

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-162

RENEE R. SHARPE
Claimant-Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,
Employer-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 APR 17 PM 12 01

Appeal from a December 4, 2013 Compensation Order by
Administrative Law Judge David L. Boddie
AHD PBL No. 12-060, DCP No. 761012-0001-2003-0010

Harold L. Levi for the Petitioner
Lindsay M. Neinast for the Respondent¹

Before HEATHER C. LESLIE, MELISSA LIN JONES and HENRY W. MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by Claimant-Petitioner (Claimant) of the November 7, 2013, 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, Claimant's request for reinstatement of temporary total disability was denied. We affirm.

FACTS OF RECORD AND PROCEDURAL HISTORY

On November 8, 2001, Claimant was employed by Employer as a communications supervisor. On that day, Claimant was assaulted by a colleague. Claimant attempted to return to work but

¹ Justin Zimmerman appeared on behalf of the Employer-Respondent at the Formal Hearing.

was unable to do so due to residual symptoms from the work accident. Employer accepted the claim as compensable as an emotional stress injury and paid benefits.

Claimant sought medical treatment for a depressive disorder and posttraumatic stress disorder (PTSD) related to her work accident. Claimant came under the care and treatment of Dr. Kenneth Gaarder, a psychiatrist.² Dr. Gaarder subsequently retired in 2006 and Claimant began treatment with Dr. David Fischer. Claimant's treatment has consisted of medication and therapy. Claimant has not returned to work.

Employer sent Claimant for an additional medical evaluation (AME) with Dr. Bruce Smoller on March 1, 2012.³ Dr. Smoller opined that Claimant was at maximum medical improvement as it relates to her work injury and did not require anymore treatment. Dr. Smoller further opined that Claimant suffered from mild dysthymia and that while she could return to work full duty, she lacked motivation to do so. . Based upon this AME, Employer terminated Claimant's benefits. After her request reconsideration of the termination was denied, Claimant timely filed for a Formal Hearing.

A Formal Hearing was held on January 31, 2013. Claimant sought reinstatement of temporary total disability benefits from September 7, 2012 to the present and continuing; payment of related medical expenses; and interest on accrued benefits. Employer contested the nature and extent of Claimant's disability, if any. A Compensation Order (CO) was issued on December 4, 2013 which denied Claimant's request.

Claimant timely appealed. Claimant argues the CO was in error in according Dr. Smoller's opinion more weight as his opinion was flawed and the CO did not explain why the treating physician's opinion was rejected. Claimant further argues that the CO erred in concluding Employer presented evidence sufficient to establish a change in Claimant's condition warranting termination.

Employer opposes the Application for Review. Employer argues the CO is supported by the substantial evidence in the record.

THE 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 on Remand 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.*, at § 1-623.28(a), and *Marriott International v. DOES*.⁴

² Prior to treatment with Dr. Gaarder, Claimant was under the care and treatment of Dr. Stephen Rojcewicz. However, he was not a physician approved by the Office of Risk Management so Claimant sought treatment with an approved physician, Dr. Gaarder.

³ This was Dr. Smoller's second AME of the Claimant. At the first AME, in 2002, Dr. Smoller opined Claimant's symptoms were medically casually related to the work accident and agreed with continued treatment at that time.

Consistent with this standard of review, the CRB is 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 conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*.⁵

DISCUSSION AND ANALYSIS

We first address Claimant's assertion that the CO erred in relying upon the medical opinion of Dr. Smoller. Claimant specifically states that as Dr. Smoller did not identify a date when Claimant "basically healed" his opinion is flawed as Dr. Smoller fails to identify when the non-related condition of dysthemic disorder began. Claimant goes on to point out the deficiencies of Dr. Smoller's opinion using select reading of the Diagnostic and Statistical Manual of Mental Disorders (DSM). We disagree with Claimant.

A review of the record reveals a lack of any evidence or documentation from the DSM that was submitted by the parties. On appeal, Claimant has attached a portion of the DSM and directs our attention to this attachment in support of Claimant's argument. We note that the attached document was not submitted as an exhibit at the Formal Hearing. Claimant is reminded that 7 DCMR § 264.1 states,

Where a party requests leave to adduce additional evidence the party must establish:

- (a) that the additional evidence is material, and
- (b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division.....

Claimant has failed to show either (a) or (b) above. As such, submission of the DSM is rejected and we will not refer to the attached documents in our review.

Moreover, Claimant's argument is essentially asking this panel to render a medical opinion regarding the diagnosis of Dr. Smoller by questioning the opinion that Claimant suffers from dysthemic disorder, a condition not related to his work injury. Claimant specifically argues that this disorder "is a mental condition that requires an ongoing diagnosis for two years or more and which is marked by depression, as well as by one or more symptoms of altered appetite, sleep disturbance, poor concentration skills and feelings of hopelessness." Claimant's argument at 16. This is a task we cannot do as rendering medical opinions are beyond our expertise. Although we may draw inferences from the evidence,⁶ the ability to draw an inference is not license to substitute a legal opinion for a medical opinion.⁷ Claimant's first argument is rejected.

⁴ 834 A.2d 882 (D.C. 2003).

⁵ *Marriott, supra*, at 885.

⁶ See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

⁷ See *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

Claimant's next argument is that the CO improperly failed to accord Dr. Fischer the treating physician preference and erred in accepting the opinion of Dr. Smoller. Claimant argues that the ALJ failed to acknowledge the treating physician preference and did not provide legitimate reasons for rejecting Dr. Fischer's opinion. We disagree.

While it is true that the CO did not refer to the treating physician preference, as outlined in *Proctor v. D.C. Public Schools*,⁸ we find this error harmless as the ALJ gave several cogent reasons to reject the opinion of the treating physician, Dr. Fischer including:

- The reports are illegible.⁹
- The reports are "repeats and almost duplications of earlier reports." CO at 9.
- The reports fail to provide and identify the objectives of a treatment plan.
- The reports fail to summarize Claimant's progress.
- Dr. Fischer's response to Dr. Smoller's AME, which included Dr. Fischer's summary of Claimant's symptoms and her diagnosis not addressed by the AME, is not consistent with the lack of documentation of the same symptoms in his reports.

A review of the evidence supports the ALJ's characterization of Dr. Fischer's reports. We find, contrary to Claimant's arguments, the above reasons are specific and legitimate reasons for rejecting Dr. Fischer's reports in favor of Dr. Smoller's AME. Claimant's argument is rejected.

Claimant's next argument is that the CO erred in finding Employer had provided sufficient evidence to establish a change in Claimant's condition warranting termination of her benefits. We disagree.

In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, the government must adduce persuasive evidence sufficient to substantiate a

⁸ CRB 12-194 AHD No. PBL 06-105A (May 13, 2013). We further note, as addressed in *Proctor*, after reassessing our position in *Lyles v. District of Columbia Department of Mental Health*, CRB No. 10-200, AHD No. PBL 09-070A (August 23, 2011) that,

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. 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. (internal reference omitted)

⁹ The CO describes the reports as "essentially illegible." We do note that some reports are more legible than others. However, taking the reports as a whole, we agree that the majority of the reports are largely illegible to varying degrees.

modification or termination of an award of benefits;¹⁰ the modification/termination may be based on any of a number of grounds including but not limited to claimant's current disability is not work-related, claimant is capable of returning to work on full or modified duty, or claimant has voluntarily limited his or her income. Employer does not dispute Claimant was paid disability compensation benefits. Having paid disability compensation benefits for work-related injuries, Employer initially had to present substantial and recent medical evidence to support a modification or termination of benefits payable as a result of disability caused by those injuries.¹¹

The ALJ begins his discussion by correctly noting that it is the Employer's burden to first show some evidence that a change of condition has occurred to warrant a suspension of benefits. CO at 4. To analyze whether or not Employer satisfied its initial burden of production, the ALJ relied upon Dr. Smoller's AME which stated:

Dr. Smoller's medical opinion was that Claimant was at maximum medical improvement and noted that she had been since 2006 according to the AME of Dr. Schulman at that time. He further opined that Claimant did not need any therapy related to the work injury, although he further stated that he was not opining she did not need any therapy, but any that was needed was not related to the work injury.

CO at 6.

We find the above satisfies Employer's initial burden. Dr. Smoller's opinion is relevant and recent. Much of Claimant's argument is that the opinion of Dr. Smoller is "materially defective," however as we discussed above, we rejected this argument.

Finally, we also reject Claimant's argument that the CO did not perform the requisite burden analysis outlined in *Jones*. We do acknowledge that the CO does not delineate burden shifting initially referenced on page 4 of the CO, or stated another way, the CO did not state that the Employer had satisfied its burden. But, taking the CO as a whole, and after correctly reciting the burden shifting scheme, it is clear that the ALJ did utilize the burden shifting scheme and implicitly found not only had the Employer presented evidence warranting a change, but after the burden shifted to Claimant, that Claimant had failed in proving continuing entitlement to disability benefits.

First, the CO extensively summarizes Dr. Smoller's report on pages 4 through 9 of the CO, concluding, albeit at the end of the CO, that

Upon review and consideration of the evidence in the record, I find that Employer has presented sufficient evidence to establish by a preponderance, that Claimant

¹⁰ *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996); *Scott v. Mushroom Transportation*, Dir. Dkt. No. 88-77 (June 5, 1990). Although the Employees' Compensation Appeals Board was abolished in 1998, its rulings remain persuasive in deciding disability cases.

¹¹ *Jones v. D.C. Department of Corrections*, Dir. Dkt. No. 07-99, OHA No. PBL97-14, ODC No. 312082 (December 19, 2000).

has had a change of condition and has reached maximum medical improvement from her November 8, 2001 work injury, and that the September 7, 2012 Final Decision on Reconsideration should be affirmed.

After discussing Employer's evidence, the CO then discusses Claimant's evidence in support of reinstatement beginning on page 9 of the CO. As discussed above, the ALJ rejected the opinion of Dr. Fischer. Having rejected the opinion of Dr. Fischer, the ALJ concluded that Claimant's disability benefits should be terminated. We are satisfied that the ALJ performed the requisite burden shifting analysis.¹²

The essence of Claimant's arguments is that there is substantial evidence in the record to support a contrary conclusion. While this may be, our role is limited to determining whether there is substantial evidence in the record to support the CO's findings of fact. What Claimant is essentially asking the CRB is to reweigh the evidence in her favor, a task we cannot perform.

Finally, we note the CO determines not only should Claimant's entitlement to workers' compensation be terminated, but further awarded further psychiatric medical treatment per the opinions of its AME physician. We find this in error. Claimant did not seek authorization for medical treatment. Moreover, as the CO discussed, Dr. Smoller opined that the Claimant did not need any therapy as it related to her work injury. Thus, Claimant is not entitled to any further treatment as it relates to her work injury. We vacate this portion of the decision.

¹² Furthermore, as the CO summarizes the conflicting evidence with some specificity and weights the evidence, a remand is unnecessary, especially in light of the ALJ's rejection of the treating physician's opinion, a finding we affirm. In light of this, we are uncertain what a remand would accomplish. As stated in *Howard v. DOES*, 881 A.2d 567 (D.C. 2005),

The general rule, derived from the Supreme Court's decision in *Securities Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87, 87 L. Ed. 626, 63 S. Ct. 454 (1943), is that an administrative order can be sustained only on the grounds relied upon by the agency. *Clark v. District of Columbia Dep't of Employment Servs.*, 743 A.2d 722, 730 (D.C. 2000). While this rule does not prevent us from upholding the agency on a different ground where the result is clearly ordained by law, see *Bio-Med. Applications v. District of Columbia Bd. of Appeals & Review*, 829 A.2d 208, 217 (D.C. 2003) ("As the Supreme Court has clarified, 'the ruling in *Chenery* has not required courts to remand in futility.'") (citation omitted), we must exercise caution before doing so.

CONCLUSION AND ORDER

The portion of the December 4, 2013 Compensation Order denying the reinstatement of temporary total disability benefits from September 7, 2012 to the present and continuing is supported by the substantial evidence in the record and is in accordance with the law and is AFFIRMED. The portion of the Compensation Order awarding further psychiatric medical treatment is vacated.

FOR THE COMPENSATION REVIEW BOARD:

/s/ *Heather C. Leslie*

HEATHER C. LESLIE

Administrative Appeals Judge

April 17, 2014

DATE