GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 05-235

SAUNDRA TAYLOR,

Claimant–Petitioner

v.

VERIZON COMMUNICATIONS, INC.,

Self-Insured Employer–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
OHA/AHD No. 03-216B; OWC No. 571165

Heather C. Leslie,[1] Esquire, for the Petitioner

Curtis B. Hane,[2] Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*,
and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[3]

[1] Petitioner was represented by Matthew Peffer, Esquire, at the formal hearing. Ms. Leslie filed the Application for Review and Memorandum of Points and Authorities in Support of Application for Review.

[2] Although represented by Mr. Hane at the formal hearing, no counsel entered any appearance on Respondent's behalf in connection with this appeal, and Respondent did not otherwise participate in these proceedings.

[3] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on April 20, 2005, the Administrative Law Judge (ALJ) denied Petitioner's claim for permanent partial disability to each of her legs. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the denial of her claims for schedule awards to her legs was unsupported by substantial evidence in the record and was not in accordance with the law. She seeks reversal of the Compensation Order and a remand to AHD with directions to grant the claim for relief.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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. *See* District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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 Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). 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 conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner first alleges that the ALJ's decision, that Petitioner had sustained no ratable impairment to either leg, is unsupported by substantial evidence. Indeed, Petitioner asserts that the finding that Petitioner "does not suffer from any permanent partial impairment to either lower extremity is not supported by *any* evidence in the record". Memorandum of Points and Authorities, page 4 (emphasis added).

Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005)., and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005)., including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

This blanket attack upon the Compensation Order is not sustainable. The record contains an independent medical evaluation (IME) report authored by Dr. Edward R. Cohen, an orthopaedic surgeon, who examined Petitioner on February 10, 2005. EE 4. The report of this evaluation is referred to specifically by the ALJ in both the findings of fact and the discussion sections of the Compensation Order. The report describes the taking of a complete medical history, a physical examination of the Petitioner, review of medical records (including two MRI studies, reports from an electrodiagnostic study, and neck and low back x-rays. The report also includes reference to Dr. Cohen's status as a Board Certified orthopaedic surgeon, and to Dr. Cohen's conclusion that Petitioner had sustained no permanent partial medical impairment to either leg, "according to the fourth edition of the AMA Guide and taking into consideration the Maryland five factors".

Contrary to Petitioner's assertion, this document, which is in the record, constitutes "such evidence as a reasonable person might accept" to support the proposition that Petitioner has sustained no ratable medical impairment to either leg. As such, the record does indeed contain substantial evidence to support the ALJ's conclusion.

The remainder (and the great bulk) of Petitioner's complaint on appeal centers not on the absence of evidence in support of the ALJ's conclusion, but rather upon the assertion that the ALJ did not accord the contrary opinion of Petitioner's treating physician, Dr. Mark Cohen, sufficient deference, given his status as a treating physician and in light of the "treating physician preference" rule which exists in this jurisdiction. Citing *Stewart v. District of Columbia Dep't of Employment Servs.*, 606 A.2d 1350 (D.C. 1992), among others, Petitioner maintains that, as a matter of law, she was entitled to prevail, because of her treating physician's opinion that she has sustained a 15% permanent partial impairment to each leg.

Petitioner's suggestions of error in connection with this issue are varied.

First (analytically, but not chronologically), Petitioner argues that "the weighing of the opinion of Dr. [Mark] Cohen against the opinions of the insurance medical examiners[4] should not have occurred in this case since there is no basis for rejecting the opinion of Dr. [Mark] Cohen". Petitioner's Memorandum of Points and Authorities, page 7. To the extent that Petitioner is suggesting that there must be something facially invalid or otherwise faulty about a treating physician's opinion to permit an ALJ to even consider opposing IME opinion, the suggestion is rejected. First, such a suggestion has no basis in the Act, nor does Petitioner identify a decisional basis for the proposition. Second, such an artificial constraint upon the fact finder makes little sense given the role that weighing evidence has in deciding contested cases. While many reasons for rejecting a treating physician's opinion might be evident without reference to any specific competing opinion, others that have been recognized as appropriate grounds for rejecting treating physician opinion, such as, for example, superior relevant professional qualifications (see, *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997), or greater actual knowledge of a patient's past medical history (see, *George Hyman Constr. Co. v. District of Columbia Dep't. of Employment Servs.*, 497 A.2d 103 (D.C. 1985)) are impossible to consider under Petitioner's proffered constraints. Indeed, Petitioner's suggestion that there must be some obviously fatal flaw inherent in a treating

[4] The reference to "insurance medical examiners" is not wholly accurate given Respondent's self-insured status.

physician's opinion before contrary opinion can be considered would render contrary opinion pointless. Petitioner's postulated restrictions on even considering contrary opinion has the ring of being fundamentally "mechanical", which "mechanical application", and perhaps even the preference itself, has been questioned by the Court of Appeals. See, *Lincoln Hockey, LLC v. District of Columbia Dep't. of Employment Servs.*, 831 A.2d 913 (D.C. 2003), pages 919 - 922.

Putting aside this argument, as Petitioner points out, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Dep't. of Employment Servs.*, 723 A.2d 845 (D.C. 1998), and *Stewart, supra*.

The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician's reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson, supra*.

Additional reasons that have been found to be relevant to this determination are the fact that the IME physician had examined the claimant personally, had reviewed all the available medical reports and diagnostic studies, and had superior relevant professional experience and specialization. *Canlas v. District of Columbia Department of Employment Services,* 723 A.2d 1210 (D.C. App. 1999).

In this case, the ALJ's reasons are apparent upon close reading of the Compensation Order. These include the fact that the treating physician's opinion was based largely upon an EMG study, about which study the doctor had "no independent opinion of his own" (Compensation Order, page 4), relying, that is, upon the interpretation of the test by a consulting physician, whose own interpretation was dichotomous and thereby "equivocal" (Compensation Order, page 6); the prevalence of negative straight leg raising tests performed by the treating physician during examination, the failure of x-rays to show any instability or diminished disc spaces in the low back (*id.*); the lack of objective findings in diagnostic studies and upon physical examination to support Petitioner's complaints and the concomitant preponderance of subjective complaints, coupled the ALJ's finding that Petitioner was not a credible witness, which finding included the ALJ's making an assessment of her demeanor which the ALJ found to lack signs of discomfort, and which testimonial assertions of radiating pain into her legs he found to be inconsistent with Petitioner's frequent, extended airplane and automobile trips (Compensation Order, page 7). Where, as here, the record lacks significant objective evidence of injury, a claimant's credibility (already a matter of special deference to the ALJ) takes on heightened importance, and can constitute another basis for questioning a treating physician's opinion. These factors were specified by the ALJ, in conjunction with his reference to the IME by Dr. Edward Cohen, noted by the ALJ to include a physical examination revealing a lack of deformity, spasm, or positive results on straight leg raising tests, with an interview (or history), and an extensive medical record review. *Id.*

These reasons, given by the ALJ as the basis for his rejection of the treating physician's opinion, are sufficiently persuasive to permit him to elect to accept the described opinion of the IME

physician. The Compensation Order, containing as it does the reasons for the ALJ's rejection of the rating of the treating physician is in accordance with the law.

CONCLUSION

The Compensation Order of April 20, 2005 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of April 20, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD

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JEFFREY. P. RUSSELL
Administrative Appeals Judge

June 16, 2005
Date