GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 MAY 19 AM 10 45

CRB No. 14-028

TRACY DOUGLAS,
Claimant-Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
Employer-Respondent.

Appeal from a February 24, 2014 Compensation Order By
Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 13-048, DCP No. 30121251443-0001

Harold L. Levi, for the Petitioner
Molly H. Young, for the Respondent[1]

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and HENRY W. MCCOY, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by Claimant - Petitioner (Claimant) of the February 24, 2014, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted, in part, Claimant's request for temporary total disability benefits and payment of medically causally related expenses. We VACATE and REMAND.

[1] The title page of the Compensation Order reflects Mary Young as Employer's counsel, and Maggie Young on the Certificate of Service. We will assume that the inconsistent reference is a clerical error, and that Molly Young – the name used in pleadings before the CRB and reflected in the hearing transcript - represented Employer at the Formal Hearing.

BACKGROUND AND FACTS OF RECORD

Claimant was employed by Employer as a road test examiner wherein Claimant tested new drivers prior to a driver's license being issued in the District of Columbia. On December 15, 2012, an applicant lost control of the vehicle Claimant was in, causing injuries to her head and back. Claimant sought medical treatment and ultimately came under the care and treatment of Dr. Dexter Love and Dr. Shobha Chidambaram.

Dr. Love diagnosed Claimant with right lower extremity radiculopathy which he opined was causally related to the work accident. Dr. Love recommended epidural injections and kept the Claimant in a no work status as of April 2013. Dr. Love also recommended a consult with Dr. Chidambaram.

On March 18, 2013, Claimant sought treatment with Dr. Chidambaram. Dr. Chidambaram diagnosed Claimant with lumbar radiculopathy, questionable disc prolapse, and pain in the lower back.

Employer sent Claimant for an IME with Dr. David C. Johnson on April 8, 2013. Dr. Johnson took a history of the injury, performed a physical examination, and reviewed the medical records provided, including the results of objective testing. Dr. Johnson opined that all treatment Claimant had to date was medically causally related to the work injury and necessary. Dr. Johnson concurred with Dr. Love that a series of epidural injections was warranted. If Claimant did not intend to have the epidural injections, then Dr. Johnson opined Claimant was at maximum medical improvement. Dr. Johnson authored an addendum which stated that Claimant could return to work, full duty, without restrictions.

A full evidentiary hearing occurred on October 2, 2013. Claimant sought an award temporary total disability benefits with payment of all related medical expenses from the date of injury to the present and continuing. The issues raised were whether the Claimant intentionally caused the work accident, thereby precluding benefits under the Act, and the nature and extent, if any, of Claimant's disability. A CO was issued on February 24, 2014 which found Claimant suffered a compensable injury entitling him to disability benefits until April 8, 2013 as well as causally related medical expenses.[2] After April 8, 2013, the CO denied Claimant's request for disability benefits, finding that per Dr. Johnson's opinion, Claimant could return to work, full duty.

Claimant timely appealed. Claimant argues the CO erred in its interpretation of Dr. Johnson's IME and that the IME does in fact support the treating physician's opinion that epidural injections are warranted and Claimant cannot return to work. Claimant also filed, contemporaneously with the Application for Review, a Motion for Leave to Re-Open the Record in order to submit medical evidence generated after the Formal Hearing.

Employer opposes, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law. Employer further opposes the Motion to Re-Open the Record.

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[2] The Employer did not appeal the conclusion that Claimant suffered an accidental injury that came within the Act, the award of causally related medical expenses, and that Claimant was entitled to disability benefits until April 8, 2013.

THE STANDARD OF REVIEW

The scope of review by the CRB, 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 on Remand 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. Code § 1-623.01, *et seq.*, (the "Act") at § 1-623.28(a), and *Marriott International v. DOES.*[3]

Consistent with this standard of review, the CRB is 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.*[4]

DISCUSSION AND ANALYSIS

Claimant argues first Employer failed to meet the preliminary burden to prove a change in condition occurred to justify a termination of benefits, relying upon D.C. Code 1-623.24(d)(4). Claimant argues that Dr. Johnson's opinion does not satisfy this burden as his opinion does not prove that Claimant's condition has changed or lessened. We disagree.

A review of the evidence reveals Claimant's argument is misplaced. D.C. Code 1-623.24(d)(1) – (d)(4) applies to claims that have been accepted and Employer is seeking to modify. Such is not the case before us. As the CO outlined:

> According to Claimant, on December 15, 2012, he was conducting a road test when the applicant who was operating the vehicle hit a pole injuring Claimant. He filed a claim for benefits under the Act for injuries sustained in the performance of his duties. On May 31, 2013, the Office of Risk Management/Disability Compensation Program (hereinafter referred to as, WC) issued a Notice of Determination Regarding Denying Workers' Compensation Benefits (hereinafter, NOD). Claimant's request for benefits was denied based on a determination that Claimant intentionally caused the accident. On June 20, 2013, the Office of Hearings and Adjudications/Administrative Hearings Division, hereinafter, AHD) received Claimant's request for a formal hearing.

CO at 2.

Employer denied Claimant's claim outright, alleging Claimant caused the work accident. The claim was never accepted nor was an award ever granted allowing for any type of modification

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[3] 834 A.2d 882 (D.C. 2003).

[4] *id* at 885.

subject to D.C. Code 1-623.24(d)(4). Thus, the burden was not preliminarily on the employer to show a change in condition. We reject Claimant's first argument.

We address Claimant's last argument next, that the ALJ did not give specific reasons for the rejection of the opinion of Dr. Love, Claimant's treating physician, in favor of that from Dr. Johnson, Employer's IME.[5] Claimant relies upon *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004) and *Changkit v. DOES*, 994 A.2d 380 (D.C. 2010) in support of her argument. We agree with Claimant.

As Claimant points out in argument, the District of Columbia Court of Appeals (DCCA) in *Changkit* stated:

> [I]n workers' compensation cases, the medical opinion of a treating physician is generally entitled to greater weight than the opinions of doctors who have been retained to examine a claimant solely for the purpose of litigation." *Kralick v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 705, 711 (D.C. 2004) (collecting cases). While a hearing officer, as the trier of fact, is entitled to reject the testimony of a treating physician, he may do so only "if the examiner sets forth *specific and legitimate reasons for doing so*." *Mexicano v. District of Columbia Dep't of Employment Servs.*, 806 A.2d 198, 205 (D.C. 2002) (emphasis added) (*quoting Olson v. District of Columbia Dep't of Employment Servs.*, 736 A.2d 1032, 1041 (D.C. 1999)).
>
> The rationale for the treating-physician preference is twofold. In comparison with an assessment by a doctor who has been retained solely for purposes of litigation, a treating physician's opinion is considered more reliable because the treating physician is "(1) less apt to be consciously or subconsciously biased by the litigation, and (2) more likely to be familiar with the patient's condition because he or she has typically spent a greater amount of time with the patient." *Kralick*, 842 A.2d at 712. At the core of this second prong is the common sense principle that a physician who has treated a patient over a substantial period of time is likely to have more insight into the patient's condition than a doctor who has had only one or two interactions with a patient and who has examined the patient in the context of possible or actual litigation.
>
> Where an agency or hearing officer has not accorded preference to the opinion of a treating physician, and has failed to provide an adequate explanation for the decision not to do so, this court will not allow the resulting ruling to stand. *See, e.g., id.* at 705 (reversing where the ALJ's explanation for rejecting the treating physician's opinion was based on a misapprehension of fact); *Mexicano*, 806 A.2d

[5] Claimant correctly points out in argument that the CRB has recently sanctioned the same analysis of the treating physician preference as outlined in *Kralick*, after recent amendments to the statute. *See Proctor v. D.C. Public Schools*, CRB No. 12-194, AHD No. PBL 06-105A, DCP No. 760002-0001-1999-0023 (May 15, 2013).

> at 205 (holding that the hearing examiner rejected the treating physician's opinion for insufficiently persuasive reasons); *Clark v. District of Columbia Dep't of Employment Servs.*, 772 A.2d 198, 204 (D.C. 2001) (setting aside administrative decision because the hearing officer failed to give adequate consideration to the deposition testimony of a treating physician); *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623, 629 (D.C. 2001) (setting aside administrative decision because "[e]ven assuming, *arguendo*, that the examiner did consider the [treating physician's] deposition, she failed to explain [satisfactorily] why she rejected his opinion, as explicitly mandated by the law in this jurisdiction").

994 A.2d at 387-388.

While both Dr. Love and Dr. Johnson agreed that epidural injections were medically causally related to the work injury and reasonable and necessary, the physicians disagreed on the ability of Claimant to return to work. Dr. Love issued a disability slip that recommended Claimant remains off work because of the work injury while Dr. Johnson, in his addendum, opined that Claimant could return to work full duty. The CO concluded, in line with the IME, that Claimant could return to work without restrictions, relying upon the medical reports of Dr. Johnson. No explanation is given for rejecting the opinion of the treating physician, Dr. Love. Without specific and legitimate reasons for rejecting the testimony of the treating physician we cannot say the CO is supported by the substantial evidence in the record and in accordance with the law. Consequently, we are forced to remand the case for further findings and conclusions. If the ALJ continues to find the opinion of Dr. Johnson more persuasive regarding Claimant's work status, specific and legitimate reasons must be given as to why the opinion of Dr. Love is rejected.

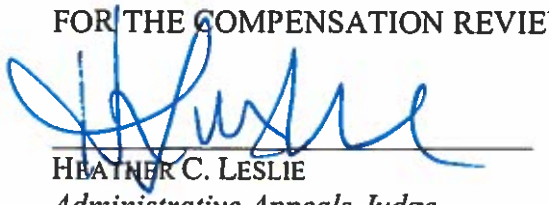
Until such time, we decline to address Claimant's other arguments as we cannot determine whether the ALJ's rejection of the treating physician is supported by the substantial evidence in the record.

As we are remanding the case to the ALJ for further findings of fact and conclusions of law, we dismiss without prejudice, Claimant's Motion to Re-Open the Record.

CONCLUSION AND ORDER

The February 24, 2014 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED for further findings of fact and conclusions of law in light of the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

May 19, 2014
DATE