

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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB (Dir. Dkt.) No. 04-24

LAWRENCE BASTIAN,

Claimant–Petitioner,

v.

D.C. WATER & SEWER AUTHORITY

AND

GALLAGHER BASSETT SERVICES,

Employer/Carrier–Respondents.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
OHA No. 03-406; OWC No. 579709¹

Benjamin T. Boscolo, Esq., for the Petitioner

Douglas A. Datt, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE, and FLOYD LEWIS, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) 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).² Pursuant

¹ Inexplicably, the OWC number identified in the Compensation Order from which appeal to the Compensation Review Board has been taken was 578972. However, the correct OWC number in this matter is 579709.

² 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

to § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders granting or denying benefits, by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC), under public and private sector Acts.

BACKGROUND

On July 19, 2001, Claimant-Petitioner (hereafter, Petitioner) sustained a work-related injury to his neck, which resulted in two claims for benefits under the Workers' Compensation Act. Initially, Petitioner filed a claim for temporary total disability (TTD) benefits with the Office of Workers' Compensation (OWC), which resulted in a Memorandum of Informal Conference, dated September 19, 2002, recommending the award of the TTD benefits as requested. Neither of the parties rejected the Memorandum of Informal Conference nor filed an Application for Formal Hearing. Thus, on November 26, 2002, OWC issued a Final Order awarding Petitioner the TTD benefits.

On April 23, 2003, Petitioner requested a second Informal Conference before OWC in which he sought a 25% permanent partial disability schedule award to each of his upper extremities. In a Memorandum of Informal Conference dated May 22, 2003, the OWC Claims Examiner denied Petitioner's request for the schedule award. Petitioner subsequently filed an Application for Formal Hearing with the Office of Hearings and Adjudication (now the Administrative Hearings Division). On January 27, 2004, the presiding ALJ issued a Compensation Order denying Petitioner's claim for the schedule award. It is Petitioner's appeal of that Compensation Order that is now before the Compensation Review Board for disposition. Petitioner bases his appeal on the assertion that the denial of his schedule award claim was erroneous as a matter of law for three reasons: (1) the Compensation Order issued by the ALJ impermissibly modified the initial OWC Final Order awarding TTD benefit; (2) the ALJ, in weighing the competing medical evidence of record, failed to adhere to long-standing precedent governing the deference to be accorded a claimant's treating physician; and (3) the findings of fact set forth in the Compensation Order are not supported by substantial evidence.

ANALYSIS

As an initial matter, the scope of review employed by the 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. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. § 32-1501 to § 32-1545 (2005), at § 32-1521.01(d)(2)(A). "Substantial evidence," as

Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 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.

As noted in the Background Statement, the claim in the instant case concerns Petitioner's entitlement to an upper extremity schedule award arising out of the July 19, 2001 work-related injury to his neck.³ Consequently, the issue before OHA/AHD was not, as Petitioner asserts, whether his neck condition "is medically causally related to [his] work-related injury of July 19, 2001," but whether Petitioner is entitled to a 25% upper extremities permanent partial disability schedule award as a result of his neck injury. Despite Petitioner's arguments to the contrary, we find that the ALJ did not, in rendering the Compensation Order of January 27, 2004, modify the November 26, 2002 OWC Final Order. In resolving Petitioner's claim for a schedule award, the ALJ did not impermissibly encroach upon the lawful jurisdiction of OWC with respect to the earlier award. The ALJ made no inconsistent findings as to the Petitioner's entitlement to temporary total disability and medical expenses. Nor did the ALJ make any inconsistent findings related to the issue of causal relationship. The issue of medical causation before the ALJ pertained to the upper extremity condition upon which Petitioner based his claim for a schedule award. It did not relate to, and thus the ALJ's findings with respect thereto did not constitute a modification of, the medical causal determination previously made by OWC pertaining to the award of temporary total disability benefits. Thus, we hold that the ALJ did not exceed OHA/AHD's jurisdiction in rendering the Compensation Order herein appealed.

We next turn to the interrelated questions of whether the ALJ, in denying Petitioner's claim for the schedule award, failed to adhere to long-standing precedent governing the deference to be accorded a claimant's treating physician upon weighing the competing medical evidence, and/or whether the ALJ's findings of fact are supported by substantial evidence.

It is well established under the law of this jurisdiction that the opinion of a claimant's treating physician is to be accorded great weight, and is generally preferred over the conflicting opinion of a physician rendering an independent medical evaluation at the behest of the employer. *Carlos Mosley v. Radio Shack Corporation*, CRB (Dir.Dkt.) No. 03-144, OHA No. 03-320 (Aug. 3, 2005), citing *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845 (DC 1998), and *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350 (DC 1992). The preference accorded to the treating physician's opinion accords to the medical opinion of a licensed treating chiropractor as well. *Mosley, supra*. However, as the Board acknowledged in *Mosley*, this preference is not absolute.⁴ Where there are persuasive reasons to do so, the ALJ "may choose to credit the testimony of a non-treating physician over [that of] a treating physician." *Canlas v. D.C. Dept. of Employment*

³ A review of the record reveals that the parties stipulated to, and the ALJ found, that the Petitioner sustained an accidental injury on July 19, 2001. ALJ Compensation Order at 2.

⁴ Indeed, the "mechanical application" of the treating physician preference has been questioned by the Court of Appeals. See *Lincoln Hockey v. D.C. Dept. of Employment Services*, 831 A.2d 913, 919-922 (DC 2003).

Services, 723 A.2d 1210, 1212 (DC 1999). However, where the opinion of the treating physician is rejected in favor of the IME physician, it is legally incumbent upon the ALJ to explain his/her decision to credit the IME opinion over that of the treating physician. An ALJ “may not reject the testimony of a treating physician without explicitly addressing that testimony and explaining why it is being rejected.” *Lincoln Hockey v. D.C. Dept. of Employment Services*, 831 A.2d 913, 920 (DC 2003). The rationale for so doing must support a reasonable conclusion consistent with the substantial evidence contained in the record. *Davis-Dodson v. Bureau of National Affairs*, Dir. Dkt. No. 94-39, H&AS No. 92-382 (Dec. 21, 1995). As the Court of Appeals explained, “Although an agency as finder of fact generally ‘need not explain why it favored the evidence on one side over that of the other,’ [citation omitted], there would be little force to the preference in favor of a treating doctor’s opinion if the agency could ignore that opinion without explanation.” *Canlas*, 723 A.2d at 1212.

As the Board noted in *Mosley*, *supra*, relevant to evaluating a treating chiropractor’s opinion versus that of an IME physician are matters such as sketchiness, vagueness and imprecision in the treating chiropractor’s opinion and/or reports, and the extent of the IME physician’s evaluation of the claimant’s condition. In addition, legitimate questions arise that must be addressed pertaining to any potentially superior relevant professional credentialing and specialization that the IME physician might have. An examination may necessarily be required of the relevant professional credentials of the chiropractor versus those of a medical doctor specialized in a field of medicine relevant to the medical condition at issue.

While in the instant case there may well be substantial evidence of record supporting the ALJ’s ultimate disposition on the issue of medical causation and nature and extent, we cannot make that determination on the record before us given the ALJ’s failure to specifically address the reasons and rationale for disregarding the treating chiropractor’s assessment that Petitioner had sustained a permanent partial impairment of his upper extremities as a result of his work-related neck injury. Accordingly, this matter is remanded to the ALJ for further proceedings consistent with the decision herein issued.

CONCLUSION

We hold that OHA/AHD had jurisdiction to hear Petitioner’s claim for a schedule award notwithstanding Petitioner’s prior OWC award of permanent partial disability benefits. In denying Petitioner’s claim for a schedule award, however, and rejecting the medical opinion of Petitioner’s treating chiropractor, the ALJ failed to adhere to the legal requirements of this jurisdiction, as herein discussed, requiring that she explain her decision to credit the IME opinion over that of the treating chiropractor.

ORDER

The Compensation Order of January 27, 2004, is AFFIRMED IN PART and VACATED IN PART for the reasons aforementioned. The case is REMANDED to the Administrative Hearings Division for further proceedings consistent with this decision.

FOR THE COMPENSATION REVIEW BOARD:

E. COOPER BROWN
Chief Administrative Appeals Judge

May 23, 2006

DATE