJ's determination that Employer rebutted the presumption is in accordance with the law; supported by substantial evidence and is therefore affirmed. *See Washington Post v. District of Columbia Dep't of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004),

We further disagree with Claimant's assertion that when weighing the conflicting medical opinions the ALJ determined the opinion of Dr. Thomas was not entitled to the treating physician preference because his opinion was given in anticipation of litigation. While the ALJ did state "Dr. Thomas[']s opinion seems to be issued in anticipation of litigation", the ALJ explained:

> Based on this opinion, every bus operator for Employer is subject to disc degeneration. It does not provide any analysis that could be specific to Claimant. He further opines that based upon the patient's prolonged driving history, it is likely that his job at least partially contributed to his condition and almost certainly aggravated his symptoms. However, Dr. Thomas doesn't provide any examination notes to support his opinion. There are no notes in any of the medical records regarding a work injury or the back pain was due to work activities. All of Claimant's doctors noted his form of employment but none made a direct correlation to his employment and his disability. Although Dr. Thomas is Claimant's treating physician and is entitled to the preference, Dr. Thomas opinion seems to be issued in anticipation of litigation it wasn't in the medical records. It was crafted as a letter with the heading physicians' statement and dated two days prior to the hearing. It is based on studies and not a specific examination of the Claimant.

CO at 7.

Thus, while it is most likely that Dr. Thomas' opinion was rendered in anticipation of litigation, we find the ALJ rejected it because it was not consistent with his previous medical records and not solely because it was rendered two days before the formal hearing. We further reject Claimant's assertion that "the rejection of Dr. Thomas' medical records because they were based off a study is likewise in error". Claimant's Brief at 9. This statement is not supported by the evidence of record as Dr. Thomas clearly stated:

> While the cause of is disc degeneration, low back pain, and left leg radicular symptoms cannot be identified with absolute certainty, numerous studies have confirmed that people engaged in a profession requiring prolonged sitting and driving are at increased risk of developing lumbar disc degeneration, especially at L5-S1. Based upon the patients' prolonged driving history it is likely that his job at least partially contributed to his condition and almost certainly aggravated his symptoms.

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We conclude the ALJ sufficiently elaborated the bases for rejecting the opinion of the treating physician, Dr. Thomas, consistent with the law of this jurisdiction. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Stewart v. DOES*, 606 A.2d 1350, 1353 n.5 (D.C. 1992). For the reasons provided herein, with regard to the lack of evidence in the record that demonstrate a cumulative injury, we reject Claimant's repeated argument that Dr. Rosenthal's opinion should be disregarded because he did not address the issue of cumulative trauma.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's current lumbar spine condition is not medically causally related to his employment is supported by substantial evidence and in accordance with the law and is therefore AFFIRMED.

So ordered.