

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**CRB No. 14-054**

**ISADORE MELTON,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES  
Employer-Petitioner.**

2014 OCT 8 AM 8 50  
DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD

Appeal from a April 10, 2014<sup>1</sup> Compensation Order on Remand by  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL10-027A, DCP No. 20071065165-0001

Isadore Melton, *Pro Se* Respondent  
Frank McDougald for the Petitioner

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE  
D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On October 10, 2007, Claimant injured his left knee on-the-job as an emergency paramedic. More than a year later, following surgery, Claimant returned to his pre-injury work with his same employer. After a few months, because he was experiencing difficulties working in his pre-injury position, Claimant began working in an administrative position.

Claimant requested permanent partial disability compensation benefits for impairment to his left leg. The Disability Compensation Program issued a Notice of Determination (“Notice”) offering to accept a 2% permanent partial impairment to Claimant’s left knee; however, Claimant

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<sup>1</sup>The ALJ signed the Compensation Order on Remand (COR) on April 9, 2014. However, the attached certificate of service reflects the COR was served on the parties on April 10, 2014. For this appeal, we will use the date the COR was served on the parties as the date of issuance.

disagreed with the assessment in the Notice, and after requesting reconsideration, he requested a formal hearing.

On December 1, 2010, the ALJ issued a Compensation Order. Claimant was awarded permanent partial disability compensation based on actual wage loss rather than a schedule member. Claimant timely appealed. A Decision and Remand Order (DRO) was issued by the CRB on March 10, 2011 which vacated the prior order. The CRB determined the Claimant properly requested permanent partial disability to the left leg as a result of the work injury.

A Compensation Order on Remand (COR) was issued on April 10, 2014. Claimant was awarded 25% permanent partial disability to the left lower extremity.

Employer timely appealed. Employer argues the COR is not supported by the substantial evidence in the record nor in accordance with the law. Specifically, Employer argues the ALJ erred in applying the treating physician preference as outlined in *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004) (hereinafter *Kralick*) as it was outdated as the preference was abolished by law.

Claimant opposes Employer's Application for Review, arguing it is in accordance with the law.

#### ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>2</sup> Section 1-623.28(a) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra*.

Employer argues the ALJ erred in relying on *Kralick*, as the treating physician preference enunciated in *Kralick* has been repealed by the District of Columbia Council. The ALJ first summarized the treatment Claimant received from Dr. Alam after the injury. After reviewing Dr. Alam's medical reports and the report of the Employer's IME physician, the ALJ concluded:

Therefore, I do not find the reports of Dr. Gordon sufficient to rebut the long standing principle that when two medical specialists, have competing opinions, the reports of the treating physician are by law given the greatest weight. *KRALICK V. DOES*, 842 2d 705 (DC 2004). The preference for the treating physician's opinions is not absolute and may be rejected if there are legitimate, articulable reasons to do so. *WHITAKER V. WMATA*, OWC No. 0001036, H&AS No. 90-803, Dir. Dkt. No. 91 (March 23, 1993). Here, there is no reason to reject the rating of the treating physician.

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<sup>2</sup> Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

CO at 7.

Employer argues this is in error as the treating physician preference was abolished by D.C. Law 18-223. Employer's argument at 4.

Since the issuance of the COR, the District of Columbia Court of Appeals has reviewed the CRB decision in *Proctor v. D.C. Public Schools*.<sup>3</sup> In *Proctor* as here, the issue was whether the ALJ had improperly applied a treating physician preference. In resolving the issue, the CRB, when addressing D.C. Law 18-223 stated:

The language that was added to the public sector Act was a single sentence:

In all medical opinions used under this section, the diagnosis or medical opinion of the employee's treating physician shall be accorded great weight over other opinions, *absent compelling reasons to the contrary*.

D.C. Code § 1-623.24 (5)(a-2)(4), deleted by D.C. Law 18-223 (emphasis added).

On further consideration, we now conclude that the now-repealed sentence represented a modification of the existing *Kralick* standard. Under *Kralick* and the "treating physician preference", the fact finder was obligated to give an initial preference to treating physician opinion, and in the absence of persuasive reasons for accepting contrary opinion, treating physician opinion prevails. Thus, in order to withstand review on appeal, the fact finder had to identify the specific "persuasive reasons".

In contrast, the now-repealed provision required not only "persuasive reasons", it required "compelling reasons" for such rejection. We note, for example, that "persuasive authority" is "authority that carries some weight but is not binding on a court", while "compel" means "to cause or bring about by force or overwhelming pressure[...] to convince (a court) that there is only one possible resolution for a legal dispute." BLACK'S LAW DICTIONARY, 7<sup>TH</sup> ED., Bryan A. Garner, Editor in Chief, West Group 1999, pages 868 and 276 -277, *seriatum*.

Thus, while the addition of the now repealed language appears to have raised the bar on overcoming treating physician preference, its repeal, in our view, restores the law to its previous state.

The Employer appealed *Proctor* to the DCCA. The DCCA disagreed with the conclusion of *Proctor* and held:

The legislative history manifests a clear and unmistakable intent on the part of

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<sup>3</sup> CRB No. 12-194, AHD No. PBL 06-105A (May 15, 2013).

Council to accord equal weight to the testimonies of both treating and non-treating physicians in public-sector cases brought under the (District of Columbia Comprehensive Merit Personnel Act).

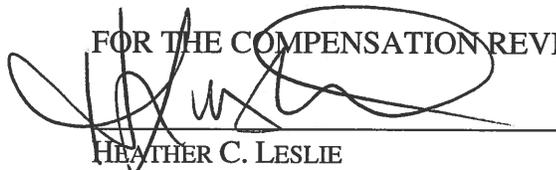
*District of Columbia Public Schools v. DOES*, 95 A.3d 1294 (D.C. 2014).

Thus, the ALJ erred in according the treating physician a preference under *Kralick*. While we are mindful that the DCCA decision above came after the issuance of the COR, we cannot affirm a COR that reflects “a faulty application of the law.” *Washington Metro. Area Transit Auth. v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown Univ.*, 971 A.2d at 915).<sup>4</sup> We must remand the case for the ALJ to reweigh the evidence of record, weighing the opinions of the physicians equally, without preference.

ORDER

The April 10, 2014 Compensation Order on Remand is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE  
*Administrative Appeals Judge*

October 8, 2014

DATE

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<sup>4</sup> *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).