

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. 04-35

NICOLE JONES,

Claimant–Respondent,

v.

SAFEWAY STORES, INC.,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA/AHD No. 02-443, OWC No. 571069

Kevin J. O’Connell, Esquire, for the Petitioner

Stephen J. Williams, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *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

¹Pursuant 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

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on February 26, 2004, the Administrative Law Judge (ALJ) granted the relief requested by Respondent, being temporary total disability from November 25, 2001 through the date of the formal hearing and continuing thereafter, payment for medical care already provided, and provision of and authorization for continued “recommended medical treatment”. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the (1) the ALJ’s determination that Respondent had not made an unauthorized change of physicians when she sought treatment from Dr. William Dorn was not in accordance with the law, because in Petitioner’s view, Respondent had made a selection of a treating physician, Dr. Craig Person, prior to commencing care with Dr. Dorn, and considering that Respondent did not obtain Petitioner’s permission to treat with Dr. Dorn, and did not obtain authorization from the Office of Workers’ Compensation (OWC) for such a change (2) the ALJ’s finding that Respondent is temporarily totally disabled for the period claimed is unsupported by substantial evidence and is not in accordance with the law, because the Compensation Order does not identify the specific evidence upon which the ALJ relied in concluding that Respondent is totally disabled, and the record lacks substantial evidence that Respondent was medically incapable of performing light duty work made available to her by Petitioner, and (3) the ALJ’s award of authorization for surgical intervention is unsupported by substantial evidence, because the record lacks sufficient evidence that surgical intervention is reasonable or necessary.

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.

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

The first matter to be addressed is Petitioner's assertion the ALJ's determination that Respondent had not made an unauthorized change of physicians when she sought treatment from Dr. William Dorn was not in accordance with the law, because in Petitioner's view, Respondent had made a selection of a treating physician, Dr. Craig Person, prior to commencing care with Dr. Dorn, and considering that Respondent did not obtain Petitioner's permission to treat with Dr. Dorn, and did not obtain authorization from the Office of Workers' Compensation (OWC) for such a change.

There is no question that Respondent did not obtain Petitioner's permission to obtain medical care from Dr. Dorn, and that she did not seek approval for that change from OWC. In connection with this claim of error, Petitioner cites *Ceco Steel v. District of Columbia Dep't. of Employment Serv's.*, 566 A.2d 1062 (D.C. 1989).

In that case, an injured employee sought emergency medical care in a hospital emergency room. Thereafter, he followed up with the same physician who treated him at the emergency room on three occasions, during which period he also underwent a course of physical therapy as recommended by the doctor. Upon being advised by the doctor that he believed the employee could return to work, the employee sought and obtained the services of another physician. The Court upheld the decision of the Director to the effect that Claimant's treatment with the emergency room physician was merely "reasonable follow-up", and did not constitute a selection of a physician under the Act. However, in so doing, the Court concluded as follows:

The critical issue in this case is whether [the employee's] follow-up care extended beyond reasonable limits and so became a constructive selection. [The employee] saw [the emergency room physician] on three separate occasions in three weeks for follow-up care after a visit to the hospital emergency room. These visits did not occur in a private office or private clinic but at the hospital clinic by referral from the emergency room. Given the restricted nature of the contact between the employee and [the emergency room physician], we conclude that the DOES decision that [the employee] did not constructively select [the emergency room physician] as his treating physician appears reasonable and in accordance with the law. We decline to establish a bright line test for reasonable follow-up care. *However, the instant circumstances probably represent the outer limit of permissible follow-up care of emergency treatment within the meaning of the D.C. Workers' Compensation Act.*

Ceco Steel, supra, at 1064 (emphasis added). The facts in *Ceco Steel* constitute a scenario sometimes referred to as "Constructive selection".

In such cases, one must also consider that *Ceco Steel* has been modified significantly in the subsequent case of *Velasquez v. District of Columbia Department of Employment Services*, 723 A.2d 401 (D.C.1999). In that case the Court wrote approvingly of the hearing examiner's "acknowledgment" that "the employer must establish that the [employee] was aware of her right to choose, and that the chosen physician and the [employee] began a 'course of treatment'". *Id.*, at 404. The Court then wrote:

Therefore, as the hearing examiner appropriately noted, it is [the employee's] continued treatment by [the emergency room physician] *after* the first evidence of her cognizance of her right to choose her own treating physician that may or may not establish [the emergency room physician] as the sole authorized treating physician under the *Ceco Steel* standard.

Id., at 404 - 405. Thus, where an employer seeks to avoid liability under the unauthorized change of physicians defense, it has the burden of establishing that the claimant had knowledge of the right to select a physician and had exercised that right, either by selecting a new or different physician or continuing to treat with the original physician for some period of time after becoming aware of the right to make a selection. See also, *Ventura v. Maryland Applicators, et al.*, OWC No. 554171, OHA No. 03-525, Compensation Order November 19, 2003.

In this case, we detect no evidence in the record establishing that Respondent had knowledge of a right to select a treating physician without reference to a list provided by Petitioner, and thus, under *Velasquez*, the ALJ's determination is in accordance with the law.

Turning to the assertion that the ALJ's finding that Respondent is temporarily totally disabled for the period claimed is unsupported by substantial evidence and is not in accordance with the law, because the Compensation Order does not identify the specific evidence upon which the ALJ relied in concluding that Respondent is totally disabled, and the record lacks substantial evidence that Respondent was medically incapable of performing light duty work made available to her by Petitioner, we note that Petitioner is correct in asserting that the Compensation Order is difficult to decipher in some respects. That is, as Petitioner notes, the ALJ identifies the "physicians" whose opinions he accepted as "claimant's physicians", without naming which of the numerous physicians treating the Respondent in this case he referred to (see, Compensation Order, page 13); he stated that he "reject"[ed] the medical opinions of "employer's IME physicians" (Compensation Order, page 14) yet he accorded "greater weight to the medical opinions of the IME physician, Dr. Zimmerman", finding them "consistent with the evidence regarding nature and extent of claimant's disability" (Compensation Order, page 14); while Dr. Zimmerman, upon whom the ALJ purportedly relied with respect to the nature and extent of disability opined that Respondent was temporarily totally disabled from November 21, 2001 through January 7, 2002, the ALJ found Respondent to have been disabled based thereon through August 26, 2002, and then proceeded to grant temporary total disability benefits through the date of the formal hearing and continuing thereafter; and the ALJ seemingly is internally inconsistent and contradictory, by accepting Dr. Dorn's opinions in one part of the Compensation Order, in another he writes "I therefore reject, in part, the diagnosis and opinions of claimant's treating physician, Dr. Dorn, as unsupported by the evidence of record. Specifically, the parts of his opinions I find unpersuasive is [sic] the diagnosis, in part, and the recommended course of treatment" (Compensation Order, page 14).

With one exception, however, we feel that close reading of the Compensation Order establishes that the ALJ accepted Respondent's testimony at the formal hearing concerning her inability to perform both her regular pre-injury job and the light duty work assigned to her. Regarding her regular duties, we note that no physician other than Dr. Gunther opined that Respondent could perform her regular duties on a full time, unrestricted basis. The determination by the ALJ to the

effect that Respondent was unable to perform her regular duties is therefore supported by substantial evidence. Further, it is apparent that the ALJ accepted as credible Respondent's testimony that even the light duty jobs offered by Petitioner were beyond her capacity, and that finding coupled with Dr. Dorn's disability slip commencing from the start date of the claimed period is substantial evidence in support of the temporary total disability award. Given the deference to be accorded a fact finder is assessing credibility, we decline to second guess this finding.

However, concerning the award of "recommended medical care", we find the discussion of the ALJ's assessment of the medical evidence in this case to be somewhat confounding and inconsistent. That is, the ALJ seemingly accepts and then rejects the opinions of the treating physicians, without identifying which such physicians he is discussing, he does the same for IME physicians, rejecting and then accepting such contradictory opinions without clarity, he asserts adherence to Dr. Dorn's opinions, except that he finds "unpersuasive" "part" (without saying which part) of the "diagnosis" and the "recommended course of treatment". The problem is compounded by the fact that, despite finding Dr. Dorn's treatment plan or recommendations "unpersuasive", the ALJ nonetheless appears to have ordered Petitioner to provide that care.

We are unable to identify with any degree of certainty the ALJ's rationale for the decision to award "recommended medical care"; we are unable to discern from the Compensation Order what that medical care consists of, and, if it is the medical care "recommended" by Dr. Dorn, we can find nothing in the ALJ's findings of fact or discussion of the record evidence that supports an award of that care, given the explicit rejection by the ALJ of the recommending physician's opinion on that subject.

CONCLUSION

The Compensation Order's conclusion that Respondent had not made an unauthorized change of physicians by seeking medical care and treatment from Dr. Dorn is in accordance with the law; the Compensation Order's findings of fact in connection with the claim for disability benefits are supported by substantial evidence and the award of those benefits is in accordance with the law; and the award of recommended medical care is inconsistent with the ALJ's findings with respect to the opinions of the treating physician relating to said care, and is therefore not in accordance with the law.

ORDER

The Compensation Order of February 26, 2003 is hereby AFFIRMED IN PART AND REVERSED AND REMANDED IN PART; the Compensation Order's award of temporary total disability benefits and the finding that Respondent had not made an unauthorized change of physicians are affirmed; the award of "recommended medical care" is reversed and the matter is remanded for further findings of fact and conclusions of law in which the specific medical care under consideration is identified and said request shall be further considered and a decision made concerning an award therefor, identifying upon what evidence the ALJ relies in granting or denying such requested medical CARE.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

October 13, 2005
DATE