CRB (Dir.Dkt.) No. 13-03A

VELERIE JONES-COE,

Claimant–Petitioner

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,

Employer/Carrier–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA No. PBL 98-024A, DCP Nos. LT4-DMH000405 and 364789

Velerie Jones-Coe, *pro se*

Ross Buchholz, Esquire, for Employer-Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE and FLOYD LEWIS, *Acting Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Acting Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR §118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code §32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et*

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on August 25, 2004, the Administrative Law Judge (ALJ) upheld Employer-Respondent's termination of compensation pursuant to the Reconsideration Final Order issued by Employer-Respondent's third party administrator (TPA) on January 6, 2003

In the Petition for Review, Claimant-Petitioner asserts that the Compensation Order is unsupported by substantial evidence and is not in accordance with the law, and that her compensation should be restored.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (a). "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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Claimant-Petitioner alleges that the ALJ had insufficient basis for upholding the decision of the TPA and Employer-Respondent to terminate her benefits. Specifically, she asserts that the medical evidence that she supplied, from her treating physician Dr. Ignacio, should have been accepted in preference to the contrary opinions of the IME physicians whose reports were relied upon by Employer-Respondent and its TPA initially and at the formal hearing. Generally speaking, she asserts that her treating physician has treated her extensively and since very early on in the course of this claim and is in a better position to accurately assess her medical condition than are

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seq., and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq*., including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

the IME physicians. She argues further that the IME reports contain inconsistencies and errors that render reliance upon them erroneous.

It is established under the Act that once Employer has accepted a claim and paid benefits in connection with that claim, any reduction or termination of those benefits must be based upon persuasive medical evidence showing a change in condition warranting such a reduction. *Chase*, ECAB No. 82-9 (July 9, 1992).

In this case, in concluding that Employer-Respondent had met this burden, the ALJ relied upon the independent medical evaluation (IME) reports of: Dr. Phillip Marion, which are found in EE 2 for report dates of October 8, 2002 and October 18, 2002, as attachments to Employer-Respondent's "Notice of Intent to Controvert Disability Compensation Payments" dated November 1, 2002, and EE 3 for report dates of April 21, 2003 and May 1, 2003; Dr. Robert Draper, Jr., which are found in the attachments to EE 2 for report date October 17, 2002, and EE 4 for report dates of April 24, 2003 and May 6, 2003; and Dr. Jeffrey Lovallo, which are found in the attachments to EE 2 for report dates of May 3, 2002 and February 20, 1997. These reports reveal that each of these doctors examined Claimant-Petitioner and reviewed EMG and MRI study reports, which were normal[2], that each examiner concluded that the physical findings on exam were exaggerated, non-anatomic, generally inconsistent with the objective studies, and unrelated to and not explained by the work injury, and that Claimant-Petitioner could return to her staff assistant job without restriction or delay.

In concluding that Employer-Respondent's evidence was sufficient to meet its burden, and in ultimately determining that the decision to terminate compensation benefits was legally correct, the ALJ also took cognizance of the medical records and reports of Claimant-Respondent's treating physician, Dr. Daniel Ignacio, and the reports of Dr. Hampton Jackson, which are found in CE 3. The ALJ acknowledged that, under the Act, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. Compensation Order, page 7, citing *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). The ALJ went on to note that even given the preference, where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, and he cited sketchiness vagueness, and imprecision in the treating physician's reports as grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, as well as superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Id.*, citing *Erickson v. Washington*

[2] Dr. Lovallo also reviewed an abnormal EMG study report which was performed by Dr. Ignacio, and which appeared, in Dr. Lovallo's opinion, to be markedly different from the earlier normal EMG study performed by another physician. Because of this, Dr. Lovallo recommended and independent EMG study be performed to determine whether the new study represented a deterioration since the normal study, or if the newer study was in error. For reasons discussed in the Compensation Order and throughout the agency file, that confirming EMG study was not conducted, despite the willingness of Employer to obtain it.

Metropolitan Area Transit Authority, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

In choosing to accept the three IME physicians opinions rather than Dr. Ignacio's opinions, the ALJ cited (1) sketchiness, vagueness and imprecision in Dr. Ignacio's reports, (2) the extreme severity of his imposed physical limitations, being a three pound lifting restriction, which, in the absence of objective findings documenting an anatomical abnormality seems incongruous, (3) his expression of an opinion of permanent total disability from all employment, which opinion was viewed as being vocational and not medical, and hence outside or beyond his field of expertise, (4) superior relevant professional credentials by the IME physicians, being orthopaedic surgeons as compared to Dr. Ignacio's physiatry specialty, and (5) the diagnoses of Dr. Ignacio being made in the absence of supporting objective testing. In connection with the final point, the ALJ also made a finding that Claimant-Petitioner lacked credibility, which by inference effects the validity of medical opinion premised upon her subjective complaints, and which bolsters the unanimous IME view of exaggeration, and symptomatic magnification. The ALJ also considered that Claimant-Petitioner was noted by the IME physicians to be uncooperative during their examinations, a fact that is supported by the IME reports. Further, implicit in the decision of the ALJ is the fact that the IME opinions were unanimous in their relevant findings of capacity to return to the pre-injury job without restrictions.

We view the determination by the ALJ to accept the IME opinions in preference to the opinions of Dr. Jackson to be within the discretion of the ALJ, being supported by sufficient reasons identified by the ALJ in the Compensation Order and confirmed by resort to the record. Although a contrary conclusion could have been reached, acceptance of opinion, much as acceptance of factual testimony, is a matter largely to be left to the discretion of a finder of fact, so long as the finder of fact operates within the strictures set forth above concerning the treating physician preference, which in this case we conclude the ALJ did.

CONCLUSION

The Compensation Order of August 25, 2004 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of August 25, 2004 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Acting Administrative Appeals Judge

March 23, 2005
DATE