GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No.16-061

JUANA CORTEZ-LUNA,
Claimant-Respondent/Cross-Petitioner,

v.

GEORGETOWN UNIVERSITY and
TRAVELERS INSURANCE,
Employer and Insurer-Petitioner/Cross-Respondent.

Appeal from an April 6, 2016 Compensation Order by
Administrative Law Judge Gennet Purcell
AHD No. 150025A, OWC No. 718204

(Decided October 11, 2016)

David M. Snyder for Claimant
Sarah M. Burton for Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals* Judge, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND REMAND ORDER

Both parties have appealed the April 6, 2016 Compensation Order ("CO") issued by an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES").

Employer, Georgetown University, challenges the ALJ's findings that Claimant, Juana Cortez-Luna, was authorized to treat with the physicians at Mininberg & Fechter, that those physicians were entitled to the treating physician preference, that Claimant's right knee problems were medically causally related to her accident at work, that Claimant proved entitlement to continuing disability benefits beginning June 18, 2015, and that Claimant reasonably participated in vocational rehabilitation.

Claimant's cross-appeal challenges the ALJ's findings that her back condition is not medically causally related to the accident at work and that proposed treatments to her back and right knee are not reasonable and necessary.

As will be discussed, the Compensation Review Board affirms the ALJ's determinations except her decision to award ongoing temporary total disability benefits and her decision denying the consultation with Dr. Zohair Alam.

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed as a housekeeper for Employer since 1994. On May 9, 2014, Claimant was walking down a flight of stairs when she slipped on a wet stair, causing her to skip some steps. She landed on her feet but fell against a door handle and door frame at the bottom of the steps. Claimant testified she injured her right leg and felt pain in her back, shoulders, arms, hands and knees.

On May 13, 2014, Claimant sought medical treatment at Kaiser Permanente ("Kaiser"), her primary medical care provider under her Employer's health insurance plan. Prior to the May 9, 2014 incident, Claimant had been treated at Kaiser for complaints relating to her lower back and both knees.

Claimant received treatment from Kaiser, primarily from internist Dr. Mario Nicholson, until July 7, 2014. During this time, Dr. Nicholson released Claimant to light duty work on May 28, 2014, to full duty on June 2, 2014, and then removed her from all work on June 9, 2014. At that examination, Dr. Nicholson told Claimant she needed to follow-up with an orthopedist outside of Kaiser, and recommended Dr. James Tozzi. He repeated this recommendation at the June 13, 2014, examination at which he also told Claimant she could return to work.

Claimant testified that she was not able to return to Kaiser for treatment after July 7, 2014, because Employer cancelled her insurance. However, the medical records show that on July 7, 2014, Claimant began a course of physical therapy for her back symptoms within the Kaiser facility. Claimant also requested a prescription refill on July 19, 2014.

Following the advice of her counsel, Claimant began receiving medical treatment from the doctors at Dr. Mininberg & Fechter, P.A. On July 21, 2014, Dr. Mininberg examined Claimant and held her out of work. On September 8, 2014, Dr. Fechter issued Claimant a light duty release to work. Dr. Mininberg also recommended an MRI of Claimant's back and right knee.

At Employer's request, on October 12, 2014, Dr. Ira Posner conducted a utilization review ("UR"). Dr. Posner opined that the requests for MRIs of the right knee and lumbar spine were not reasonable or medically necessary.

On October 7, 2014, Dr. Marc B. Danziger performed an independent medical examination ("IME") of Claimant for Employer. Dr. Danziger reported that Claimant's current symptomology in the back and knees was not related to the May 9, 2014 work injury. Dr. Danziger stated that Claimant is able to return to full duty but should be slowly transitioned back to work.

After a right knee MRI was done on December 19, 2014, Dr. Fechter referred Claimant to Dr. Zohair Alam, for possible knee joint replacement surgery. Employer did not authorize that consultation and did not authorize the lumbar spine MRI that Dr. Fechter wants.

Dr. Posner did a follow-up UR on April 16, 2015. He again opined that the treatments for the Claimant's injuries to date were not medically necessary.

On May 19, 2015, Dr. Danziger performed a second IME of Claimant. Dr. Danziger acknowledged that the MRI showed a tear of the meniscus tear and advanced arthritis in Claimant's right knee but stated treatment should have ended by July, 2014, two months after the May 9, 2014, work accident. He opined that any treatment after July 2014 was solely related to preexisting arthritis, preexisting lumbar disc issues, all of which were not related to the accident.

On April 30, 2015, pursuant to a written stipulation approved by the Office of Worker's Compensation ("OWC"), Employer agreed to pay Claimant temporary total disability benefits from May 10, 2014 through March 11, 2015, and to pay additional temporary total benefits when it initiated vocational rehabilitation services. On April 20, 2015, Employer instituted vocational rehabilitation services for Claimant retaining Carlos Encinas (hereinafter "Encinas") as her vocational counselor. Employer terminated Claimant's benefits on June 17, 2015.

The ALJ held a full evidentiary hearing on January 11, 2016, on Claimant's claim for temporary total disability benefits from June 18, 2015 to the present and continuing. Four contested issues were identified in the CO:

1. Whether Claimant's lower back condition and right knee condition are medically causally related to the work injury she sustained on May 9, 2014?

2. What is the nature and extent of Claimant's injuries?

3. Whether a lumbar MRI and surgical consultation are reasonable and necessary medical treatments for Claimant's work-related injuries?

4. Whether Claimant unreasonably failed to participate in vocational rehabilitation efforts?

CO at 2.

The ALJ issued the CO on April 6, 2016 and concluded that Claimant's low back condition was not medically causally related to the work accident and, by implication, that the MRI of the low back was neither reasonable nor necessary. The ALJ found that Claimant's right knee condition was medically causally related but that the request for surgical consultation was not reasonable

and necessary and that Claimant "participated in vocational rehabilitation"[1] concluding Claimant is entitled to benefits from June 18, 2015 to the present and continuing.

Employer filed an Application for Review ("AFR") together with a supporting memorandum on May 4, 2016. Claimant filed an Opposition to the AFR on May 19, 2016 and also filed a Cross Application for Review ("CAFR") that day. No opposition to the CAFR was filed.

DISCUSSION AND ANALYSIS

We shall first discuss Employer's AFR. Employer argues that the medical care received from the doctors at Mininberg & Fechter was not authorized and therefore the ALJ erred in finding that Dr. Fechter was entitled to the treating physician preference.

This argument incorrectly merges two terms of art. "Treating physician" and "authorized physician" have separate and independent meanings in workers' compensation jurisprudence. As the CRB held in *Jones v. George Washington University*, CRB No. 16-036 (August 10, 2016):

> As Claimant points out, Employer misapprehends the meaning of "treating physician", and conflates it with "attending physician" as that term is used in the Act.
>
> The treating physician preference is premised upon the relationships between the physician, the claimant/patient, and the medical case at issue. The preference is a matter of evidentiary weight stemming from an assumed heightened insight and understanding of a claimant's medical condition based upon the physician having treated a claimant over a long period of time, having commenced a connection with the case at a time closer to the work injury than the IME physician's exposure to the case, and the physician's relationship to the matter being more than simply for the purposes of litigation. It has nothing whatever to do with the concept of "attending physician", a concept which exists for purposes of controlling an employer's liability for payment of medical expenses.

Here, the medical providers at Mininberg & Fechter have regularly treated Claimant since July 21, 2014, that is, for almost a year and a half up to the date of the formal hearing. We agree with the ALJ that those medical providers were "treating physicians" and their medical opinions were entitled to an evidentiary preference.

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[1] We note that in her findings of fact the ALJ stated "Claimant has cooperated with vocational rehabilitation..." and in her Conclusions of Law the ALJ found "Claimant has participated in vocational rehabilitation ...".The Code provides for suspension of benefits if an "employee *unreasonably* refuses.... to accept vocational rehabilitation..." D.C. Code § 32-1507 (d). The CO's identification of issues properly identified the issue as whether Claimant unreasonably failed to participate in vocational rehabilitation and in her Discussion the ALJ stated she did not find "a basis to conclude (Claimant) has been unreasonable in her refusal to accept vocational rehabilitation." CO at 15. Despite not always including the word "unreasonable" we find the ALJ used the correct standard in analyzing the evidence presented regarding vocational rehabilitation.

As to whether Mininberg & Fechter were authorized, the record supports the ALJ's finding, stated in a footnote at page 7 of the CO that they were. The ALJ held:

> Employer raised the defense that Claimant had engaged in an unauthorized switch of physicians in this matter. Claimant's testimony and the record evidence establishes that she made a voluntary election of Dr. Fechter as her treating physician once she was notified that her continuing claim for benefits were [sic] denied, voluntary payments ceased, and without Employer having explained her rights and obligations under the Act. Claimant's Closing Brief at 8; HT at 52- 55. Employer produced no evidence of any other approved or referred orthopedist. Moreover, Claimant's medical notes state that in light of her continuing symptomology post physical therapy and conservative treatment, that referral to an orthopedist was warranted. An external orthopedic referral for disability status was noted in Claimant's medical records on June 13, 2014. CE 2 at 47, 49. Employer asserts further that said referral instruction was directed to a Dr. James Tozzi; however no evidence was submitted to support that Dr. Tozzi was an approved orthopedist for the purposes of Claimant's claim herein or, the approved treating physician, in lieu of Dr. Fechter.

In finding that the medical providers at Mininberg & Fechter were authorized, the ALJ found credible Claimant's testimony that she could not return to Kaiser after July 7, 2014, because her Employer had cancelled her insurance and that further treatment with an orthopedist was necessary.

Although Claimant was seen at Kaiser twice after she said her insurance was cancelled, once for a physical therapy once for a prescription refill, the ALJ did not find this impeached her other testimony. We find no reason to disturb that credibility finding. As is often noted, the CRB is bound to uphold a CO if supported by substantial evidence in the record even when there is substantial evidence to support a contrary conclusion. *Marriott Int'l v DOES,* 834 A.2d 882, 885 (D.C.2003).

Employer further asserts the ALJ erred in finding that Claimant's right knee condition was medically causally related to the May 9, 2014 accident at work. Employer does not dispute that Claimant is entitled to the "causal relationship" presumption (Employer's memorandum at 4-5) and Claimant does not dispute that Employer's evidence rebutted that presumption. (Claimant's Opposition at 14). Therefore, the issue before the CRB is whether there is substantial evidence to support the ALJ's finding that Claimant met her burden to prove, by a preponderance of the evidence, that her right knee condition was medically causally related to the accident at work.

In finding the requisite medical causal relationship, the ALJ acknowledged that treating physician Dr. Fechter, who knew about Claimant's pre-existing osteoarthritis and degeneration, opined that the May 9, 2014 accident at work aggravated these conditions. The ALJ found no reason to reject the opinion of the treating physician and that decision is AFFIRMED.

Employer asserts that the ALJ erred by not accepting Dr. Danziger's opinion and erred by failing to discuss that one of Kaiser's physicians, after seeing Dr. Danziger's IME opinion, agreed with Dr. Danziger. We disagree.

An ALJ does not have to give reasons for accepting a treating physician's opinion and only is obligated to specify specific reasons if she accepts the IME doctor's opinion over that of a treating physician. *Short v. DOES*, 723 A.2d 845 (D.C. 1998), *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). Therefore, the ALJ was under no obligation to explain why she was not persuaded by Dr. Danziger's or the Kaiser physician's opinions.

Employer also cites as error the ALJ's determination that Claimant did not unreasonably refuse to cooperate with vocational rehabilitation. The ALJ held:

> In conclusion, based on the totality of the circumstances, the undersigned finds that the Claimant has not failed to cooperate with vocational rehabilitation efforts provided by Employer. Claimant's passive attitude pursuing employment opportunities and inconsistent follow up with potential employers, particularly in light of her many medical conditions and life challenges, is not a basis to conclude she has been unreasonable in her refusal to accept vocational rehabilitation, and; is not entitled to medical treatment and related expenses for any established work related conditions.

CO at 14-15.

The findings and conclusions in the CO regarding vocational rehabilitation cooperation are based in large part upon the ALJ accepting Claimant's testimony. The ALJ considered all the evidence and accepted Claimant's testimony that she did the best she could.

An ALJ's credibility determination is given great deference, due to the ALJ's opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985); *Georgetown University v. DOES*, 830 A.2d 865, 870 (D.C. 2003). We see no reason to depart from these principles in this case.

Employer's other assignment of error asserts the CO must be vacated because the ALJ failed to analyze the nature and extent of Claimant's injuries despite this being identified as an issue for adjudication. Unlike the other contested issues identified in the CO that received a distinct analysis, the ALJ did not separately discuss "nature and extent". Instead, the ALJ said in Footnote 4, in the Findings of Fact:

> Employer contests Dr. Fechter's release of Claimant to light duty work, and has accordingly, raised the defense of nature and extent of Claimant's disabilities in response to Claimant seeking any ongoing TTD benefits related thereto for June 18, 2015, to the present and continuing. Conversely, Employer has also however, agreed to institute vocational rehabilitation on Claimant's behalf in exchange for the voluntary payment of TTD benefits theoretically accepting her inability to return to her preinjury positon [sic]. After several months of vocational

rehabilitation efforts, Employer now asserts that Claimant has failed to participate in vocational rehabilitation pursuant to the Act, and not entitled to any further TTD benefits as of June 17, 2015. JPHS.

CO at 5.

As these passages show, the ALJ merged the "nature and extent" issue with that of the "refusal of vocational rehabilitation" issue as is shown by the ALJ finding that by providing vocational rehabilitation services the employer was "theoretically accepting (claimant's) inability to return to her preinjury position." Indeed, the ALJ's conclusion held that Claimant was entitled to temporary total benefits because she reasonably participated with vocational rehabilitation: "Claimant has participated in vocational rehabilitation and is entitled to TTD benefits from June 18, 2016, to the present and continuing." *Id.* at 15.

We find that by combining these issues and by not separately analyzing the nature and extent of Claimant's disability, the ALJ erred.

First, by combining the two issues, the ALJ acted inconsistently with how she ruled at the formal hearing. At the hearing, Claimant's counsel objected to the introduction of the vocational rehabilitation reports into evidence, asserting that the employer needed to clarify its defenses because Claimant's counsel believed that Employer's defense that claimant is able to return to work was inconsistent with it's defense that Claimant unreasonably refused vocational rehabilitation services. HT at 10-13.

Employer's counsel responded by stating that Employer was raising two separate defenses and the ALJ agreed:

Employer's Counsel: So there's two separate issues. You can find (Claimant is) at MMI and get her to return to pre-injury employment in which case you don't even touch failure to cooperate. You're allowed to do that.

ALJ: Uh-huh.

Employer's counsel: Or you can find—I find she's not MMI. I find that Dr. Fechter's the treating physician and I find either, yes, she cooperated or, no she didn't cooperate with voc rehab. So that's why we went ahead and expended the money to put her in voc rehab.

ALJ: Okay.

Employer's Counsel: So I don't think there's a—a contradiction. I think I'm allowed to articulate both defenses

ALJ: I would tend to agree with Ms. Burton. I think I'm going to overrule the objection in light of I did see where she was released to light duty by Dr. Fechter, was it.

HT at 16-17.

Despite this ruling, there is no separate discussion of the challenge to the nature and extent of Claimant's disability and no analysis of the evidence with respect to *Logan v. DOES,* 805 A.2d 237 (D.C.2002).

> While it is well settled that an ALJ is not required to inventory the evidence and explain in detail why a particular part of it is accepted or rejected, it is equally well settled that the CRB must remand a CO where the conclusions of law do not follow rationally from factual findings. Moreover, where an ALJ fails to make express findings on all contested issues of material fact, the CRB cannot 'fill the gap" by making its own findings from the record but must remand the case to permit the ALJ to make the necessary findings. *King v. DOES,* 742 A.2d 460, 465 (D.C. 1999).

Johnson v. D.C. Public Schools, CRB No. 13-122 (January 24, 2014).

Moreover, the ALJ, in holding that the Employer could not take an inconsistent position with the OWC stipulation, overstates the legal significance of the OWC stipulation. The OWC stipulation in this case is a formal acknowledgement of the Employer's voluntary payment of compensation. Just as an employer who voluntarily pays claimant compensation may later oppose a claim for benefits at a formal hearing, an employer may oppose a claim for benefits after entering into an OWC stipulation like the one here.

Therefore, we must vacate the ALJ's award of continuing benefits and remand this case to AHD for a determination as to the nature and extent of Claimant's disability.

Claimant's cross-appeal alleges the ALJ erred in finding that her back condition is not medically causally related to the accident at work and that proposed treatments to her back and right knee are not reasonable and necessary.

With respect to her back claim, Claimant first challenges the ALJ's finding that Employer rebutted the presumption of medical causal relationship. We agree with the ALJ that Dr. Danziger's medical opinion that any back injury should have resolved by July 2014 and that her current back problems are not caused by the work accident is sufficiently specific and comprehensive to rebut the medical causal relationship presumption.

Claimant further asserts that even if the presumption was rebutted, the ALJ erred in finding that she did not prove by a preponderance of the evidence that Claimant's current back problems are medically causally related to the May 9, 2014 work injury. We disagree with Claimant.

In reaching her decision, the ALJ reviewed the medical records and gave greater weight to IME Dr. Danziger's medical opinion than to the opinion of the treating doctor, Dr. Fechter. The ALJ

properly acknowledged this jurisdiction's treating physician's preference and the requirement that the ALJ must provide specific reasons for rejecting a treating physician's opinion citing *Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

The ALJ held at page 10 of the CO:

> Given Dr. Fechter's overall assessment, and in consideration of Dr. Danziger's specific medical opinion regarding the mechanism of injury alleged, having weighed the record evidence regarding causation of the lower back condition, the most persuasive record evidence does not support a finding of medical causation for this body part. In light of this finding, no further claim analysis regarding the lower back condition is necessary.

The ALJ gave specific reasons for disfavoring Dr. Fechter's medical opinion and for favoring Dr. Danziger's opinion, all of which were supported by the evidence of record. Therefore, the ALJ's decisions that Claimant's current back condition is not medically causally related to her work injury and that further medical care for her back, (such as the requested MRI) are not Employer's responsibility are affirmed.

Lastly, Claimant asserts the ALJ erred in denying the surgical consultation with Dr. Alam.

In finding that this consultation was not reasonable and necessary, the ALJ relied on Dr. Posner's second UR report, the ALJ's belief that Dr. Fechter did not think Claimant was a candidate for surgery because of her obesity and diabetes, and on Dr. Danziger's opinions that because of her diabetes and obesity surgery is "fraught with complication" and that all residual effects of the accident have resolved. The record does not support these findings.

The following question and answer was in Dr. Posner's second UR report:

> Question: Is it reasonable and medically necessary for a consult with Dr. Alam, who will be evaluating the claimant for potential right knee surgery?
>
> Answer: Not with regard to the compensable injury of 5/9/14. [Claimant] has evidence of end stage osteoarthritis of both knees and will eventually require bilateral total knee replacements. [Claimant] is a poor candidate due to her obesity and uncontrolled diabetes. The consult may be medically necessary but not related to the compensable injury of 5/9/14.

Claimant's Memorandum at 16.

A UR reviewer must "accept as given the diagnosis of injury" 7 DCMR § 232.3. As the last sentence of the preceding shows, Dr. Posner disagreed with the surgical consult not because it wasn't necessary, but because he felt Claimant's knee condition wasn't work related, something he is not permitted to do.

Additionally, the ALJ's finding that Dr. Fechter did not believe Claimant was a surgical candidate is not supported by the record. Dr. Fechter in his deposition testified that Claimant was going to need a knee replacement and despite her obesity and diabetes was able to undergo that surgery. Dr. Fechter specifically stated at page 20 of his deposition that Claimant could undergo a total knee replacement.

The third reason relied on by the ALJ was Dr. Danziger's opinion of the surgery. He disagreed with the surgery because he didn't believe any current symptoms were medically causally related to the accident at work (an opinion that the ALJ did not accept) and his view that the Claimant, by reason of her obesity and diabetes, was not able to undergo surgery (an opinion that the treating physician does not hold).

Thus, the ALJ's decision denying the surgical consult with Dr. Alam is not supported by the record. Two of the three reasons relied on by the ALJ are not legitimate reasons for rejecting the consult: the UR reviewer improperly rejected surgery because he didn't find a medical causal relationship and contrary to what is stated in the CO; Dr. Fechter testified that despite her obesity and other problems, Claimant was a surgical candidate. The remaining reason, Dr. Danziger's opinion, is based on his disagreement with the treating physician and his view, rejected by the ALJ that Claimant's current knee problems are not caused by the work accident.

CONCLUSION AND ORDER

The ALJ's determinations that Claimant's back condition is not medically causally related to the May 9, 2014 accident at work is AFFIRMED as is, by implication, the ALJ's decision not to grant Claimant's MRI request. The ALJ's finding that Claimant reasonably cooperated with vocational rehabilitation is AFFIRMED.

The ALJ's award of temporary total disability benefits is VACATED and this case remanded to the Administrative Hearings Division for a new decision on Claimant's claim for continuing temporary total disability benefits beginning on June 18, 2015. The ALJ's finding that the surgical consultation with Dr. Alam is not reasonable and necessary is REVERSED.

So ordered.