GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-038

HENRY L. BAKER,
Claimant–Petitioner,

v.

FIRST TRANSIT and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Respondent.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2017 JUN 29 PM 9 50

Appeal from a March 28, 2017 Compensation Order
by Administrative Law Judge Donna J. Henderson
AHD No. 11-285C, OWC No. 672618

(Decided June 29, 2017)

Krista N. DeSmyter for Claimant
Meredith Pendergrass for Employer

Before: LINDA F. JORY, GENNET PURCELL, and JEFFREY P. RUSSELL *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL BACKGROUND

Claimant was a bus driver who injured his neck and left shoulder when, on June 30, 2010, while driving his bus, a car suddenly moved into his lane and he had to stop the bus quickly. Although his bus did not hit the car, passengers fell out of their seats and he was restrained by his seat belt. Subsequently, Claimant started to have neck pain. Claimant received conservative medical treatment, including physical therapy for his neck injury from Concentra Medical Center through August 31, 2010. On Claimant's final examination at Concentra, Dr. Jonathan Johnson found Claimant had mild decreased range of motion in his neck secondary to pain with forward flexion but no tenderness, swelling or nuchal rigidity. Claimant's left shoulder remained more symptomatic.

Claimant sought treatment on October 19, 2010 from Dr. Jeffrey Phillips of Phillips and Green. Dr. Phillips diagnosis was "Subacute cervical strain with cervical radiculopathy down the left upper extremity" and "Strain/contusion, left shoulder subacute". Claimant received physical therapy to his left shoulder and neck as prescribed by the physicians at Phillips and Green. Claimant's cervical MRI was reviewed by Dr. Fredric Salter, also of Phillips and Green, on January 28, 2011. Claimant reported feeling a "whole lot better in his neck and left shoulder" and that his only pain was in his left shoulder "when he lifted his shoulder all the way up." Dr. Salter found full cervical range of motion "with no spasm, tenderness or discomfort at the extremes of motion."

On August 15, 2011, Dr. Benjamin Shaffer of the Washington Orthopedics and Sports Medicine ("WOSM") examined Claimant and found that he had "mild discomfort reproduced on cervical spine extension and left lateral rotation". Dr. Shaffer opined that Claimant had "overlap between his cervical spine and shoulder". Dr. Shaffer opined that there was a causal relationship between Claimant's work-related injury and his neck and left shoulder symptoms.

Claimant attended a formal hearing at the Administrative Hearings Division ("AHD") on May 3, 2012. Although Claimant had been released to work, Claimant sought an award of continuing temporary partial disability ("TPD") benefits based on his alleged inability to perform overtime work, and causally related medical expenses. A Compensation Order issued on June 11, 2012 which denied Claimant's request for TPD benefits but granted Claimant's request for causally related medical expenses. *Henry L. Baker v. First Transit*, AHD No. 11-285A (June 11, 2012)[1].

On June 20, 2012, Claimant continued to report pain in the left shoulder. Dr. Salter ordered an MRI of the left shoulder and indicated he was referring Claimant to Dr. Benjamin Shaffer for evaluation[2].

Although not authorized by Employer initially, Claimant eventually came under the care of Dr. John Klimkiewicz on January 30, 2013. Claimant reported to Dr. Klimkiewicz that "his neck has gotten significantly better". Dr. Klimkiewicz took x-rays of Claimant's left shoulder which reportedly showed "significant endstage AC joint DJD in combination with no glenohumeral arthrosis". Claimant was to obtain his MRI results for Dr. Klimkiewicz. On July 25, 2013, Dr. Klimkiewicz performed an arthroscopic acromioclavicular joint resection with extensive debridement of the left shoulder. Claimant underwent post-surgical physical therapy.

Claimant continued to report neck symptoms to Dr. Klimkiewicz on September 17, 2014, who recommended a selective nerve root block at C6-C7. On January 6, 2015, Dr. Klimkiewicz opined that Claimant "certainly has some arthrosis in the mid cervical region and I think he is getting some discogenic pathology/radiculopathy to the arm".

On September 2, 2015, Claimant returned to Dr. Klimkiewicz who reported that Claimant complained of "tenderness globally along the shoulder" which Dr. Klimkiewicz opined was

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[1] Following appeal by Claimant, the Compensation Review Board ("CRB") affirmed the Compensation Order. *Baker v. First Transit*, CRB No. 12-105 (August 9, 2012).

[2] It is unclear why Dr. Salter indicated he was referring Claimant to Dr. Shaffer after Claimant had already been evaluated by Dr. Shaffer.

radicular. Claimant also complained of pain on his opposite (right) side as well. On this visit, Dr. Klimkiewicz reported that Claimant had "decreased range of motion in terms of his cervical spine" and "a mildly positive Spurling's maneuver." After review of repeat MRIs, Dr. Klimkiewicz opined that the MRI demonstrated multiple levels of degenerative change with foraminal stenosis and central canal stenosis in C4-C6. Dr. Klimkiewicz also reported that he observed left-sided foraminal stenosis most sever at the C5-C6 level although stenosis was also present on the right side without symptoms. Dr. Klimkiewicz attributed Claimant's left-sided symptoms to these findings. Dr. Klimkiewicz recommended a selective nerve root block for this region.

In February 2016, Dr. Klimkiewicz left the Georgetown University Medical Center Department of Orthopedic Surgery and joined WOSM as a partner. Claimant sought treatment from Dr. Joshua A. Thomas of the National Spine Pain Center on May 17, 2016 and August 1, 2016. Dr. Thomas said he would treat Claimant with a cervical epidural injection once it was approved.

Claimant still had some limitations in his cervical spine when he returned to Dr. Klimkiewicz at his new WOSM location on September 26, 2016. Dr. Klimkiewicz noted that he had recommended the selective nerve root block.

Claimant requested a formal hearing to obtain authorization for the recommended nerve root blocks. The issues presented to the ALJ were 1) whether Claimant's current neck symptoms were medically causally related to the work related injury of June 30 2010 and 2) whether the selective cervical nerve root blocks were reasonable and necessary.

A Compensation Order ("CO") issued on March 28, 2017, wherein the ALJ concluded Claimant failed to bear his burden to produce the preponderance of the evidence that his current neck complaints are medically causally related to the work-related injury and denied Claimant's claim.

On April 25, 2017, Claimant filed Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief"), seeking reversal of the CO.

On May 3, 2017, Employer filed Employer and Insurer's Opposition to Claimant's Application for Review and Memorandum of Points and Authorities in Opposition to Claimant's Application for Review ("Employer's Brief"), urging that the CO be affirmed.

DISCUSSION AND ANALYSIS

Claimant asserts:

> The Compensation Order concluded that Dr. Klimkiewicz' opinions should be rejected for two different and incorrect reasons. The first reason is that while Mr. Baker suffered problems with his neck from the date of his first meeting with Dr. Klimkiewicz and injured his neck at the work injury, he sometimes went through periods where he did not suffer problems with his neck. CO at 8-11. The Compensation Order highlighted an apparent exchange where "Dr. Klimkiewicz

opined that the findings on the cervical MRI were not causally related to the incident on June 30, 2010. CE 9, p. 50. Dr. Klimkiewicz further opined that [Mr. Baker's] neck complaints were consistent with the findings on the cervical MRI. CE 9, p. 36." CO at 9. This reason is illegitimate because Dr. Klimkiewicz never stated that the findings of the cervical MRI were not causally related to the incident on June 30, 2010. Page 50 of Mr. Baker's Ninth Exhibit, cited for this proposition, does not contain even the implication that the findings of the MRI are not related to the work injury. *See Changkit*, 994 A.2d at 388. Thus, the ALJ's rejection of Dr. Klimkiewicz' medical opinion on the foundation that Dr. Klimkiewicz testified that medical imaging studies did not show a causal connection is not supported by substantial evidence and reversal is required.

The other reason the ALJ rejected Dr. Klimkiewicz' medical opinion is by incorrectly using a medical malpractice causation standard in Mr. Baker's workers' compensation case. The ALJ cited *Lasley v. Georgetown University*, 688 A.2d 1381 (D.C. 1997) for the proposition that a medical opinion based on a temporal relationship is not sufficient basis for causation. This is incorrect.

In *Lasley*, the Court of Appeals described the issue as to whether or not "Must a medical malpractice plaintiff, in order to have his claim presented to a jury how someone undergoing neurosurgery suffered an embolism (a risk of that surgery) as a result of negligence, and that a mere temporal correlation was insufficient to demonstrate a causal connection in the medical malpractice context. *See id* at 1387.

By contrast, the Court of Appeals rejected the argument that the standard of proof needed to demonstrate medical negligence applied in the workers' compensation context. In *WMATA v. DOES,* 827 A.2d 35 (D.C. 2003)(*Spencer, intervenor*), the ALJ (then serving as defense counsel for the Washington Metropolitan Area Transit Authority) was informed by the Court that temporal causation, supported by a treating physician's medical reports, was sufficient for an injury worker to prove causation. *See Spencer*, 827 A.2d at 45. The Court stated that "the purpose of the workers' compensation act is to advance the humanitarian goal, to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases." Requiring an injured worker to produce medical testimony to the standards of medical malpractice negligence runs afoul the purpose of the Workers' Compensation Act and thus the ALJ's attempt to achieve on the bench what she failed to achieve as a litigant must be defeated by this tribunal.

Claimant's Brief at 8-10.

Employer responds:

Judge Henderson's decision to reject the treating physician's opinion is well within her discretion. Judge Henderson supported her decision to reject the treating physician's opinion with specific reasons that are supported by substantial

> evidence. . . . . Here the Claimant disagrees with the findings of Judge Henderson but that does not establish that Judge Henderson erred. While the Claimant alleges Judge Henderson applied an incorrect standard, she simply used the word temporal to describe Dr. Klimkiewicz' opinion, she did not hold it to any such standard. She highlighted the inconsistencies between the last-minute causal relationship testimony and Dr. Klimkiewicz' own treatment records, along with the Claimant's other treating physician records

Employer's Brief at 11, 12.

Not only do we disagree with Employer that the ALJ did not hold Claimant to a different evidentiary standard by relying on the Court's "substantial causal relationship" standard, we reject Employer's assertion that the ALJ adequately supported her decision to reject the treating physician's opinion. Indeed the ALJ stated:

> I find Dr. Klimkiewicz' explanations to be largely temporal. The District of Columbia Court of Appeals has held that a temporal relationship is not a causal relationship. In *Lasley v. Georgetown Univ.*, 688 A.2d 1381, 1387 (D.C. 1997), the Court wrote:
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> > Correlation and causation are hardly synonymous. We find that a "proximate temporal association alone does not suffice to show a causal link" because a mere temporal coincidence between two events does not necessarily entail a substantial causal relation between them. Consequently, more evidence is required. "Without more, this proximate temporal relationship will not support a finding of causation.
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> (citations omitted). Although the Court in *Lasley* referred to a "substantial causal relationship," the undersigned finds that a temporal relationship does not establish a causal relationship. Like the experts in *Lasley*, Claimant's "[treating physician] failed to identify any specific causal mechanism or articulate any precise sequence of cause and effect. *Id., citing Blincoe v. Luessenhop*, 669 F. Supp. 513, 517(D.D.C. 1987) (insufficient evidence to establish a causal link).

CO at 12.

We agree instead with Claimant that:

> The medical opinions of the treating physician are ordinarily preferred as witness to those doctors who have been retained to examine the claimant solely for purposes of litigation and are to be given great or significant weight. *Stewart v. DOES,* 606 A.2d 1350 (D.C. 1992). The reasons for rejecting a treating physician's analysis must be both legitimate and articulable for the rejection to be sustained. *See Sampson v. Extreme Steel, Inc.*, CRB No. 10-060 (2010). When an ALJ's reasons for rejection of the treating physician preference are faulty, the ALJ has not complied with the treating physician rule. *See Kralick v.*

> *DOES*, 842 A.2d 705, 711 (D.C. 2004). The Court of Appeals has noted several occasions where the treating physician preference was found to not been properly applied, such as when the ALJ's reason for rejection was based on a misapprehension of fact, adequate consideration of the deposition testimony was not given, or the reasons given were contradictory and unclear. *See Changkit v. DOES*, 994 A.2d 380, 388(D.C. 2010).

Claimant's Brief at 7, 8.

We are uncertain what the ALJ relied upon in her analysis of Dr. Klimkiewicz' reports to reject the treating physician's opinion. We are cautious not to be selective as to what segments of the ALJ's analysis to repeat herein so as not to take them out of context, however we do not find persuasive the ALJ's analysis of the degree of Claimant's complaints of neck pain or lack of complaints of neck pain during the course of his treatment, i.e., "Dr. Klimkiewicz testified that Claimant's neck complaints were "quiescent" on his first exam" and "Claimant had no complaints about his neck for years after his accident". CO at 10.

We note the ALJ failed to acknowledge Claimant's treatment was interrupted by his attendance at OWC and AHD to request authorization for medical treatment or Dr. Klimkiewicz' departure from his practice at Georgetown University Hospital or the two left shoulder surgeries performed by Dr. Klimkiewicz on July 25, 2013 and October 26, 2013, which resulted in pain medication (Oxycodone) and therapy to aid his recovery. We further note that the ALJ failed to consider the report of Dr. Benjamin Shaffer, now Dr. Klimkiewicz' partner, who examined Claimant in 2011 and reported that there was a causal relationship between Claimant's work-related injury and his neck and left shoulder symptoms. Yet the ALJ reasoned:

> Dr. Klimkiewicz' opinion is unequivocal when he answers "yes" or "no" to the question of whether Claimant's neck condition is medical causally related to the injury at work. However, Dr. Klimkiewicz opined the Claimant had a pre-existing arthritic neck which was acutely exacerbated by the work injury on June 30, 2010. CE 9, p. 35. See also CE 9, pp. 13 26, 27, 28, 29, 35 and 50. Dr. Klimkiewicz also opined that at the time Claimant was referred to him for the left shoulder surgery, Claimant's neck injury had resolved. CE 9, pp. 51-52. Dr. Klimkiewicz had x-rays and a second MRI performed on Claimant's cervical spine. Dr. Klimkiewicz read the x-rays and the second MRI as revealing degenerative changes (CE9, p.32), but opined he found no changes between Claimant's first and second cervical MRI's. CE 9, p. 37. Dr. Klimkiewicz opined that the findings on the cervical MRI were not causally related to the incident on June 30, 2010. CE 9, p. 50. Dr. Klimkiewicz further opined that Claimant's neck complaints were consistent with the findings on the cervical MRI. CE 9, p. 36.
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> Prior to his pre-deposition meeting with Claimant's counsel, Dr. Klimkiewicz had not been asked to opine and had not opined that Claimant's current neck complaints were medically causally related to the injury at work on June 30, 2010. CE 9, p.74. When Claimant was referred to Dr. Klimkiewicz for his

> shoulder, Dr. Klimkiewicz testified that Claimant's neck symptoms were "fairly quiescent." Dr. Klimkiewicz characterized Claimant's symptoms as "degenerative and were exacerbated by an acute trauma", however he also stated that Claimant would tell him "if something were specifically bothering him, he would've told me". CE 9, pp.14, 35, and 43. However, Dr. Klimkiewicz did not document consistent complaints of neck pain. In his initial report dated January 30, 2013, Dr. Klimkiewicz' examination revealed "some tenderness in [Claimant's] trapezial and periscapular region with some mild scapulothoracic substitution." CE 1, p.2. Again, Dr. Klimkiewicz opined that this tenderness, was consistent with Claimant's MRI results. CE 9, pp. 26-27.

CO at 9, 11.

We have reviewed CE 9, p. 50 and we agree with Claimant that Dr. Klimkiewicz did not testify that "the findings on the cervical MRI were not causally related to the incident on June 30, 2010" as the ALJ alleges. Dr. Klimkiewicz stated instead:

> . . . did the accident cause the arthritis in his neck? No. Okay. Does the – you know, it wasn't symptomatic though until the actual injury, itself, you know, so, you know, you got to kind of – you know, in that sense, you say, Okay, it wasn't a causative factor, but is it related to his symptoms, and you know, he was never symptom-free really ever since the time of the accident.

CE 9 at 50.

We also note at this juncture the ALJ's footnote 8 wherein she states:

> The second cervical MRI was performed because Claimant failed to tell Dr. Klimkiewicz that he already had a cervical MRI while he was treating with Dr. Phillips and Green. CE 9, p. 31. Claimant's failure to be forthcoming with his treating physician about his prior diagnostic testing tends to impeach his credibility concerning his prior symptoms and treatment.

CO at 9, fn 8.

After a thorough review of Dr. Klimkiewicz' testimony and reports we find nothing to support the ALJ's own conclusion that the MRI was ordered because Claimant had not been forthcoming with his previous 2010 MRI.

While the CRB is tasked with determining whether substantial evidence supports a Compensation Order's ultimate conclusion of law, we are precluded from affirming a determination that is not in accordance with the law. Consistent with *Changkit*, *supra*, the Panel concludes the ALJ's reason for rejection was based on inadequate consideration of the deposition testimony and the reasons given were contradictory and unclear, thus the ALJ did not properly apply the treating physician preference.

After a complete review of the record and arguments of the parties, the CRB determines that the CO is not supported by substantial evidence and is not in accordance with the law.

CONCLUSION AND ORDER

The CO's determination that Claimant failed to bear his burden to produce the preponderance of the evidence that his current neck complaints are medically causally related to the work-related injury is neither supported by substantial evidence nor in accordance with the law and is accordingly REVERSED. The matter is REMANDED for further analysis of the reasonableness and necessity of Claimant's request for recommended nerve root blocks consistent with the prevailing case law with respect to the utilization review process.

So ordered.