

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 14-083**

**WILLIAM ALSTON,  
Claimant-Petitioner,**

v.

**FIRST TRANSIT, INC. and  
SEDGWICK CLAIMS MANAGEMENT SERVICES,  
Employer/Insurer-Respondent.**

Appeal from a June 2, 2014 Compensation Order by  
Administrative Law Judge Joan E. Knight  
AHD No. 13-284, OWC No. 691717

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 OCT 3 PM 11 20

Lauren Pisano for the Petitioner  
Barry D. Bernstein for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

In 2005, Mr. William H. Alston suffered from a right knee condition. To increase his functionality and to decrease his pain pending a total knee replacement, Mr. Alston underwent an osteotomy with internal fixation.

In August 2011, First Transit hired Mr. Alston as a bus driver. On January 23, 2012, Mr. Alston injured his right knee when he slipped on a wet surface.

Mr. Alston initially was diagnosed with right knee sprain and was prescribed pain medication, physical therapy, and rest. Approximately one month after his injury, Dr. Neil Green diagnosed right knee internal derangement.

Following additional physical therapy, pain medication, and home exercises, Mr. Alston returned to light duty. Mr. Alston's condition continued to improve, and on April 18, 2012, he resumed his pre-injury duties, but he continued to experience mild pain, stiffness, and discomfort; as a result, he was assigned shorter bus routes.

Dr. Robert Gordon examined Mr. Alston at First Transit's request. On April 17, 2012, Dr. Gordon opined that Mr. Alston's work-related injury had resolved and that he had not sustained any residual impairment as a result of his work-related injury.

Mr. Alston returned to Dr. Green who ordered an MRI. That scan revealed significant narrowing and advanced osteoarthritis of the medial compartment. Although Mr. Alston eventually would be a candidate for total right knee arthroplasty, no further treatment was indicated at that time.

At a formal hearing, Mr. Alston asserted a claim for 30% permanent partial disability to his right knee. First Transit defended the claim on the grounds that Mr. Alston's current condition is not causally related to his compensable injury because prior to working for First Transit, Mr. Alston had a history of right knee problems which required a right tibia osteotomy to allow Mr. Alston to function relatively pain free until he underwent a total right knee replacement and that Mr. Alston has no impairment as a result of his work-related injury.

In a Compensation Order dated June 2, 2014, an administrative law judge ("ALJ") denied Mr. Alston's claim for relief. The ALJ ruled Mr. Alston's work-related injury had healed without residual impairment.

On appeal, Mr. Alston asserts First Transit did not successfully rebut the presumption of compensability or "the treating doctor presumption."<sup>1</sup> Mr. Alston objects to the ALJ's purported failure to explain why Dr. Gordon's opinion is so persuasive and why that opinion is sufficient to rebut the treating physician preference, particularly given the extent of Dr. Gordon's examination of Mr. Alston (details of which the ALJ did not allow into the record). Mr. Alston also objects to the ALJ's summary of Dr. Gordon's reports as "a misconstruction and reconstruction of the evidence [leading] Dr. Gordon into concluding something he does not[, namely,] Claimant's current right knee conditions is [*sic*] not causally related to his January 23, 2012 work accident."<sup>2</sup> Finally, Mr. Alston asserts the ALJ failed to satisfy the *Jones*<sup>3</sup> standard when ruling that Mr. Alston is not entitled to permanent partial disability benefits for his knee injury. For these reasons, Mr. Alston requests the Compensation Review Board ("CRB") reverse the June 2, 2014 Compensation Order.

In response, First Transit asserts that because Dr. Gordon "examined the Claimant, took a history from the Claimant, reviewed medical records and then made s [*sic*] number of conclusions

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<sup>1</sup> Claimant's Memorandum in Support of Claimant's Application for Review of June 2, 2014 Compensation Order, pp. 6, 7.

<sup>2</sup> *Id.* at p. 12.

<sup>3</sup> *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

including that the Claimant had no evidence of any conditions as related to the injury of January 23, 2012 that should continue to produce symptoms or affect endurance or function, . . . the medical opinion of Dr. Gordon was sufficient to show that the Claimant's right knee condition was not causally related to his employment."<sup>4</sup> First Transit also asserts the ALJ properly applied the treating physician preference. First Transit, therefore, requests the CRB affirm the Compensation Order.

#### ISSUES ON APPEAL

1. Did First Transit successfully rebut the presumption of compensability?
2. Did the ALJ properly apply the treating physician preference?
3. Did the ALJ improperly prevent Mr. Alston from testifying about Dr. Gordon's independent medical examination?
4. Did the ALJ improperly summarize Dr. Gordon's medical reports?
5. Is the June 2, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

#### PRELIMINARY MATTERS

In the "Factual Background" of Claimant's Memorandum in Support of Claimant's Application for Review of June 2, 2014 Compensation Order, Mr. Alston raises some concerns regarding the ALJ's handling of the formal hearing in this matter. Mr. Alston does not specifically raise any issue of impropriety but asserts (among other things) that

from the immediate onset of the Parties' Formal Hearing, the ALJ was of the mind-set [*sic*] that Mr. Alston's right knee condition was solely related to his prior knee injury, and not at all related to his most recent trauma of January 23, 2012. For example, when counsel for the Employer and Insurer mentioned to the ALJ that they were contesting causal connection of Mr. Alston's right knee to this accepted claim, the ALJ, on her own initiative, told defense counsel the case law [*sic*] he should be relying upon in order to rebut the treating doctor's opinion that Mr. Alston sustained a permanent partial disability to his right knee as a result of his January 23, 2012 work injury. (FH Transcript at 17-18)<sup>[5]</sup>

The entire formal hearing transcript has been reviewed, and there is no impropriety in the ALJ's handling of this matter. The ALJ's coaching (as Mr. Alston would have us believe) is equally

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<sup>4</sup> Employer/Insurer's Opposition to Claimant's Application for Review, p. 4.

<sup>5</sup> Claimant's Memorandum in Support of Claimant's Application for Review of June 2, 2014 Compensation Order, p. 4.

susceptible to the interpretation of an admonition that if First Transit failed to satisfy its burden, the ALJ would rule in Mr. Alston's favor or even more likely that the time to argue the contents of the exhibits was not when the exhibits were being identified for the record but during the presentation of evidence.<sup>6</sup> Without more, the CRB is unwilling to attribute an unprofessional interpretation to the ALJ's handling of this matter.

#### ANALYSIS<sup>7</sup>

Pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability ("Presumption").<sup>8</sup> In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.<sup>9</sup> "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."<sup>10</sup> There is no dispute the ALJ appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was First Transit's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."<sup>11</sup> Only upon a successful showing by First Transit would the burden return to Mr. Alston to prove by a preponderance of the evidence, without the benefit of the Presumption, his current right knee condition arose out of and in the course of employment.<sup>12</sup>

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<sup>6</sup> Similar to the ALJ's reference to *Washington Post v. DOES* when discussing rebutting the presumption of compensability with First Transit, the ALJ referenced *Jones v. DOES* when discussing the economic impact element of a permanency claim with Mr. Alston. Hearing Transcript p. 25.

<sup>7</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 ("Act"). 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).

<sup>8</sup> Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

<sup>9</sup> *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

<sup>10</sup> *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

<sup>11</sup> *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

<sup>12</sup> See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

To rebut the Presumption, the ALJ relied upon First Transit's documentary, medical evidence:

To support its position, Employer presented, as rebuttal evidence, the April 17, 2012, IME report and July 11, 2012 addendum of Dr. Gordon. Dr. Gordon opined that Claimant has long since recovered from with [sic] work injury and that injury produced no permanent aggravation of his preexisting condition. Employer asserts that upon [sic] Dr. Gordon's medical opinion as to the cause of Claimant's current condition is predicated on his review of medical history, diagnostic reports, physical examination and assessment. Dr. Gordon wrote:

This patient slipped and fell at work on 1/23/12. There is nothing in his examination or my review of the medical records and radiographic reports thus far provided to indicate that any injuries that may have occurred on 1/23/12 were anything other than soft tissue injuries that were initially diagnosed.

[Claimant] has no evidence of any condition as related to this [work] injury that should continue to produce symptoms or affect endurance or function. All of the findings on examination are consistent with his preexisting degenerative changes which were so severe that he had bone-on-bone in the medial compartment with varus deformity and osteophytes. . . in his right knee that, in 2005 was treated with a proximal tibial osteotomy for severed [sic] arthritis of the medial compartment . . . that was still present and obviously had nothing to do with what occurred on 1/23/12.

The IME medical opinion of Dr. Gordon is sufficient to show Claimant's right knee condition is not causally related to his employment. Accordingly, Employer has presented sufficient evidence to rebut the presumption of causation. The record is therefore reviewed without reference to any presumption in order to determine whether Claimant has shown, by a preponderance of the evidence, his right knee condition is related to his employment and therefore compensable.<sup>13]</sup>

The Presumption is rebutted when the record demonstrates a physician has performed a personal examination of the claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the causal relationship presumption.<sup>14</sup> Mr. Alston argues that Dr. Gordon's opinion is not sufficient to rebut the "treating doctor presumption,"<sup>15</sup> but there is no such presumption; Mr. Alston conflates the presumption of compensability and the treating physician preference, but Dr. Gordon's opinion that Mr. Alston's work-related injury has healed is sufficient to rebut the Presumption.

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<sup>13</sup> *Alston v. First Transit, Inc.*, AHD No. 13-284, OWC No. 691717 (June 2, 2014), pp. 5-6.

<sup>14</sup> *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

<sup>15</sup> *Alston, supra*, at pp. 6 & 7.

As for the treating physician preference, although there is a preference for the opinion of a treating physician, that preference is not absolute, and when there are specific reasons for rejecting the opinion of a treating physician, the opinion of another physician may be given greater weight.<sup>16</sup> In this case, after recognizing the treating physician preference and when weighing the evidence, the ALJ reviewed Dr. Green's medical records and rejected his opinions because in light of Mr. Alston's pre-existing knee condition, Dr. Green's medical opinions were vague and lacked specificity:

On this record, Dr. Green's medical notes do not reflect the type of essential details to draw the necessary conclusions needed in this case. Dr. Green has provided no clear medical explanation as to his diagnosis of right knee internal derangement being causally related to Claimant's work injury. Dr. Green's findings and treatment relied heavily upon Claimant's subjective complaints and consisted of palliative care in the form of pain medication and home exercise. Dr. Green wrote:

. . .by history [Claimant] was doing well and was essentially free of pain until the injuries of 1-23-12".

Dr. Green's notations are devoid of an unambiguous opinion of the cause of Claimant's current complaints to support medical causation. Dr. Green did not address how Claimant's soft tissue injury is related to his current right knee pain or provide a medical opinion how it may have aggravated the underlying degenerative joint arthritic disease. To draw a conclusion that Claimant's current right knee condition is causally related would be conclusory, at best. Accordingly, Dr. Green's notes and opinions, without substantial evidence to support them, cannot be considered such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The medical opinions relied upon by Claimant are less persuasive than those of Dr. Gordon. Therefore, I find Claimant has not proven, by a preponderance of the evidence, his work-related injury resulted in or caused the alleged disability claimed herein.<sup>[17]</sup>

Mr. Alston's argument that the ALJ failed to state how Dr. Gordon's opinion is sufficient to sever the Act's preference for Dr. Green's opinion is a misstatement of the applicable burden. At

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<sup>16</sup> See *Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (Remand Order December 31, 1986) citing *Murray v. Heckler*, 624 F. Supp. 1156 (D.C. 1986).

<sup>17</sup> *Alston, supra*, at pp. 6-7. Given that on February 23, 2012 Dr. Green notes that Mr. Alston slipped and fell at work and that Mr. Alston had recovered satisfactorily from his prior right knee surgery, the ALJ's characterization of Dr. Green's "notes and opinions" as not "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" is questionable. Based upon the totality of Dr. Green's medical reports, a reasonable person could accept Dr. Green's "notes and opinions" as sufficient to support a finding of causal relationship; however, in light of the context within which this statement is found, namely that the ALJ was weighing the evidence in accordance with the preponderance of the evidence standard and not the mere scintilla standard, the ALJ's language is harmless.

this stage, the burden was on Mr. Alston to prove that his current right knee condition is compensable, and given his pre-existing knee condition, there is no reason to reject the ALJ's ruling that Dr. Green failed to unambiguously link Mr. Alston's knee condition to his work-related injury or her reliance upon the remaining medical opinion in the record, the opinion of Dr. Gordon.

Similarly, Mr. Alston complains that Dr. Gordon's opinion is not sufficient to sever the causal relationship between his current right knee condition and his work-related injury because Dr. Gordon opines Mr. Alston had sustained a soft tissue injury and because the ALJ cut-and-pasted various portions of multiple medical records to reach her conclusion that Dr. Gordon's opinion regarding causal relationship is more persuasive. First, Dr. Gordon unequivocally asserted Mr. Alston "has no evidence of any condition as related to this injury that should continue to produce symptoms or affect endurance of function. All of the findings on examination are consistent with his preexisting degenerative change."<sup>18</sup> Dr. Gordon reviewed Mr. Alston's medical records including his diagnoses, and Dr. Gordon did not limit his opinion to a consideration that Mr. Alston sustained only a soft tissue injury; the CRB is not convinced by Mr. Alston's argument. Next, as for the ALJ's summary of Dr. Gordon's records, there is no substantive error warranting reversal; admittedly, it would have been preferable for the ALJ not to give the appearance of one extended quote from a single report when summarizing Dr. Gordon's medical opinion, but the ALJ was within her purview to utilize selective vocabulary from the existing medical record so long as her conclusion reasonably flows from consideration of the record as a whole, which it does.

Continuing, we have reviewed the ALJ's alleged error in "not allowing Mr. Alston to testify to the length and nature of Dr. Gordon's IME."<sup>19</sup> When Ms. Pisano asked Mr. Alston, "Do you recall about how long you had been seen by Dr. Gordon in 2002," referring to "how long [Mr. Alston] was in his actual ... exam room,"<sup>20</sup> Mr. Bernstein objected to questioning regarding the length of the examination. Ms. Pisano proffered Mr. Alston would testify the exam "wasn't very long and it wasn't very extensive."<sup>21</sup> In fact, over objections, Ms. Pisano tried several times to get into evidence details regarding Dr. Gordon's examination of Mr. Alston;<sup>22</sup> however, as the ALJ pointed out, there is no criteria in *Washington Post*<sup>23</sup> regarding the length of time or the level of intensity a physical examination by an independent medical examination physician must take, and after recognizing Dr. Gordon is not Mr. Alston's treating physician, the ALJ sustained the objections and elected to rely upon the documentary, medical evidence. At one point, Ms.

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<sup>18</sup> Employer's Exhibit 2.

<sup>19</sup> Claimant's Memorandum in Support of Claimant's Application for Review of June 2, 2014 Compensation Order, p. 9.

<sup>20</sup> Hearing Transcript, p. 48.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at pp. 48-52.

<sup>23</sup> *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

Pisano responded “Okay. That’s fine, Your Honor. Okay. Thank you.”<sup>24</sup> Ms. Pisano raised no legal argument, and although the time period and the interaction may go to the weight of the evidence, given Ms. Pisano’s failure to offer any legal argument to the ALJ (who then could have addressed any deficiency first-hand), we find no basis to disturb the rulings on the objections. Furthermore, the CRB declines to overrule the objections because the ALJ is correct in her assertion that there are no requirements regarding the performance of an independent medical examination.

Similar to Mr. Alston’s prior argument, Mr. Alston’s argument that “[t]he ALJ incorrectly states how Mr. Alston’s right knee was feeling after his January 23, 2012 work accident, and makes no mention at all in her Compensation Order as to the minimal complaints he had immediately before his work injury as compared to the time of the formal hearing”<sup>25</sup> amounts to a request that the CRB reweigh the evidence. There may be substantial evidence in the record to support a conclusion other than the one reached by the ALJ; however, so long as the ALJ’s findings of fact are supported by substantial evidence and her conclusions of law rationally flow from those facts, the CRB is without authority to re-weigh the evidence and reach a difference, albeit plausible, result.<sup>26</sup>

As for Mr. Alston’s argument that “[t]he ALJ erroneously states in her Compensation Order that Mr. Alston would need a knee replacement as a result of his pre-existing 2005 knee injury,”<sup>27</sup> on February 4, 2005, seven years before his work-related injury, Dr. Praveer Srivastava performed a “valgus closing wedge, right high tibial osteotomy with internal fixation” which was “appropriate for the patient to improve his symptoms and allow him to continue with functional and relatively pain free life for several more years until he gets ready for total knee replacement.”<sup>28</sup> While it may be true that “[t]here was NO evidence admitted by either Party to this case to support that Mr. Alston would definitely have required a total knee replacement as a result of his 2005 knee injury,”<sup>29</sup> Dr. Praveer’s operative report is a recognition that Mr. Alston’s pre-existing condition had rendered him likely to need a total knee replacement, and the ALJ was entitled to draw inferences from that evidence.

Finally, based upon the ALJ’s causal relationship ruling and her explanation that the work-related condition has resolved without residuals, “Mr. Alston’s ongoing economic impact

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<sup>24</sup> Hearing Transcript, p. 49.

<sup>25</sup> Claimant’s Memorandum in Support of Claimant’s Application for Review of June 2, 2014 Compensation Order, p. 13.

<sup>26</sup> *Marriott, supra.*

<sup>27</sup> Claimant’s Memorandum in Support of Claimant’s Application for Review of June 2, 2014 Compensation Order, p. 16.

<sup>28</sup> Employer’s Exhibit 4.

<sup>29</sup> Claimant’s Memorandum in Support of Claimant’s Application for Review of June 2, 2014 Compensation Order, p. 17.

following his work injury”<sup>30</sup> is not attributable to his compensable injury. Thus, the ALJ’s ruling that Mr. Alston is not entitled to permanent partial disability benefits satisfies the *Jones* standard.

CONCLUSION AND ORDER

Dr. Gordon’s opinion is legally sufficient to rebut the presumption of compensability. In the end, the ALJ rejected Dr. Green’s weak opinion for valid reasons; she gave more weight to Dr. Gordon’s opinion for legitimate reasons. There is no legal justification for disturbing the ALJ’s rulings on objections, summary of Dr. Gordon’s reports, findings of fact, or conclusions of law. The June 2, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
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MELISSA LIN JONES  
*Administrative Appeals Judge*

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October 3, 2014  
DATE

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<sup>30</sup> *Id.* at p. 21.