

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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir. Dkt.) No. 03-154

ROSA DAVILA,

Claimant – Petitioner

v.

MERISTAR HOTELS & RESORTS AND AMERICAN PROTECTION INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 01-052B, OWC No. 553706

Benjamin T. Boscolo, Esquire, for the Petitioner

Kevin J. O’Connell, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board 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).¹

¹ 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 Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director’s Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers’ and disability compensation claims arising under the D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on November 28, 2003, the Administrative Law Judge (ALJ) denied the relief requested by Claimant-Petitioner (Petitioner) for authorization for a surgical procedure to her back. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is unsupported by substantial evidence and is not in accordance with the law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (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. D.C. Official Code §32-1522(d)(2). “Substantial evidence,” as 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. App. 2003). Consistent with this scope 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.

Turning to the case under review herein, Petitioner alleges that the ALJ’s decision is erroneous because the ALJ failed to defer to the opinion of the treating physician, Dr. Ian Gordon and the ALJ was without jurisdiction to address the weight to which the Utilization Review Report was entitled. Respondent counters by contending that the medical opinion of Petitioner’s treating physician, Dr. Gordon was properly rejected by the ALJ and the ALJ’s consideration of the Utilization Review Report was not erroneous and did not violate Petitioner’s due process rights.

In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Dep’t. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dep’t. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992). Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers' compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the testimony of the treating physician. *Canlas v. Dep’t. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995).

Petitioner contends that the ALJ erred by rejecting Dr. Gordon's opinion because Dr. Gordon's findings were not identified, the reasons for rejecting Dr. Gordon's opinion were not identified and the rationale for rejecting this physician's opinion was not supported by substantial evidence in the record. However, the ALJ, in detail, described Dr. Gordon's findings and opinion on the necessity and reasonableness of Petitioner's third spinal surgery on pages 3 and 4 of the Compensation Order. As Respondent points out, not only does the ALJ identify Dr. Gordon's findings and opinion that a third surgery is necessary, but the ALJ quotes directly from Dr. Gordon's notes to summarize Dr. Gordon's opinion on Petitioner's present work capacity

A review of the Compensation Order clearly shows that the ALJ clearly described the reasons for rejecting the opinion of Dr. Gordon that Petitioner required a third surgical procedure for her back. The ALJ noted that Respondent's physician, Dr. Ian Wattenmaker, after examining Petitioner, concluded that a third surgery was not necessary. In addition, Dr. Stephen Ozanne, who after reviewing all of the medical records, including the findings and conclusions of Dr. Gordon, prepared a Utilization Review Report, also concluding that the requested medical procedure, fusion for back pain, was not reasonable or necessary, noting that there was no structural instability and stressing that fusion for only back pain is controversial. The ALJ emphasized that the video surveillance tapes show Petitioner walking, moving, standing and planting flowers on July 4, 2002, without any evidence of pain or limitation. Moreover, Dr. Gordon did not view the video surveillance tapes.

In summarizing the reasons for rejecting Dr. Gordon's opinion and concluding that the recommended third surgery was not necessary without first exploring a conservative course of treatment, the ALJ stated:

Thus, [Dr. Ozanne's] observations of claimant's activities as demonstrated by the surveillance videos as well as his review of claimant's prior medical records compelled Dr. Ozanne's conclusion that surgery at this time is not necessary. Moreover, Dr. Ozanne expressed a possibility of claimant's reevaluation for surgery after Dr. Gordon's review of the surveillance videos. Dr. Ozanne's opinion seems consistent with that of Dr. Wattenmaker's who testified that the inconsistencies in claimant's examination did not favor the recommended surgery in that claimant suffered from a globally decreased sensation throughout her feet, legs and thighs. Elaborating it was unlikely that this sensory deficit would be attributable to claimant's lumbar condition, Dr. Wattenmaker opined that such abnormality would involve the compression of the spinal cord, not an injury to the low back. Noting further claimant had reached maximum medical improvement, Dr. Wattenmaker recommended against surgery.

Compensation Order at 5.

Recently, the CRB, in great detail, reiterated how it is quite proper to reject the opinion of the treating physician if persuasive reasons are given to accept a conflicting medical opinion submitted by an employer. *Taylor v. Verizon Communications, Inc.*, CRB No. 05-232, OHA No.

03-216B, OWC No. 571165 (June 16, 2005). After reviewing the record, it is clear that the ALJ detailed the reasons for rejecting the opinion of Petitioner's treating physician, Dr. Gordon in favor of the views of Drs. Ozanne and Wattenmaker. As a result, there is no reason to disturb the ALJ's determination on this issue.

Finally, Petitioner argues that the Compensation Order should be void as the ALJ did not have jurisdiction to consider the Utilization Review Report, inferring that Dr. Gordon may not have had an opportunity to review the report and respond to it. Also, Petitioner seems to contend that the ALJ's consideration of the report violates her due process rights.

On this issue, as Respondent points out, there is no indication in the record that Dr. Gordon did not receive a copy of the Utilization Review Report, as this was not mentioned at the hearing. Furthermore, Petitioner had the opportunity to submit testimony or another report from Dr. Gordon to further justify the recommendation for additional surgery. Moreover, any objection to Respondent's submission of the Utilization Review Report into evidence should have been raised with the ALJ at the hearing, but Petitioner did not object to Respondent's admission of this report and as such, the ALJ did not err in considering a relevant medical report, that was properly admitted into evidence without any objection.

Petitioner's argument that somehow she was denied due process because Dr. Gordon was not given the opportunity to rebut or request reconsideration of the report must also be rejected. Petitioner had the chance to submit additional evidence to respond to Respondent's evidence or request that the ALJ leave the record open after the conclusion of the hearing for more evidence to be submitted, but Petitioner failed to request additional time to allow Dr. Gordon to respond. In addition, under the regulations in 7 DCMR § 223.4, after the hearing ended on June 10, 2003, Petitioner had until "any time prior to the filing of a compensation order" (or until November 28, 2003) to file a motion to reopen the record for receipt of additional evidence. No such motion was filed. Thus, Petitioner's arguments concerning the ALJ's consideration of the Utilization Review Report are rejected.

CONCLUSION

The Compensation Order of November 28, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of November 28, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

August 15, 2005
DATE