

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-007

MONIQUE L. EZE,
Claimant-Petitioner,

v.

CHILDREN'S NATIONAL MEDICAL CENTER and
YORK RISK SERVICES GROUP,
Employer/Third-Party Administrator-Respondent.

Appeal from a December 21, 2015 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 14-418, OWC No. 708459

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUN 8 PM 10 46

(Decided June 8, 2016)

Krista N. DeSmyter for Claimant
Sarah M. Burton for Employer

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and *Lawrence D. Tarr, Chief Administrative Appeals Judge.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a special police officer. On August 2, 2013, Claimant was struck by a portable x-ray machine causing injury to her neck, lower back and legs. She did not miss any work as a result of the incident. On August 8, 2013 Claimant had to chase after a parent and she felt sore afterwards. Claimant complained of soreness from the August 8, 2013 incident to her manager and was advised to go to Occupational Health (OHD). She was advised to stay off of work until August 31, 2013. Claimant sought treatment from Kaiser Permanente on August 16, 2013. She was examined by Dr. Maurice Wright who diagnosed her with lumbar radiculopathy and hamstring muscle strain in her right leg. Physical therapy was recommended and Claimant was advised to stay off work for three days and for various other days thereafter.

On August 27, 2013, Claimant was released for light duty work which would allow her to sit and stand freely. Between August 2013 and April 2014, Claimant was provided light duty work which involved checking in visitors that were not employed by Employer. Claimant complained of aching, burning and numbing in her right leg. Employer advised Claimant that she was able to stand and stretch as needed.

A lumbar MRI performed on September 5, 2013 was normal.

At the request of Employer, Claimant was examined on October 15, 2013 by Dr. Louis Levitt, an orthopedic surgeon, who opined that Claimant was able to work full duty without restrictions. Claimant was seen numerous times in Employer's Occupational Health Department (OHD) and provided various light duty restriction orders and off duty orders. On October 25, 2013, Claimant was advised by OHD that she was able to return to full duty as of October 25, 2013.

On October 28, 2013, Dr. Wright diagnosed Claimant with severe myofascial pain resulting from deep thigh muscle strain and recommended an MRI of the right thigh.

On October 30, 2013, Claimant reported that she fell at work and when she tried to get up she fell again and hit her head on a wall. She was seen in Employer's emergency room and a CT of her head was performed which was unremarkable. She was transferred to the Washington Hospital Center where another CT scan of her head was performed as well as MRI of the head and right femur. The discharge diagnosis was "fall with near syncope".

Claimant treated with Dr. Daniel Glor, a neurologist with Kaiser Permanente on November 5, 2013 and November 8, 2013. Dr. Glor opined that Claimant may have a sciatic nerve injury in her right thigh, and he recommended a nerve conduction study. Based on Claimant's continued complaints of leg instability and pain, Dr. Glor referred Claimant to pain management and advised Claimant to stay off work until December 1, 2013.

A dispute arose as to whether Claimant was entitled to various payments of temporary total disability (TTD), temporary partial disability (TPD) as well payment of medical benefits. A formal hearing was conducted on October 9, 2014. The issues presented to the ALJ were:

- (1) Is Claimant's current condition medically causally related to the work-related injuries occurring on August 2, 2013 and August 8, 2013?
- (2) What is the nature and extent of the disability, if any?
- (3) Is continued treatment for Claimant's current condition reasonable and necessary?

Eze v. Children's National Medical Center, AHD No. 14-415, OWC No. 708459 (December 21 2015) at 2.

The Compensation Order (CO) granted in part and denied in part Claimant's claims for relief. The ALJ concluded Claimant's current medical condition is medically causally related to her

work injuries but Claimant was able to return to full duty as of October 15, 2013 and was not entitled to disability benefits or additional medical treatment after October 15, 2013.

Claimant filed an Application for Review asserting the December 21, 2015 CO is not supported by substantial evidence. Employer filed a timely response arguing that the CO should be affirmed.

ISSUE ON APPEAL

Is the December 21, 2015 CO supported by substantial evidence and in accordance with the law?

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions 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 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.

Nature and Extent of Injury

Claimant argues in her Memorandum of Points and Authorities in Support of Claimant's Application for Review (Claimant's Brief) that the CO's denial of temporary total and temporary partial benefits after October 15, 2013 is error as a matter of law and is not based on substantial evidence because it rejected the opinion of the treating physician illicitly, because it ignored material evidence in the record, and because its findings regarding the nature and extent of disability are based on findings that are inconsistent with its determination that Claimant's current low back, right leg and neck conditions are causally related to her work injuries.

In support of her position, Claimant asserts:

According to the ALJ, even though she had determined that Ms. Eze's current lower back, neck, and right leg conditions are medically causally related to her work injuries, she relied on the opinion of Dr. Levitt, which was parroted by Dr. Riso, that she could return to work full duty from "soft tissue injuries," a diagnosis only Dr. Levitt made, not the treating physicians. According to the ALJ, the weight of the evidence favors the Employer and Ms. Eze was no longer temporarily totally disabled after October 15, 2013. *Id.* Her conclusion is faulty in that there is nothing in the Act, or the case law which states that a claimant

must have objective evidence of an injury in order to qualify for temporary total disability benefits.

Further, the MRI of the right thigh demonstrated that Ms. Eze suffers gluteus medius tendinopathy. CE 1 at 49. Dr. Wright explained that in addition to Ms. Eze's sciatica, that she had overstretched that muscle. *Id.* The Compensation Order's ignoring of this material fact demonstrating an objective basis for her ongoing complaints requires remand. An administrative decision may not be affirmed when it "ignores material evidence in the record," *Darden v. D.C. Dep't of Empl. Servs.*, 911 A.2d 410, 416 (D.C. 2006) or fails to make "findings with respect to a potentially material issue[", *Smith v. D.C. Dep't of Human Rights*, 77 A.3d 980, 994 (D.C. 2013). The Compensation Order's failure to analyze Ms. Eze's testimony about her ability to work during the claimed period, evidence material to the nature and extent of disability, requires reversal.

Claimant's Brief at 8. 9.

Employer's opposition states the ALJ properly concluded the Claimant was not entitled to ongoing disability benefits and the CO should be affirmed. Employer asserts that although Claimant's Brief indicates she is appealing the denial of TPD benefits she failed to articulate in her argument how the ALJ erred in denying temporary partial disability and therefore she has waived this argument.

We note Employer does not address Claimant's assertion that the ALJ ignored material evidence. Employer argues instead, as it did at the formal hearing, that Claimant had a subsequent intervening incident on October 30, 2013 that Employer asserts was idiopathic which severed the causal relationship of Claimant's ongoing complaints.

We agree with Claimant that there is no mention of Claimant's right thigh MRI in the CO. Review of the medical evidence of record reveals Claimant complained of right thigh pain on September 24, 2013 and that on October 9, 2013, Dr. Wright advised Claimant to schedule an MRI of the thigh after reporting:

. . . posterior mid-thigh spasm/tightness which radiates up to upper gluteal area; she will at times have sensation of numbness tingling extending down into right leg below the knee she has the sensation that her right leg is going to give out.

CE 1 at 92.

On October 28, 2013, Dr. Wright reported:

Hx; pt had been improving except for continued focal right upper posterior thigh pain which was worsened after sitting or prolonged standing indicated that Claimant was reportedly ordered back to work on 10-25-13 in advance of [MRI] evaluation of thigh; she was also told to wear work vest despite being told that she

needed [PT] of neck and lower back; she comes to me in tears today because of worsened right posterior thigh pain that radiates down to foot.

M/s ros: has worsened deep posterior thigh to lower right thigh pain which is constant and limits her ability to bear weight; she feels as if leg is completely asleep and hurts on base of foot when she puts weight on it.

CE 1 at 82.

The record contains a list for future appointments from Kaiser that indicates Claimant was scheduled for two MRIs on November 22, 2013, of the right thigh and of the abdomen. CE 1 at 53, 87, 89. We note, however, that the medical record does not contain the right thigh MRI results as an exhibit. However CE 1, the Kaiser Permanent records contains a letter which Dr. Wright sent to Claimant on November 24, 2013 which states:

Your right thigh [MRI] showed that you have “gluteus medius” tendinopathy. So in addition to your sciatica, you also had overstretched this muscle. If you go to you tube and put in gluteus medius pain,” you will find a lot of videos on home exercises you can do [to] help with this. So you may want to get the injection first and then do some time [sic] doing these and the physical therapy exercise.

CE 1 at 49.

This letter contradicts the ALJ’s determination:

In reviewing the medical records, I find that Claimant’s treating physicians are treating her based upon her subjective complaints. Claimant’s treating physician’s medical records do not present any logical objective evidence that explains why Claimant is experiencing increased numbness and pain nine months, after her work related injury that only consisted of soft tissue injuries. Further, Claimant’s physician have not determined a root cause, nor is any plan presented to resolve Claimant’s condition in her right thigh, lower back, and neck, that should have resolved according to Dr. Levitt and Dr. Riso.

CO at 10.

Inasmuch as neither Dr. Levitt nor Dr. Riso were provided the right thigh MRI results, we agree with Claimant that the CO’s “ignoring of this material fact demonstrating an objective basis for her ongoing complaints requires remand”.

In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 *et seq.*, an agency’s decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

We cannot discern what the ALJ's thought processes might have been, had the thigh MRI been made part of the record or if the ALJ reviewed Dr. Wright's letter of November 24, 2013. And, as we often point out, we are not empowered to fill in the gaps in fact finding in a compensation order that comes before us on appeal. *See King v. DOES*, 742 A.2d 460 (D.C. 1999).

Given the statements of Kaiser neurologist, Dr. Glor that "because of Claimant's persistent leg pain and also her post-concussion symptoms I wrote today for the patient to stay off work until at least 12-1-13", CE 1 at 66, we cannot conclude that the ALJ's reliance on the October 15, 2013 report of Dr. Levitt over the treating physician's opinion to be supported by substantial evidence.

Necessity and Reasonableness of Additional Medical Treatment

We must agree with Claimant's position on this issue also. Claimant asserts:

...[Dr. Riso's] opinion, however, is invalid in that it does not comport with the D.C. Regulation applying to utilization review. DCMR [§] 7- 232.3 requires the utilization review to accept the diagnoses and to review all medical records. It is clear the reviewer did not accept the diagnoses of Dr. Wright, Dr. Glor or Dr. Ruenji. Instead, he ignored their impressions and relied on the faulty opinion of Dr. Levitt's one IME evaluation completed in October, 2013. It is clear that the reviewer did not review all pertinent medical records because his analysis contains the same fatal flaw as Dr. Levitt's he makes no mention and renders no analysis whatsoever of the objective findings on the right thigh MRI. *See* EE 2. Dr. Riso's review is factually incorrect as it pertains to the testing done. As the medical records at Kaiser indicate, a nerve conduction study was completed, but an EMG was not. CE 1 at 65. Dr. Glor reported that the results of the nerve conduction study would not rule out irritation of the sciatic nerves. *Id.* The reviewer did not provide medical rationale for why multiple doctor's analysis of Ms. Eze's condition warranted the injections.

The Compensation Order relies on what it determines to be a lack of objective medical evidence to deny Ms. Eze's entitlement to reasonable and necessary treatment. As stated above, this is factually incorrect and the right thigh MRI is an objective test that was abnormal. Even without the thigh MRI, nothing in the Act or case law state that subjective complaints alone preclude an injured worker from access to treatment or further consultation from a medical care provider.

Claimant's Brief at 11. (emphasis in original).

CONCLUSION AND ORDER

We find the CO's conclusion that Claimant's current condition is medically causally related to her August 2, 2013 and August 8, 2013 work injuries has not been challenged on appeal and is accordingly AFFIRMED. We find the CO's conclusion that Claimant's disability as a result of her work related injuries ended on October 15, 2013, the date of the IME, is not supported by

substantial evidence and is VACATED. We further find the ALJ's conclusion that medical treatment is no longer reasonable and necessary is not in accordance with the law and is VACATED. The matter is REMANDED for further fact finding and analysis consistent with this decision.

So ordered.