

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir.Dkt.) No. 03-149

ARTHUR M. JONES,

Claimant – Petitioner

v.

NICHOLSON CONSTRUCTION CO. AND LIBERTY MUTUAL INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
OHA No. 03-431, OWC No. 586249

Heather C. Leslie, Esq., for the Petitioner

Russell A. Kerr, Esq., for the Respondent

Before, LINDA F. JORY, FLOYD LEWIS, and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, 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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, 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. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), 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.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on November 19, 2003, the Administrative Law Judge (ALJ) granted the request for temporary total disability benefits, in part, on the basis that the Claimant-Petitioner (Petitioner) voluntarily limited his income, and denied the request for medical benefits, in part, on the basis that the Petitioner was not authorized to receive medical treatment from Dr. Joel Fetcher. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law.

ANALYSIS

As an initial matter, the standard 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. D.C. Official Code § 32-1521.01(d)(2)(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, Petitioner alleges that the ALJ erred in finding that the Petitioner selected Dr. Eduardo Haim as his treating physician, in disregarding the authorization given to the Petitioner by the Office of Workers’ Compensation (OWC) to treat with Dr. Joel Fetcher and in not according great weight to the opinion of Dr. Fetcher, the treating physician, as required by law. The Respondent maintains that the ALJ committed no errors, and that the decision below is supported by substantial evidence, is in accordance with the law and should be affirmed.

The Act provides that an injured worker shall have the right to choose an attending/treating physician from whom to receive medical treatment for his work-related injury. *See* D.C. Official Code § 32-1507(b)(3); 7 DCMR § 212.2. To exercise this right, an injured worker must know of his right of selection, and must establish a course of treatment with the physician. *See Ceco Steel v. D.C. Department of Employment Services*, 566 A.2d 1062 (D.C. 1989). Once the injured worker selects a treating physician, the worker may not change to another physician unless the

worker is authorized to do so by the employer or the Office of Workers' Compensation (OWC). 7 DCMR § 212.12.

The question before the ALJ was whether the Petitioner selected a treating physician before he began treating with Dr. Fetcher, whom the Petitioner claims as his treating physician. If he knew of his right to select and established a course of treatment with a physician, then the Petitioner was required to receive authorization to treat with Dr. Fetcher.

At the hearing, the Petitioner maintained that he was unaware of his right to select a treating physician since he was unable to read the information package from the Respondent about his rights when injured at work. However, the ALJ determined that, regardless of his limited reading ability, the Petitioner was aware of his right to choose a treating physician when he went to Dr. Haim for treatment. The ALJ relied upon the testimony of Mr. Kenneth Reed, the Respondent's loss prevention manager, as opposed to the Petitioner's testimony in this regard, because the Petitioner's testimony was deemed "unreliable". Compensation Order at p. 6. Mr. Reed testified that, when the Petitioner reported his injury, he [Mr. Reed] verbally informed the Petitioner of his right to choose a treating physician. There is no evidence in the record that the Petitioner denied Mr. Reed's assertion. Further, the evidence shows that the Petitioner established a course of treatment with Drs. Haim and Dr. Unger to extent that Dr. Unger performed surgery on the Petitioner's left knee. The Panel determines that the ALJ's conclusion that the Petitioner's treatment from Dr. Fetcher was unauthorized is supported by substantial evidence in the record.

As further argument for disregarding the ALJ's determination that he engaged in an unauthorized change of physicians, the Petitioner also asserts that the ALJ erred in disregarding the authorization given to the Petitioner by the OWC to treat with Dr. Fetcher. Claimant Memorandum at p. 4. However, the record is devoid of any evidence of any such authorization from OWC.

With respect to the Petitioner's argument that the ALJ erred in not according great weight to the opinion on Dr. Fetcher, it is well settled in this jurisdiction that the treating physician is not absolute. When rejecting the opinion of the treating physician, the fact-finder must set forth persuasive reasons for such action which are supported by the record. *See Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998); *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). Here, the ALJ stated the reason for rejecting Dr. Fetcher's March 27, 2003 opinion, to wit:

Dr. Fetcher's generalized limitation of claimant's activities likewise fails to provide the specificity needed to make a determination as to whether claimant was capable of working within his usual employment of in any modified position offered by employer.

Compensation Order at pp. 7-8.

A review of the March 27, 2003 report shows that Dr. Fetcher, after examining the Petitioner, prescribed "limited activities, physical therapy", and then prohibited the Petitioner's return to

work at that time. He did not delineate what type of physical activities, all or some, were restricted. The Panel determines that the ALJ provided a persuasive reason for rejecting the treating physician which reason is supported by substantial evidence in the record. The Panel will not disturb this finding.

CONCLUSION

The Compensation Order of November 19, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of November 19, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

October 21, 2005
DATE