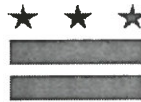


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**MURIEL BOWSER**  
MAYOR



**ODIE DONALD II**  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 17-012**

**KENNETH J. DUNBAR,**  
**Claimant-Petitioner,**

**v.**

**PLANNED PARENTHOOD FEDERATION OF AMERICA and**  
**ESIS SOUTHEAST,**  
**Employer/Carrier-Respondent.**

Appeal from a January 13, 2016 Compensation Order  
by Administrative Law Judge Lilian Shepherd  
AHD No. 16-487 OWC No. 739082

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2017 APR 28 AM 8 41

(Decided April 28, 2017)

Jillian M. Petrella for Claimant  
Jose Estrada for Employer

Before GENNET PURCELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals*  
*Judges.*

GENNET PURCELL for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Kenneth J. Dunbar ("Claimant") worked as a facilities coordinator for Planned Parenthood Federation of America ("Employer"). On November 24, 2015, Claimant lifted a box from a shelf and twisted to the right to put it on a cart when he heard something pop. Claimant felt pain in his lower back and legs and was unable to keep working despite his attempt to do so.

Claimant sought follow-up care at Bowie Health Center the following day, and followed up with Dr. Roy E. Bands for ongoing care and treatment on December 2, 2015. Dr. Bands conducted examinations on Claimant to include: positive straight leg tests for his left and right legs, motor exams, and reflex exams, and diagnosed Claimant with lumbar radiculopathy, spinal stenosis and intervertebral disc disorders.

Medical records reflect Claimant continued to treat and undergo physical examinations with Dr. Bands on December 17, 2015, May 26, 2016, July 5, 2016, and October 19, 2016. Medical records also indicate that Claimant's lower back pain leg pain, numbness, and weakness persisted. Over the course of treatment, Dr. Bands discussed treatment options with Claimant to include physical therapy, anti-inflammatory agents, pain medications, cortisone injections, bracing and various other forms of non-operative treatments.

Claimant was next referred to Dr. Alexander S. Mark, a radiologist, for a magnetic resonance imaging ("MRI") of his lumbar spine. Dr. Mark's findings were that Claimant's spinal alignment, spinal conus and vertebral bodies were normal, and that his spinal canal was congenitally large. Dr. Mark's overall impression was that the multi-level disc bulges apparent in the MRI were without spinal stenosis or extruded fragment.

At Employer's request, on July 5, 2016, Claimant was examined by orthopedic surgeon, Dr. Louis Levitt. Dr. Levitt's examination revealed Claimant was in control of his posture, had forward flexion of the lumbar spine at 45 to 50 degrees, normal lateral bending, supple muscles and no spasm. Dr. Levitt opined that Claimant had a normal exam and there was no evidence of active discogenic process or lumbar radiculopathy. Dr. Levitt also opined that Claimant was at maximum medical improvement and considerations for surgical treatment were not clinically supported.

On November 3, 2016, a Utilization Review ("UR") report prepared by Dr. Keith Louwenaar stated that the surgery recommended by Dr. Bands was not reasonable or necessary.

On December 2, 3, and 5, 2016, Anthony Davis, an investigator for Employer, conducted a 16-hour surveillance of Claimant. A 7-minute video summary of the surveillance viewed during the hearing showed Claimant putting a small child inside his vehicle and bending to pick up objects.

A dispute arose regarding Claimant's continuing entitlement to temporary total disability benefits and request for medical treatment. A full evidentiary hearing was held before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES").

A compensation order ("CO") issued on January 13, 2017, denied Claimant's claim for relief. *Dunbar v. Planned Parenthood Federation of America*, AHD No. 16-487, OWC No. 739082, (January 13, 2017).

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum of Points and Authorities in Support of the Application for Review ("Claimant's Brief"). In his appeal Claimant asserts that the CO is not based on substantial evidence in the record and must be reversed. Claimant's Brief at 1.

Employer opposed the appeal by filing a Memorandum of Points and Authorities in Opposition to Claimant's Application for Review ("Employer's Brief").

## ANALYSIS

Claimant's first argument is that the ALJ failed to give proper weight to the opinions and findings of his treating physician, Dr. Bands.

In support of this claim, Claimant asserts:

In this case, the ALJ credited the opinions of the IME doctor, Louis Levitt, over the opinions of Dr. Bands and while she explains her reason for doing so, her reasoning was not supported by the facts in the record. The ALJ repeatedly stated that Dr. Bands' opinions were not based on any objective tests (See, e.g. CO p.8) but the record was replete with evidence that his opinions were based on the MRI and repeated positive bilateral straight-leg raising tests.

The ALJ, in explaining her decision to "give [] more weight to Dr. Levitt's IME," incorrectly stated that "Dr. Bands seemingly relies on Claimant's subjective complaints with no objective tests." CO p. 8. The ALJ also held that "Dr. Bands' opinion is based on Claimant's subjective complaints without any objective tests to support his complaints." Id. In the summary of the medical records in the Compensation Order, the ALJ only notes a positive bilateral straight leg raising test performed by Dr. Bands during Mr. Dunbar's first appointment with Dr. Bands on December 2, 2015. CO p. 3. However, Dr. Bands performed a straight leg raising test in all four of Mr. Dunbar's appointments and the test was positive bilaterally each time. CE 3. The Employer's IME doctor, Dr. Louis Levitt, in his deposition called the straight leg raising test "[t]he real test of nerve root irritation." Employer's Exhibit (EE) 3 pp. 14-15.

Claimant's Brief at 5.

In opposition, Employer asserts:

In this case, the ALJ specifically outlines the reasons for rejecting Dr. Bands' opinion, noting they are based on Claimant's subjective complaints without any objective tests to support his complaints. The ALJ takes into consideration Dr. Bands' medical records and deposition testimony in noting that *at no point were any exams performed to consider the potential for exaggerated complaints.* (CO, p. 7). The ALJ notes Dr. Bands never noted how many physical therapy sessions Claimant attended or the impact of the physical therapy on his condition, even noting Dr. Bands testified that he was unaware if Claimant had ever undergone any physical therapy whatsoever. (CO, p.8). [ . . . ] Interestingly, Dr. Bands also testified that he did not perform any exams on Claimant to determine the level of responses Claimant was displaying, as the ALJ noted that "he did not perform a Waddell test or anything of that nature." (CO, p.7, 11).

Employer's Brief at 4 (Emphasis added in italics).

We agree with Employer's recitation of the ALJ's analysis on this issue. The ALJ correctly noted Claimant's burden of proving, by a preponderance of the evidence, his entitlement to TTD benefits. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). Noting next, the absence of a presumption of compensability afforded to a claimant, and that concerning the extent of disability, and that total disability does not mean absolute helplessness and the inability to do any work at all, the ALJ referenced the treating physician preference accorded to the opinions of treating physicians in this jurisdiction. The ALJ concluded that Claimant established a *prima facie* case of temporary total disability.

The prevailing law dictates that in assessing the weight of competing medical testimony in workers' compensation cases, attending physicians are ordinarily preferred as witnesses rather than those doctors who have been retained to examine injured workers solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). Even with this preference however, the trier of fact may choose to credit the testimony of a non-treating physician over a treating physician. *Short v. DOES*, 723 A.2d 845 (D.C. 1998). And where there are persuasive reasons to do so, a treating physician's opinions may be rejected. *Stewart, supra*.

In assessing the weight of the competing medical reports submitted by both Employer and Claimant, the ALJ summarized in detail, Dr. Bands and Dr. Levitt's treatment notes. The ALJ concluded not to credit Dr. Bands with the treating physician preference stating:

Although Claimant is entitled to the treating physician preference, upon a review of the record evidence, I find Dr. Levitt's evidence to be more persuasive; therefore, I reject Dr. Bands' opinion. Dr. Bands' opinion is based on Claimant's subjective complaints without any objective tests to support his complaints. Giving more weight to the opinion of Dr. Levitt, Claimant has not established by a preponderance of the evidence that he remains temporarily and totally disabled from returning to his pre-injury job.

CO at 8.

The ALJ relied upon the July 5, 2016, IME report of Dr. Levitt to support Employer's rebuttal of Claimant's *prima facie* case.

Citing to *Jackson v. DOES*, 955 A.2d 728 (D.C. 2008), Claimant argues that the ALJ's reliance on Dr. Levitt's opinion was not supported by substantial evidence in the record. In *Jackson*, the District of Columbia Court of Appeals overturned the ALJ's determination that the claimant's treating doctor had not been informed of claimant's full medical history. The court held the treating doctor in fact learned of the claimant's full medical history at a deposition. The facts and record in the instant case are not analogous to those in *Jackson*.

Furthermore, Claimant appears to have misinterpreted the meaning of the ALJ's statement "... without any objective tests to support his complaints." In so stating, the ALJ did not intend to reference that no objective tests at all were performed by Dr. Bands; this is evident by her discussion elsewhere in the CO of the straight-leg tests Dr. Bands conducted. We discern that the ALJ instead meant to reference that notwithstanding Claimant's ongoing treatment, *in response*

to his subjective complaints, Dr. Bands did not endeavor to conduct any objective tests as a means of confirming, or not, those subjective complaints.

Further clarification of the intended meaning of the ALJ's "without any objective tests..." statement and decision to reject Dr. Bands' opinion and to credit Dr. Levitt's opinion is noted in the CO:

In reviewing the record, Dr. Bands has kept Claimant out of work based on Claimant's subjective complaints. *In contrast to Dr. Levitt's examination of Claimant who opined that Claimant was exaggerating his symptoms, Dr. Levitt performed objective tests to support his opinions of Claimant. Dr. Levitt found inconsistencies between Claimant's complaints and the objective medical tests, in addition to finding no evidence of disuse to the musculature of Claimant's lower extremity to suggest that he uses his legs and his back fairly routinely.* This correlates with Dr. Bands' finding that from December 2, 2015 to October 9, 2016, Claimant's lower extremities are normal strength except for the quads which were a little weak and his reflexes remained normal.

CO at 8 (Emphasis added in Italics).

Assuming *arguendo*, Claimant properly interpreted the ALJ's statement regarding the absence of objective tests conducted by Dr. Bands that was not the sole evidentiary issue upon which the ALJ relied upon in deciding to credit Dr. Levitt's opinion over Dr. Bands. The ALJ concluded, first, taking into consideration Claimant's exaggerated symptomology, the absence of evidence of pathology or disuse related to his back, the inconsistencies and impossibilities of Claimant's reported symptoms, and the age-normal clinical findings and MRI report, that Dr. Levitt's medical evidence was more persuasive than Dr. Bands' and second, that Dr. Bands' opinion was: (1) based on Claimant's subjective complaints and, as (2) compared to Dr. Levitt's opinion was lacking in any corresponding objective tests to support those subjective complaints.

We disagree with Claimant's assertion that the ALJ's decision to not afford Dr. Bands the treating physician's preference is unsupported by substantial evidence in the record. Accordingly, the CO's conclusions with regard to the nature and extent of Claimant's injuries are affirmed.

Claimant next argues that the ALJ's conclusion that Claimant is no longer temporarily and totally disabled is not supported by substantial evidence in the record as the treatment history Dr. Levitt relied upon for his IME was incorrect. Claimant specifically points this panel to an incorrect number of physical therapy ("PT") sessions noted in Dr. Levitt's report (15 PT sessions cited in the report as opposed to the 3 PT sessions testified to by Claimant), a comparison of the negative straight-leg tests findings opined to by both Dr. Levitt and Dr. Bands, that Dr. Levitt reviewed Claimant's MRI report and not the MRI films, and an alternate interpretation of the surveillance evidence submitted into the record by Employer.

With regard to the inconsistencies in the number of PT sessions noted in Dr. Levitt's report as opposed to Claimant's testimony—with the exception of references made regarding Dr. Bands' recommending Claimant attend PT, that Dr. Bands' medical records did not indicate how many PT sessions Claimant attended, or the impact of the PT sessions on Claimant's conditions—we

do not find evidence of this apparent inconsistency reflected in the ALJ's decision to deny benefits to Claimant; neither do we deem the inconsistency to be of sufficient significance to warrant a remand.

With regard to Claimant's assertion that Dr. Levitt's review and assessment of his MRI report as contrasted against Dr. Bands' review and assessment of the MRI films themselves, renders Dr. Levitt's opinion insufficient, and as such, the ALJ's denial benefits, not based on substantial evidence, we disagree. We know of no case law prioritizing a doctor's assessment of an actual MRI image over a doctor's assessment of an MRI report, and Claimant's counsel points us to none.

Claimant's counsel asserts:

Employer/Insurer's evidence, a one-time IME by a defense doctor who performs IMEs for well over 10 insurance carriers and for whom it has been so long since he performed an IME for a plaintiff/claimant that he cannot recall when that last was (EE 3 pp. 24-26), and seven minutes of surveillance video, is not sufficient evidence to rebut Mr. Dunbar's showing of being temporarily and totally disabled.

Claimant's Brief at 12.

As best we can discern, Claimant appears to be suggesting that, since Employer retained the services Dr. Levitt, an IME physician compensated for the provision of IMEs, and in the practice of so doing frequently, the CRB should infer that the IME report is somehow compromised or otherwise lacking in evidentiary sufficiency. Notwithstanding the challenge to Dr. Levitt's expertise and impartiality as IME doctor, Claimant's counsel makes no valid legal-based argument; as such, we decline to respond to Claimant's counsel's argument on this particular point.

With regard to Claimant's disagreements with the ALJ's findings and conclusion listed above, we determine that each of these arguments appear to be instances of Claimant seeking to have us reweigh the evidence and in doing so, substitute our judgment for that of the ALJ, which of course is beyond our authority. *See Marriot, supra*. We are limited to assessing whether the facts found and conclusions reached in the CO are supported by substantial evidence in the records; on the issue of the nature and extent of Claimant's injury, we determine that they do.

Finally, Claimant argues that the ALJ erred in ruling that the surgery requested by Claimant's treating doctors was not reasonable or necessary. Claimant re-asserts his argument related to the ALJ's "without any objective tests..." statement and argues that this finding is contrary to the evidence in the record stating:

In analyzing the medical evidence to determine whether the requested surgery is reasonable and necessary, the ALJ gave credit to Dr. Bands here for relying on the MRI but she also stated, in error, that Dr. Bands "never performed any additional objective tests." CO p. 11. This finding is contrary to the evidence on [sic] the

record and discussed in detail above that Dr. Bands performed a straight-leg raising test (which Dr. Levitt called the “the real test of nerve root irritation” (EE 3pp. 14-15)) four times and each time the test was positive bilaterally. CE 3.

Employer/Insurer also relied on a Utilization Review (UR) to contest Claimant’s request for surgery. The UR applied the Official Disability Guidelines (ODG) which state that for a laminectomy to be supported, “[o]bjective findings on examination need to be present. Straight leg raising test ...should correlate with the symptoms and imaging.” EE 1 p. 4. (emphasis added).

Claimant’s Brief at 13-14.

Employer argues in opposition:

Dr. Louwenaar reviewed the entirety of the medical records, including Dr. Levitt’s IME report, and noted many issues with Dr. Bands’ reports and opinions. Dr. Louwenaar noted that while Dr. Bands noted positive straight leg raise, *he does not describe the results to indicate radicular pain below the knee or at what range of motion this occurs.* (CO, p. 10). Dr. Louwenaar notes pin prick was not assessed, and that the MRI findings are not consistent with nerve root compression. (*Id.*) The UR report also notes that deep tendon reflexes are symmetrical rather than asymmetrical. (EE 1, p. 9). Dr. Louwenaar, taking into consideration the entirety of the medical records, as well as the Official Disability Guidelines opined the non-specific complaints with limited exam findings are not supportive of a 4-level surgical procedure. (*Id.*)

Employer’s Brief at 7.

We reiterate our clarification of the ALJ’s “without any objective tests...” statement. In her assessment of the UR Report, the ALJ summarized the UR’s findings and conclusions and Dr. Louwenaar’s opinion that the recommended surgical procedure was not reasonable nor necessary, and in addition to Dr. Levitt’s IME report, weighed those equally against Dr. Bands’ deposition testimony and medical records including Claimant’s MRI report. Finding that the weight of the evidence was not in Claimant’s favor, the ALJ concluded Claimant did not meet his burden of demonstrating that the requested medical care is reasonable and necessary. We find no error with the ALJ’s assessment of the reasonableness and necessity of Claimant’s request for surgery.

Our consideration of Claimant’s argument regarding the reasonableness and necessity of Claimant’s treatment leads us to conclude that, at a base level, Claimant disagrees with the conclusions reached by the ALJ and Claimant’s entitlement to the requested procedure. Notwithstanding his position regarding the ALJ’s statement that Dr. Bands “never performed any additional objective tests”, Claimant cites to no law or statute in support of his disagreement with the CO’s conclusions on this issue.

Claimant's remaining arguments once again amount to little more than Claimant asking that we reweigh the evidence and substitute our judgment for that of the ALJ. As previously stated in this order however, and as mandated by law, where the ALJ's decision is supported by substantial evidence, we have no authority to do so. *Marriott, supra*.

#### CONCLUSION AND ORDER

The Compensation Order is AFFIRMED.

*So ordered.*