DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-1408

EULA WRIGHT, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

FIRST TRANSIT, *et al.*, INTERVENORS.

On Petition for Review of an Order
of the District of Columbia
Department of Employment Services
(CRB-112-15)

(Submitted January 6, 2017 Decided March 3, 2017)

Before THOMPSON and BECKWITH, *Associate Judges*, and FARRELL, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Eula D. Wright appeals the December 1, 2015, Order of the Compensation Review Board (the "CRB" or the "Board") affirming the determination by a Department of Employment Services Administrative Law Judge ("ALJ") that denied her claim for medical benefits. We affirm.

I.

Petitioner was employed by intervenor First Transit (the "Employer") as a bus operator when she suffered a work injury on October 2, 2008. She came before the ALJ for a hearing on February 11, 2015, on her claim for workers'

compensation coverage of surgical expenses (for "anterior cervical decompression and fusion at C5-C6 and C6-C7") and reimbursement of associated mileage and other expenses. After the hearing and after requesting and receiving additional medical records from petitioner's treating physicians, the ALJ determined in a June 12, 2015, Compensation Order that petitioner's current neck condition for which she seeks benefits is not causally related to the October 2, 2008, work-related accident. The CRB affirmed the Compensation Order on December 1, 2015, concluding that it was supported by substantial evidence in the record. Petitioner now contends that the ALJ's conclusions that the Employer rebutted the presumption of compensability and that petitioner failed to demonstrate by a preponderance of the evidence that her neck condition is causally related to her October 2008 work-related injury are not supported by substantial evidence in the record, and that the CRB therefore erred in affirming the Compensation Order. For the reasons that follow, we disagree.

II.

"In a workers' compensation case, we review the decision of the Board, not that of the ALJ[,]" but we "cannot ignore the compensation order which is the subject of the Board's review." *Marriott at Wardman Park v. District of Columbia Dep't of Emp't Servs*., 85 A.3d 1272, 1276 (D.C. 2014) (internal quotation marks omitted). "Our standard of review mirrors that which the Board is bound to apply." *Id.* "[T]he Board was not entitled to consider the evidence de novo or to make factual findings different from those of the ALJ." *Id.* "Rather, the Board was bound by the ALJ's findings of fact even if it might have reached a contrary result based on an independent review of the record." *Id*. The ALJ, not the CRB, is the "judge of the credibility of witnesses[.]" *Jones v. District of Columbia Dep't of Emp't Servs*., 41 A.3d 1219, 1222 (D.C. 2012). "[I]f substantial evidence exists to support the ALJ's findings, the existence of substantial evidence to the contrary did not permit the Board to substitute its judgment for that of the ALJ." *Marriott*, 85 A.3d at 1276 (brackets and internal quotation marks omitted).

"'Substantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. (internal quotation marks omitted). This court "will not disturb an agency's decision if it flows rationally from the facts which are supported by substantial evidence in the record." *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs*., 929 A.2d 865, 869 (D.C. 2007) (internal quotation marks omitted).

III.

Petitioner argues first that the CRB erred in concluding that substantial evidence supports the ALJ's determination that the Employer rebutted the statutory presumption of compensability. The Workers' Compensation Act (the "Act") establishes a presumption that, in the absence of evidence to the contrary, an injured worker's claim for benefits comes within the provisions of the Act — in other words, a presumed "causal connection between the [compensable condition] and [a] work-related event, activity, or requirement" that "has the *potential* of resulting in or contributing to the . . . disability." *Id.* at 870 (emphasis in original) (quoting *Whittaker v. District of Columbia Dep't of Emp't Servs.*, 668 A.2d 844, 845 (D.C. 1995)); *see* D.C. Code § 32-1521 (1) (2012 Repl.). When the presumption of compensability is triggered, the burden is on the employer to provide substantial evidence showing that the condition "did not arise out of and in the course of employment." *Washington Post v. District of Columbia Dep't of Emp't Servs.*, 852 A.2d 909, 911 (D.C. 2004) (quoting *Ferreira v. District of Columbia Dep't of Emp't Servs.*, 531 A.2d 651, 655 (D.C. 1987)). "[T]he presumption of compensability cannot be overcome merely by some isolated evidence," *id.* (quoting *Whittaker*, 668 A.2d at 847), but the presumption is also not "so strong as to require the employer to prove that causation is *impossible* in order to rebut it." *Id.* (emphasis in original) (quoting *Washington Hosp. Ctr. v. District of Columbia Dep't of Emp't Servs.*, 744 A.2d 992, 1000 (D.C. 2000)). "The employer's evidence simply needs to be specific and comprehensive enough that a reasonable mind might accept it as adequate[.]" *Id.* (internal citation, quotation marks, and alteration omitted). An employer meets its burden and rebuts the presumption when the employer "proffer[s] a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability." *Id.* at 910; *see also Jackson v. District of Columbia Dep't of Emp't Servs.*, 979 A.2d 43, 46 (D.C. 2009).

In this case, Dr. Clifford Hinkes reviewed petitioner's medical records and examined her on May 14, 2009, as part of an independent medical examination. He opined that she has "degenerative arthritis with stenosis" and cervical spondylosis that are "not causally related to the [October 2008] work injury." Dr. Hinkes conducted a follow-up evaluation of petitioner on December 20, 2012, and found that petitioner "now has evidence of a herniated disc with a possible free fragment on the cervical MRI[,]" but again opined that her condition was "not

causally related to the work injury of 10/2/08." On June 13, 2013, Dr. Ronald Cohen conducted an independent medical evaluation, in which he found, after reviewing petitioner's medical records and examining her, that her October 2008 work injury had resolved and that she had "no current symptoms causally related to that incident." He concluded that her flare-up of neck pain in September 2011 was "not unexpected because of the extensive pre-existing degenerative changes in her cervical spine[,]" which has "no causal relationship to the incident at work on 10/2/08, 3 years prior to that." He stated that flare-ups of pain are "the usual history of somebody with cervical osteoarthritis[,]" and opined that there was "no possible causal relationship between [the October 2008] incident and [petitioner's] symptoms in 2013 or 2014." He also noted that there was "no clear continuity of [petitioner's] symptoms from 10/2/08 to the present time," that petitioner had "worked at regular duty all through 2010 while receiving no ongoing treatment to the cervical spine," and that she was "very clear [in giving her oral history to him] that she did not require any medications for pain[.]"

We agree with the CRB that Dr. Hinkes and Dr. Ronald Cohen "render[ed] . . . unambiguous opinion[s] that the [October 2008] work injury did not contribute" to the condition for which petitioner sought benefits.[1] *Jackson*, 979 A.2d at 46; *Washington Post*, 852 A.2d at 910. Their testimony was specific and comprehensive and constituted substantial evidence that rebutted the statutory presumption of causation and compensability.[2] *Cf. Washington Post*, 852 A.2d at

[1] Petitioner argues that Dr. Ronald Cohen's opinion was not unambiguous and unequivocal because he "allowed for the possibility that [petitioner's underlying degenerative condition] could have been caused by the [October 2008 injury.]" We disagree because what Dr. Ronald Cohen actually (and unequivocally) said in his deposition is that while it is "within the realm of possibility" that a strain could "hasten the development or onset of the degenerative condition[,]" "[t]here's no evidence at all in this case that that occurred[.]"

[2] Petitioner further argues Dr. Ronald Cohen's evaluation "did not discuss the possibility that [the degenerative condition] was exacerbated by the incident on October 2, 2008[,] or that the degeneration followed the original injury[.]" However, as to the first of these points, the issue was not whether, during the remainder of 2008 and into 2009, the October 2008 injury temporarily exacerbated what the independent medical examiners opined were "pre-existing degenerative changes" in petitioner's cervical spine (though Dr. Ronald Cohen did opine that

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913 (reasoning that the independent medical examiner "supported [his opinion] with detailed reasons" and that his opinion was "specific and comprehensive enough" to rebut the statutory presumption where he explained that the claimant's injury was not the result of any previous work trauma but "represent[ed] the natural deterioration of a pre-existing knee disease"; that "[t]he natural history of [claimant's] osteochondritic dissecans is to become symptomatic"; that claimant's work injury resulted "in a temporary irritation of the [knee] joint" but "did not advance[] [claimant's] knee pathology or structurally change[] his knee in any manner"; and that if the claimant's work traumas "had caused a significant injury . . . and had further advanced his osteochondritic pathology, [he] would have sought treatment" during a time when he did not seek treatment) (internal quotation marks omitted).

IV.

If the employer successfully rebuts the presumption of compensability, "the statutory presumption drops out of the case entirely." *Washington Post*, 852 A.2d at 911. "The burden then reverts to the claimant to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed" to the condition for which she seeks benefits. *Id.* (citing *Washington Hosp. Ctr.*, 744 A.2d at 998). Petitioner asserts that the CRB erred in affirming the ALJ's determination that she did not meet that burden through the medical opinion of Dr. Michael Franchetti, with whom she began treatment on October 22, 2008, after her October 2008 work injury. In September 2009, Dr. Franchetti had reported "improvement of [petitioner's] neck" ("[i]mproved exacerbation of chronic cervical strain and bilateral cervical radiculopathy"), but in repeated reports referencing visits by petitioner in 2011 through 2014, he attributed

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petitioner's cervical osteoarthritis "was aggravated by the incident of 10-2-08 *for a short time*" (emphasis added)). The issue was whether the neck condition with which petitioner presented in 2012 and later years (and for which she sought coverage of surgical expenses) was causally related to the 2008 injury, a question that Dr. Ronald Cohen squarely answered in his statement that petitioner's "cervical complaints at this time [June 13, 2013] are not causally related to the incident of 10/2/08[.]" Dr. Hinkes similarly opined that there was no permanent "impairment of any part of the body due to the work injury of 10/2/08."

petitioner's flare-up of neck pain and "persistent neck pain" to her October 2, 2008, injury. Dr. Franchetti testified in his June 19, 2014, deposition that petitioner sustained "natural deterioration of th[e] original injury from October 2, '08[,]"and he specifically attributed her disc herniation (shown on the 2012 and 2013 MRI) to that 2008 injury.

As petitioner correctly notes, the medical testimony of a treating physician in workers' compensation cases is generally preferred to that of '"to doctors who have been retained to examine the claimant solely for purposes of litigation.'" *See, e.g.*, *Potomac Elec. Power Co. v. District of Columbia Dep't of Emp't Servs.*, 835 A.2d 527, 529 (D.C. 2003) (quoting *Stewart v. District of Columbia Dep't of Emp't Servs.*, 606 A.2d 1350, 1353 (D.C. 1992)). Where there is conflicting medical testimony, however, '"the hearing examiner, as judge of the credibility of witnesses, may reject the testimony of a treating physician and decide to credit the testimony of another physician[.]"' *Jones*, 41 A.3d at 1222 (quoting *Mexicano v. District of Columbia Dep't of Emp't Servs.*, 806 A.2d 198, 205 (D.C. 2002)). "If the hearing examiner decides to reject the testimony of the treating physician, . . . she must 'set forth specific and legitimate reasons for doing so.'" *Id.* (internal alterations omitted) (quoting *Mexicano*, 806 A.2d at 205).

Here, rejecting the opinion Dr. Franchetti expressed in his deposition and medical reports, the ALJ determined that petitioner "suffer[ed] from pre-injury degenerative changes with stenosis which results in periodic flare-ups of muscle pain"; that the October 2, 2008, work accident caused petitioner to "suffer[] from a cervical muscle strain/sprain which resolved"; and that petitioner "did not suffer any aggravation, hastening[,] or progression of her underlying condition as a result of the October 2, 2008 work accident." The ALJ acknowledged the treating-physician preference, but rejected "Dr. Franchetti's findings on exam and the opinions . . . as inconsistent and duplicitous."[3]

[3] The ALJ also rejected the causal-relationship opinion of neurosurgeon Dr. Joseph Jamaris, who saw petitioner in January and March 2013. The ALJ reasoned that his opinion was "premised on an incorrect statement of the facts [about the number of work injuries petitioner had sustained] and combines two different dates of injury." Further, citing petitioner's "appearance and demeanor" during the hearing when she was asked about her continued symptoms, the ALJ found petitioner's testimony regarding her "complaints of continuous neck pain" to be "not credible."

The ALJ cited and explained in detail a host of reasons for rejecting Dr. Franchetti's opinion on causation. For example, the ALJ cited medical records showing that Dr. Franchetti and his partners treated petitioner not only after her October 2008 injury, but also after a June 2010 back injury and February 2011 elbow and bilateral shoulder injury, and emphasized that Dr. Franchetti did not provide all the relevant medical records from his practice group until after the formal hearing. Among the records not initially submitted was a January 9, 2012, report by Dr. Franchetti's associate Dr. William Launder, who described a "horrible flare up of pain" in petitioner's neck and attributed it to "the accident on February 6, 2011." Also missing from the exhibits that claimant's counsel submitted to the ALJ prior to the hearing was a January 12, 2012, report by Dr. Mark Cohen, another of Dr. Franchetti's associates, who stated his impression that petitioner had "[p]ossible cervical radiculopathy" and attributed it to "the work injury from February 6, 2011." Citing a report by Dr. Franchetti himself that was not produced until after the hearing, the ALJ found that the (September 7, 2011) report "d[id] not reveal [a] complete medical histor[y]," given that it stated that petitioner had experienced a flare-up of neck pain "with no additional trauma[,]" omitting mention of the trauma of petitioner's February 2011 fall and elbow and shoulder injury. The ALJ found that the "findings on exam [by Dr. Franchetti and his associates] [we]re inconsistent depending on the account number/dates of injury" that were the subject of each report.

The ALJ found in addition that Dr. Franchetti's "diagnosis [wa]s inconsistent with objective studies." It appears that the ALJ was referring to an EMG test done on petitioner on March 30, 2011, which showed no "finding for radiculopathy." The ALJ further found that petitioner's complete medical records and physical therapy and work hardening reports, while containing some reports of flare-ups of neck pain, "belie Dr. Franchetti's characterization of [her] neck pain as chronic and debilitating" and an "8 to 9 out of 10 every day." The record supports that finding. And although Dr. Franchetti testified at his deposition that petitioner "followed up [with a visit to him] in 2010 with symptoms worsening considerably[,]" the ALJ found (and documentary evidence supports) that after 2009, petitioner "did not return to Dr. Franchetti for treatment for her 2008 neck injury for two years."

Because of the foregoing inconsistencies and omissions, the ALJ found that Dr. Franchetti's testimony and opinions "are not credible" and accorded his opinion on causal relationship "no weight." By contrast, the ALJ found that the opinions of Dr. Hinkes and Dr. Ronald Cohen were "more consistent with the medical reports of all the medical providers, the independent medical examiners

[including Dr. Edward Cohen, who conducted an independent medical examination of petitioner on March 13, 2012, in connection with the February 2011 work injury and noted that petitioner "offer[ed] no complaints . . . referable to her neck" [,] and the objective testing[,]" as well as with "the gap of approximately two years in treatment[.]" We are satisfied that these were reasonable bases for the ALJ to credit the independent medical examiners' opinions over that of Dr. Franchetti and for the CRB to determine that the ALJ's findings were supported by substantial evidence.[4]

Wherefore, the judgment of the CRB is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

[4] *Cf. Canlas v. District of Columbia Dep't of Emp't. Servs*., 723 A.2d 1210, 1212-13 (D.C. 1999) (concluding that the evidence was sufficient to support the hearing examiner's rejection of the treating physicians' opinions where the independent medical examiner's opinion was "'more consistent with' the 'objective evidence' of petitioner's condition than were the contrary opinions offered by petitioner's physicians"); *WMATA v. District of Columbia Dep't of Emp't Servs*., 926 A.2d 140, 146 n.9, 148 (D.C. 2007) (agreeing with the CRB's analysis, including its reasoning that the ALJ could have denied claimant's disability claim based upon the opinions of the independent medical examiner, which was corroborated by evidence that the claimant returned to work successfully "despite his treating physician's continuing opinion that he was unfit for duty").

Petitioner asserts that the ALJ "determined that [her] neck complaints were the result of [the] February 6, 2001[,] injury" and argues that the ALJ thereby substituted her "own medical judgment over that of the expert witnesses who testified in the case[,]"but we see nothing in the Compensation Order that supports that premise or argument.

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