Compensation Review Board

CRB No. 12-017

SANTOS A. GONZALEZ,
Claimant–Respondent,

v.

UNICCO SERVICE COMPANY AND TRAVELERS INSURANCE COMPANY,
Employer/Carrier-Petitioner

Appeal from a Compensation Order by
The Honorable Karen R. Calmeise
AHD No. 06-155A, OWC No. 604331

David A. Kapson, Esquire, for the Claimant/Respondent
Douglas A. Seymour, Esquire, for the Employer-Carrier/Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

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, et seq., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on January 10, 2012 of a Compensation Order (CO) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of

Columbia Department of Employment Services (DOES). In that CO, Claimant's request for temporary total disability wage loss benefits from March 1, 2010 to the present and continuing and causally related medical expenses was granted.

Claimant was working part-time as a janitor for Employer on September 19, 2004 when he slipped and fell injuring his back, left shoulder and left arm.[1] Following his injury, Claimant treated with several different physicians before coming under the care of Dr. Marc Danzinger on December 6, 2004. Dr. Danzinger, an orthopedist, was Claimant's treating physician.

Claimant was treated by Dr. Danzinger for complaints of left low back pain and left leg radicular pain. In his final examination of Claimant on January 20, 2010, which included an MRI review, Dr. Danzinger opined that he had no explanation for Claimant's pain, that further treatment was not needed, and that he could continue working full duty with no restrictions.

At Claimant's counsel's request, Dr. Gary W. London, a neurologist, conducted an independent medical record review of Claimant's treatment. After a thorough review of Claimant's treatment records from the date of injury, Dr. London opined that the work injury caused a disc rupture at L4-5 and was responsible for the continuing complaints of left leg radicular pain. Dr. London was also of the opinion Claimant could work light duty with a lifting restriction of 25 pounds.

Following his 2004 work injury, Claimant has not returned to work for Employer or for his second employer, Airways Cleaners, performing janitorial work. The presiding Administrative Law Judge (ALJ) found that since his injury Claimant has worked various temporary jobs for other employers, but not in any job requiring heavy lifting or moving heavy objects. The ALJ found that while Claimant earned no wages in 2010, he did work and receive wages from various other employers in 2011.

Based on the record developed at the formal hearing, the ALJ determined that Claimant's disabling low back condition is medically causally related to the September 19, 2004 work injury and that he is temporarily and totally disabled and therefore granted the request for ongoing wage loss benefits and medical expenses.[2] Employer filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues that the ALJ erred in not giving Dr. Danzinger's final report the greater weight due a treating physician's opinion and in the alternative improper awarded benefits based solely upon the report of a physician performing a record review but no examination. Employer also argues the ALJ erred in finding Claimant had made a *prima facie* showing of total disability. Claimant argues that the ALJ's findings and conclusions are supported by substantial evidence in the record and should be affirmed.

---

[1] At the time of his work injury, Claimant worked 20 hours per week as a janitor for Employer and 40 hours per week at a second employer, Airways Cleaners.

[2] *Gonzalez v. UNICCO Service Company*, AHD No. 06-155A, OWC No. 604331 (January 10, 2012).

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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[3] *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). 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.

ANALYSIS

In the case under appeal, the issues presented for adjudication were the medical causal relationship between Claimant's low back pain and disabling condition[4] and the work injury and the nature and extent of his disability. On the issue of medical causal relationship, the ALJ found that Claimant had invoked the presumption that his low back pain and left leg radicular symptoms were causally related to his work injury. The ALJ further found the Employer's evidence insufficient to rebut the presumption allowing her to conclude that Claimant's disabling condition was medically causally related to the work injury. Employer does not contest this ruling.

It is in the resolution of the nature and extent of Claimant's disability that Employer contends the ALJ committed error in affording greater weight to the opinions of a physician conducting a review solely of Claimant's medical records as opposed to the opinions of Claimant's treating physician. As both parties noted, an injured worker is not afforded a presumption of compensability as to the nature and extent of their disability[5], but rather had the burden of proving by a preponderance of the evidence the entitlement to the requested level of benefits.[6] The ALJ also acknowledged that when weighing competing medical opinions, there is generally a preference is given to the opinions of the treating physician over physicians retained solely for the purpose of litigation.[7] However, it is only with respect to treating physicians is it necessary to give specific reasons when rejecting that opinion.[8]

---

[3] "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

[4] In the statement of issues presented in the CO, the ALJ incorrectly stated the issue as "[W]hether there is a medical causal relationship between the claimant's right foot condition and the work injury." In the instant matter, Claimant sustained no injury to his right foot.

[5] *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986).

[6] *WMATA v. DOES*, 926 A.2d 149 (D.C. 2007).

[7] *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004); *Short v. DOES*, 723 A.2d 845 (D.C. 1998).

The competing medical reports admitted into evidence on the nature and extent of Claimant's disability consisted of the treating physician's January 20, 2010 final examination report and the November 29, 2010 independent medical review conducted by Dr. London at Claimant's request. The ALJ found Dr. London's report to be "extensive" in its presentation of Claimant's medical treatment and its analysis of the diagnostic test results. Dr. London found Claimant's clinical complaints to be related to his work injury and that he was limited to light duty with lifting restrictions. The ALJ determined that "Dr. London's opinion supports Claimant's credible testimony that his low back pain continues and that he is unable to perform his pre-injury janitorial duties.[9]

In rejecting the treating physician, the ALJ stated:

> Although the Employer submits the report authored by the treating physician from a January 20, 2010 medical examination, I find the unsigned report which was not issued on official letterhead, presents an indefinite and confusing narrative to support his opinion that the Claimant could return to work full duty without restrictions.
>
> The treating physician treated the Claimant from shortly after the 2004 work injury however; the report makes no mention of the Claimant's prior medical treatment or the work injury itself. Without reference to slip and fall at work, the report, supposedly issued by the treating physician, notes MRI findings of L4-5 disc bulge but he does not attribute the condition to another cause or intervening injury.
>
> Furthermore, the report begins with the statement; (sic)
>
> > Santos Gonzalez returns to the office with increasing low back pain without specific injury. (EE 1)
>
> The treating physician could be referring to the fact that the Claimant has had no additional injury since the previous medical visits or that he attributes the Claimant's low back complaints to a degenerative condition. Of the possibilities, the undersigned is left to speculate. I find the "return to work" opinion of Dr. Danzinger to be unpersuasive because of a lack of reference to another causal relationship or activity in the January 2010 medical examination and report. Therefore I do not attribute the treating physician preference to him.[10]

In discounting the opinion of the treating physician, the ALJ has cited to specific weaknesses and legitimate reasons in the report for doing so. The ALJ's reasoning is in keeping with the D.C.

---

[8] *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

[9] *Gonzalez, supra*, at 6.

[10] *Id.*

Court of Appeals pronouncement on the treating physician preference.[11] In addition, what Employer is essentially asking us to do is to re-weigh the evidence in its favor, something we are prohibited from doing, especially here where the ALJ's determination is supported by substantial evidence in the record.

Finally, the ALJ used Claimant's credible testimony plus the medical review opinion of Dr. London to determine that Claimant had made a *prima facie* showing under of being totally disabled.[12] As we hold that the ALJ gave specific reasons for rejecting the treating physician's January 20, 2010 report, which included a statement that Claimant could return to full duty work without restriction and a disability slip to the same effect. As Claimant had made the initial showing under Logan, it was Employer's burden to show the availability of suitable alternative employment, which it failed to do. As the ALJ made the appropriate determination, we find no basis to disturb it.

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the January 10, 2012 Compensation Order are supported by substantial evidence and in accordance with the applicable law. Accordingly, the Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

_____
HENRY W. MCCOY
Administrative Appeals Judge

June 20, 2012
DATE

[11] See *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

[12] *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).