

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-121

**LAMENTHIA WILLS,
Claimant-Respondent/Cross-Petitioner**

v.

**COMPASS GROUP and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator Petitioner/Cross-Respondent.**

Appeal from an August 31, 2016 Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 16-241, OWC No. 726450

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 JAN 6 AM 10 12

(Decided January 6, 2017)

Manuel R. Geraldo for Claimant
Joseph C. Tarpine, III for Employer

Before LINDA F. JORY, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Lamenthia Wills ("Claimant") worked as a housekeeper for Compass Group ("Employer"). Claimant's duties for Employer included cleaning bathrooms, showers and living areas in the dormitories at Howard University.

On March 10, 2015, Claimant was in a utility closet preparing her cart for the day, when approximately 30 mirrors fell down onto her left foot. After she removed the mirrors from her left foot she fell onto her bottom. Claimant was taken to Washington Hospital Center and subsequently came under the care of Dr. Amita Luhadiya, board certified podiatrist. Dr.

Luhadiya diagnosed a Lisfranc fracture of the left foot and informed Claimant that surgery would be necessary to re-align the fracture, requiring three months for recovery.

On March 25, 2015, Claimant underwent an open reduction, internal fixation of the left first, second and third metatarsocuneiform joints in the Lisfranc joint. On July 27, 2015, Claimant underwent a subsequent surgery for the removal of the hardware.

In a letter dated January 5, 2016, Employer informed Claimant she was terminated as of that date as ‘... the result of failure to report to work at the Howard University.’

On January 20, 2016, at the request of Employer, Claimant underwent an Independent Medical Evaluation (“IME”) by Dr. Robert A. Smith, a board-certified orthopedic surgeon. Dr. Smith opined that Claimant could return to her pre-injury work.

On May 31, 2016, Dr. Luhadiya, in a “To Whom It May Concern” report, opined that Claimant has Chronic Regional Pain Syndrome (“CRPS”) and recommended physical therapy, foot insoles and supportive shoes, oral medication, and pain management treatment via injections. Dr. Luhadiya recommended vocational rehabilitation and concluded that Claimant could perform a desk duty job.

Employer submitted a Utilization Review Report (“UR”), dated June 1, 2016 by Dr. Brent Fink, an orthopedic surgeon. Dr. Fink concluded that only palliative care, i.e., activity restrictions, medication, shoe inserts and modifications and home exercise was reasonable and necessary medical care.

Claimant testified she still has pain underneath her left foot and on the outside of the ankle along with swelling and stiffness, and she cannot flex her toes. Claimant also testified she is collecting unemployment benefits, and indicated she would accept light-duty within the restrictions set forth by Dr. Luhadiya and that she uses her cane daily.

Claimant requested a formal hearing seeking temporary total disability (“TTD”), from January 27, 2016 through the present and continuing, vocational rehabilitation assistance, payment of causally related medical expenses, including but not limited to, orthotics, epidural injections and a cane, and bad faith penalties pursuant to D.C. Code §32-1528(b). Employer sought credit for unemployment benefits paid to Claimant during the period for which benefits Claimant seeks. A formal 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 August 23, 2016 wherein the ALJ concluded Claimant had proven by a preponderance of the evidence, that she has CRPS, and that she has been temporarily and totally disabled from January 27, 2016 to the present and continuing. The ALJ further found Claimant was entitled to vocational rehabilitation assistance and that the recommended medical treatment by Dr. Luhadiya consisting of physical therapy, foot insoles and supportive shoes, oral medication, and pain management treatment via injections, is medical reasonable and necessary. The ALJ further concluded Claimant was not entitled to bad faith penalties and that Employer was entitled to a credit for the unemployment benefits Claimant received during the period for which disability benefits had been awarded.

Employer timely appealed the CO to the Compensation Review Board (“CRB”) by filing Employer and Insurer’s Partial Application for Review and Memorandum of Points and Authorities in Support of Partial Application for Review (“Employer’s Brief”). Claimant filed Claimant’s Opposition to Employer’s Application for Review and Cross Application for Review (“Claimant’s Brief”).

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (“Act”) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). “Substantial evidence” as defined by the District of Columbia Court of Appeals (“DCCA”), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB is also bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Employer and Insurer’s Partial Application for Review.

Employer initially asserts

The [ALJ] erred in finding that the Claimant was entitled to temporary total disability benefits from January 27, 2016, to the present and continuing and in finding that the Claimant was entitled to vocational rehabilitation.

Employer’s Brief at 6.

Specifically Employer argues:

Here, there are several specific and comprehensive reasons as to why the opinions of the Claimant’s treating physicians do not support the [CO] and why, instead, the opinions of Dr. Smith should be accepted. The [ALJ] ignored the fact that Dr. Smith’s opinions are more in line with the objective medical evidence, which shows that the Claimant sustained a fracture but that it was surgically repaired, leaving the Claimant with a lack of instability in the left ankle. This is something which the Claimant’s treating physicians admit to, but then seem to ignore in continuing to treat her. Conversely Dr. Smith’s opinion comports with these objective findings, showing that the Claimant’s condition has improved from an objective standpoint, meaning she does not need additional treatment or work restrictions.

The [ALJ] also erred in finding that the Claimant has CRPS. Indeed, there is no mention at all in the Compensation Order as to the basis for finding that the Claimant has CRPS or why he has found that she meets the criteria for this diagnosis. Instead Dr. Smith explained why the Claimant does not meet a clinical diagnosis of CRPS and he clarified that this is because there are many physical attributes of CRPS and that, pursuant to the AMA Guides, a person should have at least five objective, clinical or diagnostic testing to confirm the presence of CRPS. His opinion is based on a lack of objective, corroborative evidence to support a diagnosis of CRPS which makes it more plausible and persuasive than the opinions of the Claimant's treating physician, which appear to simply be that "the type of injury" that the Claimant sustained "can commonly result" in a diagnosis of CRPS. This language from the Claimant's treating physician is simply insufficient under D.C. law for the Claimant to meet her burden.

Employer's Brief at 8, 9.

The ALJ, we find, properly set forth the standard for establishing the nature and extent of disability as pronounced in *Logan v. DOES*, 805 A.2d 237 (DC 2002) (*Logan*) and we find no error in his determination that Claimant met her *prima facie* case of total disability and that Employer met its burden of rebutting Claimant's *prima facie* case of total disability. The ALJ further set forth the treating physician's preference applied when weighing the medical evidence to determine if Claimant meets her burden of establish entitlement to benefits by a preponderance of the evidence. *Stewart v. DOES*, 606 A.2d. 1350 (D.C. 1992). The ALJ reasoned:

Upon review of the record evidence, I give more weight to, and find persuasive, the well documented and well substantiated records of claimant's treating physician, Dr. Luhadiya. I find Dr. Luhadiya's conclusions are supported by claimant's history and Dr. Luhadiya's medical treatment. Dr. Luhadiya, who was also Claimant's surgeon, has consistently opined in his reports that Claimant can return to sedentary work with restrictions. Dr. Luhadiya has also recommended vocational rehabilitation, physical therapy, foot insoles and supportive shoes, oral medication, and pain management treatment via injections.

By way of contrast, I give little weight to and reject, the opinions of Dr. Smith, Employer's IME physician. To begin with, Dr. Smith admitted at his deposition that he did not know what Claimant's pre-injury job duties were. Second, there is no indication in his January 20, 2016 report that he had reviewed Claimant's extensive medical records. In fact, Dr. Smith admitted at this deposition, that he had reviewed only limited records from the Washington Hospital Center, and a CT and X-ray report. Finally, Dr. Smith admitted that he did not review the diagnostic test results.

Therefore, having found nothing in the opinions of Employer's IME physician which requires the undersigned to disregard the opinion of [C]laimant's treating physician, I find the treating physician's opinions persuasive and are thus entitled

to the treating physician's preference. Accordingly, based on Dr. Luhadiya's opinions, I find that claimant has proven, by a preponderance of the evidence, that she has Chronic Regional Pain Syndrome (CRPS). I further find that Claimant has proven, by a preponderance of the evidence, that she has been temporarily and totally disabled from January 27, 2016 to the present and continuing.

CO at 5 (citations omitted).

We reject Employer's argument and conclude the ALJ has adequately explained why he did not reject the opinion of the treating physician in favor of the IME physician with regard to the nature and extent of Claimant's disability. We conclude that the ALJ adequately explained why he rejected Dr. Smith's opinion as he was not provided the diagnostic test results. We further find Employer is requesting that we reweigh the evidence, which is an undertaking which is beyond our authority, in that we are only concerned with whether the determination of the ALJ is supported by substantial evidence. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). The ALJ's determination that Claimant has met her burden of establishing that she is entitled to temporary total disability benefit from January 27, 2016, to the present and continuing is supported by substantial evidence and in accordance with the law.

Employer further asserts that the ALJ also erred in finding that the Claimant has CRPS and that the ALJ erred in finding Claimant was entitled to additional medical treatment to treat CRPS. Specifically Employer asserts:

. . . Indeed, there is no mention at all in the Compensation Order as to the basis for finding that the Claimant has CRPS or why he has found that she meets the criteria for this diagnosis.

Employer's Brief at 9.

We are not persuaded by Employer's argument as the ALJ is not empowered to make medical conclusions and instead he relied on the treating physician's opinion that Claimant has CRPS. We further reject Employer's assertion that the ALJ erred in rejecting the clear and decisive utilization review report. The ALJ reasoned:

Upon review of the medical evidence, I give more weight to the opinions of the treating physician, Dr. Luhadiya, than I give to the opinions of the UR physician, because Dr. Luhadiya's opinions are clearly set forth, well-documented over the course of his treatment of Claimant, and well-reasoned. Dr. Luhadiya, in both his January 26, 2016 and May 31, 2016 "To Whom it May Concern" reports, unequivocally recommended physical therapy, foot insoles and supportive shoes, oral medication, and pain management treatment, via injections.

By way of contrast, in his report of January 6, 2016 the UR physician, Dr. Fink, relying on the opinions of the IME physician, Dr. Smith, opined that Claimant does not have CRPS or RSD [relex sympathetic dystrophy]. Then, on Page 5 of his

report, Dr. Fink opines that pain management via injections is recommended for CRPS but not for Lisfranc fracture/dislocations.

However, since I have previously found, based on the opinions of the treating physician, Dr. Luhadiya, that Claimant has CRPS I do not find the opinions of Dr. Fink well supported. In performing a UR the reviewer accepts the diagnosis of injury, examines the claimant's medical records, and makes findings concerning "the necessity, character or sufficiency" of the medical services to treat the injury. *Children's Nat'l Medical Cts, v. DOES*, 992 A.2d 403, 409 (D.C. 2010) citing 7 DCMR § 232.3. In this case, Dr. Fink did not accept Dr. Luhadiya's diagnosis of CRPS and thus I give Dr. Fink's opinions, little if any, weight.

CO at 7 (citations omitted).

We reject Employer's argument and find more persuasive Claimant's argument in opposition:

. . . Dr. Smith testified that it is common place for him to rely upon the records of the treating physician, and other physicians, in forming his opinion. However, he only had limited records available to him when he examined Ms. Wills. Dr. Smith testified he "had some notes from the hospital center, a CT and X-ray report, but other than there was not much provided on the day I saw her". This was all that the Petitioners provided him after Ms. Wills has been treating for 10 months for the Lisfranc fracture. Most significantly, he did not see the bone scan that Dr. Smith testified would be definitive as to whether Ms. Wills had CRPS. He was unaware that Ms. Wills had a bone scan. The CT Scan to which Dr. Smith refers was taken shortly after the accident that showed the Lisfranc fracture. Sixth, Ms. Will had a CT scan in May 2016 that confirmed again she had CRPS. CRPS is a chronic pain condition most often affecting one of the limbs (arms, legs, hands or feet) usually after an injury or trauma to that limb. CRPS is believed to be caused by damage to, or malfunction of, the peripheral and central nervous systems. Dr. Smith never saw this CT scan. Seventh, Dr. Smith did not see the medical reports of Dr. Chen, the pain specialist doctor treating Ms. Wills. Simply stated, Dr. Smith's opinions are unsubstantiated.

On the other hand, Dr. Luhadiya's opinions are fully substantiated and are based on months of treatment and evaluations of Ms. Wills and review of all of the medical records including the diagnostic tests that Dr. Smith agreed would help confirm the diagnosis of CRPS.

Claimant's Brief at 11-12.

Again we state that we are precluded from re-weighing the evidence, and we conclude the ALJ's determination that the recommended treatment for Claimant's CRPS is reasonable and necessary is supported by substantial evidence and in accordance with the law.

With regard to Employer's assertion that the ALJ erred in awarding vocational rehabilitation to Claimant, Employer asserts only that:

Because the above shows that the Claimant cannot meet her burden as to an inability to perform her pre-injury job, she is not entitled to the medical treatment or temporary total disability benefits being sought. She is also not entitled to vocational rehabilitation benefits, as the opinions of her treating physicians are without merit and unsupported by the objective medical evidence. The Claimant cannot show from a medical or factual standpoint that she is unable to return to her pre-injury job and, as a result the opinions of Dr. Smith releasing the Claimant to full duty work should be adopted, showing that vocational rehabilitation is not warranted in this case.

Employer's Brief at 11.

Inasmuch as Employer's position on Claimant's entitlement to vocational rehabilitation is based on the rejected premise that Claimant has not established entitlement to TTD benefits, Employer's position in this regard is also rejected as we have concluded that the ALJ's determination that Claimant has met her burden of establishing entitlement to TTD benefits to be supported by substantial evidence and in accordance with the law. Accordingly we affirm the ALJ's award of vocational rehabilitation as it is in accordance with the law as well.

Claimant's Application for Partial Review

In addition to opposing Employer's Application for Partial Review, which we have already addressed, Claimant requests a partial review as Claimant asserts the ALJ erred in concluding that she was not entitled to bad faith penalties. Specifically Claimant asserts:

The Respondent contends the Petitioners acted in bad faith in terminating her compensation because the [sic] Dr. Smith's opinions were patently deficient. The Act requires more than a *pro forma* medical examination for the Petitioners to act in good faith. Dr. Smith at best satisfied only the minimum requirements of examining Ms. Wills and writing his opinion. It is Respondent's position that a doctor that the Petitioners relies upon must do more than a perfunctory examination in order to act in good faith. Otherwise, an employer will always be considered to be acting in good faith irrespective of the deficiencies of their examining physician because of their failure to provide the doctor with the information needed to render his or her opinion based on the actual facts. It is one thing for doctors to disagree based on the complete medical evidence. It is entirely a different matter if the treating doctor and the examining physician disagree because the Petitioners failed to provide the examining the [sic] doctor to arrive at an opinion favorable to it. In the instant case, the Petitioner dictated the result by withholding pertinent information from Dr. Smith. Respondent maintains that withholding information critical to an accurate assessment of the nature and extent of Respondent's disability is bad faith.

Claimant's Brief at 14, 15.

We disagree. There is no evidence in the record to establish that Employer intentionally withheld medical records from Dr. Smith in order to dictate the result. To the contrary, we find it is in the best interest of Employer to provide all of the existing medical records and find it more likely that the failure to provide the records was an oversight if in fact Employer had possession of more records. We further adopt the reasoning of the ALJ in this regard:

Claimant argues that Dr. Smith's IME report was allegedly insufficient, in part, because Employer had not provided Dr. Smith with a complete set of Claimant's medical records, and in part because of questions concerning Dr. Smith's examination of Claimant. Thus, Claimant argues, Employer's reliance on Dr. Smith's IME conclusions constituted bad faith. However, in this case, Dr. Smith, a board-certified orthopedic surgeon, examined Claimant, reviewed medical records, and issued his report.

Thus, I reject Claimant's argument because it attempts to equate the alleged insufficiency of Dr. Smith's IME report with bad faith. Rather the alleged insufficiency of Dr. Smith's IME report and his conclusions contained therein, goes not to bad faith but rather to the weight given to Dr. Smith's conclusions. Therefore, I find that because Employer relied on the conclusion and opinions of its IME physician to terminate voluntary payments of [TTD] benefits, it acted in good faith.

CO at 9 (citations and footnotes omitted).

We have determined the ALJ's determination that the Employer did not act in bad faith is supported by substantial evidence and in accordance with the law.

Lastly, Claimant asserts that the question of whether an Employer is entitled to a credit for unemployment versus a credit against unemployment for workers compensation benefits has not yet been decided by the District of Columbia Court of Appeals ("DCCA"). While this is true and until such time as the issue is addressed by the court, the CRB has held an employer is entitled to a credit for unemployment benefits received by an injured worker during the disability period requested "to prevent an injured worker from receiving double recovery of monies from an employer." *Gibson v. Aramark*, CRB No. 08-007 (January 2, 2008).

As there is no dispute that Claimant did in fact receive unemployment benefits for the same period of relief claimed, such a credit supports the policy against a double recovery and the impropriety of duplicative benefits, while ensuring that an injured employee does not receive more money under wage-loss legislation while not working than that employee earned before he or she was injured. See *Beckwith v. Providence Hospital*, CRB No. 07-138, (September 7, 2007). The ALJ's award of a credit against Claimant's worker compensation benefits is in accordance with the law and is AFFIRMED.

CONCLUSION AND ORDER

The August 31, 2016 Compensation Order is supported by substantial evidence and is in accordance with the law and is **AFFIRMED**.

So ordered.