GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 FEB 19 AM 9 25

COMPENSATION REVIEW BOARD

CRB No. 14-106

TRACY DOUGLAS,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
Employer-Respondent.

Appeal from September 5, 2014 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
PSWCP No. 30121251443-0001, OHA No. PBL13-048

Harold L. Levi for the Petitioner
Molly Young for the Respondent

Before MELISSA LIN JONES, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Beginning in 2005, Mr. Tracey Douglas began working for the District of Columbia Department of Motor Vehicles ("Employer") as a road test examiner. On December 15, 2012, Mr. Douglas was administering a road test when an applicant collided with a sign:

> I find Claimant was riding in the passenger seat of the vehicle holding a [clipboard] and pen when the applicant exited the parking lot without first stopping the vehicle to watch for oncoming traffic. The student then proceeded to make a right turn onto Brentwood Road, going north. The applicant turned so wide that the vehicle went into the lane of oncoming traffic. The applicant then accelerated causing [the] vehicle to go into the far right lane of Brentwood Road onto the curb and into a sign post.

> As the applicant lost control of the vehicle I find Claimant put the gear in neutral and applied the hand brake. He then dropped the [clipboard] and reached over to help steer the vehicle. I find Claimant's attempts were unsuccessful in avoiding an accident. I find Claimant attempted to avoid the accident but failed to follow the standard and customary practice exercised in his line of work.

Douglas v. D.C. Department of Motor Vehicles, PSWCP No. 30121251443-0001, OHA No. PBL13-048 (February 24, 2014).

Mr. Douglas filed a claim for injuries to his neck, low back, and right leg including medical benefits and wage loss benefits from December 15, 2012 to the date of the formal hearing and continuing. In response, Employer denied workers' compensation disability benefits on the grounds that Mr. Douglas had intentionally caused his injury.

Following a formal hearing, an administrative law judge ("ALJ") ruled Mr. Douglas had sustained a compensable, soft tissue injury that required conservative treatment including injections. The ALJ awarded Mr. Douglas medical benefits and temporary total disability compensation benefits through April 8, 2013. *Id.*

Mr. Douglas appealed the February 24, 2014 Compensation Order,[1] and the Compensation Review Board ("CRB") vacated that Compensation Order because the ALJ had not applied a treating physician preference:

> While both Dr. Love and Dr. Johnson agreed that epidural injections were medically causally related to the work injury and reasonable and necessary, the physicians disagreed on the ability of Claimant to return to work. Dr. Love issued a disability slip that recommended Claimant remains off work because of the work injury while Dr. Johnson, in his addendum, opined that Claimant could return to work full duty. The CO concluded, in line with the IME, that Claimant could return to work without restrictions, relying upon the medical reports of Dr. Johnson. No explanation is given for rejecting the opinion of the treating physician, Dr. Love. Without specific and legitimate reasons for rejecting the testimony of the treating physician we cannot say the CO is supported by the substantial evidence in the record and in accordance with the law. Consequently, we are forced to remand the case for further findings and conclusions. If the ALJ continues to find the opinion of Dr. Johnson more persuasive regarding Claimant's work status, specific and legitimate reasons must be given as to why the opinion of Dr. Love is rejected.
>
> Until such time, we decline to address Claimant's other arguments as we cannot determine whether the ALJ's rejection of the treating physician is supported by the substantial evidence in the record.

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[1] Employer did not appeal the ruling that Mr. Douglas had suffered a compensable accidental injury. *Douglas v. D.C. Department of Motor Vehicles*, CRB No. 14-028, DCP No. 30121251443-0001, OHA No. PBL13-048 (May 19, 2014).

Douglas v. D.C. Department of Motor Vehicles, CRB No. 14-028, DCP No. 30121251443-0001, OHA No. PBL13-048 (May 19, 2014).

On remand, the ALJ accepted post-hearing evidence and reviewed the record as a whole. The ALJ reached the same conclusion he had reached previously; the ALJ awarded Mr. Douglas medical benefits and temporary total disability compensation benefits through April 8, 2013. *Douglas v. D.C. Department of Motor Vehicles*, CRB No. 14-028, DCP No. 30121251443-0001, OHA No. PBL13-048 (September 5, 2014).

Mr. Douglas appeals the September 5, 2014 Compensation Order on Remand. Mr. Douglas argues the ALJ erroneously terminated his temporary total disability compensation benefits because he required medical treatment after April 8, 2013. Mr. Douglas also asserts the ALJ "misquoted the IME and misstated its opinion as concluding that Petitioner had reached maximum medical improvement status without the recommended epidurals and that he could return to work on April 8, 2013 without restrictions." Memorandum in Support of Petition for Review of Compensation Order on Remand, p. 2. Mr. Douglas concedes that because Employer had denied his claim, the burden of proof rests with him, but he asserts Employer failed to produce sufficient evidence to prove his injury and disability had resolved as of April 8, 2013. Mr. Douglas requests the CRB reverse the Compensation Order on Remand.

In opposition, Employer contends the ALJ reasonably relied upon Dr. David C. Johnson's opinion to terminate Mr. Douglas' temporary total disability benefits because although injections may have been recommended to alleviate Mr. Douglas' pain, he was medically cleared to return to work. Employer also contends the ALJ applied the proper burden of proof in this case. For these reasons, Employer requests the CRB affirm the Compensation Order on Remand.

Mr. Douglas filed a reply to Employer's opposition. In his reply, Mr. Douglas asserts he remains entitled to indemnity benefits because he has not unconditionally reached maximum medical improvement; "[a]s the IME opined that ESIs were reasonable, medically necessary and appropriate, there is no proof that Douglas' disability had ceased as of the COR termination date or that his ongoing condition was no longer causally related to his work injury." Reply Memorandum in Support of Petition for Review of Compensation Order on Remand, p. 3.

ISSUES ON APPEAL

1. Did the ALJ mischaracterize Dr. Johnson's report to reach the conclusion that Mr. Douglas was capable of returning to work as of April 8, 2013?

2. Is the September 5, 2014 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

ANALYSIS[2]

Pursuant to the May 19, 2014 Decision and Remand Order, the ALJ applied a treating physician preference to Dr. Love's opinions; however, since the Decision and Remand Order issued, the Court of Appeals has reviewed a 2010 statutory amendment repealing the treating physician preference in public sector claims and has ruled

> [t]he legislative history manifests a clear and unmistakable intent on the part of the Council to accord equal weight to the testimonies of both treating and non-treating physicians in public-sector cases brought under the [Act].

D.C. Public Schools v DOES, 95 A.3d 1284, 1288 (2014). Thus, there is no treating physician preference to apply in this case. That the ALJ did so is harmless error because he gave sufficient reasons for rejecting Dr. Love's opinions with or without relying on a preference:

> Considering all the medical evidence, I find the weight of the evidence indicates that Claimant's pre-existing back injury and surgery were aggravated by the December 15, 2012 work injury and as a result Claimant experienced head, neck, back and right lower extremity pain subsequent to the December 15, 2012 work injury. I find based on the weight of all the medical evidence that Claimant's head and neck pain had completely resolved by the time Dr. Johnson opined Claimant could return to work.
>
> I reject the reports of Dr. Love. Dr. Love reported on January 2, 2013 that examination of Claimant's lower extremities revealed normal pulses, sensation and strength and the Claimant's straight leg raising test was normal with negative tension signs on both lower extremities. [CE 5] Dr. Love noted radiographs of Claimant's lumbar spine demonstrated spondylolisthesis. He opined Claimant's complaints were caused by nerve root impingement. He noted on February 6, 2003, that the MRI showed disc bulge at L4-5 and evidence of Claimant's prior surgery at L4-5. Dr. Love diagnosed Claimant with right side radiculopathy. Dr. Love opined on January 2, 2013, that he thinks the December 2012 MVA "could have" exacerbated Claimant's previous condition. The conditions of L4-5 herniation, prior surgery with right side radiculopathy was diagnosed prior to the work injury and the evidence shows it did not completely resolve. Dr. Love provides no medical explanation of how Claimant's December 15, 2012 injury exacerbated his pre-existing conditions. The objective medical evidence tends to show Claimant as having the same complaints of low back pain and right lower extremity pain he had before the December 15, 2012 work injury. Further Dr.

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[2] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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.*, ("Act") at §1-623.28(a). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

> Love does not explain how Claimant's symptoms limit his ability to function. He baldly states that Claimant cannot go back to testing drivers.
>
> It has been held that the treating physician's statement that Claimant "can't work" absent a medical explanation for Claimant's limitations are not probative of Claimant's disability and should be rejected. The treating's statements do not constitute a medical opinion as comments outside the scope of his medical expertise "cannot be afforded any preference usually accorded a treating physician." *DARDEN V. DOES, 911 A.2d 410* [D.C. 2006]. Consequently, Dr. Love provides no assistance in assessing the nature and extent of Claimant's disability.
>
> Therefore, of the medical evidence I relied on the reports of Dr. Johnson to reach the decision that Claimant reached maximum medical improvement of his symptoms resulting from the December 15, 2012 injury with some right lower extremity pain that will require further medical treatment.

Douglas v. D.C. Department of Transportation, AHD No. PBL13-048, PSCP No. 30121251443-0001 (September 5, 2014), pp. 9-10. Based upon this review of the evidence in the record as a whole, the ALJ awarded Mr. Douglas temporary total disability compensation benefits through April 8, 2013, and there is no basis for the CRB to overturn that ruling.

It is not necessary that an injury resolve without residuals in order for a claimant to be released to return to pre-injury work, and as for Mr. Douglas' argument that there is no evidence in the record to support the ALJ's terminating indemnity benefits as of April 8, 2013, the CRB has reviewed the independent medical examination report of Dr. Johnson which states:

> The treatment, thus far, has been reasonable and necessary. It would be my recommendation, as Dr. Love had previously suggested, that the patient have a series of epidural steroid injections to see if this might alleviate his symptoms. If after one, or maximum of two injections, the patient does not note any substantial improvement then this treatment should be abandoned and he should be returned to full duty work. If he does have improvement from the first injection of greater than 75%, then after four days resting from the injection, he could probably return to full duty work without restrictions. If he has no epidural steroid injections, then he can return now to full duty work without restrictions. There is no evidence on the electrodiagnostic studies, the MRI scan (although there is degenerative bulging at L4-5 and L5-S1, there is no lateralization or evidence of any acute injury that could be attributed to the incident of December 15, 2012 nor any lesion that would be responsible for right-sided lumbar radicular symptoms) or the physical examination to suggest any objective abnormality that would preclude him from performing his normal work activities without restriction.
>
> The patient will be considered to have reached maximum medical improvement at this time if no epidural steroid injections are being planned.

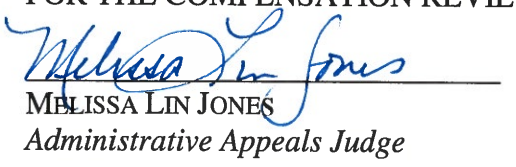
> If the patient does have the injection(s), then four or five days after the first or second epidural steroid injection is performed, if there is improvement in his symptoms, then he will be considered to have reached maximum medical improvement.

Claimant's Exhibit 11. The ALJ reasonably concluded from this report that although epidurals may provide Mr. Douglas with some relief, as of April 8, 2013, he was not suffering from "any objective abnormality that would preclude him from performing his normal work activities without restriction." *Id.* In fact, Dr. Johnson completed a Return to Work Preliminary Report indicating Mr. Douglas could return to work as of April 8, 2013 but may require a few days off following any epidural injections he may have. *Id.* In addition, Dr. Johnson reiterated in his April 26, 2013 addendum that at the time of his previous report "as to whether the patient is capable of returning to full duty work, I concluded that there was no evidence from an objective standpoint in the electrodiagnostic studies, the MRI scan or the physical examination to suggest any objective abnormality that would preclude the patient from performing his normal work activities without restriction." *Id.* (Emphasis in original.) Thus, there is substantial evidence in the record to support the ALJ's terminating indemnity benefits as of April 8, 2013. Mr. Douglas' remaining arguments go to the weight that should have been given to the medical opinions in the record, but the CRB is without authority to reweigh the evidence. *Marriott*, *supra*.

CONCLUSION AND ORDER

Dr. Johnson's report supports the ALJ's conclusion that Mr. Douglas was capable of returning to work as of April 8, 2013. The September 5, 2014 Compensation Order on Remand is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

February 19, 2015
DATE