GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-125

VINCENT D. JONES
Claimant-Respondent,

v.

WILLIAMS LEA and NEW HAMPSHIRE INDEMNITY COMPANY, INC.,
Employer and Carrier-Petitioners.

Appeal from a September 16, 2013 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 13-269, OWC No. 700021

David J. Kapson, for the Respondent
Julie D. Murray, for the Petitioners

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the September 16, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for temporary total disability benefits from January 9, 2013, to the present and continuing and payment of casually related medical expenses. We AFFIRM.

FACTS OF RECORD AND PROCEDURAL HISTORY

On December 5, 2012, the Claimant was employed by the Employer as an Office Manager. The Claimant, prior to the injury, did suffer from several non work related conditions. These conditions included gout and back pain which did result in some time off of work. On the date of the injury, the Claimant was working full duty without restrictions.

On that day, the Claimant suffered various injuries after lifting several boxes of computer paper at work at the request of the Employer.[1] The Claimant alleged injuries to his neck, right shoulder, right arm, back, right leg and right foot. Subsequently, the Claimant sought treatment with his primary care physician, Dr. James Griffin. Dr. Griffin ordered several diagnostic tests and placed the Claimant in an off work status after an MRI showed diffuse disc degenerative changes and disc bulges between the L1 and L5 levels.

The Claimant subsequently came under the care and treatment of Dr. William Launder. Dr. Launder diagnosed the Claimant with cervical and lumbar radiculopathy and opined the Claimant could not work. Dr. Launder further opined that the Claimant's back and neck condition were the result of the December 5, 2012 injury and that the Claimant was disabled as a result. On June 6, 2013, Dr. Launder released the Claimant back to work with restrictions from repeated heavy lifting.

The Employer sent the Claimant for several independent medical evaluations (IME). The Employer first sent the Claimant for an IME with Dr. Robert Gordon on January 23, 2013. After performing a physical examination, Dr. Gordon opined that the Claimant had only sustained a back strain and had recovered from the work injury. The Employer also sent the Claimant for an IME with Dr. Louis Levitt on April 23, 2012. Dr. Levitt also provided an addendum on June 21, 2013. Dr. Levitt opined that the Claimant only suffered strains to his neck, shoulders, upper back and lower back and that the Claimant fully recovered within three to four months of the accident. Dr. Levitt further opined that any further treatment was related to the Claimant's pre-existing conditions.

A Formal Hearing was held on July 3, 2013. The Claimant sought an award of temporary total disability from January 9, 2013 to the present and continuing and payment of causally related medical bills. The issues raised were whether the Claimant's condition was medically causally related to the work injury, the nature and extent of the Claimant's disability, if any, and whether the Claimant voluntarily limited his income. A Compensation Order was issued on September 16, 2013 which granted the Claimant's claim for relief, concluding the Claimant's neck and back conditions were casually related to the work injury.

The Employer timely appealed the CO to the CRB. The Employer argues the ALJ erred in finding the Claimant's neck and back conditions are medically causally related to the work injury

[1] We note that in the background section of the CO the ALJ references an accidental injury date of December 12, 2012. In the findings of fact, the ALJ states the parties stipulated to an accidental injury date of November 3, 2004. As the parties both reference November 5, 2012 as the injury date, and the ALJ later references this date as the day the injury occurred, we will adopt an accidental injury date of November 5, 2012 and treat any other references to different dates as a typographical error.

of December 5, 2012, the ALJ erred in ignoring the opinions of the IME physicians and in according more weight to the opinions of the Claimant's treating physicians, and that the ALJ erred in finding the Claimant was temporarily and totally disabled and did not voluntarily limit his income.

The Claimant argues the CO is supported by the substantial evidence in the record and is accordance with the law and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that the ALJ erred in finding a medical causal relationship between the Claimant's present neck and back conditions and the work injury. Specifically, the Employer argues the ALJ ignored the prior documented pre-existing conditions and erred when stating that "the record of prior treatment does not prove that the pre-existing conditions continued, unabated, through to the December 2012 work incident." CO at 7. The Employer argues that by inserting the word "unabated," the ALJ inserted a new legal requirement. We disagree.

We note that the ALJ did take into consideration, and comment upon, the Claimant's prior medical condition. The ALJ states,

> Employer also argues that the Claimant's pre-existing gout condition may be responsible, in some part, for his complaints that he has difficulty walking after the December 5, 2012 work incident. Furthermore, Employer points out that Claimant was treated for prior complaints of back pain and right side chest pain, and that Claimant's spinal condition reflects only degenerative changes, I find that this argument fails to take into consideration that the medical treatment was initiated immediately following Claimant performed the unusual work tasks. Employer introduced, through the IME report by Dr. Gordon, that Claimant's ongoing gout condition is his primary medical concern and that he has no restrictions from working due to the 2012 incident at work. (EE 2 pg 5)Although Employer presented evidence in the form of prior medical records from 2006 through November 2012, that document various dates and incidents of treatment for complaints of low back pain from doing yard work in February 2011 (EE 7); low back pain in June 2012; left side pain from lifting items at home in August 2012; and right knee pain from a medial meniscus tear in 2006; the record of prior medical treatment does not prove that the pre-existing conditions continued,

> unabated, through to the December 2012 work incident or that they were the cause of Claimant's current neck and back complaints.

CO at 6, 7.

Thus, contrary to the Employer's assertion that the CO "ignores the well-documented pre-existing medical history," as the above quoted passage shows, the CO addressed the Claimant's past medical history. We also decline to conclude that the ALJ inserted a new legal requirement when using the word "unabated." The Employer asserts that by using this word, the ALJ, after having found the Employer rebutted the presumption of compensability, then proceeded to place an additional burden upon the Employer to show that the pre-existing condition continued unabated. We decline to follow the Employer's rationale.

The ALJ concluded that after the Claimant invoked the presumption of compensability, the Employer rebutted that presumption by introducing the IME's of Dr. Levitt and Dr. Gordon. *See* CO at 6. After having found that the Employer successfully rebutted the presumption, the ALJ correctly noted that the presumption of compensability then drops from the case and the Claimant must prove, by a preponderance of the evidence, that the Claimant's medical condition is casually related to the work accident. After having addressed the Claimant's evidence, specifically the medical reports of the treating physician, the ALJ discounts the Employer's arguments, as the above quoted paragraph illustrates. We do not see the ALJ as inserting any new legal requirement in the context of the CO by using the term "unabated." Rather, after having followed the burden shifting scheme enunciated above, the ALJ found the Claimant had proven by a preponderance of the evidence, regardless of the Employer's arguments, that his medical condition was medically causally related to the work injury.

This brings us to the Employer's second argument, that the ALJ erred in rejecting the opinions of Dr. Gordon and Dr. Levitt in favor of the treating physician's opinion. The Employer argues that the ALJ erred in discounting the IME opinions as those opinions were the only clear and unambiguous opinions offered that took into consideration the Claimant's past medical history and conditions. The Employer argues that Dr. Launder had not reviewed all the past medical records and that Dr. Griffin never gave an opinion which casually related the Claimant's condition to the work injury.

When reviewing the opinion of the treating physician, Dr. Launder, the ALJ noted,

> The treating orthopedist physically examined Claimant on January 17, 2013 and continued to treat the Claimant through to April 11, 2013. Dr. Launder reviewed X-ray test results and he ordered subsequent MRI tests of Claimant's low back and neck. Dr. Launder reviewed Claimant's MRI scans and reported degenerative changes at C6-C7 narrowing of the right neural foramen and degenerative changes at L1 and L5. Claimant treated with Dr. Launder on four dates between January and April 2013. On April 11, 2013, Dr. Launder reported that "the treatment rendered for the low back and neck injuries were "reasonable and necessary and causally related to the injury/injuries sustained on December 5, 2012". (CE 2) Also in a letter to Claimant's counsel dated June 6, 2013, Dr. Launder reported that the Claimant had objective findings from diminished motion of his neck and back with tenderness and spasm in both areas. Dr. Launder opined that the Claimant's symptoms were consistent with the diagnosis of cervical and lumbar radiculopathies and the objective findings. Following a

> review of his medical history, opined that the Claimant's treatment for cervical and lumbar radiculopathy was due to the December 5, 2012 injury "from stacking and pushing cartons at work". (CE 2 pg 17)

CO at 6.

The ALJ, after having considered the IME opinions, stated,

> I find that the IME's opinions that the Claimant's pre-existing medical conditions caused or contributed to his medical symptoms do not warrant rejection of the treating orthopedist, Dr. Launder's opinion that the December 12, 2012 work incident was responsible, in whole or in part, for Claimant's current symptoms. Claimant was able to work with his gout and the pre-existing neck and back condition prior to the December 2012 work incident.

CO at 7.

As the Claimant correctly notes in opposition to the Employer's argument, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *see also, Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). This rule is not absolute however, as the trier of fact may reject the opinion of the treating physician when there are persuasive reasons for doing so such as sketchiness, vagueness and imprecision in the reports of the treating physician. *Id.*

Here, the ALJ found the medical opinion of the treating physician, Dr. Launder, to be persuasive and accorded him the treating physician preference. We find no error in this. The Employer urges that the ALJ erred in according this preference to Dr. Launder as Dr. Launder never reviewed the prior medical records documenting the Claimant's pre-existing conditions. While this may have been a reason for the ALJ to reject the treating physician's opinion, the ALJ, after considering the evidence declined to do so. What the Employer is asking us to do is to reweigh the evidence in their favor and reject the treating physician's opinion, a task we cannot do. The ALJ weighed the evidence and accorded the treating physician the well accepted preference in the District of Columbia. We affirm this finding.

The Employer next argues that the ALJ erred in awarding temporary total disability benefits where there was not substantial evidence to support such a claim. The Employer argues that the Claimant's pre-injury job was within the restrictions given to him by Dr. Launder, who on June 3, 2013 opined the Claimant could return to work with restrictions of no repetitive or heavy lifting. The Employer points to two seemingly contradictory statements the ALJ makes in the CO. Specifically, the ALJ states in the findings of fact section,

> I find that on December 5, 2012 Claimant was directed to perform the duties of another worker and he delivered multiple cases of computer paper to workstations in the building. Claimant delivered computer paper 15-20 cartons at a time several times during the day. (HT 45-48) When Claimant delivered the boxes he had to lift, bend, stoop and push the individual boxes of paper. Prior to December 5,

> 2012, I find Claimant's regular work duties did not require him to lift, push and pull or deliver cases of copy paper for the entire work day.

CO at 3.

However, in the discussion section of the CO, the ALJ concludes,

> Claimant has submitted substantial, credible testimonial and medical evidence that he is unable to perform his regular job, and is temporarily totally disabled. The medical reports issued by the treating orthopedist restricts' Claimant from heavy lifting inherent to his regular work duties that require him to lift and deliver packages and boxes of litigation documents.

CO at 9.

We find the two statements to be reconcilable. As the ALJ noted, the Claimant on the day of the accident, was required to deliver heavy boxes of paper for an extended period of time throughout the building. The evidence shows, and the Employer does not contest this, this task was required on the day of the injury because of the absence of a colleague. Thus, delivering cases of paper over the course of a day was not a regular part of the Claimant's duties.

However, as part of his regular duties, the Claimant was often tasked with "delivering packages and boxes of litigation documents." A review of the hearing transcript supports this assertion

> Q: Did you physically have to perform any of the duties associated with the mail requirements of Arnold & Porter.
> A: Absolutely.
> Q: Okay. And can you tell Her Honor, physically the types of things that you would have to do?
> A: At any time packages would come in. They could be over 100 pounds. And the majority of my staff are women, and besides myself and maybe two other guys. And a lot of times, I can't get these guys. So instead of me asking the women to do it, I would do it.
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> . . . .
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> ALJ: And the mail would include boxes of documents and exhibits sometimes, not just envelopes?
> A: Yes. Yes.
> ALJ: All right. So you're saying some of the packages would be large packages of evidence or documents needed for the law firm?
> A: Yes.
> ALJ: And some of those packages or boxes would be up to 100 pounds?
> A: Yes.

Hearing transcript 39-41.

Contrary to the Employer's argument that there was no evidence produced that the Claimant was unable to return to his pre-injury job, the Claimant testified that his pre-injury job did require lifting in excess of a 100 pounds. In conjunction with Dr. Launder's restrictions, the ALJ determined that the Claimant had submitted evidence through his testimony and medical documentation that he is unable to perform his regular job. As the ALJ found the Claimant to have presented a *prima facie* case of total disability, the burden then shifted to the employer to present sufficient evidence of suitable job availability to overcome a finding of total disability. *Logan v. DOES* 805 A.2d 237, 243 (D.C. 2002). As the ALJ points out, there is no evidence that the Employer made an offer of employment within the restrictions imposed upon the Claimant. We reject the Employer's argument and affirm the CO's conclusion that the Claimant is entitled to disability benefits for the time period sought.[2]

CONCLUSION AND ORDER

The September 16, 2013 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

February 25, 2014
DATE

[2] We must note that the ALJ states when addressing the nature and extent of the Claimant's disability, a "claimant has the burden of adducing the substantial evidence necessary to establish a right to the particular level of benefit requested under the Act" relying on *Dunston v. DOES*, 509 A.2d 109 (1986). We assume the ALJ was referring to the claimant's burden of production, and not the ultimate burden borne by Claimants on this issue, which is to establish the level of disability by a preponderance of the evidence. Any confusion, however, we deem harmless in light of the correct application of the *Logan* burden shifting scheme, which the ALJ employed.