COMPENSATION REVIEW BOARD

CRB No. 12-048

DONNA SPENCE AND ISAAC SPENCE [ALVIN CARSON, DECEASED],

Claimants–Petitioners,

v.

HONEYWELL TECHNOLOGY SOLUTIONS, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

Employer and Insurer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
AHD No. 02-202E, OWC No. 570288

Benjamin T. Boscolo, Esquire, for the Petitioners

Mark W. Bertram, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] MELISSA LIN JONES, AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Alvin N. Carson was employed by Honeywell Technology Solutions, Inc. (Honeywell), in a custodial position. He suffered from diabetes, vascular disease and hypertension.

On August 10, 2001, he sustained a work related injury while cleaning a floor. The injury occurred when the caustic floor cleaning chemical got onto his shoes, causing severe burns. He was hospitalized, developed gangrene in both feet and lower legs, and required amputation of both legs below the knees.

[1] Judge Russell was appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 (June 23, 2011).

In September 2002, Mr. Carson underwent a stent placement and catheterization, and was followed for this procedure and his related vascular problems by Dr. Allen Oboler and his practice group through numerous hospitalizations, diagnostic and therapeutic procedures through October 28, 2003. He did not see Dr. Oboler's group again.

Mr. Carson was admitted to Southern Maryland Hospital Center in June and July for cardiovascular related complaints. Following the July admission he was transferred to St. Thomas Nursing Home in Hyattsville, Maryland, where on August 20, 2009 he was found non-responsive in his room. He was taken by emergency transport to Washington Adventist Hospital where, despite resuscitative efforts, he passed away on August 20, 2009.

Mr. Carson was survived by his wife, Donna Spence, whom he married January 16, 2003, and son, Isaac Spence, born May 21, 1993 (Claimants). They sought benefits as surviving widow and child under the Act, which benefits were denied by Honeywell on the grounds that Mr. Carson's death was unrelated to his work injury, and that the claim was not timely. The dispute was presented for resolution by an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on January 31, 2012.

At the formal hearing, the Claimants submitted the deposition of Dr. Oboler and an independent medical evaluation (IME) report from Dr. Jonathan S. Fish, written based upon his review of certain unspecified medical records which included records from Southern Maryland Hospital Center. Honeywell submitted an IME report from Dr. Michael L. Hess, based upon medical records identified by Dr. Hess therein. Honeywell also submitted a deposition of Dr. Fish.

On February 27, 2012, the ALJ issued a Compensation Order (CO) denying the claimed benefits on the grounds that the Claimants had failed to establish that Mr. Carson's death was medically causally related to the work injury by a preponderance of the evidence.

The Claimants filed a timely appeal of the CO, to which Honeywell has filed an opposition.

We reverse and remand for further consideration of the claim.

DISCUSSION

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 (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. "Substantial evidence" is such relevant evidence as a reasonable mind might accept to support a conclusion. *Canlas v. DOES*, 723 A.2d 1210 (1999).

The only issue presented in this appeal is whether there is substantial evidence to support the ALJ's conclusion that the bilateral amputations did not contribute to the Mr. Carson's death, with the caveat that if her determination requires that she reject the contrary opinion of a treating physician, she acknowledge the existence of that contrary opinion and give adequate justification for rejecting it.

The opinion cited by the ALJ that she accepted, that of Dr. Hess, is the following:

> Mr. Carson was an unfortunate man with documented known diabetes when he experienced an industrial accident on August 10, 2001. As a consequence of his diabetes and the production of peripheral vascular disease, coronary artery disease and renal failure, Mr. Carson expired from cardiovascular disease on August 20, 2009. I cannot incriminate the [decedent's] work injury of August 10, 2001 as a contributing factor to the development of this coronary artery disease and peripheral vascular disease. It is well established that his naturally progressive disease predated his work injury and it was the underlying disease of diabetes and its vascular complications including heart failure that caused his demise.

CO, page 5, quoting from EE 1, page 2. It is clear that this opinion is adequate to support the conclusion that Mr. Carson's amputations did not hasten his death. What remains then is to assess whether the ALJ acknowledged the existence of a contrary opinion from Dr. Allen Oboler, and gave adequate reasons for rejecting it.

The ALJ summarized Dr. Oboler's opinion on page 5 of the CO as follows: "The physical activity of the decedent trying to ambulate himself has caused an aggravation of his congestive heart failure as there is a great deal of stress on his already limited cardiac reserve". She also found as a fact that Dr. Oboler had last treated Mr. Carson October 28, 2003, which was nearly six years before his death on August 8, 2009. CO, page 3. It is worth noting that the ALJ referred to the fact that Dr. Oboler did not think that Mr. Carson's "coronary artery disease" was caused or aggravated by the work injury, and that only the congestive heart failure was. See, CO, page 7, and EE 6, page 55.

This discussion by the ALJ was part of the analysis for the purpose of determining whether the evidence invoked the statutory presumption that Mr. Carson's death was causally related to his work injury. The ALJ determined that it was sufficient for that purpose. Accordingly, we conclude that in the ALJ's view, an "aggravation of his congestive heart failure", if ultimately shown to have occurred, was a contributing cause of Mr. Carson's death.

After so finding, the ALJ considered the IME performed by Dr. Hess at Honeywell's request. The ALJ found it to be sufficiently specific and comprehensive to overcome the presumption. She then embarked upon the task of weighing the evidence without reference to any presumption, and with the claimant's bearing the burden of proof by a preponderance of the evidence.

After considering and rejecting the opinion of Dr. Fish (Claimants's IME), she determined that as between Dr. Fish and Dr. Hess, she preferred Dr. Hess's opinions, as they took greater account of

Mr. Carson's overall medical condition, including his diabetes. The ALJ then turned to Dr. Oboler's opinion.

Here is the discussion of Dr. Oboler's opinion. After noting how bereft the record is with respect to Mr. Carson's medical condition in the lead up to his death, she wrote: "The details of what condition the decedent was in prior to his death are not known, i.e., was he still trying to ambulate in the same [strenuous] fashion he was when he treated with Dr. Oboler or did he have the same physical stressors or had he resigned to a wheel chair for mobilization." CO, page 7 – 8.

What the ALJ was referring to concerning "ambulating" is found in Dr. Oboler's deposition testimony in EE 6 at 55 through 58, where Dr. Oboler describes Mr. Carson's mode of getting around as being a very physically demanding method of pulling and pushing himself around using his arms, unable to use prosthetics due to the nature of the amputations.

Nowhere in the Discussion does the ALJ ever state specifically that she is rejecting Dr. Oboler's opinion. Since the basis of her finding that the presumption had been invoked was that Dr. Oboler testified that the work injury aggravated Mr. Carson's congestive heart failure, and since she ultimately denied the claim based upon a failure to establish medical causation by a preponderance of the evidence, she of necessity rejected his opinion to that effect.

The only apparent reason for rejecting Dr. Oboler's opinion is the lack of any evidence that in the six years that had passed between Dr. Oboler's last seeing Mr. Carson and his ultimate demise, Mr. Carson persisted in his highly taxing method of getting around.

Under the treating physician preference rule in this jurisdiction[2], if a treating physician's opinion is to be rejected, an ALJ must give a "persuasive" reason or reasons for doing so. There is no hard and fast rule for how many reasons must be given or what constitutes "persuasive". It stands to reason though that the fewer the reasons, the stronger they ought to be.

Here, the ALJ gave but a single reason: the absence of evidence that an underlying circumstance upon which the rejected opinion was based persisted in the time between the doctor's last seeing Mr. Carson and Mr. Carson's death. We are hard pressed to say that this single reason, standing alone and being itself unsupported by anything of a positive nature (that is, the ALJ cites no evidence that Mr. Carson discontinued the practices about which Dr. Oboler testified, and which he also characterized as having been sufficient to have caused a *permanent* aggravation of the congestive

[2] It is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See*, *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 rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician's reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

heart failure; see, EE 6, page 58 – 59) is sufficiently persuasive to meet the requirements of the treating physician preference. [3]

We recognize that the ALJ regarded Dr. Hess's report highly, at least in comparison to the opinion of Claimants' IME physician Dr. Fish, calling it "well reasoned" and "well informed", and that she set forth a lengthy and persuasive portion of that report including Dr. Hess's reasoning concerning how the underlying diabetic condition followed its own "natural course" leading to Mr. Carson's death. She did this in the context of contrasting Dr. Hess's reasoning with that of Dr. Fish, which she felt relied too heavily on speculative or arbitrary factors such as projected life expectancy studies involving multiple amputees or people with pre-existing arteriosclerotic cardiovascular disease.

However, the ALJ did not undertake a similar analysis of comparing the reasoning or logic behind the opinion of Dr. Oboler. Thus, we must reverse the denial on the grounds that the implied rejection of Dr. Oboler's opinion that the injury aggravated Mr. Carson's congestive heart failure is not in accordance with the law.

On remand, the ALJ shall consider further the medical evidence, and if the opinion of Dr. Oboler is again rejected, the ALJ must fully explain the reasons for that rejection. Otherwise, the matter requires further findings of fact and conclusions of law on the remaining issues that were not reached in the CO.

CONCLUSION

The rejection of the opinion of Mr. Carson's treating physician is not sufficiently explained to be in accordance with the law.

[3] We do not agree with either Honeywell's assertion in its brief that Dr. Oboler opined that the work injury and subsequent amputations did not contribute to Mr. Carson's death, or with the claimants' assertion in their brief that that Dr. Oboler testified that the work injury and subsequent amputations did so contribute. Dr. Oboler opined that the work injury aggravated Mr. Carson's congestive heart failure, and that it did not aggravate his "coronary artery disease". Remarkably, no one seems to have even asked him whether he believed that the congestive heart failure contributed to Mr. Carson's death. However, as is discussed *ante*, we have determined that the ALJ must have inferred that it was Dr. Oboler's opinion that the congestive heart failure did in fact contribute to Mr. Carson's death; otherwise, his opinion that the injury aggravated the congestive heart failure would not have led to the conclusion that the presumption had been invoked.

ORDER

The denial of the claim for death benefits is vacated. The matter is remanded for further consideration in a manner consistent with the aforegoing Decision and Remand Order.

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JEFFREY P. RUSSELL
ADMINISTRATIVE APPEALS JUDGE

May 11, 2012
Date