GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB (Dir. Dkt.) No. 03-144

CARLOS MOSLEY,

Claimant–Petitioner

v.

RADIO SHACK CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA/AHD No. 03-320, OWC No. 576379

Allen S. Toppelberg, Esquire, for the Petitioner

Curtis B. Hane, Esquire, for the Respondent

Before E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1]Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on November 12, 2003, the Administrative Law Judge (ALJ) granted Respondent's request to terminate Petitioner's ongoing temporary total disability benefits as of September 24, 2002, and denied Petitioner's claim for those benefits. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ "erred by failing to properly consider all the medical evidence on file", and that the ALJ's "efforts to discredit Dr. Henderson [Petitioner's chiropractor] were both unfounded and improper". "Claimant's Application for Review" (AFR), page 1. Respondent opposes the appeal, and contends that the decision of the ALJ is supported by substantial evidence in the nature of independent medical evaluations (IMEs), that the ALJ was correct when she found the record lacking documentary evidence that Petitioner's chiropractor or orthopaedic surgeon had authored written disability slips, and that her decision to credit the opinions of Petitioner's treating neurologist and neuro-psychologist, and the opinions of the IME orthopaedic surgeons, in preference to that of Petitioner's chiropractor is in accordance with the law. "Employer/Carrier's Memorandum of Points and Authorities in Opposition to Claimant's Application for Review" (Opposition), *passim*.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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 Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner first posits error on the ALJ's part, under the rubric that she failed to "properly consider all the medical evidence on file". Review of the various assertions following this contention reveals that Petitioner's complaint centers on the

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responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

ALJ having declined to accept Petitioner's point of view concerning the relative merits of conflicting medical opinion. Petitioner asserts, in essence, that two reports from the chiropractor, one of which stated that as of March 26, 2003[2], the chiropractor "placed" Petitioner on "full disability", and the other of which stated that as of June 25, 2003, Petitioner had yet to "fully recover" from his "neck injuries, proved beyond refutation Petitioner's entitlement to a determination that he was "totally disabled from June 2003 to the date of the hearing and continuing". AFR, unnumbered page 3.

It is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See, Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician's reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing and specialization as reasons to support acceptance of IME opinion instead of treating physician opinion. *Canlas v. District of Columbia Department of Employment Services*, 723 A.2d 1210 (D.C. App. 1999); *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

Indeed, the "mechanical application" of such a preference has been questioned by the Court of Appeals. See, *Lincoln Hockey, LLC v. District of Columbia Department of Employment Services and Jeffrey Brown, Intervenor*, 832 A.2d 913 (D.C. 2003), at 919 - 922.

In that the Act includes "chiropractor" within the definition of "physician", the application of the treating physician preference to chiropractic opinion is appropriate. See, D.C. Code § 32-1501 (17A). Nonetheless, where the evidence demonstrates the relevant professional credentials of a medical doctor specializing in orthopaedics, or in neurology (that is, the fact that these physicians attended medical school, and underwent post-medical school training in their respective medical specialties), a legitimate basis is presented upon which to resolve medical opinion conflicts in favor of the medical doctor or doctors, and that is, in part, what the ALJ did

[2] In its Opposition, Respondent asserts that the exhibits submitted at the formal hearing by Petitioner did not contain the March 26, 2003 statement of "full disability", because only a partial copy of that report was admitted. Opposition, page 5. However, review of the record demonstrates that CE 1, although described in the "Claimant's List of Exhibits" as being "Medical Report [sic] from Dr. Alison Henderson from 12-4-02 to 3-26-03", that exhibit in actuality is a complete copy of the March 26, 2003 report, and contains duplicate pages for pages two and three thereof. It does not contain any report dated December 4, 2002, or any other date. From this, it appears that, in collating the exhibits for the formal hearing, Petitioner's counsel included extra copies of certain pages of certain exhibits in the package submitted to the ALJ, omitting other pages entirely, did likewise for the package provided to Respondent at the hearing, and that neither of the packages match the other. While this might ordinarily require that the matter be remanded to AHD for the purpose of reconstituting the record accurately, Petitioner points to no record evidence in its AFR that is not contained in the record before the ALJ and before us, which evidence Petitioner suggests is relevant to the alleged errors on the part of the ALJ. In other words, all record exhibits referred to in the AFR were before the ALJ and have been transmitted to us.

in this case. Indeed, one of the physicians relied upon by the ALJ was in fact also a treating physician, who, contrary to the assertion of Petitioner, did frequently examine and evaluate Petitioner's physical injuries as well as manage the psychological injury. See, CE 5, *passim*.

We detect no error in the ALJ's rejection of the chiropractor's opinion and acceptance of the IME and treating neuro-psychologist's opinions referred to in the Compensation Order, and her determination based thereon that Petitioner could return to work in his pre-injury employment, as noted by the IME physician in the report of June 10, 2003 (EE 10), and by the treating neurologist and neuro-psychologist in the report of September 24, 2002 (CE 5).

Similarly, we find that the ALJ had adequate justification for determining that Petitioner's testimony lacked credibility, given his contradictory testimony concerning his post-termination letter from Respondent as well as his inconsistent testimony concerning the length of time that he returned to alternative employment prior to the time that he sought the benefits under consideration in the formal hearing. Further, we find adequate justification for the ALJ's determining that, as discussed above, Dr. Henderson's opinions were subject to question. We find no error in the ALJ expressing skepticism at the chiropractor's basing an opinion that Petitioner's condition was unlikely to improve "given his age", considering as the ALJ did that the Petitioner was only 30 years old, or pointing out that the record contains no specific documentation of an opinion on Dr. Henderson's part concerning the capacity or lack thereof to perform the pre-injury job during the relevant period.

Upon a thorough review of the record, we detect no error in the ALJ's findings of fact or application of those facts to the law.

As a final matter, we note with dismay the tenor and tone of the AFR. While zealous advocacy on behalf of one's client is to be admired and encouraged, the AFR contains numerous hyperbolic, vitriolic and professionally demeaning characterizations of the ALJ and her decision, none of which do we find to be supportable upon review of the Compensation Order or the record, and some of which are inexplicably factually inaccurate, such as the assertion by Petitioner's counsel that "there was not testimony or evidence of any kind offered to indicate that Dr. Henderson [the chiropractor] and the claimant were 'friends'", a finding made by the ALJ which counsel proceeded to characterize as "nothing short of slanderous". AFR, unnumbered page 4. This assertion is patently wrong, given the testimony of Petitioner, found at HT 36, where in answer to the question "Are you a friend of Dr. Henderson?," Petitioner answered "I am". Characterizing the ALJ's cogent analysis of the evidence as appearing to "go out of her way" or to go to "great lengths" and "in haste" to discredit Dr. Henderson is beyond the bounds of advocacy, and borders on disrespect. Counsel's phraseology implied, intentionally or otherwise, that the ALJ had acted with some intentional malice or ill motive, an implication that is utterly unsupported by the record. We hope that this is an isolated instance of counsel overstepping propriety.[3]

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[3] The District of Columbia Bar Association has promulgated "Voluntary Standards for Civility" in conjunction with (but not as part of) the Code of Professional Conduct. Among those standards is the following:

Lawyers' Duties to the Court

CONCLUSION

The Compensation Order of is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of November 12, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY. P. RUSSELL
Administrative Appeals Judge

August 3, 2005
DATE

24. We recognize that the public's perception of our system of justice is influenced by the relationship between lawyers and judges, and that judges perform a symbolic role. At the same time, lawyers have the right and, at times, the duty to be critical of judges and their rulings. Thus, in all communications with the court, we will speak and write civilly. In expressing criticism of the court, we shall seek to use language that minimizes disrespect for courts and the system of justice.