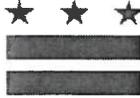


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

ODIE DONALD II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-098

**MICHAEL HAIRE,
Claimant/Respondent,**

v.

**FORT MYER CONSTRUCTION CORPORATION and
GALLAGHER BASSETT SERVICES,
Employer and Third-Party Administrator/Petitioners.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 NOV 21 PM 1 24

Appeal from a September 8, 2017 Compensation Order on Remand
By Administrative Law Judge Donna J. Henderson
AHD No. 15-099, OWC No. 720380

(Decided November 21, 2017)

Alan J. Lowe and Jillian M. Petrella for the Claimant
Gerard J. Emig and Nathan J. Postillion for the Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeal Judge*, JEFFREY P. RUSSELL and
HEATHER C. LESLIE, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND ORDER

This case is before the Compensation Review Board (“CRB”) on the request for review by the Employer, Fort Myer Construction Corporation, of the September 8, 2017 Compensation Order On Remand (“COR”) issued by an administrative law judge (“ALJ”) in the Administrative Hearings Division of the Department of Employment Services (“DOES”). In that decision, the ALJ, as she had in her earlier Compensation Order (“CO”), held that Claimant, Michael Haire, had proven entitlement to temporary total disability benefits from October 9, 2014 to the present and continuing. For the reasons that will be stated, the CRB affirms that decision.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Michael Haire (“Claimant”) was employed as a heavy equipment operator by Fort Myer Construction (“Employer”). On July 15, 2014, he was driving a backhoe for Employer when a Metro bus hit the backhoe, striking it from behind. Claimant was treated at the Fort Washington

Medical Center emergency room on the day of the accident. Claimant came under the care of Dr. Dennis A. Carlini on July 24, 2014. Dr. Carlini is Claimant's treating physician.

Employer accepted Claimant's claim and voluntarily paid him workers' compensation benefits until October 8, 2014. Employer ended benefits after it received a report from Dr. Robert Smith who examined Claimant for an independent medical examination ("IME"). Claimant filed for a formal hearing and an ALJ awarded continuing temporary total disability benefits from October 9, 2014 to the hearing date and continuing. *Haire v. Fort Myer Construction*, AHD No. 15-099, OWC No. 720380 (August 31, 2015).

Employer appealed the CO to the CRB asserting the ALJ erred by disregarding the IME's opinion and by basing her decision solely on Claimant's testimony. In opposition, Claimant argued that the ALJ's decision was supported by both the Claimant's testimony and the opinion of the treating physician, Dr. Carlini.¹

The CRB affirmed the award, finding that an ALJ could award benefits based solely on a claimant's testimony, without supporting medical documentation, under limited circumstances if the ALJ stated sufficient reasons for doing so. *Haire v. Fort Myer Construction Company*, CRB No. 15-161 (March 3, 2016) ("DO").

Employer appealed to the District of Columbia Court of Appeals ("DCCA"), which vacated and remanded the CRB's DO. The DCCA did not affirm the DO for two primary reasons: (1) the failure of the ALJ to state with certainty her holding regarding Dr. Carlini's opinions² and (2) the lack of clarity by the CRB in identifying the limited circumstances and sufficient reasons an award of disability benefits can be based solely on a claimant's testimony without supporting medical evidence.³ *Fort Myer Construction Co. v. DOES and Haire*, 16-AA-280 Mem. Op. & J. (D.C. May 25, 2017) ("MOJ").

¹ Dr. Carlini's medical records and his *de bene esse* deposition were admitted into evidence at the formal hearing,

² The DCCA held:

The ALJ never stated that she rejected Dr. Carlini's records and testimony entirely and would not consider them at all. The ALJ expressed concern about "contradictions between [Dr. Carlini's] testimony and [Mr. Haire's] testimony," specifically whether Dr. Carlini's insistence that Mr. Haire's radiculopathy occurred in his left arms compared with Mr. Haire's testimony that he experiences symptoms in both arms but primarily his right one and, relatedly, Dr. Carlini's admittedly "poor recordkeeping." Accordingly, the ALJ "reject[ed] any preference for and afford[ed] little weight" to his opinions. The ALJ subsequently found that employer's evidence "rebutted the opinion of Dr. Carlini." Thereafter, she did not refer to his records or testimony again in her decision-making and instead seemed to rely entirely on Mr. Haire's testimony.

³ The DCCA concluded:

In short, because it is not clear to us (1) whether the CRB properly looked to its prior decisions in *Fuentes* and *Hoff* to evaluate the ALJ's decision in this case, or (2) if it did, what constitutes "limited circumstances" and "sufficient reasons" in cases where the actual existence of an injury is disputed, remand is required.

In our Decision and Remand Order, the CRB noted that it shared the DCCA's uncertainty as to whether the ALJ only relied on Claimant's testimony or whether she relied on Claimant's testimony and Dr. Carlini's opinions in awarding benefits and remanded this matter to the ALJ for clarification.⁴ *Haire v. Fort Myer Construction Company*, CRB No. 15-161 (R) (August 18, 2017) ("DRO").

The CRB in the DRO also responded to the DCCA's remand instruction to revisit our earlier decisions and clarify when an ALJ may issue an award for temporary total or temporary partial disability benefits based solely on a claimant's testimony. We endorse and incorporate by reference the CRB's analysis of this issue as stated in the DRO. It is sufficient for the purposes of the present appeal to only state our conclusion:

Therefore, in response to the remand instructions, we find that in general, claims for disability benefits should be supported by medical evidence but the absence of such evidence will not automatically defeat a claim for disability benefits. An award for disability benefits may be entered in the absence of supporting medical evidence if an ALJ finds a claimant is credible and there is other evidence in the record that would permit the reasonable inference of disability.

Id. at 10.

The ALJ issued her COR on September 8, 2017. The ALJ again concluded that Claimant had proven by a preponderance of the evidence that he has been disabled from performing his pre-injury work as a heavy equipment operator and awarded Claimant temporary total disability benefits from October 9, 2014, to the present and continuing. *Haire v. Fort Myer Construction*, AHD No. 15-099, OWC No. 720380 (September 8, 2017).

Employer timely appealed the ALJ's COR. Both parties have filed memoranda in support of their respective positions.

On review, Employer argues that the ALJ's remand decision is logically inconsistent because the ALJ relied on Dr. Carlini's opinion despite rejecting any preference for Dr. Carlini's opinions. Employer asserts that since his testimony was not afforded the treating physician preference, his opinions "should not be afforded any weight and presumably disregarded." Therefore, without Dr. Carlini's evidence, the only evidence that supports the award is claimant's testimony. The ALJ's COR should be reversed, Employer states, because the ALJ did not identify any other evidence in the record besides Claimant's testimony that would permit the reasonable inference of disability.

⁴ The CRB held

While the ALJ rejected the opinion of the IME physician and was critical of the treating physician's opinion, the ALJ's decision is not clear as to the basis of her decision, that is, whether the ALJ based her decision solely on Claimant's testimony or whether the ALJ relied on both the Claimant's testimony and the discounted, but possibly not rejected, opinion of the treating physician, Dr. Carlini. The ALJ's most direct statement on her assessment of Dr. Carlini's opinions is ambiguous: "I reject and afford little weight to the opinions of Dr. Carlini." CO at 5.

Claimant in opposition argues that Employer misread the ALJ's COR and the ALJ correctly awarded benefits.

Claimant asserts:

ALJ Henderson's Compensation Order on Remand, from which this appeal is taken, clarifies beyond a doubt that her initial ruling was based on the medical evidence and Mr. Haire's testimony in conjunction. Because ALJ Henderson's decision was also based on the medical evidence from Dr. Carlini, she was not required to address guidance provided by the CRB in its Decision and Remand Order on when benefits can be awarded where no medical evidence supporting an award exists.

Opposition memorandum at 4.

ANALYSIS

As stated, the ALJ was instructed on remand to identify if her award of benefits was based only on Claimant's testimony or if she relied on Claimant's testimony and the medical opinion of Dr. Carlini as stated in his medical records and testimony. The parties interpret the ALJ's decision differently.

Claimant argues that the ALJ based her award on Claimant's testimony and Dr. Carlini's evidence. Employer argues, in effect, that since the ALJ denied Dr. Carlini the treating physician preference, the ALJ could not rely on his opinion, and therefore the ALJ based her award only on Claimant's testimony. Employer contends since the ALJ did not identify other evidence in the record that would permit the reasonable inference of disability, as required by the CRB's remand decision in this case, the ALJ's decision should be reversed.

We agree with Claimant's argument.

There is no dispute that Dr. Carlini is Claimant's treating physician. A treating physician is in a favored position with respect to the evidentiary weight afforded the physician's medical opinion:

[I]n workers' compensation cases, the medical opinion of a treating physician is generally entitled to greater weight than the opinions of doctors who have been retained to examine a claimant solely for the purpose of litigation." *Kralick v. DOES*, 842 A.2d 705, 711 (D.C. 2004) (collecting cases). While a hearing officer, as the trier of fact, is entitled to reject the testimony of a treating physician, he may do so only "if the examiner sets forth *specific and legitimate reasons for doing so*." *Mexicano v. DOES*, 806 A.2d 198, 205 (D.C. 2002) (emphasis added) (quoting *Olson v. DOES*, 736 A.2d 1032, 1041 (D.C. 1999).

The rationale for the treating-physician preference is twofold. In comparison with an assessment by a doctor who has been retained solely for purposes of litigation,

a treating physician's opinion is considered more reliable because the treating physician is "(1) less apt to be consciously or subconsciously biased by the litigation, and (2) more likely to be familiar with the patient's condition because he or she has typically spent a greater amount of time with the patient." *Kralick*, 842 A.2d at 712. At the core of this second prong is the common sense principle that a physician who has treated a patient over a substantial period of time is likely to have more insight into the patient's condition than a doctor who has had only one or two interactions with a patient and who has examined the patient in the context of possible or actual litigation.

Changekit v. DOES, 994 A.2d 380, 287-388 (D.C. 2010).

In the case now before the CRB, the ALJ did not give Dr. Carlini the treating physician preference:

In this case, I rejected any preference for, and afforded less weight than generally accorded to, the opinion of a treating physician because it was inconsistent with Claimant's testimony that his pain was mainly in his right arm, rather than his left arm, and because of Dr. Carlini's poor recordkeeping.

COR at 2.

We disagree with Employer that an ALJ must reject the opinion of a treating physician when that physician is not given the evidentiary preference. Rejecting the treating physician preference only means that the treating physician's opinion is not dispositive, but instead, that the treating physician's opinion stands on equal evidentiary footing as the other medical evidence. It does not mean, as suggested by Employer, that if not given preference, the treating physician's opinion is not afforded any weight and must be disregarded.

In her CO and COR, the ALJ was critical of Dr. Carlini's opinion but did not reject it. Instead, she weighed Dr. Carlini's opinion against IME Dr. Smith's opinion and concluded that Claimant met his burden of proving that he was disabled from performing his full duties with Dr. Carlini's opinion and Claimant's credible testimony:

Because Claimant described his symptoms and their location in his right arm very specifically, the undersigned accorded Claimant's testimony great weight. In addition, the undersigned observed Claimant answer questions on cross-examination directly, without evasiveness or hostility. HT at 43 -- 3. The undersigned found Claimant's description of his symptoms to be credible, and afforded no weight Dr. Smith's findings on exam or his testimony that Claimant complained of "diffuse" symptoms in his "whole arm." *Compare* HT 40 with CE 6, p. 29.

Although acknowledging "wear and tear changes" on the MRI, Dr. Smith characterized these changes as "benign." CE 6, p. 31. The undersigned reads Dr. Smith's opinion that the changes on the MRI were "benign" to address the issue of nature and extent, *i.e.* not causing any disability. Based upon his conclusion that

the MRI was benign and upon his physical exam, Dr. Smith "thought [Claimant] had recovered fully and could go back to work without restriction." HT at 30 -- 31. Dr. Smith addressed Claimant's ability to return to work in a particular job title, heavy equipment operator. However, Dr. Smith did not discuss Claimant's job duties as a heavy equipment operator for Employer with any specificity. He did not address non-driving duties such as climbing steps into the cab (HT at 24) and washing the vehicle. HT at 29 -- 30. Claimant's duties required "climb[ing] the machine and spray[ing] the top off' with a pressure washer "mostly every evening when we come in with a new piece of equipment." HT at 30 -- 31. Because there is no evidence that Dr. Smith had a job description or considered all the Claimant's job duties as a heavy equipment operator for Employer as well as the other reasons stated above, the undersigned affords Dr. Smith's opinion that Claimant could return to full duty without restriction no weight.

In addition to weighing Dr. Smith's opinion against Claimant's testimony, the undersigned weighed Dr. Smith's opinion weighed against that of Dr. Carlini. Dr. Smith examined Claimant once on October 8, 2014. EE 1. Dr. Carlini examined Claimant on at least six occasions before Employer refused to authorize additional treatment. CE 6, pp. 21 -- 22. Dr. Carlini's opinion was consistent with Claimant's credible testimony that he was incapable of performing his full duties as a heavy equipment operator for Employer. *The combination of Claimant's credible testimony and Dr. Carlini's opinion that Claimant is currently unable to return to his former employment, tipped the balance-scale in favor of Claimant. Thus, the undersigned concludes that Claimant proven, by a preponderance of the evidence, that he was disabled from performing his full duties as a heavy equipment operator. Golding-Alleyne at 1215-16.*

COR at 3-4 (Italics added).

The CRB's appellate review duty is not to determine whether there is contrary evidence in the record to reach a different conclusion than that reached by the ALJ. The CRB's responsibility is to judge whether the ALJ's factual findings and legal conclusions are supported by substantial evidence and in accordance with the law.

Here, the ALJ's decision that Claimant proved he was temporarily totally disabled is supported by substantial evidence in the record, Dr. Carlini's discounted, but not rejected medical opinions that Claimant could not work and Claimant's credible testimony.

For these reasons, the ALJ's September 9, 2017 COR is affirmed.

CONCLUSION AND ORDER

The ALJ's September 8, 2017 Compensation Order on Remand is supported by substantial evidence in the record and is in accordance with the law. That decision is AFFIRMED.