GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-046

DIONNE BUTCHER-WALLACE,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,
Self-Insured Employer-Petitioner.

Appeal from a March 12, 2013 Compensation Order By
Administrative Law Judge Amelia G. Govan
AHD No. 12-464, OWC No. 687714

Douglas A. Datt, Esquire for Petitioner
Matthew Peffer, Esquire for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

Dionne R. Butcher-Wallace was employed as staff accountant, with duties including preparation and documentation of financial transactions for posting, account reconciliation, attending meetings, scanning documents and file maintenance.

On January 6, 2012, while working at her work station, she attempted to close an overhead metal cabinet door, during the course of which attempt the door became detached and fell, striking her right arm and hand from the tips of her fingers to her right elbow. It came to rest in such a position that it pinned her arm on the desk surface. Using her left arm and with the assistance of a co-worker she removed the fallen door.

Almost immediately thereafter, the building was evacuated due to a fire alarm being sounded.

While standing outside, Ms. Butcher-Wallace reported the incident to her employer's (WASA's) Risk Department manager. Ms. Butcher-Wallace felt an unusual sensation in her right hand and wrist area. Upon returning to the building, she began experiencing tingling from the right wrist up to and beyond the elbow. This occurred on a Friday.

The next morning, Ms. Butcher-Thomas felt throbbing pain in the right wrist.

She sought medical care from her primary care physician, Dr. Darcy Ibitoye, who placed her wrist in a splint brace. Dr. Ibitoye also recommended a course of physical therapy and had an MRI taken of the wrist on January 16, 2012, which revealed a torn triangular fibrocartilage ligament complex, or TFCC. He referred Ms. Butcher-Wallace to a hand surgeon, Dr. Lloyd Cox, for further evaluation.

Dr. Cox saw her on January 19, 2012. Based upon his examination and the results of the MRI, Dr. Cox diagnosed a wrist contusion with radial neuropraxia, which is a peripheral nerve injury in which the nerve remains in place but, due to the severity of the trauma, it doesn't transmit impulses. Dr. Cox recommended discontinuation of the physical therapy and brace once the already prescribed course of treatment was completed.

Dr. Cox released Ms. Butcher-Wallace to return to her regular duties as of January 23, 2012. However, when she attempted to return to her regular work, she was only able to tolerate working for about five hours due to aching, pain and numbness in the wrist and forearm.

She returned to Dr. Cox on January 26, 2012, at which time he recommended occupational therapy, application of a gel, and limited work hours of no more than four per day for a couple of weeks.

WASA arranged for Ms. Butcher-Wallace to be seen and evaluated for the purpose of an independent medical evaluation (IME) by Dr. James Higgins, a hand specialist. The IME was performed on February 3, 2012. Ms. Butcher-Wallace, who had decided to discontinue treatment with Dr. Cox, was advised that, if she chose, she could continue to treat with Dr. Higgins after the IME.

Ms. Butcher-Wallace decided that she would treat with Dr. Higgins, who essentially maintained the same treatment plan as Dr. Cox, adding a cortisone injection. He provided a light duty work slip limiting her work to four hours per day until February 27, 2012, with full regular duty thereafter.

However, when Ms. Butcher-Wallace was seen again on March 7, 2012, he continued his recommendation for therapy and the splint, as well as another week of four hour shifts.

Ms. Butcher-Wallace continued to complain of her symptoms, and on April 2, 2012, Dr. Higgins obtained a nerve conduction study. When he reviewed the results on May 1, 2012, he concluded that neither the TFCC tear shown on the MRI nor the nerve compressions were related to the January 2012 work injury.

In his final treatment note, Dr. Higgins wrote that Ms. Butcher-Thomas "might benefit from a second opinion", and that she was free to return to him for treatment in the future on an as needed basis.[1] He also recommended against any surgical intervention, and indicated that she could return to work without further restrictions.

Ms. Butcher-Wallace sought further medical advice from an orthopaedic physician, Dr. Olumuyima Paul, on May 21, 2012. Dr. Paul reviewed the MRI and some other x-rays, and concluded that the TFCC tear was the source of her ongoing complaints. He referred her to another hand surgeon, Dr. Richard Pyfrom.

Ms. Butcher-Wallace saw Dr. Pyfrom on May 23, 2012. He provided a cortisone shot and recommended further medical care, including surgery.

Ms. Butcher-Wallace sought authorization to change her attending physician to Dr. Pyfrom from WASA and the Office of Workers' Compensation, at an informal conference conducted on June 26, 2012. Following the conference, on July 5, 2012, the claims examiner denied the request, a decision that Ms. Butcher-Wallace appealed to the Compensation Review Board (CRB).

At that same conference, Ms. Butcher-Wallace also requested certain wage replacement benefits for various periods of time she claimed to have lost from work. In a separate written recommendation, the claims examiner recommended awarding some of the claimed wage loss benefits, and denied others. Ms. Butcher-Wallace rejected the recommendation, and filed an Application for Formal Hearing with the hearings section of the Department of Employment Services (DOES).

While the appeal to the CRB and the AFH were pending, Ms. Butcher-Wallace proceeded to obtain the recommended care from Dr. Pyfrom. He provided the cortisone injection, and recommended physical therapy. On July 2012 he performed surgery on Ms. Butcher-Wallace's right wrist, and on September 2012, he operated on her right elbow.

A formal hearing was held on December 5, 2012 at which the claim for the wage loss benefits was presented. On February 22, 2013, prior to the ALJ issuing a Compensation Order, the CRB issued an order dismissing the appeal of OWC's denial of authorization to change attending physicians without prejudice to it being refilled upon issuance of the Compensation Order that was to result from the formal proceedings pending in the hearing section. This was done in order to avoid conflicting outcomes concerning medical causation, a subject that could have had an impact not only upon the disposition of the appeal to the CRB, but upon any decision on

[1] In the Compensation Order, the ALJ characterized this as being a discharge from further care and a recommendation for a second opinion. WASA challenges this characterization, arguing that the second opinion reference was a mere accommodation to an unhappy patient, and the "return as needed" advice demonstrated the opposite of a discharge from care, since he remained willing to continue to see her. This, of course, ignores the fact that by asserting that her complaints are unrelated to the work injury, Dr. Higgins was advising Ms. Butcher-Wallace that his future services were no longer covered medical care under the Act.

reconsideration by the claims examiner should the CRB direct such further consideration be given the request.[2]

On March 12, 2013, the ALJ issued a Compensation Order finding that the medical conditions for which Dr. Pyfrom had provided care, including the two surgeries, were causally related to the work injury and were disabling, and that the time lost from work was therefore compensable. In so doing, she accepted Dr. Pyfrom's opinion, and rejected that of Dr. Higgins.

This appeal ensued, with WASA seeking reversal of the award. Ms. Butcher-Wallace opposed the appeal.

Because the ALJ's decision is supported by substantial evidence in the form of the opinion of Dr. Pyfrom, and because the ALJ gave adequate record based reasons for rejecting the contrary opinion of Dr. Higgins, we affirm.

DISCUSSION AND ANALYSIS[3]

WASA's arguments on this appeal are all centered on the ALJ's handling and consideration of the competing medical opinions of Drs. Higgins, Pyfrom and Cox, and most specifically, how the ALJ did or did not accord the treating physician preference to any of their opinions.

WASA asserts:

> It is well established that in weighing conflicting medical opinions, the opinions of the claimant's treating physician is accorded a preference rather than doctors who have been retained to examine injured workers solely for the purpose of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). If an Administrative Law Judge elects to credit another physician over a treating physician, the ALJ must explain why she has failed to accord the treating physician the preference. *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999).
>
> Although the ALJ acknowledged these principles, the ALJ failed to make a finding as to which doctor was the treating physician because, according to the ALJ, "the question of which physician is in fact the treating physician has been the subject of litigation in other forums, and is pending before the CRB." The ALJ, therefore, concluded that "no medical expert will be accorded the status of

[2] On the same date that WASA filed this appeal, Ms. Butcher-Wallace re-filed her appeal of the OWC proceedings. That appeal is being considered separately under the caption *Dionne Butcher-Wallace v. WASA*, CRB No. 13-086, OWC No. 687713.

[3] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will 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.

> treating physician for the purposes of weighing the medical evidence" and that she could draw any reasonable inferences from the medical evidence presented. CO at 7, *citing George Hyman Construction Company v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

WASA Memorandum, page 10 – 11.

After disputing that the cited case stands for the ALJ's asserted proposition, WASA exposed the nature of its misunderstanding (as well as an error of analysis on the part of the ALJ) of the nature and effect of "the treating physician preference" by continuing:

> The Act provides an injured employee with the right to choose an attending physician to provide medical care. D.C. Code §32-1507 (b)(3). The regulations implementing this statutory provision provide that once an employee has selected a treating physician, permission must be obtained from either the insurer or the Office of Workers' Compensation before switching to another physician. 7 DCMR 212.12-13. Claimant here chose Dr. Cox and then received permission to switch to Dr. Higgins. She received no further authorization nor has there been any ruling reversing the denial of her request to change physicians.

WASA memorandum, page 11.

WASA is confusing two different and largely unrelated concepts. One is that of which physician is deemed to be a claimant's "attending physician", a designation with implications concerning what doctor will be deemed to control the medical care program and provide or prescribe medical care for which an employer is liable to pay under the Act. The attending physician rules exist to avoid subjecting employer's to liability to pay for unauthorized medical care where a claimant is "doctor shopping" or otherwise obtaining medical care and incurring medical expenses at claimant's own whim. And, the identity of the attending physician has significant implications in cases involving the invocation of the utilization review (UR) provisions concerning the reasonableness and necessity of specific medical care. See, D.C. Code § 32-1507 (b)(6); also, *Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

The other concept is the treating physician doctrine, which has nothing whatsoever to do with whether an employer is or is not responsible for the payment of a given doctor's bills or for a particular medical procedure a claimant has sought and/or obtained. Rather, it is a doctrine that deals with the evaluation of expert medical opinion, and its rationale is premised upon the nature of the relationship of a specific physician to a patient and that patient's case. It assumes that a treating physician is more likely to have a greater insight into a patient's medical condition, its etiology, effects and responses to the care that has been provided and/or contemplated, and is less likely to be biased than a physician whose connection with the case is solely for the purpose of litigation.

Under the Act, there can only be one "attending physician" at a time; however, in modern medical practice there can be and frequently are numerous treating physicians. There is no such

thing as "an attending physician preference" when it comes to evaluating competing medical opinions.

In this case, the parties[4] and the ALJ have all lost sight of this distinction. However, the effect of the ALJ's analytic misstep is that she treated all three medical providers whose opinions were before her equally from an initial "preference" perspective, which is precisely what the facts of this case dictate, given that all three doctors are, to one degree or another, treating physicians. And, most significantly, the ALJ not only treated all the physicians equally *vis a vis* their relational status to the patient, she gave specific, record based reasons for rejecting the opinion of Dr. Higgins, which is what the treating physician preference requires. The ALJ wrote:

> I reject this medical opinion as unpersuasive and illogical. Even if the TFCC tear pre-existed the January 2012 work accident, it was asymptomatic. From the beginning of his interaction with Claimant, Dr. Higgins has been Employer's surrogate. He discharged her from his care based on his opinion that although she had significant complaints and objective findings of abnormal upper right extremity condition, those complaints and findings were not specifically related to her work injury. There is no doctor-patient relationship reflected in his reports or conclusions; rather, it is clear that he does not have compassion or patience with Claimant's complaints. The belief that ongoing right upper extremity symptoms that began after a heavy object slammed Claimant's hand and forearm into her work desk are "idiopathic" is not consistent with human experience or with the other record medical evidence.

Compensation Order, page 8.

WASA characterizes the ALJ's decision as being the result of "personal bias", an unfortunate choice of words, given that there is no evidence or suggestion that this ALJ has any personal connection with or knowledge of Dr. Higgins outside the four corners of the record in this case. While the ALJ's language may seem unduly harsh to WASA, the reasons that she gave for rejecting the opinion of Dr. Higgins—it illogic and its inconsistency with normal human experience—are supported by the record and are adequately persuasive for rejection of a treating physician's opinion.

WASA challenges the ALJ's characterization of Dr. Higgins having "discharged" Ms. Butcher-Wallace from further care, arguing that offering to see her in the future on an as needed basis is not a discharge, and WASA further disputes the ALJ's interpretation of Dr. Higgins's comments about seeking a second opinion as being a clear misinterpretation of his intention to merely humor the patient or passively acquiesce to the patient's unwarranted desire to obtain further care. While WASA's views on the doctor's meaning and intent are certainly plausible, so too are the interpretation that the ALJ placed upon them, and we can not substitute our judgment for that of the ALJ in this regard.

[4] Ms. Butcher-Wallace's treatment of the subject, found on page 8 of her Memorandum, suggests a confusion between a preference for the opinion of a treating physician, and a *presumption* that treating physician opinion is correct. The preference is not a presumption.

As WASA points out, there are three different physicians expressing opinions on numerous different medical issues in this case, and no two of them agree on all the issues presented. The ALJ's decision to accept the opinion of Dr. Pyfrom, unquestionably a treating physician, was hers to make.

CONCLUSION AND ORDER

Because the ALJ's decision is supported by substantial evidence in the form of the opinion of Dr. Pyfrom, and because the ALJ gave adequate record based reasons for rejecting the contrary opinion of Dr. Higgins, the Compensation Order of March 12, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

August 6, 2013

DATE