

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-111

WILLITA THOMPSON,

Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. 05-056B

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 JUN 19 PM 10 43

Charles Krikawa III, Esquire, for the Petitioner

Donna J. Henderson, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HEATHER C. LESLIE, AND MELISSA LIN JONES, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

On February 26, 2003, Willita Thompson injured her left arm while working for WMATA as a subway station manager. During the course of her medical treatment she underwent two surgical procedures, a carpal tunnel release at the wrist and an ulnar anterior transposition at the elbow. At a formal hearing conducted before Administrative Law Judge (ALJ) David L. Boddie on November 4, 2010, she sought a permanent partial disability award of 61% (sixty one percent) to the left arm under the schedule, based in part upon a report by a panel of three physicians, one of whom was her treating physician. WMATA opposed the claim for an award of that size, and relied upon opinions and reports of two independent medical evaluators (IMEs), Dr. Jeffrey Lovallo and Dr. Richard

¹ Judges Russell and Leslie are appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 and 11-03 (June 23, 2011).

Barth. Dr. Lovallo opined that Ms. Thompson had sustained a 3% (three percent) permanent medical impairment to the left arm. Dr. Barth did not express an opinion as to the extent of left arm impairment in percentage terms, but described Ms. Thompson's condition as being "near normal", with her symptoms and complaints being "very minimal" and "essentially normal", and noted that "she is working full-duty capacity as a station manager" and "has been working without restrictions for a couple of years now."

On October 4, 2011, the ALJ issued a Compensation Order in which he made an award of 6% (six percent) permanent partial disability under the schedule to the left arm.

Ms. Thompson timely appealed the award. As grounds for the appeal, Ms. Thompson contends that the ALJ failed to accord her treating physician's opinion as to the extent of her medical impairment the weight to which it is entitled under the law, and seeks a remand for further consideration with instructions to accord the physician's opinion the preference to which treating physician opinion is due. WMATA has filed an opposition, arguing that the ALJ's decision is supported by substantial evidence and should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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.

DISCUSSION AND ANALYSIS

Ms. Thompson injured her left arm while working for WMATA as a subway station manager. During the course of her medical treatment she underwent two surgical procedures, a carpal tunnel release at the wrist and an ulnar anterior transposition at the elbow. Both surgeries were performed by Dr. Rida Azer, who also provided virtually all of Ms. Thompson's medical care for this injury from the date the injury occurred through the two surgeries and thereafter, the most recent treatment report in the record being dated October 14, 2009.

Two weeks later, on October 30, 2009, a report was issued and signed by three physicians, one being Dr. Azer, the other two being Dr. Henry M. Daniels and Dr. Hampton Jackson. Dr. Jackson's name appears on the letterhead of all of the medical reports authored by Dr. Azer in the record; Dr. Daniels' name does not appear on those letterheads. In that report it is stated that a physical examination was conducted which included visual observation and pinch and grip strength testing, and that the physicians, acting under the name "Committee for Evaluation of Permanent

Impairment”, determined that Ms. Thompson had sustained a 61% permanent partial impairment to her left arm.

On October 16, 2010 Dr. Azer wrote by hand on a copy of the committee report the words “I concur with the findings”, signing and dating the note.

In the Compensation Order under review, after noting the existence of the treating physician preference as referenced in *Lincoln Hockey v. DOES*, 831 A.2d 913 (D.C. 2003), *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999), and *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992) and explaining that the preference requires that an ALJ consider treating physician opinion and, if rejected, justify that rejection with specific reasons for that rejection, the ALJ wrote as follows:

Finally, in a document dated October 30, 2009, entitled Committee For Evaluation of Permanent Impairment, comprised of Drs. Azer, Henry Daniels, and Hampton Jackson, the Claimant was evaluated for her February 26, 2003 injury, based on what was referred to as “persistent pain, weakness, and dyesthesias and limited use of her left upper extremity.”

Reportedly, after reviewing the Claimant’s chart, diagnostic testing results, and performing a physical examination, the Committee assessed a 61 per cent [sic] permanent impairment rating of the left upper extremity.

While recognizing that there is a preference for the medical opinions of treating physicians under the Act, I do not recognize or accept the Committee’s medical opinion assessing the Claimant’s degree of permanency as those of a treating physician, notwithstanding that Dr. Azer is a member. Furthermore, I reject the medical opinions reflected in the Committee’s report as unreliable and *not based upon any evidence in the record*.

While the report indicates that the chart and other information was available and considered for their review, *no specifics were cited* from it as contributing to their conclusions other than the fact the Claimant had undergone two surgical procedures and that two diagnostic tests were reported positive for abnormalities, *the latter of which is not in evidence*.

Additionally, while the Claimant testified that she was examined individually by each doctor, there is *no indication from that Committee’s report that took place*. Further, while stating the evaluation is being performed because of “persistent pain, weakness, and dyesthesias and limited use of the left upper extremity”, *none of the post-surgical medical reports of Dr. Azer, with the exception of the October 14, 2009 medical report note that any of these symptoms or problems were being reported or experienced* or that any treatment was rendered other than the injections reported on that date.

I therefore reject the medical opinions of Committee [sic], and accord the greater weight to the medical opinions of Employer’s IME physician, Dr. Lovallo, assessing

a permanent partial impairment rating, as being the most consistent medical opinion with the evidence in the record.

Compensation Order, page 9 (*italics added*). Ms. Thompson argues in this appeal the ALJ's statement that the Committee's report should not be treated as if it were treating physician opinion is erroneous, and that because of this error the matter needs to be returned for further consideration with the Committee report being treated as if it were treating physician opinion.

Although the Committee's report *per se* does not qualify for the treating physician preference, it was error for the ALJ not to afford the opinion in that report the treating physician preference because not only was Dr. Azer a member of the Committee, he took the additional step of re-confirming his commitment to the conclusions of the report when he, and he alone, re-signed the copy of the report. While one might question the methodology of issuing a committee report and reasonably be concerned whether some aspects of the report truly reflect each signor's views, that would be a reason to question the opinions expressed therein, but it doesn't remove the report from being the opinion of Dr. Azer.

However, although we agree that the ALJ's statement that the Committee report *per se* doesn't constitute treating physician opinion is error, we deem it harmless, for the reason that the ALJ proceeded to treat the report's conclusions as if they were treating physician opinion, by giving his explicit reasons for rejection, which are highlighted by *italics* in the above quoted passage. We must, then, discern whether the ALJ's reasons for rejecting the report's (and hence, Dr. Azer's) opinions are supported by substantial evidence. If they are, then the Compensation Order must be affirmed, and if not, the matter must be remanded for further consideration.²

The first of the reasons given for rejecting the conclusions of the report was that they were "not based on any evidence of record" in that "no specifics were cited" from the medical "chart", except that the two surgeries are noted in the chart, and two tests were described but "the latter [of the two tests] is not in evidence." The ALJ doesn't identify the two "tests" that he refers to, but in the report, in the same paragraph where the "chart" is referenced, it is noted that "this patient had diagnostic studies to confirm carpal tunnel syndrome and left ulnar neuropathy [...] as well as recent EMG/NCV done on 10/26/09 that shows chronic denervation of the left abductor pollicis", etc. We conclude that these are the two diagnostic tests to which the ALJ refers, and assume further that the "latter" test that he says is "not in evidence" is the October 26, 2009 EMG/NCV tests, since that test is both later in time than the carpal tunnel tests, and also is the latter of the two tests in their order of mention in the report.

Review of the record, however, reveals that the October 26, 2009 test results and analysis are in fact in the record, at CE 2, performed by Dr. Daniel R. Ignacio, and bearing page numbering commencing at "77" through "87", and containing Dr. Ignacio's assessment that the results

² We recognize that the degree of medical impairment and the extent of disability are separate and distinct questions, the former being a medical question and the latter a vocational or "industrial" question. That being said, the former is undeniably highly relevant to the latter, medical impairment being a *sine qua non* of disability. A fatal error in handling assessment of medical impairment opinion renders the disability assessment infirm. That is not say that an ALJ must make a specific finding as to the degree of medical impairment to reach a valid conclusion as to the extent of disability. However, the medical evidence still must be assessed in accordance with established rules governing treating physician opinion.

revealed, among other things (at "84") "ulnar nerve conduction [being] blocked at the elbow [which has] improved" but which is "still slow", with "chronic denervation [of the] bilateral abductor pollicis brveis [sic] muscles more so on left". Thus, the statement that the Committee report is "not based on any evidence of record" and that the "latter" of two reports referenced in the Committee report is not in the record are inaccurate.

The second reason given by the ALJ for rejecting the report is that "there is no indication in the Committee's report that" an actual physical examination took place. This is a problematic assessment. First, Dr. Azer, a contributor to the report, clearly examined Ms. Thompson many, many times, as is evidenced by the multiple progress notes in CE 2. Second, the Committee report itself contains specific reports of neck pain on "Head compression" but none on "Head extension test", as well as noting that Ms. Thompson was "noted to be ambulatory without an ambulatory aide". The report also describes the results (inconclusive) of an examination for left arm atrophy, and the results of grip and pinch strength testing. It is apparent that the ALJ's statement that "there is no indication" that an actual examination took place is clearly wrong. The ALJ might reasonably question the relevance of parts of the exam that is described (i.e., the head compression and extension tests), and might question their validity in light of his separate finding that Ms. Thompson lacks credibility (Compensation Order, page 10), but there dos not appear to be any reason to doubt that an examination occurred. It may be that Ms. Thompson was not examined by all three doctors separately, but the report clearly contains information only obtainable by reference to some type of examination.

The third reason given for rejecting the Committee report's conclusions are that the "none of the post-surgical medical reports of Dr. Azer, with the exception of the October 14, 2009 medical report note that any of these symptoms [persistent pain, weakness, and dyesthesias and limited use of the left upper extremity] or problems were being reported or experienced or that any treatment was rendered other than the injections reported on that date." The problem with the ALJ's reliance upon this reasoning is that it's "exception" seems to significantly undermine the validity of the point being made, that is, that Ms. Thompson was not reporting pain.

Thus it is evident that at least two, and possibly all three, of the ALJ's reasons for rejecting the Committee report (and hence the treating physician's opinion) are contradicted by reference to the record. This renders the decision unsupported by substantial evidence, requiring a remand for further consideration of the claim.

We stress that on remand, the ALJ may still reach the same conclusions as are contained in the Compensation Order. However, in doing so, the ALJ must recognize that the Committee report does represent the opinion of Dr. Azer: he has subscribed his name to it not once but twice. There may yet be articulable, record based and persuasive reasons for rejecting the opinions contained therein. However, the ones given in the Compensation Order of October 4, 2011 are not supported by reference to the contents of the record.

CONCLUSION

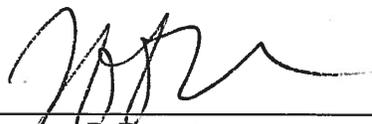
The ALJ's determination that the Committee report was not entitled to be considered in light of the treating physician preference is not in accordance with the law, and the reasons enunciated for

rejecting the opinions contained in the report are not supported by substantial evidence, rendering the award based in part upon that rejection unsupported by substantial evidence and not in accordance with the law.

ORDER

The Award of a 6% permanent partial disability to the left arm is reversed and vacated, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

January 19, 2012
DATE