COMPENSATION REVIEW BOARD

CRB No. 13-151

DENISE A. WARMUS,
Claimant–Petitioner,

v.

WACKENHUT SERVICES, INC. and GALLAGHER BASSETT SERVICES,
Employer/Carrier-Respondents

Appeal from a October 31, 2013 Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 09-022B, OWC No. 630574

Benjamin T. Boscolo, for the Petitioner
Kelly D. Fato, for the Respondents

Before: HENRY W. MCCOY, HEATHER C. LESLIE, and Melissa Lin Jones, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on October 31, 2013[1] of an Errata Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) denied

[1] The October 31, 2013 CO under review is entitled "Errata Compensation Order". Both Petitioner and Respondent reference this CO in their respective filings. However, a simply entitled "Compensation Order" filed with Petitioner's application for review is dated August 31, 2013. Other than the fact that August 31st was a Saturday, there is nothing in either party's filing or the Errata CO itself to explain the reason for the issuance of an erratum.

Claimant's request for authorization for medical treatment for her left shoulder condition as it was found not causally related to the work injury of July 17, 2006.[2]

Claimant was working for Employer as a security officer on July 17, 2006 when she hit her right knee on an x-ray machine. Claimant filed a claim for temporary total disability benefits and causally related medical expenses. Following a formal hearing on September 15, 2009, Claimant's claim for relief was granted in an October 27, 2010 CO.[3] This decision was not appealed and the ALJ in the instant matter under review adopted and incorporated the findings of fact and conclusions of law of the preceding CO.

Claimant now contends after she underwent right knee surgery on August 20, 2007 her leg gave way causing her to fall and injure her left shoulder. Claimant also testified to other falls which she attributed to the instability of her right knee. As she is left hand dominate, Claimant testified that in all of these falls she braced or caught herself with her left arm causing her to experience pain in her left shoulder.

As the October 27, 2010 CO only authorized treatment for the causally related right knee and back pain, Claimant filed a claim seeking authorization specifically for an MRI of the left shoulder. Finding Claimant's testimony on reporting her left shoulder injury to her treating physician to lack credibility and the lack of medical evidence expressing a causal relationship between the claimed left shoulder injury and the 2006 work injury, the ALJ denied the request to authorize treatment. Claimant filed a timely appeal with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred as a matter of law in not applying the treating physician preference and in determining that the left shoulder injury was not causally related to the July 17, 2006 work injury. Employer counters that both of Claimant's arguments are without merit and that the CO is supported by substantial evidence and should be affirmed.

ANALYSIS

The scope of review by the CRB, 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 CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[4] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

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[2] *Warmus v. Wackenhut Services, Inc.,* AHD No. 09-022B, OWC No. 630574 (October 31, 2013)(CO).

[3] *Warmus v. Wackenhut Services, Inc.,* AHD No. 09-022A, OWC No. 630574 (October 27, 2010).

[4] "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

We first take up Claimant's assertion that the ALJ erred as a matter of law in failing to apply the treating physician preference. As Claimant stated correctly, in this jurisdiction, the medical opinion of the treating physician is afforded a preference over the opinion of a doctor who is engaged to examine the claimant solely for the purposes of litigation.[5] This preference is accorded because it is recognized that the treating physician generally has spent more time with the injured worker and because the treating physician has not been involved with the injured worker solely for purposes of litigation, his opinion is less likely to be biased.[6]

As Claimant is entitled to a rebuttable presumption that her claim for benefits comes within the provisions of the Act[7], which extends to the medical causal relationship between the work injury and resulting disability[8], the ALJ relied on Claimant's testimony to find that the presumption was invoked. With the presumption invoked and the burden shifted to Employer to rebut, the ALJ determined that the medical reports of Dr. Levitt were sufficient to rebut the presumption. Neither party contested these determinations. Rather, it is the weighing of the evidence without the benefit of the presumption that Claimant takes issue.

In assessing Claimant's medical evidence, the ALJ stated twice during the course of the decision that "Claimant's evidence is void of medical documentation that relates the current medical condition of her left shoulder to the work incident of July 17, 2006." Claimant asserts that this statement is inaccurate and does not consider the treating physician's opinion with regard to the left shoulder condition. We agree.

There is no dispute in this case that Dr. John Klimkiewicz was Claimant's treating physician, having treated her since 2006. Claimant specifically argues that Dr. Klimkiewicz "opined that her shoulder condition was causally related to her knee condition because the symptoms that she was experiencing were consistent with the history given by Ms. Warmus of her knee giving way causing her to fall several times upon the left arm and shoulder."[9] In addition, Claimant asserts that Dr. Klimkiewicz opined Claimant's "left shoulder condition was due to the fall that she reported to him and was consistent with his findings on clinical examination and his long-standing knowledge of her right knee condition."[10] In making these assertions, Claimant cites to no specific exhibits in the record.

The ALJ noted that Claimant testified that on August 20, 2007, a day after she underwent right knee surgery, her leg "gave way" causing her to fall and injure her left shoulder. Claimant did not testify to seeking medical treatment but rather waited until her next scheduled appointment with Dr. Klimkiewicz on August 28, 2007 where she allegedly related the incident

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[5] *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992).

[6] *Lincoln Hockey, LLC v. DOES*, 831 A.2d 913 (D.C. 2003).

[7] D.C. Code § 32-1521(1). See also, *Parodi v. DOES*, 560 A.2d 524 (D.C. 1989).

[8] *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

[9] Claimant's *Memorandum of Points and Authorities in Support of Application for Review*, p. 6.

[10] *Id.*

but the medical report of that date does not corroborate her testimony. The ALJ quotes from that medical report, which focuses on Claimant's post-surgery (arthroscopy to reconstruct ACL) right knee pain with the ALJ concluding: "Dr. Klimkiewicz makes no mention of Claimant's alleged fall or left shoulder injury of August 20, 2007."

The ALJ goes on to note that after numerous visits over the course of the next three and a half years that it was not until an April 29, 2011 visit that a notation of the shoulder injury appears and not by Dr. Klimkiewicz, but his technician, "Oswald". The hand-written notes relate that the left shoulder "crackles and pops" and that the right knee/back had "given out a couple of times on me" and "fallen & twisted knee & injured L shoulder".[11] Dr. Klimkiewicz's actual report for that date makes no mention of the left shoulder but rather as he stated in his deposition, was "focused more on her knee and her back."[12]

However, Dr. Klimkiewicz did testify on direct in his deposition to some examination and treatment of the left shoulder (CE 7, deposition p. 22-23):

> Q So, the gratis medical treatment that you gave, when was that first rendered?
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> A You know, I've got to say - - I'm not even sure when the injection was done because I didn't even dictate it as part of her note, but I know that I did inject her one - - I injected her on two occasions. Once, the dictated dictation was - - I saw that in my note here, I just don't have the dates memorized - - the first was September 1st of 2012.
>
> Q And did you take a history from her regarding her shoulder complaints then?
>
> A Yeah, you know, on examination she's complaining more of her left shoulder. She states she mentioned this to her attorney who reviewed my notes and there was no recollection of this in my notes. She had a fall postoperatively where she injured her left shoulder. I injected her one time in the office and this gave her some temporary relief for presumptive impingement. Impingement is a little bit of tendonitis to the shoulder. She comes in for evaluation and at that time, she had a fairly benign exam in terms of the shoulder, in terms of her range of motion, but did have some tenderness where the rotator cuff would insert, which is very common in this age group after an injury - - it doesn't have to be after an injury, but it can be after an injury - - and so I injected her again at that time.

[11] The observational notes appear in what is marked as "Tribunal Exhibit 1". Dr. Klimkiewicz identified the writer as "Oswald" in his deposition testimony under direct examination on p. 22. CE 7.

[12] Klimkiewicz Deposition, p. 21, line 11-12. CE 7.

Dr. Klimkiewicz was then asked based on his history and physical examination of Claimant if he had an opinion, within a reasonable degree of medical probability, about the cause of her left shoulder condition and stated:

> Well, what I can say is that when she came in, there was never really any, let's say objective signs, no bruising, nothing like that matter. I can say she never presented like a fracture. She never had any problems with her shoulder prior to this fall. I didn't witness the fall, but I have no reason to believe that she had [not] fallen, so I have to put two and two together and kind of say I think a lot of her shoulder pain is probably a result of that fall. You know, but, again with lack of documentation, I mean, obviously that's up for debate. But sure, trauma can cause impingement. I still think that's her diagnosis. I think to definitively to work that up, I do think that an MRI isn't unreasonable, but I got to say, in Denise - - in the big picture of Denise's case, I mean, that's, you know, why the route was taken because my main job, obviously, was to try to get her back into some form of gainful employment, and quite frankly, I didn't pay much attention to the shoulder because quite frankly she had no means to kind of work it up appropriately, and I've got to that, you know, I was trying to be, let's say, charitable, okay, in terms of my approach to her. She was never charged for anything regarding the shoulder and the documentation that I just read to you was all of the documentation that I have.[13]

Claimant stresses in this appeal that Dr. Klimkiewicz rendered an opinion that her left shoulder condition was due to the fall she reported to him and consistent with his clinical examination and his knowledge of her right knee condition. After a review of his medical reports and his deposition, the above statement by Dr. Klimkiewicz is most likely the basis for Claimant's argument. While this response to the question asking his opinion is lacking in certainty and he does not state specifically that his opinion is "within a reasonable degree of medical probability", it is Dr. Klimkiewicz's opinion on causation and causal relationship and thus entitled to the treating physician preference.

While the discussion portion of the CO begins with statements on the current state of the law with regard to the presumption of compensability, rebutting that presumption, and the supporting case law for both, there is no concomitant acknowledgement of the treating physician preference. With there being no dispute that Employer presented sufficient evidence to rebut the presumption, it would be expected for the ALJ to state that the evidence would now be weighed without the benefit of the presumption with Claimant having to show by a preponderance of the evidence that her left shoulder condition was causally related to the 2006 work injury. The lack of such a statement is probably attributable to the ALJ's initial determination invoking the presumption that there was no evidence of any doctor's opinion expressing that causal relationship.

The ALJ's statement that Claimant's evidence is "void" of any doctor's opinion on causal relationship is not an accurate interpretation. Dr. Klimkiewicz does not use the same causal

[13] *Id*., p. 25-26.

relationship language in relating Claimant's left shoulder to her right knee that he does when speaking about her back pain and total knee replacement. However, he does make the connection that prior to Claimant falling, she had no shoulder problems and now she does, so he puts "two and two together" to conclude that her shoulder pain is probably the result of the fall. This constitutes Dr. Klimkiewicz's opinion on causal relationship and it is entitled to the treating physician preference.[14]

In her final conclusion, the ALJ stated in "assessing Claimant's evidence by a preponderance of the evidence standard, Claimant has failed to prove her left shoulder condition is causally related to the work incident." Again, this conclusion is predicated on the determination that "Claimant's evidence is void of medical documentation" of that causal relationship, which we now deem to be error. Dr. Klimkiewicz's opinion on causal relationship in all of its nuances should have been combined with the other record evidence pointing to a causal relationship and weighed against Employer's rebuttal evidence in order to determine whether Claimant prevailed by a preponderance of the evidence. As this was not done initially, the ALJ is instructed to do so on remand.

Finally, we address Claimant's argument that the ALJ failed to consider the alternative theory she advanced that it was the cumulative result of multiple falls onto her left side that contributed to the left shoulder injury. Claimant specifically argued in her closing statements at the hearing that she was not relying solely on the August 20, 2007 fall (Hearing Transcript, p. 112), the pain from which she concedes went away (HT, p. 120), but rather she points to recurring falls where she braced herself with her left arm and fell onto left shoulder as the cause for her current left shoulder pain. As we agree the ALJ erred in failing to consider this alternative theory of injury, we commend to the ALJ's reconsideration the detailed colloquy she engaged in with both counsel during closing arguments where specific references were made in the evidentiary record indentifying multiple falls onto the left shoulder.

[14] While there is a well established preference, in this jurisdiction, for the treating physician's opinion, that preference is not absolute because when there are specific reasons for rejecting the opinion of the treating physician, the opinion of another physician may be given greater weight. *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999).

CONCLUSION AND ORDER

The ALJ's determination that Claimant has not met her burden by a preponderance of the evidence that her left shoulder condition is causally related to the 2006 work injury is not supported by substantial evidence in the record and is not in accordance with the law. The October 31, 2013 Errata Compensation Order is VACATED, and this matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

February 18, 2014
DATE