COMPENSATION REVIEW BOARD

CRB No. 13-042

BERTRAN LONG,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Self-Insured Employer-Petitioner

Appeal from a February 28, 2013 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. PBL 08-087B, DCP No. 300991266863

Harold L. Levi, Esquire, for the Respondent
Shermineh Jones, Esquire, for the Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on February 28, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) awarded Claimant temporary total disability benefits from April 8, 2012 to the present and continuing and causally related medical expenses.[1]

Claimant was working as a corrections officer on March 5, 2008 when he was attacked by an inmate and as a result of the ensuing struggle sustained injuries to his face, back, left leg, mouth, and head. The Office of Risk Management (ORM)/Public Sector Workers'

[1] *Long v. D.C. Department of Corrections,* AHD No. PBL 08-087B, DCP No. 300991266863 (February 28, 2013).

Compensation Program (PSWCP) accepted Claimant's claim for injuries and subsequently awarded continuation of pay from March 6 to March 26, 2008 and temporary total disability benefits from March 27, 2008 to April 7, 2012. While Claimant's claim was initially only accepted as to his head, left leg and mouth, his back was ultimately accepted.

Claimant initially treated with Dr. Michael Magee at Capital Orthopaedic Specialists for complaints of low back pain and numbness to his toes. After an MRI showing a broad disc bulge in lower lumbar spine, Dr. Magee referred Claimant to a practice colleague, Dr. Leonid Selya, an orthopedic spinal surgeon, who saw Claimant initially on May 7, 2008. Dr. Selya diagnosed acute onset of a herniated disc causally related to the work injury, considered him totally disabled, and recommended physical therapy and epidural steroid injections for pain management.

Employer sent Claimant for three additional medical examinations (AME), the first with Dr. Mark Rosenthal on November 5, 2008, the second with Dr. Ross Myerson on June 8, 2009, and the third with Dr. Mohammad Zamani on June 27, 2011. After an examination and reviewing Claimant's MRI, Dr. Rosenthal diagnosed lumbar radiculopathy superimposed on pre-existing degenerative disease, with the radiculopathy related to the work injury. He also considered Claimant unable to continue working as a corrections officer, but he could work in a sedentary position.

Dr. Zamani determined after an examination and review of Claimant's medical records that Claimant had reached maximum medical improvement (MMI) from the March 5, 2008 work injury, had no radiculopathy, no sign of disc herniation, good mobility in his back, and could return to his pre-injury job without any restrictions. Following Dr. Zamani's issuance of two addendums confirming his initial report, ORM/PSWCP, on January 27, 2012, issued Claimant a notice of intent to terminate his benefits because of a change in his condition. Rather than file for reconsideration, Claimant filed for a formal hearing, which was held on October 2, 2012.

A CO was issued on February 28, 2013 where the presiding administrative law judge (ALJ) found that Claimant's current back and left leg conditions were medically causally related to the March 5, 2008 work accident and awarded him temporary total disability benefits from April 8, 2012 to the present and continuing, along with causally related medical benefits. Employer filed the instant timely appeal with Claimant filing in opposition.

On appeal, Employer asserts that the ALJ erred as a matter of law in allocating more weight to the treating physician's opinion when the statutory preference under the public sector Act was repealed. Employer also argues that the ALJ failed to adequately assess its evidence. In opposition, Claimant argues that the ALJ's general reference to the treating physician preference does not constitute reversible error and that Employer failed to meet its burden by a preponderance of the evidence that Claimant experienced a change in condition warranting termination of his benefits. We affirm.

ANALYSIS

The scope of review by the Compensation Review Board (CRB) is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.[2] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq*. ("Act"). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, the ALJ, in resolving the contested issue of medical causal relationship[3], stated:

> In cases involving competing medical opinions under the Act, the opinions of treating or examining physicians are generally preferred over those of physicians retained solely for purposes of litigation. *See Kralick v. District of Columbia Dep't of Employment Servs*., 842 A.2d 705 (D.C. 2004).[4]

As its first issue on appeal, Employer contends the ALJ's application of the treating physician preference in a public sector workers' compensation case constituted a misapplication of the law requiring that this matter be reversed. In support, Employer cites the CRB's decision in *Gaston-Jenkins v. D.C. Department of Motor Vehicles*.[5] While there is a clear statement in the cited case that application of the treating physician preference by the ALJ in that case constituted a misapplication of the law warranting remand, Employer has failed to take into account the evolution in the CRB's position first expressed in *Lyles*[6], but later disavowed and definitively stated in *Proctor*[7], and reaffirmed as settled in *Abbott*[8].

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[2] "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

[3] In introducing the issue of medical causal relationship, the ALJ placed the burden on the wrong party when she stated "the burden lies with Claimant…" to show the relationship between the disability and work injury. As this is a public sector case where the claim was accepted, benefits paid, and then terminated, the initial burden of production is placed upon the employer. As it is later determined that the award in Claimant's favor is supported by substantial evidence, the ALJ's misplacement of the burden is deemed harmless error.

[4] CO, p. 5.

[5] *Gaston-Jenkins v. D.C. Department of Motor Vehicles*, CRB No. 12-098, AHD No. PBL 11-049, DCP No. 761019000120060005 (August 8, 2012).

[6] *Lyles v. D.C. Department of Mental Health*, CRB No. 10-200, AHD No. PBL 09-070A (August 23, 2011).

[7] *Proctor v. D.C. Public Schools*, CRB No. 12-194, AHD No. PBL 06-105A, DCP No. 760002-0001-1999-0023 (May 15, 2013).

[8] *Abbott v. D.C. Public Schools*, CRB No. 12-153, AHD No. PBL 07-065B, DCP No. A984800-0667-0001 (June 4, 2013).

In *Proctor* as here, the issue was whether the ALJ had improperly applied a treating physician preference. In resolving the issue, the CRB stated:

> When the Council of the District of Columbia passed the Disability Compensation Amendment Act of 2010, effective September 24, 2010, it eliminated the previously enacted statutory provision that up until now we have been referring to as the "treating physician preference", codified at D.C. Code § 1-623.23 (a-2)(4). We have viewed the repeal of that provision as resulting in rendering application of the "treating physician preference" non-mandatory. Our logic was that given that assessing credibility remains an integral function of the fact finder, and given that a physician's relationship to a medical case generally and a given patient specifically are at least relevant to the quality of a medical opinion relating to that patient, ALJs are free to consider treating physician status as a factor in assessing competing medical opinion.
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> Specifically, we have held:
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> > Given that assessing credibility remains an integral function of the fact finder, and given that a physician's relationship to a medical case generally and a given patient specifically are at least relevant to the quality of a medical opinion relating to that patient, ALJs are free to consider treating physician status as a factor in assessing competing medical opinion.
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> See, *Lyles v. District of Columbia Department of Mental Health*, CRB No. 10-200, AHD No. PBL 09-070A (August 23, 2011).
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> The ALJ's well reasoned Compensation Order has given us the occasion to further consider the effect of the enactment, and then repeal, of the treating physician opinion provision.
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> As the ALJ points out, the District of Columbia Court of Appeals has sanctioned the application of a treating physician preference as it exists in public sector cases at least since *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004). While *Kralick* predates by several years the enactment of the now repealed and short-lived amendment under the public sector Act, and while we infer from the repeal of the amendment that the Council no longer wishes that terms of the now repealed provision be applied, review of the language that had been enacted and repealed suggests that our position in *Lyles* was somewhat off the mark.
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> * * * *

The language that was added to the public sector Act was a single sentence:

> In all medical opinions used under this section, the diagnosis or medical opinion of the employee's treating physician shall be accorded great weight over other opinions, *absent compelling reasons to the contrary*.

D.C. Code § 1-623.23 (a-2)(4), deleted by D.C. Law 18-223 (emphasis added).

On further consideration, we now conclude that the now-repealed sentence represented a modification of the existing *Kralick* standard. Under *Kralick* and the "treating physician preference", the fact finder was obligated to give an initial preference to treating physician opinion, and in the absence of persuasive reasons for accepting contrary opinion, treating physician opinion prevails. Thus, in order to withstand review on appeal, the fact finder had to identify the specific "persuasive reasons".

In contrast, the now-repealed provision required not only "persuasive reasons", it required "compelling reasons" for such rejection. We note, for example, that "persuasive authority" is "authority that carries some weight but is not binding on a court", while "compel" means "to cause or bring about by force or overwhelming pressure[…] to convince (a court) that there is only one possible resolution for a legal dispute." BLACK'S LAW DICTIONARY, 868, 276-277, *seriatum* (7th Ed., 1999).

Thus, while the addition of the now repealed language appears to have raised the bar on overcoming treating physician preference, its repeal, in our view, restores the law to its previous state.

Under *Kralick*, the ALJ is free to rely upon specific record based attributes of a treating physician's relationship to the case under consideration, such as the length of time and number of visits or examinations that the physician preformed, the extent of treatment rendered, the timing of the commencement of the physician's relationship with this case as compared with the timing of the relationship of a physician holding a conflicting opinion relationship to the case, or other record based factors that an ALJ may deem relevant to assessing whether a specific treating physician is in a better position to more accurately assess the true nature of the injury and its effect upon the patient. That is precisely what the ALJ did in this matter, and we detect no error. See, e.g., Compensation Order, page 6-7. Contrary to Petitioner's argument that "one can only speculate what the ALJ's decision would have been had the proper standard been applied"

> (Petitioner's memorandum, page 4), the ALJ gave specific and legitimate reasons for accepting the treating physician's opinion as opposed to that of the IME physician.
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> We recognize that this is a departure from our previous ruling in Lyles, which we now view to have inartfully interpreted the now-repealed amendment as a mere statutory enactment of the treating physician preference. We take this opportunity to specifically correct that error, and state that *Lyles* is no longer to be applied.

Proctor, supra, p. 3-5.[9]

In evaluating the conflicting medical opinions in the instant case on the issue of medical causal relationship, the ALJ concluded:

> Claimant has met his burden. As Dr. Selya had the opportunity to evaluate Claimant's condition over an extended period of time of four years, the greater weight is given to his assessment. The opinion of Dr. Rosenthal, who examined Claimant within eight months after his accident, bolsters Dr. Selya's findings. Claimant's back and his left leg conditions are related to the accidental injury that occurred on March 6, 2008 [sic] in the course of his employment.

The reasons why the ALJ has given the greater weight to the opinion of the treating physician is in accordance with the established precedent as described in *Kralick*. The ALJ has relied on Dr. Selya's extended treatment relationship with Claimant and his expressly stated opinion that Claimant's current condition was due to the work injury. In addition, the ALJ noted that Employer's first IME physician, Dr. Rosenthal, also expressed the opinion that Claimant's radiculopathy was related to the work injury. In contrast, the ALJ noted that Employer's other AME physicians, Drs. Myerson and Zamani, never gave a definitive opinion regarding medical causal relationship. No error is found because the ALJ's reasons for finding the treating physician's opinion more persuasive constitutes a proper application of the law as expressed in *Kralick*, and as further interpreted in *Proctor* and *Abbott*.[10]

On the issue of the nature and extent of Claimant's disability, Employer argues that the ALJ erred in not adequately assessing its evidence when she concluded that substantial evidence was not presented to support the termination of Claimant's benefits. Specifically, Employer

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[9] See *Abbott, supra*, p. 2-5.

[10] With regard to the CRB's treatment of the treating physician preference in public sector cases, *en banc* review, which is discretionary and which may be granted where two or more panels disagree concerning resolution of an issue, is not appropriate or warranted given the consistent application of *Kralick* by several review panels on which all members of the CRB have participated. As noted, the CRB's initial interpretation in *Lyles* has been disavowed, with a definitive statement in *Proctor*, which was affirmed in *Abbott*, that the ALJ is permitted to find the treating physician opinion persuasive without affording it a preference in accordance with *Kralick*.

argues that the ALJ rejected Dr. Zamani's opinion as not being based on facts and the statement that Dr. Zamani's conclusions were unfounded and based on untrue statements is not accurate. We disagree.

It is well-settled in this jurisdiction that once the Employer accepts an injured worker's claim as compensable and pays benefits, it bears the initial burden to produce current and probative evidence of a change in the injured worker's medical condition to warrant a modification or termination of the worker's disability benefits. If the Employer fails to meet this burden, the injured worker prevails outright. However, if the Employer meets it burden, then the burden shifts to the injured worker to produce evidence that the work injury continues to be disabling. If the injured worker meets this burden, the medical evidence is weighed with the injured worker bearing the burden of showing entitlement to the requested benefits by a preponderance of the evidence.[11]

In the case under review, as Employer accepted Claimant's claim for injuries and paid disability benefits pursuant to that claim, it would have been appropriate for the ALJ to place the initial burden upon Employer to show a change in condition, make a determination of whether that burden was met, and if met, shift the burden of production to Claimant, and if Claimant met his burden, then weigh the medical evidence. Rather than make these separate determinations, the ALJ proceeded with a weighing of the medical evidence as if each party had met its respective burden.

The ALJ conducted a thorough review of the competing medical evidence. In assessing Employer's medical evidence first, the ALJ discounted Dr. Zamani's June 27, 2011 opinion because it was based on the incorrect statement that Claimant had always been in good health. Dr. Zamani specifically stated that Claimant, among other things, had no history of cardiopulmonary or gastrointestinal problems. As the ALJ noted, Dr. Selya's medical history of Claimant recounted a history of "well-controlled hypertension" and treatment for "diverticulitis and GI bleeding."[12]

More significantly, Dr. Zamani made no mention of Claimant's January 2009 acute heart attack and that the commencement of physical therapy for his back pain had to be stopped.

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[11] See *Workcuff v. D.C. Housing Authority*, CRB No. 12-187(1), AHD No. PBL 12-022, DCP No. 761001-0001-200-20006 (August 30, 2013), quoting *D.C. Dept. of Mental Health v. DOES*, 15 A.3d 692, 698 (D.C. 20011):

> In workers' compensation cases where, as here, there is no presumption of compensability, [footnote omitted] the burden of proof "falls on the claimant to show by a preponderance of the evidence that his or her disability was caused by a work-related injury." *McCamey v. District of Columbia Dep't of Employment Servs*., 947 A.2d 1191, 1199 [footnote omitted] (D.C. 2008) (en banc) (citing *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Services*., 744 A.2d 992, 998 (D.C. 2000)).

[12] In weighing the medical evidence, the ALJ essentially made a determination that the PSWCP had not met its initial burden and thus there was no need to shift the burden to Claimant. However, as Claimant was found to prevail, the ALJ's application of the "substantial evidence" standard of proof to Claimant's evidence instead of the "preponderance of the evidence" standard is deemed harmless error.

Contrary to Employer's assertion, Claimant's health problems unrelated to the work injury did have an impact on the treatment for Claimant's back condition. This omission by Dr. Zamani is not insignificant and was properly interpreted by the ALJ. In taking exception to Dr. Zamani's other statements regarding the number of epidural injections, the absence of radiculopathy, the ALJ's finding fault with these assessments is also supported by the record.

In finding Dr. Selya's opinion assessing Claimant's current condition more persuasive, the ALJ reasoned:

> In support of his claim, Claimant relies upon the reports of this treating physician, Dr. Selya. On August 1, 2012, Dr. Selya opined, in a detailed report, that Claimant is totally disabled, and cannot return to his pre-injury employment because of the severity of pain, and the loss of lumbar motion due to the acute trauma to his lumbosacral [sic] discs (CE 7). There is no indication for spinal surgical follow-up unless Claimant decides to proceed with surgical correction of his discogenic low back pain, and, he should be managed by a chronic pain management specialist. Further, Dr. Selya recommended that Claimant undergo a functional evaluation, and might consider a work hardening program and vocational rehabilitation.
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> Dr. Zamani, after just one examination of Claimant, opined that he had reached maximum medical improvement, and that he was capable of performing his regular job. Dr. Selya opined that Claimant was totally disabled and was not capable of returning to his pre-injury employment. The greater weight is given to Dr. Selya's assessment because he had the opportunity to evaluate Claimant's condition over an extended period of time. Dr. Zamani's opinion is rejected because it is not based upon the facts regarding Claimant's health status. Thus, Employer has failed to present substantial recent medical evidence to support the termination of Claimant's disability benefits on March 22, 2012.[13]

The ALJ has properly weighed the competing medical evidence and provided reasons, supported by substantial evidence in the record, for discrediting the IME opinion of Dr. Zamani in favor of the treating physician, Dr. Selya. Employer's arguments amount to a request that we re-weigh the evidence in its favor, something we are not permitted to do. Also, while the ALJ did provide reasons for rejecting the IME opinion, there is no requirement for doing so when the treating physician opinion is deemed more persuasive.[14]

[13] CO, p. 6-7.

[14] See *Bennett v. WMATA*, CRB No. 09-057, AHD No. 08-327, OWC No. 635032 (April 13, 2010) (citing *Washington Hospital Center v. DOES*, 821 A.2d 898, 904 (D.C. 2003)).

CONCLUSION AND ORDER

The February 28, 2013 Compensation Order is supported by substantial evidence in the record and is in accordance with the law and therefore is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

November 12, 2013
DATE