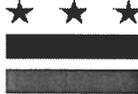


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-035

**SALVADOR H. MARTINEZ,
Claimant-Petitioner,**

v.

**FORT MYER CONSTRUCTION CORPORATION
and LIBERTY MUTUAL INSURANCE CO.,
Employer/Carrier-Respondent**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 SEP 12 AM 9 05

Appeal from a February 25, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 12-351A, OWC Nos. 675507, 696932

Michael J. Kitzman for the Petitioner
Gerard J. Emig for the Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges*.

HENRY W. MCCOY, for the Compensation Review Board. JEFFREY P. RUSSELL, *concurring*.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a truck driver, driving a 14-wheel dump truck. On November 12, 2010, Claimant fell off his truck onto his legs. Claimant received initial treatment the same day at Concentra Medical Center where he was assessed as having sustained a lumbar strain, hip strain, and groin strain. Claimant subsequently complained of severe pain extending

into his right groin and hip. With treatment, Claimant returned to full duty on or about April 28, 2011 with virtually no pain in his lower back or lower extremities.

On September 6, 2012, Claimant fell off his truck again sustaining injury to his elbow/forearm, shoulder, and thoracic spine. Claimant received his initial treatment again at Concentra where he was released to return to work with no prolonged standing and walking no longer than it could be tolerated.

On February 11, 2013, Claimant fell while walking on ice and snow. At this time, Claimant was no longer working for Employer.

On April 18, 2013, Claimant started treating with Dr. Peter Bernad, with a chief complaint of lower back pain. Claimant provided a history of his three falls and Dr. Bernad recorded that the pain started after the third fall.

Claimant filed a claim for temporary partial disability benefits from December 23, 2012 to January 24, 2013 and temporary total disability benefits from February 2, 2013 to the present and continuing, and reimbursement for causally related medical expenses. Following a hearing, an Administrative Law Judge (ALJ) determined that Claimant's alleged disability was not causally related to the injuries he sustained on either November 12, 2010 or September 6, 2012 while in the course of his employment.¹ Claimant has filed a timely appeal with Employer filing in opposition.

On appeal, Claimant argues that the ALJ erred in rejecting the opinion of the treating physician and that the findings on Claimant's credibility are not in accordance with the law. In opposition, Employer asserts that the ALJ gave specific reasons for rejecting the opinion of the treating physician and provided documentation from the hearing record to support her credibility findings. 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 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.² *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained 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

¹ *Martinez v. Ft. Myer Construction Corporation*, AHD No. 12-351A, OWC Nos. 675507, 696932 (February 25, 2014).

² "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

While it was stipulated that Claimant had sustained injuries while in the course of his employment in two work related accidents on November 12, 2010 and September 6, 2012, it was contested by Employer that any currently claimed disability was medically causally related to either incident. Rather, it was Employer's contention that any current alleged disability is related to the slip and fall on the ice on February 22, 2013 and Claimant's diabetic neuropathy.

As provided under the Act and case law precedent, the ALJ determined that Claimant had invoked the presumption of compensability that his claimed disabling medical condition was medically causally related to his work injuries³ and that Employer had rebutted the presumption pursuant to the standard established in *Reynolds*⁴. With the presumption rebutted, the ALJ proceeded to determine whether Claimant established by a preponderance of the evidence that his claimed disability is causally related to his work injuries without the benefit of the presumption.⁵

It is well-settled law in this jurisdiction that a preference is accorded the testimony of the treating physician over that of a physician retained for litigation purposes.⁶ However, this preference is not absolute, because when there are specific reasons delineated for rejecting the opinion of the treating physician, the opinion of another physician may be given greater weight.⁷ It is here that Claimant asserts the ALJ committed error.

The ALJ noted that Claimant was relying on the medical reports of his treating physician, Dr. Bernad, to prove medical causal relationship. In reviewing Dr. Bernad's reports, the ALJ observed that in the reports from April 18, 2013 to July 26, 2013, no mention was made of any injury occurring at work, nor any mention of Claimant's work or work activities. As the ALJ found, Dr. Bernad stated in his first two reports: "Patient has a history of multiple falls; 11/12/10, 9/6/13, and 2/11/13. Pain started after the third fall."⁸ In his April 30, 2013 report, Dr. Bernad noted Claimant had filed for disability, fell frequently and had a history of multiple falls. By his June 24, 2013 report, the ALJ noted that Dr. Bernad stopped mentioning Claimant's falls and instead reported that "The patient has a history of a gun shot from 1993, the bullet is still lodged at L4 which is visible on X-ray. CE 1 at 6."⁹

³ See *Ferreria v. DOES*, 531A.2d 651 (D.C. 1987); *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

⁴ *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

⁵ See *Washington Hospital Center v. DOES*, 744 A.2d 992 (D.C. 2000).

⁶ *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004); see also *Short v. DOES*, 723 A.2d 845 (D.C. 1998), *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992).

⁷ *Canlas v. DOES*, 723 A.2d 1210, 1211-12 (D.C. 1999).

⁸ CO at 7, quoting CE 1, p. 26 and 29.

⁹ *Id.*, at 7.

The ALJ then contrasted Dr. Bernad's observations as noted above with his comments contained in a December 17, 2013 "To whom it may concern" letter. In noting the salient differences, the ALJ reasoned:

The undersigned concludes that Dr. Bernad's late attempt to relate claimant's disability to a work injury is confusing and obviously rendered in preparation for a formal hearing. It is unclear why Dr. Bernad never mentioned a work related injury before December 2013, however the record is clear that the fall in 2013 occurred after claimant was no longer working when he fell on ice and snow. Dr. Bernad had previously indicated on two occasions that the pains claimant complained of occurred *after the third fall*. CE 1 at 26, 29. Thus, Dr. Bernad's decision to change the language from "after the third fall" to "the current pain started after the fall" is extremely questionable and the undersigned is not persuaded that [sic] by his change of language. The undersigned is further of the opinion that this opinion is not entitled to any preference or greater weight than the reports Dr. Bernad issued in April 2013 shortly after the slip and fall on ice and snow and after his personal examinations. *See Proctor v. Georgetown University Hospital*, CRB No. 08-180, AHD No. 02-281, OWC No. 569076 (October 10, 2008).¹⁰ (Emphasis in original.)

In this quoted statement, the ALJ provides the reasons for rejecting the treating physician's later opinion in favor of his original opinion as well as the independent medical report from Dr. Richard Conant that Claimant's current complaints and disability are not the result of the 2010 and 2012 work incidents. The ALJ cites Dr. Bernad's failure to mention in any of his reports that the 2010 and 2012 falls were work related. In addition, Dr. Bernad initially opined that Claimant's pain complaints started after the third non-work related fall; but subsequently changed his opinion in a December 2013 report.

Thus, in accordance with applying the treating physician preference, the ALJ took note of Dr. Bernad's opinions from the start of treatment and concluding with the December 2013 report. While acknowledging Dr. Bernad's role as the treating physician, the ALJ found his later opinion on medical causal relationship less persuasive than the opinion of Dr. Conant and gave specific reasons as required. We find no error in the ALJ's reasoning.

Claimant also cites as error the ALJ's determination that he was not a credible witness. Claimant argues that the ALJ's credibility determination is based only on a consideration of his demeanor and appearance without any evaluation of his testimony in light of its rationality, internal consistency and the manner in which it hangs together with the other evidence in the record.¹¹

In finding Claimant not to be a credible witness, the ALJ stated:

¹⁰ *Id.*, at 7-8.

¹¹ Claimant's Memorandum of Points and Authorities in Support of Application for Review, p. 6.

At the outset, the undersigned concludes that claimant was not a credible witness. This conclusion is based on his demeanor, specifically his failure to keep his eyes open during his testimony and his failure to answer the questions directly as they were translated to him, notwithstanding that claimant completely understood every question asked in English before they were translated for him. Specifically, claimant had to be stopped numerous times and embellished his testimony regularly with his opinion of how he was treated by employer. See HT at 23, 24, 25, 26, 29, 30, 31, 32, 46.¹²

A determination of credibility, like other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole.¹³ Such a determination should involve more than a mere consideration of the witness' demeanor and appearance; it should include an overall evaluation of the testimony in light of its rationality, internal coherence, and consistency with other evidence of record.¹⁴ The credibility findings of an ALJ are entitled to great weight when properly supported.¹⁵

There is some merit in Claimant's argument that the ALJ's credibility determination is improper. The ALJ based the credibility determination on Claimant's "failure to keep his eyes open during his testimony," but such a failure is not inherently indicative of deception. Similarly, to the extent the ALJ based the credibility determination on citations to the hearing transcript, not is there no concomitant observation by the ALJ that this testimony is at odds with other record evidence; given that the ALJ specifically directed Claimant to use the services of a translator, it is unclear how the ALJ reached the conclusion that "claimant completely understood every question asked in English before they were translated for him." "Having to be stopped" (without some record explanation as to why) also is not a tell-tale sign of deception. Finally, expressing an opinion of his treatment by the employer is not necessarily an embellishment and certainly not an embellishment that changes the underlying answer. Nonetheless, to the extent this can be considered error, it is deemed harmless.

The presumption of compensability was invoked on Employer's stipulation that the work injuries occurred and in weighing the medical evidence the ALJ used Claimant's treating physician's reports. At no time was Claimant's credibility a determinative factor in the ALJ's deliberations and as such there is no basis to find reversible error based on the credibility determination.

¹² CO at 5.

¹³ See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

¹⁴ *McAlister v. Flipppo Construction Company*, CRB No. 08-045, AHD No. 03-314, OWC No. 585987 (March 25, 2008); *Russell v. WMATA*, CRB No. 03-241, OHA No. 03-241, OWC No. 560813 (September 28, 2005).

¹⁵ *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

CONCLUSION AND ORDER

The ALJ's determination that Claimant failed to establish by a preponderance of the evidence that his current disability is medically causally related to either the 2010 or 2012 workplace incidents is supported by substantial evidence in the record and in accordance with the law. Accordingly, the February 25, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

September 12, 2014
DATE

JEFFREY P. RUSSELL, *concurring.*

Although I agree with the outcome, I must respectfully disagree with my colleagues' implication that the ALJ acted beyond proper discretion in finding the claimant to lack credibility. The Compensation Order describes behavioral characteristics, lack of directness on responding to questions, and argumentative responses which may, in the judgment of the fact finder, form a legitimate basis for discounting a witness's testimony.

While I agree that a mere recitation that "a witness is not credible based upon his demeanor" is not, under contemporary standards, generally considered adequate to support a finding of lack of credibility, demeanor and the characteristics of a witness's manner of testifying that is adequately described can still form a legitimate basis, beyond the clichéd "cold dead record", to judge the value of testimony.

I fear we too often go too far on insisting that a long litany of demonstrably untrue statements be identified in the record before we defer to an ALJ's credibility determination. We don't require so exhaustive a description of corroborating evidence when a witness is pronounced credible; and I don't think we ought to require a much greater degree of specificity when a witness is deemed incredible.

/s/ Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge