GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-194

COLICCHIO PROCTOR,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer–Petitioner.

Appeal from a November 21, 2012 Compensation Order of
Administrative Law Judge Linda F. Jory
AHD No. PBL 06-105A, DCP No. 760002-0001-1999-0023

Andrea Comentale, Esquire, for the Petitioner
Harold L. Levi, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, *Administrative Appeals Judges,* LAWRENCE D. TARR, *Chief Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

This case is before the Compensation Review Board (CRB) on the request of the Employer and Petitioner District of Columbia Public Schools for review of the Compensation Order issued November 21, 2012 by an Administrative Law Judge (ALJ) in the hearings division of the District of Columbia Department of Employment Services (DOES). In that Compensation Order, the ALJ granted Claimant Colicchio Proctor's claim for reinstatement of temporary total disability benefits, which had been terminated based upon the results of an Additional Medical Evaluation (AME) in which the AME physician opined that the current condition of Ms. Colicchio's undisputedly damaged and impaired knees, which are in need of total replacement, is not the result of her September 26, 1994 slip and fall. Petitioner had accepted the incident and resultant injury as compensable, and paid temporary total disability benefits and provided medical treatment until April 6, 2012, when they were terminated based upon the AME report.

Following a formal hearing, the ALJ issued a Compensation Order reinstating temporary total disability benefits. Petitioner filed a timely appeal, to which Ms. Proctor filed an opposition.

We affirm.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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*, D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Act), at § 1-623.28 (a), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to 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, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The sole assignment of error raised by Petitioner in this case concerns the evaluation of medical opinion by the ALJ. Petitioner argues that the ALJ improperly applied a "treating physician preference" when considering this case.

When the Council of the District of Columbia passed the *Disability Compensation Amendment Act of 2010*, effective September 24, 2010, it eliminated the previously enacted statutory provision that up until now we have been referring to as the "treating physician preference", codified at D.C. Code § 1-623.23 (a-2)(4). We have viewed the repeal of that provision as resulting in rendering application of the "treating physician preference" non-mandatory. Our logic was that given that assessing credibility remains an integral function of the fact finder, and given that a physician's relationship to a medical case generally and a given patient specifically are at least relevant to the quality of a medical opinion relating to that patient, ALJs are free to consider treating physician status as a factor in assessing competing medical opinion.

Specifically, we have held:

> Given that assessing credibility remains an integral function of the fact finder, and given that a physician's relationship to a medical case generally and a given patient specifically are at least relevant to the quality of a medical opinion relating to that patient, ALJs are free to consider treating physician status as a factor in assessing competing medical opinion.

See, *Lyles v. District of Columbia Department of Mental Health*, CRB No. 10-200, AHD No. PBL 09-070A (August 23, 2011).

The ALJ's well reasoned Compensation Order has given us the occasion to further consider the effect of the enactment, and then repeal, of the treating physician opinion provision.

As the ALJ points out, the District of Columbia Court of Appeals has sanctioned the application of a treating physician preference as it exists in public sector cases at least since *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004). While *Kralick* predates by several years the enactment of the now repealed and short-lived amendment under the public sector Act, and while we infer from the repeal of the amendment that the Council no longer wishes that terms of the now repealed provision be applied, review of the language that had been enacted and then repealed suggests that our position in *Lyles.* was somewhat off the mark.

In *Kralick*, the District of Columbia Court of Appeals described the application of the treating physician preference applicable in public sector workers compensation cases, as follows,

> On appeal, petitioner argues that DOES erred in failing to defer to the opinion of petitioner's treating physician, Dr. Collins [footnote omitted]. Because Dr. Collins' opinion directly contradicts the findings relied upon by DOES to justify the termination of her benefits, petitioner asserts that the decision was not supported by substantial evidence. Petitioner is correct in pointing out that HN6 in workers' compensation cases, the medical opinion of a treating physician is generally entitled to greater weight than the opinions of doctors who have been retained to examine a claimant solely for the purpose of litigation. *See e.g.*, *Lincoln Hockey v. District of Columbia Dep't of Employment Servs.*, 831 A.2d 913, 919 (D.C. 2003); *Clark v. District of Columbia Dep't of Employment Servs.*, 772 A.2d 198, 202 (D.C. 2001); *Harris v. District of Columbia Dep't of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Short v. Department of Employment Servs.*, 723 A.2d 845, 851 (D.C. 1998); *Stewart v. District of Columbia Dep't of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992). Although a Hearing Officer remains free to reject the testimony of a treating physician, he cannot do so "without explicitly addressing that testimony and explaining why it is being rejected." *Lincoln Hockey*, 831 A.2d at 919 (citing *Canlas v. District of Columbia Dep't of Employment Servs.*, 723 A.2d 1210, 1212 (D.C. 1999)). As we have said, "there would be little force to the preference in favor of a treating doctor's opinion if the agency could ignore that opinion without explanation." *Canlas*, 723 A.2d at 1212.
>
> ...
>
> Respondent argues that this court should limit the treating physician preference to cases arising under the District of Columbia Workers' Compensation Act, D.C. Code §§ 32-1501 *et. seq*. (2001), formerly D.C. Code §§ 36-301 *et. seq*. (1981). In support of this contention, respondent points to two differences between the Workers Compensation Act (which applies to employees in the private sector) and the CMPA (which applies to government employees such as petitioner). First, respondent asserts that the treating physician preference is somehow related to the Workers Compensation Act's presumption that employees' injuries are compensable. *See* D.C. Code § 32-1521 (2001), formerly D.C. Code § 36-321 (1981). Because the CMPA does not contain a similar presumption of compensability, respondent argues that the treating physician preference should not apply here. Second, respondent points out that while the CMPA's disability compensation program is funded by local

> government taxes, *see* D.C. Code § 1-623.42 (2001), formerly D.C. Code § 1-624.42 (1981), the private sector program under the Workers Compensation Act is privately funded by employers "principally by premium payments to large, national insurance companies." *See* D.C. Code §§ 32-1534, 32-1540 and 32-1541 (2001), formerly D.C. Code §§ 36-334, 36-340, and 36-341 (1981). According to respondent, because the insurance companies' profits depend on minimizing payouts for benefits to injured workers, medical experts designated by insurance companies are more likely to be biased than medical experts designated by the government.
>
> Contrary to respondent's first claim, the treating physician preference appears wholly unrelated to the Workers Compensation Act's presumption of compensability. In a recent opinion, we explained the twofold rationale for our treating physician preference: As compared to a doctor retained solely for litigation purposes, we said that a treating physician was (1) less apt to be consciously or subconsciously biased by the litigation, and (2) more likely to be familiar with the patient's condition because he or she has typically spent a greater amount of time with the patient. *See Lincoln Hockey*, 831 A.2d at 919. Likewise, we are unpersuaded by respondent's suggestion that disability compensation claims under the CMPA are somehow less "adversarial" than claims arising under the Workers Compensation Act. We see no reason why a claimant employed by the District should be treated any differently than a claimant employed in the private sector when it comes to assessing the credibility of that claimant's treating physician's testimony.
>
> Furthermore, although the treating physician preference was established in cases arising under the Workers Compensation Act, *see*, *e.g.*, *Stewart*, 606 A.2d at 1353, the preference is commonly applied at the administrative level in cases arising under the CMPA. *See*, *e.g.*, *Smallwood v. District of Columbia Dep't of Mental Health*, 2003 DC Wrk. Comp. LEXIS 258, *16-17 (August 18, 2003); *Berryman-Turner v. District of Columbia Dep't of Corrections*, 2003 DC Wrk. Comp. LEXIS 322, *19-20, (October 1, 2003). In fact, even in the instant case, both the Hearing Officer and the Director applied the treating physician preference before rejecting Dr. Collins' testimony as "stale." Given that the agency entrusted with carrying out the CMPA's mandate has determined that the treating physician preference applies to CMPA cases, we defer to that determination because it is not "plainly erroneous or inconsistent with the statute." *See District of Columbia v. Davis*, 685 A.2d 389, 393 (D.C. 1996) (stating that "we refrain from substituting our judgment 'in areas of expertise reserved for the agency.'") (citation omitted).

The language that was added to the public sector Act was a single 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*.

D.C. Code § 1-623.23 (a-2)(4), deleted by D.C. Law 18-223 (emphasis added).

On further consideration, we now conclude that the now-repealed sentence represented a modification of the existing *Kralick* standard. Under *Kralick* and the "treating physician preference", the fact finder was obligated to give an initial preference to treating physician opinion, and in the absence of persuasive reasons for accepting contrary opinion, treating physician opinion prevails. Thus, in order to withstand review on appeal, the fact finder had to identify the specific "persuasive reasons".

In contrast, the now–repealed provision required not only "persuasive reasons", it required "compelling reasons" for such rejection. We note, for example, that "persuasive authority" is "authority that carries some weight but is not binding on a court", while "compel" means "to cause or bring about by force or overwhelming pressure[…] to convince (a court) that there is only one possible resolution for a legal dispute." BLACK'S LAW DICTIONARY, 868, 276 -277, *seriatum* (7th Ed., 1999),.

Thus, while the addition of the now repealed language appears to have raised the bar on overcoming treating physican preference, its repeal, in our view, restores the law to its previous state.

Under *Kralick*, the ALJ is free to rely upon specific record based attributes of a treating physician's relationship to the case under consideration, such as the length of time and number of visits or examinations that the physician performed, the extent of treatment rendered, the timing of the commencement of the physician's relationship with this case as compared with the timing of the relationship of a physician holding a conflicting opinion relationship to the case, or other record based factors that an ALJ may deem relevant to assessing whether a specific treating physician is in a better position to more accurately assess the true nature of the injury and its effect upon the patient. That is precisely what the ALJ did in this matter, and we detect no error. See, e.g., Compensation Order, page 6 – 7. Contrary to Petitioner's argument that "one can only speculate what the ALJ's decision would have been had the proper standard been applied" (Petitioner's memorandum, page 4), the ALJ gave specific and legitimate reasons for accepting the treating physician's opinion as opposed to that of the IME physician.

We recognize that this is a departure from our previous ruling in *Lyles*, which we now view to have inartfully interpreted the now-repealed amendment as a mere statutory enactment of the treating physician preference. We take this opportunity to specifically correct that error, and state that *Lyles* is no longer to be applied.

CONCLUSION

The ALJ's consideration of record based factors relative to a physician's relationship with Respondent due to his status as her treating physician was not error.

ORDER

The Compensation Order of November 21, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

_____
JEFFREY P. RUSSELL
Administrative Appeals Judge

May 15, 2013
DATE