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. 03-116

FRANK JOHNSON, JR.,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA/AHD No. 03-067, OWC No. 574237

Matthew J. Peffer, Esquire, for the Petitioner

Donna J. Henderson, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia Workers'

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA), District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 21, 2003, the Administrative Law Judge (ALJ) found that Petitioner had sustained an accidental injury arising out of and occurring in the course of his employment with Respondent, granted Petitioner's claim for temporary total disability from April 26, 2002 through October 24, 2002, and denied his claim for temporary total disability thereafter. Petitioner now seeks review of that Compensation Order.[2]

As grounds for this appeal, Petitioner alleges as error that (1) the ALJ's rejection of the opinion of one of Petitioner's treating physicians to the effect that Petitioner was unable to perform his pre-injury job during the period claimed was erroneous in that it was based, in Petitioner's view, upon an erroneous premise, that being that there were no objective tests supporting the opinion and (2) the ALJ's acceptance of the opinion of an independent medical examiner (IME) was erroneous, because in Petitioner's view, that opinion was "inherently unreliable" because the IME physician examined Petitioner "no more than a few times for the purposes of litigation, with the initial visit about three (3) months after the date of accident".

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. *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). "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. 2003). 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.

Turning to the case under review herein, Petitioner first alleges that the ALJ's decision is erroneous "as a matter of law" (Memorandum of Points and Authorities in Support of Claimant's Application

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Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] This appeal was originally filed with the Director of the Department of Employment Services (DOES), and subsequently came under the jurisdiction of CRB as discussed in footnote 1, *ante*. Upon being assigned to a review panel on October 13, 2005, the file was reviewed and it was determined that the matter was not ripe for such assignment, in that the record that had been transmitted from AHD was incomplete. The assignment was rescinded, and a request was made for the complete record at that time. The missing record evidence was received by the Clerk of CRB and the matter was reassigned to this panel on February 28, 2006.

For Review, page 8) because it was based upon the opinion of an IME physician who saw Petitioner "no more than a few times for the purposes of litigation, with the initial visit about three (3) months after the date of the accident", while "the" treating physician treated Petitioner "on numerous occasions from December 20, 2001 to October 28, 2002". The second point of contention raised by Petitioner is that, beyond there being inadequate support for accepting the IME opinion, the ALJ's decision must be reversed because, in Petitioner's view, the ALJ's stated reason for rejecting the opinion of a treating physician is factually incorrect. Together, these contentions amount to a single issue on appeal and that is whether the decision by the ALJ to accept an IME opinion in preference the opinion of one of Petitioner's treating physicians is supported by substantial evidence and is in accordance with the law.

Under the law of the District of Columbia, there is a preference for the opinion of a treating physician, over the conflicting opinion of a non-treating physician who is connected to the case for litigation purposes. *See, Short v. District of Columbia Department of Employment Services,* 723 A.2d 845 (D.C. App. 1998); *see also, Stewart v. District of Columbia Department of Employment Services,* 606 A.2d 1350 (D.C. 1992), and *Butler v. Boatman and Magnani,* OWC No. 0044699, H&AS 84-348 (December 31, 1986). This rule is premised upon the assumption that a physician who has treated a patient numerous times over a number of weeks, months or years is likely to have a greater and more reliable insight into the condition of a patient than does a physician who has had only a very limited exposure to the patient, and upon a concern that a physician hired for purely litigation-related evaluations may have either an unwitting or overt bias. *See, Lincoln Hockey, LLC v. District of Columbia Department of Employment Services and Jeffrey Brown, Intervenor,* 832 A.2d 913 (D.C. App. 2003).

However, the rule is not absolute, and where there are persuasive reasons to do so, a treating physician's opinions may be rejected. *Stewart, supra.* In such a case, the Agency may choose to credit the testimony of a non-treating physician over a treating physician. *Short, supra.* Among the reasons that have resulted in such a rejection are sketchiness, vagueness and imprecision in the reports of the treating physician. *Erickson v. W.M.A.T.A.*, H&AS No. 92-63, OWC No. 181489 (October 28, 1993), *aff'd.* Dir. Dkt. No. 93-82 (June 5, 1997); *see also, Marriott International v. District of Columbia Department of Employment Services,* 834 A.2d 882 (D.C. App. 2003). Additional reasons that have been found to be relevant to this determination are the fact that the IME physician had examined the claimant personally, had reviewed all the available medical reports and diagnostic studies, and had superior relevant professional experience and specialization. *Canlas v. District of Columbia Department of Employment Services,* 723 A.2d 1210 (D.C. 1999).

In this case, Petitioner urges reversal of the ALJ's decision, asserting that the ALJ made a fundamental error because he stated, according to Petitioner, that "the Administrative Law Judge made a finding that Mr. Johnson's subjective complaints were unsupported by any objective evidence from Dr. Drakes [one of Petitioner's treating physicians]. However, the Administrative Law Judge fails to acknowledge the fact that Dr. Drakes reports consist not only of the credible complaints of Mr. Johnson, but also findings of objective tests he performed during his evaluations." Memorandum, page 8. The objective tests to which Petitioner refers are identified as two MRIs and an EMG study.

Petitioner's assertion that the ALJ failed to "acknowledge" those tests is not accurate. The ALJ discusses them specifically at page 8 – 9 of the Compensation Order. Rather than erroneously ignoring the tests, however, the ALJ provided the following assessment of their import:

> Upon review and consideration of the medical evidence in the record, I find the claimant has failed to sustain his burden [under *Dunston v. D.C. Dept. Of Employment Services,* 509 A.2d 109 (D.C. 1986)] to establish he is entitled to payment of ongoing temporary total disability compensation benefits from April 26, 2002 to the present and continuing. I base this finding upon the objective diagnostic test results of claimant's cervical and lumbar spine in the record which reflect that he has no abnormalities, other than degenerative changes in either area, and the medical opinions of Dr. Friedler, which I accord greater weight, than those of Dr. Drakes, the claimant's treating physician, until late November 2002.
>
> I find the medical opinions of Dr. Friedler to be the most cogent and consistent with the other medical evidence in the record and I therefore accept his opinions upon review of claimant's discogram, his findings on physical examination on two occasions, that the claimant had reached maximum medical improvement from his December 15, 2001 injury as of October 24, 2002 and the IME addendum report of that date.
>
> I find that the medical records of the claimant's treating physician, Dr. Drakes, do not demonstrate any objective basis or evidence to support the ongoing diagnosis of cervical and lumbar radiculopathy or evidence of findings on physical examination to support the claimant's subjective complaints of symptoms.

Compensation Order, page 11. Read as a whole, it is evident that, contrary to the assertion of Petitioner, the ALJ was aware of the findings of the "objective studies", but he concluded that the irregularities demonstrated by them were degenerative in nature, and that they did not support "claimant's subjective complaints of symptoms". We note that the ALJ made specific reference to the results of the October 17, 2002 discogram administered at the IME physician's recommendation, the result of which are nowhere remarked upon by Dr. Drakes.

While it is true that Petitioner did produce evidence that a reasonable person might accept as supporting the claimed benefits, *Dunston, supra,* requires that a claimant produce a preponderance of the evidence in support of the level of benefits sought. It is evident that the ALJ did what *Dunston* mandates, which is assess the evidence with the burden being on Petitioner to produce a preponderance of the evidence, and in so doing, he gave specific, rational and adequate reasons which are supported by the record for accepting the IME opinion over that of the treating physician. While the individual members of this panel may have reached a conclusion contrary to that reached by the ALJ, the action of the ALJ is within his discretion as the fact finder, and his Compensation Order is supported by substantial evidence and conforms to the requirements of the law. Petitioner seeks to have this panel substitute its judgment for that of the ALJ in weighing the evidence, an exercise that we may not undertake under the Act.

CONCLUSION

The Compensation Order of August 21, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of August 21, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

March 2, 2006
DATE