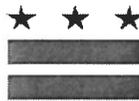


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 15-170

VICTORIA O. MENSAH,
Claimant-Petitioner,

v.

PROVIDENCE HOSPITAL/CARROLL MANOR
and SEDGWICK CMS,
Employer/Third-Party Administrator-Respondent.

Appeal from a September 22, 2015 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 14-218, OWC No. 705716

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 28 PM 1 33

(Decided March 28, 2016)

David J. Kapson for Claimant
Sarah M. Burton for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY on behalf of the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Victoria O. Mensah (Claimant) worked for Carroll Manor (Employer) as a certified nursing assistant. On June 1, 2013, Claimant was transferring a patient from a bed to a wheelchair using the Hoyer lift, when the lift tilted and struck her on the right side of the head and knocked her down.

She was transported by ambulance to Providence Hospital where she was treated for injuries to her head, neck and back. Claimant came under the care of Dr. Richard S. Meyer of the orthopedic group Phillips and Green initially for headaches, back pain, neck pain and occasional numbness in her left leg. Claimant was referred to Dr. V. Sharma, a neurologist for her headache complaints.

Dr. Thomas Wagner of Phillips and Green ordered a neurosurgical evaluation for a disc protrusion at C4-5 and C5-6.

Claimant came under the care of Dr. Sharma on June 25, 2013 for posttraumatic headaches and dizziness. Dr. Sharma held Claimant out of work. At the request of Employer, Claimant was examined by Dr. Louis E. Levitt, an orthopedist on September 10, 2013 and by Dr. Richard Restak on October 21, 2013. Dr. Restak issued an addendum on October 25, 2013 indicating that Claimant could work 20 hours per week for two weeks and then return to regular full duty. Employer obtained an opinion from a utilization review (UR) that concluded physical therapy and a neurosurgical consultation were not reasonable and necessary.

On June 5, 2014, Claimant presented her claim for temporary total disability (TTD) benefits and ongoing medical treatment to an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES). On September 22, 2015, the ALJ issued a Compensation Order denying Claimant's claim, as the ALJ concluded Claimant was no longer totally disabled and did not need further medical treatment.

Claimant filed a timely appeal, arguing that the ALJ's finding that Claimant has not demonstrated an entitlement to TTD benefits is not supported by substantial evidence. Claimant further contends the ALJ's determination that further medical treatment is not reasonable and necessary is not supported by substantial evidence.

Employer filed a timely opposition to the appeal, arguing that the ALJ's decision is supported by substantial evidence and is in accordance with prevailing law.

ISSUE ON APPEAL

Is the September 22, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

Is the ALJ's conclusion that Claimant has not demonstrated an entitlement to TTD benefits supported by substantial evidence and in accordance with the law?

The ALJ properly set forth the standard set forth in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) (*Logan*) for determining the nature and extent of a disability.²

¹ The scope of review by the CRB 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(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 must 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.

² In *Logan*, the District of Columbia Court of Appeals explained the system employed under the Act for determining the extent of disability. A claimant must establish in the first instance that the work injury prevents the performance

The ALJ concluded that Claimant demonstrated a *prima facie* case of total disability under the *Logan* test. With the submission of the reports of Claimant's treating physicians, Dr. Meyer and Dr. Wagner, the ALJ found Claimant met her burden of demonstrating an inability to perform her usual job, shifting the burden to Employer to rebut Claimant's alleged inability or otherwise seek to rebut by establishing the availability of other jobs Claimant could perform. With regard to Employer's evidence, the ALJ stated:

Dr. Levitt and Dr. Restak each opined that Claimant's June 1, 2013 work related injury has resolved. Dr. Levitt opined that Claimant may return to work at her pre-injury level of employment. Dr. Restak opined that Claimant was able to work 20 hours per week for two weeks, and then return to full duty. There is no objective evidence showing that Claimant's symptoms are preventing her from returning to work. In the instant case, the weight of the evidence favors Employer. Claimant is no longer temporary totally disabled.

CO at 7.

Claimant asserts the ALJ offered no "meaningful explanation" as to why the opinions of the independent medical examination (IME) physician are being accepted over that of Drs. Meyer, Wagner and Sharma. Claimant's Brief at 9. We agree. While the ALJ announced the treating physician preference in the "Nature and Extent of Injury" analysis, the ALJ failed to explain why the opinions of Drs. Meyer and Wagner that Claimant was not fit for working duty, were not afforded the treating physician preference. To the contrary, the ALJ stated "the weight of the evidence favors Employer". CO at 7.

While we do not agree with Claimant that a "meaningful explanation" is required when a treating physician's opinion is rejected, we do agree that an ALJ must provide "specific and legitimate reasons" to reject the treating physician opinion and the ALJ in the instant matter failed to do so. As Claimant correctly reminds us, the District of Columbia Court of Appeals (DCCA) failed to accept an ALJ's rejection of a treating physician opinion because the ALJ found an IME physician's opinion is "thorough and comprehensive". The DCCA remanded the matter to the CRB to require the ALJ to provide the necessary "specific and legitimate reasons" to reject the treating physician preference. *See Mellese v. DOES*, Mem. Op. & J. (D.C. June 4, 2012), *Mellese v. Global Fund for Children*, CRB No. 11-029(R) (July 26, 2012). The ALJ's conclusion that Claimant could return to her pre-injury duties is not in accordance with the law and this conclusion is accordingly vacated and the matter remanded to AHD for the ALJ to provide "specific and legitimate reasons" to reject the treating physician preference.

of the claimant's pre-injury job. If the claimant establishes this, a *prima facie* showing of total disability is established, shifting to the employer the burden of rebutting that showing, either by demonstrating that the claimant can in fact return to the pre-injury job, or showing that the employer has offered a modified position to the claimant which is within the claimant's physical capacity, or showing that there are other suitable alternative jobs available in the employment marketplace to persons such as the claimant for which the claimant could compete in light of claimant's age, education work experience, and physical capacity. If the employer does this, the burden shifts back to the claimant to demonstrate that employer's evidence is faulty or inadequate, by, for example, demonstrating that the claimant has actively and diligently sought employment but failed to obtain work.

Is the ALJ's conclusion that Claimant is precluded from all future medical treatment because it is not reasonable and necessary supported by substantial evidence and in accordance with the law?

In support of her position that the ALJ's "reasonable and necessary" determination is in error and must be reversed, Claimant asserts:

- 1) The ALJ has engaged in the precluded analysis of weighing the opinions of the IME doctors in determining the issue of reasonableness and necessity of medical treatment.
- 2) The ALJ does not explain why the opinion of Dr. Goldman is more credible than that of specialists who have engaged in active treatment of Claimant.
- 3) The ALJ was only asked to make a finding on the reasonableness and necessity of the requested neurosurgical consultation and physical therapy. However, the statements made in the Conclusion of Law section of the Compensation Order could be construed to deny Claimant all future medical care and treatment related to this work injury.

With regard to Claimant's first point, we noted the DCCA has agreed with the CRB's holding that it is permissible for an ALJ to consider an IME physician's opinion as evidence supporting the UR report. *Placido v. DOES*, 92 A.3d 323, (D.C. 2014) citing *Hisler v. DOES*, 950 A.2d 738, 746 (D.C. 2008). Thus, we reject Claimant's assertion that the ALJ was precluded from weighing opinions of the IME doctors by merely stating in the CO that the opinion of Dr. Goldman mirrors the opinion of Dr. Levitt and Dr. Restak. CO at 9.

With regard to weighing the opinions of the treating physician and the UR opinion, the ALJ stated:

Claimant's treating physicians treated her based upon her subjective complaints. The medical records of the treating physicians do not present objective evidence explaining why claimant reports experiencing increased numbness and pain eight months after her soft tissue injures. The June 3 2013 radiology report indicated no acute abnormality within Claimant's CT head/brain scan. The July 31, 2013 report showed that Claimant's head CT showed no abnormality and C Spine CT showed no fracture.

* * *

Dr. Goldman opined that (1) it is very clear in the medical records that the claimant has significant functional overlay, significant exaggeration of clinical findings, and does not appear to require any medical treatment whatsoever; (2) that the claimant is not a candidate for any continuation of physical therapy, that she has had extensive physical therapy and that it has not provided any significant long term curative or restorative benefits; and (3) that the claimant is absolutely not a candidate for neurosurgeon consultation, that the claimant is not a candidate for any type of surgery, and that she is significantly exaggerating her clinical findings.

CO at 8.

This Panel concludes the ALJ fully explained why she credited the opinion of Dr. Goldman over the opinion of the treating physician and committed no error.

With regard to Claimant's third point, we note the ALJ listed three questions in the CO that were specifically presented to Dr. Goldman by Employer. The first question involved treatment for headaches with Dr. Sharma, the second question involved physical therapy and the third question asked about the reasonableness and necessity of the neurosurgical consultation. We further note no distinction in the hearing transcript or the Joint Pre-Hearing Statement which would indicate Claimant was only asking for approval of physical therapy and a neurosurgical consultation. Accordingly, we find no error in the ALJ's reasonableness and necessity analysis. As we conclude the ALJ's determination that further medical treatment is not reasonable and necessary at this time is supported by substantial evidence and in accordance with the law, this conclusion is affirmed.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant could return to her pre-injury duties is not in accordance with the law is accordingly VACATED and the matter REMANDED to AHD for the ALJ to provide specific and legitimate reasons why she rejected the treating physician preference. The ALJ's conclusion that Claimant's further medical treatment is not necessary or reasonable is in accordance with the law and is accordingly AFFIRMED.

So ordered