CRB No. 13-097

PHILLIS SHIPMAN,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,
Employer–Petitioner.

Appeal from a July 2, 2013 Compensation Order of
Administrative Law Judge Karen R. Calmeise
AHD No. PBL 13-026, DCP No. 30081088886-0001

Cory Argust, Esquire, for the Petitioner
Kirk D. Williams, Esquire, for the Respondent

Before HEATHER C. LESLIE AND HENRY W. MCCOY, *Administrative Appeals Judges,* LAWRENCE D. TARR, *Chief Administrative Appeals Judges*.

HEATHER C. LESLIE, for the Compensation Review Panel:

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the July 2, 2013 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for temporary total disability benefits from December 8, 2013 to the present and continuing as well as payment of all causally related medical expenses. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

The Claimant was employed by the Employer as Psychiatric Nurse Team Leader. On October 21, 2008, the Claimant injured her back and neck when she fell while attempting to sit down at work. The Claimant sought medical treatment with Dr. Leonid Selya and was diagnosed with a cervical and back sprain. Dr. Selya also opined the Claimant suffered from an aggravation of "previously reported discogenic low back pain." Ultimately, Dr. Selya indicated the Claimant could return to work in a light duty position. The Claimant has not returned to work.

Prior to the 2008 injury, the Claimant had a 2006 work injury to her back. The Claimant was diagnosed with an L5-L4 disc herniation. After treatment with Dr. Selya, the Claimant returned to work without restrictions in early 2007.

The Employer accepted the Claimant's claim for the neck and back strain resulting from the October 21, 2008 injury. The Employer paid the Claimant temporary total disability benefits and related treatment with Dr. Selya.

On February 25, 2009, the Employer sent the Claimant for an additional medical evaluation (AME) with Dr. Jerome Reichmister. Dr. Reichmister took a history of the injury and treatment and performed a physical examination. Dr. Reichmister opined the Claimant aggravated her pre-existing back condition as a result of the October 21, 2008 injury.

On April 29, 2011, the Claimant underwent an AME with Dr. Robert Draper. Dr. Draper also took a history of the Claimant's injury and treatment. Dr. Draper opined the Claimant's injury had resolved from the October 21, 2008 injury and that she could return to work without restrictions.

On July 19, 2012, the Claimant underwent an AME with Dr. Stuart Gordon. Dr. Gordon took a history of the Claimant's injury and treatment. Similar to Dr. Draper, Dr. Gordon opined the Claimant's back and neck strains had resolved from the October 21, 2008 injury and that she could return to work without restrictions.

Based on the AME with Dr. Gordon, the Employer issued a Notice of Determination (NOD) terminating the Claimant's benefits. The Claimant requested a reconsideration of the NOD. A Final Determination on Reconsideration was issued on December 13, 2012, upholding the termination of the Claimant's benefits. The Claimant's benefits were terminated. The Claimant requested a Formal Hearing.

A full evidentiary hearing occurred on May 15, 2013. The Claimant sought an award of temporary total disability from December 8, 2012 to the present and continuing. The sole issue raised was the nature and extent of the Claimant's disability, if any. A CO was issued on July 2, 2013 which granted the Claimant's claim for relief.

The Employer timely appealed. The Employer argues the CO should be reversed because (1) the ALJ exceeded the scope of her jurisdiction when considering injuries outside the accepted claim; (2) the ALJ improperly applied the treating physician preference; (3) the ALJ's decision to give greater weight to the treating physician over the AME physicians is not supported by the substantial evidence; and (4) the ALJ made several factual findings in the CO which are not supported by the substantial evidence in the record.

The Claimant opposes the application for review, arguing the ALJ can consider the Claimant's physical capacity and is not limited by the NOD and that the ALJ properly accepted the treating physician's opinion.

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. Official 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 Employer's first argument is that the ALJ exceeded her authority by considering the earlier 2006 work related injury. In other words, the Employer argues the 2006 herniated L4-L5 disc condition was not properly before the ALJ as it was not accepted as part of the October 2008 injury. The only conditions properly before the ALJ, the Employer asserts, were the neck and back strains.

However, as the Employer concedes in argument, pursuant to the Joint Pre-Hearing Order the ALJ was to consider an aggravation of the Claimant's back and neck strains. As the Employer points out, when a Claimant submits a claim for an aggravation of a previously accepted body part, that work injury "constitutes a new injury for purposes of compensability insofar as the aggravation resulted from an independent work related incident." *Joseph Brown v. D.C. Dep't of Mental Health*.[1] The previously accepted body part, the back, was injured in 2006. As the ALJ discussed,

> Also on her behalf Claimant introduced the reports of her treating physician who treated Claimant following her 2006 work accident. The treating physician also treated Claimant following the 2008 work accident. The treating physician diagnosed Claimant with L4-5 disc herniation as a result of the 2006 work injury and he opined that the medical treatment resulted in a remission of her symptoms. He noted that Claimants symptoms of pain interfere with her walking and standing and that her condition is caused by the 2006 and 2008 work accidents. The treating physician further opined that the 2008 work injury re-aggravated the lumbar back condition. (EE 7, report dated August 27, 2012) The treating physician recommended that Claimant not return to work full time as a psychiatric nurse and that she only work light duty. (EE 7, pg 1 of 2)

CO at 5-6.

It is clear having reviewed the evidence, the ALJ determined the Claimant had aggravated her back condition. What the Employer is arguing in essence is that the ALJ cannot take into account the prior back injury and disc herniations at all. If this were true, it would be impossible to show an

[1] CRB No. 08-192, AHD No. PBL 07-054 (July 28, 2009).

aggravation of any pre-existing condition. By necessity, the ALJ does have to take into consideration the prior condition to have found an aggravation to have occurred. We reject the Employer's argument on this point.

The Employer's second argument is the ALJ's application of the treating physician preference is contrary to the CRB's decision in *Lyles v. D.C. Department of Mental Health*.[2] After reviewing the Disability Compensation Amendment Act of 2010, effective September 24, 2010, the CRB determined that the Council of the District of Columbia repealed the treating physician preference. With the treating physician preference abolished, we 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.[3]

We have since reconsidered that opinion. In *Proctor v. D.C. Public Schools,*[4] the CRB re-reviewed the history surrounding the treating physician preference and determined,

> 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 § 1-623.24 (5)(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

[2] CRB No. 10-200, AHD No. PBL 09-070A (August 23, 2011).

[3] *Id*.

[4] CRB No. 12-194, AHD No. PBL 06-105A (May 15, 2013).

> legal dispute." BLACK'S LAW DICTIONARY, 7TH ED., Bryan A. Garner, Editor in Chief, West Group 1999, pages 868 and 276 -277, *seriatum*.
>
> Thus, while the addition of the now repealed language appears to have raised the bar on overcoming treating physician 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.

Thus, the ALJ's application of the treating physician preference was not in error as *Lyles* is no longer controlling. The ALJ noted Dr. Selya had the benefit of treating the Claimant over an extended period of time, a plausible reason to find Dr. Selya's opinion as the treating physician to be more persuasive. We find no error in the above.

The Employer next argues, assuming the treating preference applies, that the ALJ's decision to accord Dr. Selya's opinion more weight is not supported by the substantial evidence in the record. The Employer argues specifically that Dr. Selya does not have a greater understanding than the IME physicians of the Claimant's work requirements, but rather the same understanding as the IME physician's knowledge derived from Dr. Selya's reports. Moreover, the Employer argues that Dr. Selya's opinions are sketchy, vague and inconsistent. We reject all of the Employer's arguments.

A review of the CO reveals the ALJ took into consideration the IME opinions as well as Dr. Selya's opinions and articulated cogent reasons why Dr. Selya's opinion was preferred.

> The treating physician had the benefit of reviewing the Claimants medical and physical condition over a significant period of time. The treating physician also had the benefit of monitoring the Claimants condition after she returned to work in 2007. Although the diagnostic tests show that the herniated L4-5 disc[s] have remained unchanged since the 2006 work injury; the Claimants complaints of increased pain and symptoms while walking and standing, are the reasons that the treating physician cites as why she should not return to work full time as psychiatric nurse. Also, after reviewing the AME opinions, the treating physician conclusively opined that the Claimant should only work light duty and stated that:

> She cannot lift more than 10 pounds and she should not be allowed to get in any situations when her back can be reinjured either due to direct or indirect contact with combative patients.
>
> (EE 7, report dated 8/27/2013)
>
> While not discounting the AME physicians medical expertise and analysis of her medical history, I find that neither AME physician took into consideration the fact that the Claimant was working, full duty in 2007 and for the greater part of 2008. Also, even though Claimant continued to take medication for back pain in 2007 and 2008, prior to the instant work accident, no evidence was presented to show that she lost time from work due to the pre-existing lumbar disc condition. While he has treated Claimant over a period of four (4) years, the treating physician shows an understanding of her full duty work requirements and he offers a more clear and consistent picture of Claimants physical capabilities over an extended period of time. (Footnote omitted).

CO at 6.

We find no error in the above analysis. The ALJ gave several cogent reasons why Dr. Selya's opinion was given more weight. What the Employer is asking us to do is to re-weigh the evidence in the Employer's favor, a task we cannot do. As stated above, 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. *Marriot, supra*.

Finally, the Employer points out several factual mistakes the ALJ made. The Employer takes issue with the award of disability benefits prior to December 13, 2012, pointing this panel to the stipulations recited on page 9 of the hearing transcript. We only note that further discussion over the stipulations continued after page 9 and on to page 13 at which point, the ALJ concluded the claim for relief as being temporary total disability from December 8, 2012 to the present and continuing. Hearing transcript at 13. The Employer did not object. The Employer's argument is rejected.

The Employer also takes issue with the ALJ's characterization of the NOD, wherein the ALJ states the Employer accepted the "Claimant's lumbar spine and cervical strain and aggravation of a previously reported discogenic low back condition." We find any mischaracterization to be harmless as no prejudice occurred ultimately to the Employer and the Employer does not put forth any argument alleging any prejudice.

Finally, the Employer argues that the ALJ erred in stating that there was "no evidence" presented to show that the Claimant lost time from work due to her earlier back injury. Employer's argument at 21. A review of the CO shows that ALJ did find that no evidence was presented to show she lost time from work in 2007 and 2008 because of the 2006 injury. A review of the hearing transcript shows the Claimant testified that she returned to work in early 2007 as a result of the injury. While

it is true the Claimant did return to work early in 2007, she returned to work full duty and worked until her new injury. We find the ALJ's statement to be harmless error as it was not determinative of the outcome reached.

CONCLUSION

The Compensation Order of July 2, 2013 is in accordance with the law and is supported by the substantial evidence in the record.

ORDER

The Compensation Order of July 2, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

October 2, 2013
DATE