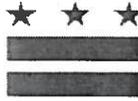


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-099

**KENNETH WILLIS,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS
Employer–Petitioner.**

Appeal from a September 6, 2017 Compensation Order on Remand
by Administrative Law Judge Gwenlynn D' Souza
AHD No. PBL 16-039A, DCP No. 0468-WC-14-0001213

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 NOV 17 PM 12 20

(Decided November 17, 2017)

Benjamin E. Douglas for Claimant
Nada A. Paisant and Andrea G. Comentale for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following is taken from a Decision and Remand Order issued by the Compensation Review Board (“CRB”) in *Kenneth Willis v. District of Columbia Department of Public Works*, CRB No. 17-070 (August 25, 2017):

Claimant worked for Employer as a Sanitation Worker. While working on September 6, 2014, Claimant was a passenger in a work truck that was struck by another vehicle that caused the truck to overturn. On October 27, 2014, the Office of Risk Management (“ORM”) issued a Notice of Determination (“NOD”) which accepted Claimant’s claim for the neck, back, knees, right rib and left hip.

Claimant treated with Dr. Mohammad H. Beiraghdar, neurologist, who diagnosed greater occipital neuralgia, from neck injury; post traumatic cervical, thoracic and lumbar strain/sprain; sacroiliac dysfunction; piriformis syndrome; and muscle spasm on December 2, 2014. On December 3, 2014, Dr. Peter E. Lavine, an orthopedist examined Claimant and diagnosed osteoarthritis of both hips, strain of the back and neck and contusion of the knees. He expected Claimant's right rib to heal within a month. On January 7, 2015, Dr. Lavine released Claimant to modified duty with restrictions on lifting over 35 pounds, twisting, pushing or pulling.

At Employer's request, on December 1, 2015, Claimant consulted Dr. Stanley R. Rothschild for an independent medical examination ("IME"). Dr. Rothschild determined Claimant had no medical restrictions.

On August 4, 2016, Claimant underwent a Functional Capacity Examination ("FCE"). After the FCE, a goal was set for Claimant to reach the medium physical level by being able to lift up to 50 pounds on an occasional basis and improving weight bearing to 60 minute intervals.

Claimant participated in work hardening through Rehab at Work on August 8 and 9, 2016 but he complained about pain and was subsequently discharged.

Relying on the medical opinion of Dr. Rothschild and the reports from Rehab at Work, ORM issued a Notice of Determination Terminating Workers' Compensation Benefits on October 11, 2016. On October 24, 2016, Employer received a letter of resignation from Claimant via email.

On October 31, 2016, Claimant filed a Request for Formal Hearing. A scheduling order subsequently issued setting the matter for a Formal Hearing.

On December 1, 2016, ORM issued an Amended Notice of Determination terminating Claimant's temporary total disability benefits. On December 6, 2016, Claimant filed a Request for Formal Hearing on the amended notice. On December 22, 2016, an administrative law judge ("ALJ") issued an Order denying Employer's Motion to Dismiss on jurisdictional grounds.

On June 6, 2017, the ALJ issued the Compensation Order which is the subject of the current appeal. *Kenneth Willis v. District of Columbia Department of Public Works*, AHD No., PBL 16-039A, DCP No. 0468-WC-14-0001213 (June 6, 2017) ("CO").

* * *

The CO concluded that AHD had jurisdiction to hear claims related to Claimant's injuries to the head and left lower extremity but not for the left rib, right hip and right lower extremity. The CO further concluded Employer did not prove by a preponderance of the evidence that it properly terminated workers' compensation

benefits and awarded reinstatement of temporary and total disability benefits from October 12, 2016 to the present and continuing and payment of causally related medical expenses from October 24, 2016 to the present and continuing.

ANALYSIS

Employer argues the ALJ's determination that Employer improperly terminated benefits is not supported by substantial evidence and that the ALJ's credibility determination is not supported by substantial evidence. Specifically, Employer asserts:

Moreover, there is no objective medical evidence to support Claimant's subjective complaints of pain as related to the work injury or his inability to lift in excess of fifty pounds. The ALJ found Dr. Lavin's November 7, 2016 letter more persuasive regarding Claimant's work restriction than Dr. Rothschild's IME regarding Claimant returning to work without any restrictions. CO, p. 13. However substantial evidence does [sic] support the ALJ's conclusion.

* * *

On April 29, 2015, Claimant again had a follow up with Dr. Lavine. Dr. Lavine ordered additional diagnostic tests to examine Claimant's subjective complaints. Moreover, Dr. Lavine noted that "[a]s far as work is concerned, I would like to see him resume full duty/full time." On May 7, 2015 and May 15, 2015, Claimant had x-rays of his knees and hip and an MRI of his spine. EE 11 at 124.

On June 22, 2015, Dr. Lavine concluded the following:

[Claimant returns for follow-up of his Left hip, Bilateral Knee and lower back pain. He did get XR: (B) Knees (L) Hip and MRI L/S. These studies showed age related degenerative changes but no traumatic acute injuries. [Claimant] is asking to Return to Work at modified duty. He would like a 40# weight restriction. [Claimant's] exam is essentially unchanged for the past several months. He has myofascial pain and joint pain. His soft tissue injuries are healed by now. He is ready for discharge. No progression or deterioration is expected. No addition or further treatment is warranted. He can be released to modified duty, with a #40 lifting limit. He should take OTC NSAIDS prn. He should do home exercises. He has reached MMI as of July 2015. I will see him on a PRN bases Plan: Discharge.

We disagree with Claimant's characterization of the medical evidence and agree instead with Employer that:

. . . In the June 22, 2015 visit, Dr. Lavine found Claimant's injuries healed and no additional or further treatment was warranted. EE 11 at 126. The June 22, 2015 report, also indicated that Claimant requested a " . . . RTW at modified duty. He would like a 40# weight restriction." EE 11 at 25. Dr. Lavine provided no justification, other than Claimant's request, to substantiate the modified duty weight restriction. Moreover, there is no objective evidence demonstrating a medical necessity for Claimant to have a work restriction related to the work injury. In February and April 2015, Dr. Lavine indicated that Claimant could return full duty with no qualifications. CE 5 and EE 11. Therefore, the ALJ's determination that Dr. Lavine's November 7, 2016 letter regarding Claimant's subjective complaint is not supported by substantial evidence.

* * *

A review of Dr. Lavine's April 29, 2015 report reveals Dr. Lavine reported on that date "As far as work I concerned, I would like to see him resume duty full time." EE 11 at 123.

A review of the June 22, 2015 report of Dr. Lavine reveals that Dr. Lavine did in fact state in the report "Mr. Willis is asking to RTW at modified duty. He would like a 40# weight restriction." EE 11 at 125.

We note that neither of these reports were made part of Claimant's exhibit package. It is clear the ALJ did not acknowledge that Claimant asked for the 40 pound lifting restriction after he was fully released to return to full duty. It is also apparent that the ALJ did not review either of the two reports which are contained only in Employer's Exhibits.

This panel finds it significant that the CO does not mention these two reports authored by Dr. Lavine, but that the ALJ relied on Dr. Lavine's November 2016 letter in reaching the determination that Claimant had restrictions on returning to work.

In order to conform to the requirements of the D.C. Administrative Procedures Act ("APA"), (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must flow rationally from the findings. D.C. Code §2-501 *et seq.* as amended; *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984).

* * *

Thus, the law requires we remand this matter for the ALJ to consider both the April 29, 2015 and the June 22, 2015 reports of Dr. Lavine and make appropriate findings of fact.

* * *

Normally an ALJ's decision which is based on credibility findings deserve special weight, because the ALJ has the opportunity to observe the appearance and demeanor of the witness", *WMATA v. DOES*, 683 A.2d 470 (D.C. 1996). It is fundamental that the fact finder's credibility determinations are given great deference, given their opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

While we would be inclined to affirm the ALJ's credibility determination as it is entitled to deference, we are remanding this matter for reconsideration of Dr. Lavine's 40 pound lifting restriction. The ALJ should accordingly re-visit the credibility of Claimant after considering all of the evidence of record.

CONCLUSION AND ORDER

The Compensation Order's award of benefits is not in accordance with the law as the CO's determination that Employer has not proven by a preponderance of evidence that it properly terminated Claimant's workers' compensation benefits is not supported by substantial evidence and is VACATED. The matter is REMANDED to the Administrative Hearings Division for further findings of fact and consideration of *all* of the evidence of record and reconsideration as to whether Employer has failed to show that benefits should have been terminated.

Id., at 1-3; 5-7 (footnotes omitted, italics in original).

On September 26, 2017, the Administrative Law Judge ("ALJ") issued a Compensation Order on Remand ("COR"), in which it was again found that Employer had not proven, by a preponderance of the evidence, that Claimant's benefits should be terminated, and ordered they be reinstated.

Employer filed an Application for Review and a Memorandum of Points and Authorities Supporting Petitioner's Application for Review ("Employer's Brief")¹ seeking reversal of the COR, to which Claimant filed Claimant's Response to Application for Review ("Claimant's Brief"), asserting that the COR is supported by substantial evidence and should be affirmed.

¹ Employer's Application for Review, filed on October 6, 2017, included a Motion for Enlargement of Time to File Supporting Memorandum of Points and Authorities. The motion was granted, and Employer's Brief was filed October 31, 2017.

ANALYSIS

The Decision and Remand Order directed the ALJ to do two things: (1) consider all the evidence, specifically including medical records from Dr. Lavine dated April 29, 2015 and June 25, 2015, and (2) “re-visit” the determination concerning Claimant’s credibility in light of that further consideration.

The following portion of the COR is the ALJ’s response to these directives. After recounting in detail summaries of the entire medical record, the ALJ wrote:

Employer ... relies on a change in medical restrictions by Dr. Lavine. On January 7, 2015, Dr. Lavine restricted Claimant from lifting. On April 29, 2015 Dr. Lavine reported that "As far as work is concerned, I would like to see him resume duty full time." EE 11 at 123. During the June 22, 2015 visit, Dr. Lavine noted that Claimant requested a return to work with a 40 pound weight lifting restriction, to which Dr. Lavine agreed. EE 11 at 126. On November 7, 2016 Dr. Lavine continued to maintain a restriction on lifting.

* * *

While Employer contends that Claimant has failed to show a restriction on lifting, which is based on objective evidence, the applicable law permits a finding based upon such evidence. Subjective complaints of physical pain and consequent suffering may properly serve as a basis for an examining physician's medical determination of physical incapacity, but the factfinder must determine credibility. *See Marriott v. Department of Employment Servs.*, 85 A.3d 1272 (D.C. 2014); *McAlister v. District of Columbia Dept. of Employment Servs.*, CRB No. 08-045, *aff'd* 983 A.2d 1064 (D.C. 2009).

When Claimant participated in physical therapy from September 2014 to February 2015 at Progressive Physical Therapy, the initial goal was for Claimant to lift up to 50 pounds. CE 12. When Claimant attended a FCE in August 2016, he was able to lift up to 20 pounds, and the goal again was for Claimant to lift up to 50 pounds. CE 9.

The undersigned finds Claimant credible regarding his inability to lift more than 50 pounds repeatedly as required by his job description based on the consistency of his statement to Dr. Lavine about his inability to lift weight and the records of Progressive Physical Therapy, which do not reflect that Claimant was able to lift in excess of 50 pounds after many physical therapy sessions from September 2014 to February 2015, and the records of Rehab at Work, which reflected an inability to lift more than 20 pounds occasionally at the time of discharge in August 2016. Claimant showed progress by reaching the goal of walking after aquatherapy, but not the ability to lift more than 50 pounds. While there is some evidence Claimant did not fully participate in physical therapy at CARE IQ in November 2014 or

Rehab at Work in August 2016, there was no indication in those treatment records that Claimant could ever lift in excess of 50 pounds.

The undersigned acknowledges Dr. Lavine's opinions on April 29, 2015, and June 22, 2015, are inconsistent about Claimant's ability to return to work and appear to have changed after Claimant requested a 50 [sic] pounds lifting restriction. Dr. Lavine's June 22, 2015 medical restriction was consistent with the recommendation of Dr. Beiraghdar, during this same time period. Dr. Beiraghdar recommended that Claimant avoid strenuous physical activity and long periods of work without ample time to relax and light exercise.

The undersigned finds persuasive, and gives more weight to, the most recent opinions of Dr. Lavine regarding Claimant's restriction on a return to limited duty, based on the results during Claimant's physical therapy with Progressive Physical Therapy Associates and the FCE discharge recommendation by Rehab At Work. The undersigned rejects the opinion of Dr. Rothschild because while he presumes that Claimant will have the ability to performed heavy duty work and lift in excess of 50 pounds after participation at Rehab at Work, the goal set by Rehab at Work was only a medium physical demand level of up to 50 pounds.

* * *

ORDER

It is **ORDERED** that Claimant's claim for temporary total disability benefits and causally-related medical expenses be, and hereby is, **GRANTED**. It is further **ORDERED** that Claimant is hereby awarded temporary total disability benefits from October 12, 2016, to the present and continuing, and payment of causally related medical expenses from October 24, 2016, to the present and continuing.

COR at 8-9.

Employer argues at length that these findings and conclusions are not supported by substantial evidence. The primary focus of the argument is that the ALJ's statement that Claimant's testimony is supported by the Progressive Physical Therapy and Rehab at Work records is untenable, given that those records contain numerous expressions by the therapists that, in their view, Claimant failed to give adequate effort to his rehabilitation therapy, rendering irrelevant the fact that Claimant never achieved the goal of a 50 pound lifting capacity.

We must point out that, while we may have agreed with Employer were we assessing the evidence anew, our task is limited to determining whether the ALJ's decision is supported by substantial evidence, which is such evidence as a reasonable person might accept to support a given conclusion. *Marriott, supra*.

The ALJ acknowledged that Claimant's participation in the rehabilitation program was less than optimal, but the rehabilitation records are not the sole basis of the ALJ's findings. Specifically, she relied upon (1) Claimant's testimony, (2) Dr. Lavine's most recent June 22, 2015 agreement

to place Claimant under a 40 pound lifting restriction, (3) Dr. Beiraghdar's June 6, 2015 report in which the doctor, a neurologist, opined that Claimant should "[a]void strenuous physical activity and long periods of work without ample time to relax", and (4) the undisputed fact that Claimant's job requirements were indeed strenuous. Combined with the rehabilitation reports, these are 6 bases cited by the ALJ to support her determination concerning Claimant's testimony as to his inability to physically perform his pre-injury duties as a sanitation worker.

This evidence is such that a reasonable person might conclude that Claimant remains incapable of performing his pre-injury job, and thus the ALJ's award is supported by substantial evidence.

Further, the ALJ carried out the directive of the CRB to consider the two specific medical reports which had not been alluded to in the original Compensation Order, and to re-visit the issue of Claimant's credibility in light of "all the evidence", including those reports. Had the CRB intended to compel a decision one way or the other, the ALJ would have been instructed to deny Claimant's claim for relief. The ALJ remains the sole finder of fact.

Finally, Employer argues that the portion of the award including causally related medical expenses should be vacated because there is no present request for any specific medical care. While we agree that there is nothing in this record indicating that Claimant seeks current medical care, the fact that the ALJ found that Claimant continues to suffer from disabling work-related injuries implies entitlement to such care as is reasonable and necessary to treat such injuries, and as such it is not error to enunciate that entitlement in the award. Even if it is a technical error, it is nonetheless harmless. Employer is not precluded from contesting the reasonableness and necessity or causal relationship of future medical care if any is sought.

CONCLUSION AND ORDER

The facts as found by the ALJ are supported by substantial evidence, the re-instatement of Claimant's benefits is in accordance with the law and is **AFFIRMED**.

So ordered.