

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-115

SHURON TURNER,

Claimant- Petitioner,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY,

Self Insured - Employer - Respondent.

Appeal from a Compensation Order of
Administrative Law Belva D. Newsome
OHA No. 11-124, OWC No. 667761

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 JUN 26 PM 12 08

David Kapson, Esquire, for the Claimant
Mark H. Dho, Esquire, for the Employer

Before HEATHER C. LESLIE,¹ LAWRENCE D. TARR, and HENRY MCCOY, *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the September 20, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section² of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for permanent partial disability to her right lower extremity, causally related medicals and interest. We REVERSE and REMAND.

¹ Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

² Formerly known as the Administrative Hearings Division.

BACKGROUND AND FACTS OF RECORD

On February 15, 2010, the Claimant injured her right knee, right ankle and right leg after slipping and falling on ice in the Employer's parking lot. The Claimant came under the care and treatment of Dr. Richard Meyers and Dr. Frederic Salter of the medical practice, Phillips and Green, Limited Partnership. After conservative treatment, the Claimant was ultimately released back to full duty. The Claimant saw Dr. Jeffrey Phillips of the same practice on November 23, 2010, for a final evaluation where Dr. Phillips opined the Claimant suffered from a 16% permanent partial disability to her right lower extremity as a result of the work injury.

The Employer sent the Claimant to be examined for an Independent Medical Evaluation (IME) with Dr. Louis Levitt on two occasions, April 20, 2010 and February 1, 2011. Dr. Levitt opined that the Claimant did not suffer from any permanent impairment attributable to her work injury.

A full evidentiary hearing was held on July 13, 2011 with the sole issue presented being the nature and extent of the Claimant's right lower extremity. A CO was issued on September 20, 2011 denying the Claimant's claim for relief. In that CO, the ALJ found that Dr. Phillips was not a treating physician and not entitled to the treating physician preference. The ALJ found the opinion of Dr. Levitt more persuasive.

The Claimant appealed on October 25, 2011 and filed concurrently a motion to file the application for review out of time. The Claimant first alleged that neither she nor her counsel received the September 20, 2011 CO until October 25, 2011 at which time only her counsel received the CO. The Claimant further argues that the ALJ was in error in not affording the treating physician preference to Dr. Phillips. The Employer counters that the ALJ was correct in not extending the treating physician preference to Dr. Phillips and that the CO is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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. See District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

Preliminarily, we must first address the Claimant's request to file the application for review out of time.

D.C Code §32-1522(2A)(A) states:

A party aggrieved by a compensation order may file an application for review pursuant with the Board within 30 days of the issuance of the compensation order. A party adverse to the review may file an opposition answer; no further submissions shall be permitted, unless requested by the review panel.

Similarly, 7 DCMR § 258.2 provides:

An Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken.

The Claimant, through counsel, avers that the CO, dated September 20, 2011, was not received by Claimant's counsel until October 25, 2011. Claimant's counsel also states, via a notarized affidavit, that the Claimant had not yet received, via mail, the CO as of October 27, 2011. The Employer's opposition, filed after the Claimant's application for review and motion to file the review out of time, does not dispute any of these facts or argue that the application for review was untimely. We are mindful that the filing of a timely appeal is not a jurisdictional prerequisite to appellate review, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling when equity so requires. See *Covington v. Metro Pet Pals LLC*, CRB (Dir.Dkt.) No. 03-96, OHA No. 02-448A, OWC No. 583242 (March 18, 2005). Considering Counsel's affidavit and the Employer's lack of any opposition to the timeliness of the filing of the application of review, as well as the oft quoted principle in this jurisdiction that doubts, including factual, are to be resolved in the employees favor, we find the application for review to be timely. *Jimenez v. DOES*, 701 A.2d 831, 840-741 (D.C. 1997).

Turning to the CO, the Claimant primarily argues that the ALJ was incorrect in finding Dr. Phillips was not a treating physician. The Claimant argues that as Dr. Phillips was part of the "team" of doctors at Phillips and Green and not retained solely for purposes of litigation, he should be accorded treating physician status, relying upon *Georgetown Univ. v. DOES*, 985 A.2d 431 (D.C. 2009). We disagree.

In the case of *Lincoln Hockey, LLC v. DOES*, 831 A.2d 913 (D.C. 2003), the District of Columbia Court of Appeals stated,

The rationale for this preference for the testimony of treating physicians seems to be two-fold, in part because the treating physician was not involved solely for the purposes of litigation and thus perhaps is less apt, even if subconsciously, to be biased in making a diagnosis, and in part because of the typically greater amount of time the doctor has worked with the patient. See, e.g., *Cuppett v. Covington & Burling*, 1998 DC Wrk. Comp. LEXIS 337, 22, H&AS No. 96-563 OWC No. 293552 (Compensation Order, December 25, 1998) ("this sensible rule has at its core the reasonable assumption that physician who has treated a patient numerous times over a number of weeks, months or years is likely to have a greater and more reliable insight into the condition of a patient than does a physician who has merely had only a very limited exposure to the patient."). Subsequently we added

another prong to the "treating physician" doctrine; namely, that a hearing examiner may not reject the testimony of a treating physician without explicitly addressing that testimony and explaining why it is being rejected. *Canlas v. District of Columbia Dep't of Employment Servs.*, 723 A.2d 1210, 1212 (D.C. 1999).

The case law does not directly define "treating physician," but instead appears to define it by negation; treating "physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine the claimant solely for the purposes of litigation." *Stewart*, 606 A.2d at 1353. It is not entirely clear as to the precise nature of the "preference" to be given to the testimony of the treating physician, although plainly the hearing examiner is free to reject it with a proper explanation for doing so. See *Mexicano v. District of Columbia Dep't of Employment Servs.*, 806 A.2d 198, 205 (D.C. 2002). In contesting the credibility or weight of a treating physician's opinion, the employer has the opportunity, before the hearing examiner, to question the factual foundation of the doctor's opinion, suggest that the doctor is unaware of the employee's medical history or otherwise challenge the factual basis of the treating physician's opinion; the hearing examiner takes such a challenge, in addition to competing medical opinions, into account when assessing the medical evidence and addressing whether the treating physician's opinion should be controlling. See *Safeway Stores v. District of Columbia Dep't of Employment Servs.*, 806 A.2d 1214, 1221-22 (D.C. 2002); *Olson v. District of Columbia Dep't of Employment Servs.*, 736 A.2d 1032 (D.C. 1999).

Although we will note that the ALJ incorrectly states that Dr. Phillips was an IME physician, a label not supported by the record testimony or evidence, we find this error harmless as it is clear that Dr. Phillips only examined the Claimant on one occasion, a factor the ALJ took into consideration when determining that Dr. Phillips was not a treating physician.³ As the DCCA stated above in *Lincoln*, a factor to determine whether or not a physician is a "treating physician" is the amount of time the doctor treated the physician. A review of the evidence shows that Dr. Meyer treated the patient approximately 5 times, including the initial consultation. Dr. Salter treated the Claimant approximately 7 times. With this in mind, the ALJ correctly labeled them as treating physicians, neither of whom ultimately rendered any opinion on what, if any, permanent impairment the Claimant suffered from as a result of her work injury.

We decline to extend the label of "treating physician" to all members of a medical practice as the Claimant urges us to do, regardless of the Claimant's relationship with that particular physician. The ALJ is free to consider, as was done in the case at bar, all the evidence presented including the amount of visits when determining who, and who is not, a treating physician in medical practices with multiple doctors. Because of only a one time visit at the very end of treatment, the ALJ determined that Dr. Phillips was not a treating physician. Without more facts regarding any

³ This one time visit is in direct contrast to the fact pattern in *Georgetown, supra*, which the Claimant relies upon. In *Georgetown*, the DCCA found that the treating physicians had spent a "considerable time" with the Claimant. 985 A.2d at 432.

requisite familiarity or any further visits with the Claimant, we find no error in the ALJ's conclusion.

However, we are forced to remand the case as the ALJ was in error when describing the Claimant's legal burden as to produce "substantial evidence of the level of benefits sought." CO at 3. As the District of Columbia Court of Appeals (DCCA) wrote in *Washington Metropolitan Area Transit Authority v. DOES and Juni Browne, Intervenor*, 926 A.2d 149 (D.C. 2007) (*Browne*):

On the question of the nature and extent of Mr. Browne's disability, the ALJ properly acknowledged that the claimant is not entitled to any presumptions. [citation omitted]; *Dunston v. District of Columbia Dep't of Employment Servs.*, 509 A.2d 109 (D.C. 1986). The worker's compensation act defines disability as a "physical or mental incapacity, because of injury which results in the loss of wages." D.C. Code § 32-1501 (8) [footnote omitted]. Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the correct burden of proof is a preponderance of the evidence [footnote omitted]. *Burge v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623, 628 (D.C. 2001).

Browne, supra, at 149.

We must also remand the CO as we find the ALJ, when discussing whether or not the Claimant suffered from a medical impairment rendered two internally inconsistent statements that lead to confusion. While ultimately rejecting Dr. Phillips opinion in favor of Dr. Levitt's and finding that the Claimant did not suffer from a permanent impairment, the ALJ also stated,

Claimant has submitted substantial, credible medical evidence that she suffers from a permanent partial impairment. CO at 4.

We cannot resolve the conclusion that the Claimant did not suffer any impairment with the above statement. Upon remand, the ALJ is directed to reconcile this statement with her ultimate conclusion.

Finally, as the ALJ correctly noted, the ALJ is free to consider more than the medical opinions when assessing the extent of disability to a scheduled member. It is well settled that "disability is an economic and not a medical concept." *The Washington Post v. DOES*, 675 A.2d 37, 40 (D.C. 1996). The ALJ is not bound to accept the treating physician's medical opinion of whether petitioner has a "disability" as that concept is defined in the Workers' Compensation Act. *See Negussie vDOES*, 915 A.2d 391, 392 (D.C. 2007) ("[A]s used in the Act, 'disability' is an economic and legal concept which should not be confounded with a medical condition . . .").⁴

⁴See also *Gly Construction Co. v. Davis*, 60 Md. App. 602, 607, 483 A.2d 1330, 1333 (1984) ("To hold that in all cases the [Maryland Workmen's Compensation] Commission or the court is compelled to find an amount of disability that is no greater than the highest medical evaluation and no less than the lowest medical evaluation would impermissibly shift the legal determination of 'disability' to physicians. That result would be in clear contravention

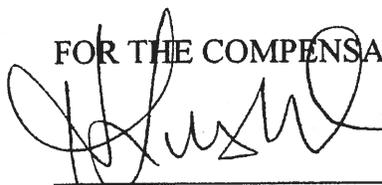
The ALJ is required by statute to consider all the evidence and to exercise independent judgment in determining whether the claimant has a permanent disability and, if so, the extent of that disability. *Id.* at 398.

The ALJ did discuss the Claimant's testimony regarding her job duties, the physical demands of the Claimant's job, and her current complaints, including her "continuing symptoms as radiating pain through her right knee; inability to walk long periods of time; and, the requirement of icing and elevating her right knee for pain." CO at 4. However, no other discussion regarding any affect on the Claimant's ability to work ensues making it unclear in what context the above paragraph should be taken. We are quick to note that we make no decision on whether or not the record supports such an award of permanent partial disability based on any impact to the Claimant's work capacity, but simply the ALJ must explain whether or not, in light of the discussion of the Claimant's current complaints, some award is warranted. Upon remand, the ALJ is to clarify the above discussion.

CONCLUSION AND ORDER

The CO of September 20, 2011 is not in accordance with the law. The Compensation Order is **REVERSED** and **REMANDED** for further findings and analysis consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



Heather C. Leslie
Administrative Appeals Judge

January 26, 2012

DATE