GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-095

MULU MESSLE
Claimant-Petitioner,

v.

APOLLINE UNIT OWNERS ASSOCIATION and
BERKSHIRE HATHAWAY GUARD INSURANCE CO.
Employer/Carrier-Respondent.

Appeal from a June 22, 2016 Compensation Order on Remand
by Administrative Law Judge Douglas A. Seymour
AHD No. 16-116 OWC No. 733857

(Decided November 30, 2016)

David M. Snyder for Claimant
Sarah M. Burton for Employer

Before GENNET PURCELL, HEATHER C. LESLIE, and LINDA F. JORY, *Administrative Appeals Judges*

GENNET PURCELL for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Mulu Messle ("Claimant"), 42 years old, was a receptionist for Apolline Unit Owners ("Employer") where her job duties were to give out unit keys, and to receive letters and packages.

On August 17, 2015, Claimant alleged she suffered injuries to her neck, low back and right wrist after picking up a package which shifted weight in her hands and caused her to lose her balance and fall. Claimant was seen at George Washington University Hospital ("GWUH") where she was examined, discharged and diagnosed with a back sprain/strain and with hypoglycemia.

On August 18, 2015, Claimant returned to GWUH with a history of having suffered a fall at home, neck pain, headache, diffuse back pain, and right wrist pain. Claimant was diagnosed with a cervical right wrist and back sprains, a lumbar strain, and tension headaches.

On August 28, 2015 Claimant began conservative treatment with Dr. Joel A. Fechter. On December 15, 2015, Dr. Harvey Mininberg, of the same practice, released Claimant to light duty work with no lifting over 20 pounds and recommended MRIs of the cervical and lumbar spine.

On February 29, 2016, Dr. Jason Garber, at Employer's request, prepared a Utilization Review Report ("UR Report") concluding that the recommended cervical and lumbar MRI's were not medically necessary.

At Employer's request, on March 17, 2016, Claimant underwent an Independent Medical Examination ("IME") by Dr. Gary W. London. Dr. London opined that Claimant had fallen on August 17, 2015, unrelated to her job duties; had sustained soft tissue cervical and lumbar strain injuries which should have resolved within 8 to 16 weeks; had normal neurological and musculoskeletal examination; had reached maximum medical improvement, had no permanent injuries and could return to her pre-injury duties with a 50 pound lifting restriction.

Claimant was terminated by Employer on September 24, 2015.

A full evidentiary hearing occurred on April 7, 2016. Claimant sought an award of temporary total disability ("TTD") benefits from August 18, 2015 to the present and continuing, interest, causally related medical expenses and authorization for a cervical and lumbar MRI. The issues to be adjudicated were whether Claimant sustained a compensable injury, whether said injury arose out of and in the course of his employment, the nature and extent of Claimant's disability, if any, and whether the recommended MRI's were medically reasonable and necessary.

A Compensation Order ("CO") was issued on July 22, 2016 which denied Claimant's request for authorization for the MRIs, and granted Claimant's claim for the payment of casually related medical expenses, TTD benefits from August 18, 2015 to December 7, 2015, and interest on accrued benefits.

Claimant timely appealed the decision. Claimant argues that the CO's finding that Claimant's work injury was resolved as of December 7, 2015, is not supported by substantial evidence, and the CO's finding that Claimant is not entitled to the cervical and lumbar MRI is arbitrary and capricious.

Employer opposed the appeal by filing Employer/Carrier's Opposition to Claimant's Application for Review ("Employer's Brief"). In its opposition, Employer asserted the CO is supported by substantial evidence and law and should be affirmed.

ANALYSIS[1]

Claimant first argues the ALJ erred when determining that Claimant was not credible as it pertains to her testimony regarding the weight of the box which caused her to fall. Further, that this credibility finding is inconsistent with the record evidence that Claimant was injured by a large, heavy box and the ALJ's conclusion that Claimant established, without the benefit of the presumption of compensability, that she sustained an injury which arose out of and in the course of her employment. Claimant argues that the CO's findings of credibility should be rejected because they are based on "a subjective analysis of the weight of a box that the ALJ had no way of determining." Claimant's Brief at 9.

Employer asserts however, and correctly, that credibility findings are within the sound discretion of the ALJ and pursuant to the governing law in this jurisdiction, such findings are "entitled to great deference." *See Ogden v. Bon Appetit Mang. Co.*, CRB No. 09-031 (D.C. 2009). Indeed, an ALJ's decisions regarding credibility findings deserve special weight as the ALJ, as the sole fact-finder, has the unique opportunity to observe the appearance and demeanor of the witness. *See WMATA v. DOES*, 683 A.2d 470, 477 (D.C. 1996).

When weighing the evidence to conclude Claimant did sustain an accidental injury, the ALJ stated:

> With the presumption having fallen from the case, the burden of proof now rests with the claimant. Having had the opportunity to listen to claimants' testimony, and to observe both her demeanor and appearance at the formal hearing, I found Claimant a credible witness with respect to her testimony concerning her fall on August 17, 2015.
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> Claimant credibly testified that the box she had lifted up off the counter then shifted, causing her to fall. Claimant's testimony is corroborated by the video which shows that as the box begins to slip out of Claimant's hands, she begins to fall, striking the chair and eventually coming to rest in a seated position. HT 27-30. CE 9 [1]
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> In addition, Dr. Fechter, Claimant's treating physician, having viewed the video, opined during his deposition that Claimant injured herself while lifting and moving the box at work. Accordingly, I find persuasive Claimant's testimony, the video of the incident, and Dr. Fechter's opinion, that Claimant sustained an injury

[1] 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.

by accident which arose out of and in the course of employment. CE 8 at 37-41, CE 9.

[1] However, I did not find Claimant's testimony credible that the box in question weighed 49 to 50 pounds. The video shows claimant turning the box on its sides, while the box is still up on the counter, several times with little difficulty. The video also shows Claimant, after she had removed the box from the counter, holding the box uprights with only her right hand while steadying it with her left hand, for an extended period of time as she talks with her supervisor. In addition, later in the video, Claimant's supervisor can be seen moving the box, on more than one occasion, by using just on hand placed on the top of the box.

CO at 6.

With regard to the ALJ's discretion to make findings on the credibility of a claimant, the District of Columbia Court of Appeals ("DCCA") has held that in determining whether a claimant has met his or her burden, "a[n ALJ] must weigh and consider the evidence as well as make credibility determinations. In this regard, the [ALJ] may of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence." *McCamey v. DOES*, 947 A.2d 1191, 1214 (D.C. 2008).

Claimant also argues that the ALJ failed to discuss how her testimony was in conflict with the record evidence in rendering his credibility findings regarding the weight of the box. Citing to our decision in *Grant-Hopkins v. Alion Science and Technology,* CRB No. 14-027 (June 26, 2014), Claimant asserts "there must be some detail and specificity in the Compensation Order to permit a determination as to whether that credibility assessment is arbitrary and capricious." Claimant Brief at 9-10.

Albeit in a footnote, the ALJ commented that his credibility determination was based upon his review of the video evidence showing Claimant's actions and movements at the time of the injury, *i.e.* moving/flipping the box about with ease and the inconsistency between these images and the testimony regarding the weight of the box Claimant offered. The ALJ found, instead, that although Claimant credibly testified that the box she lifted up off the counter shifted and caused her to fall; testimony which was confirmed by the video, her specific testimony regarding the weight of that same box was not supported by the video evidence, and as such, not credible. Our review of the CO indicates that the ALJ sufficiently met this specificity standard; we find no error here.

On the factual question of the box's approximate weight, we must credit the finding of the ALJ who heard Claimant's testimony, saw the video evidence, and saw Claimant testify in the case. The ALJ was in the best position to make the credibility determination and the factual findings at issue. *See Georgetown Univ. v. DOES*, 862 A.2d 387, 393 (D.C. 2004) (*"Georgetown Univ"*). The ALJ thus concluded that the Claimant's characterization of the box as "heavy" was subjective and not supported by substantial evidence.

Just as the DCCA is required to defer to the ALJ's factual finding, so must the CRB. *See Wash. Metro. Area Transit Auth., v. DOES*, 926 A.2d 140, 147 (D.C. 2007) ("The [CRB] may not consider the evidence de novo and make factual findings different from those of the [ALJ]." (internal quotation marks and citation omitted)). We do not find the ALJ's credibility determination to be inconsistent with the Act or the governing law. We, the CRB, are bound by

the ALJ's finding, even if we might have reached a different result based on an independent review of the record." *Georgetown Univ.,* 862 A.2d at 393 (citation omitted).

Claimant next argues that the record does not support the ALJ's rejection of Claimant's treating physician, Dr. Fechter's medical opinion, noting Claimant continues to suffer low back problems and in doing so, arbitrarily denied Claimant's request for authorization for MRIs.

With regard to the CO's rejection of Dr. Fechter's opinion, upon noting the prevailing treating physician preference in this jurisdiction, and acknowledging that any decision to credit another physician must be explained, *See Velasquez v. DOES*, 723 A.2d 401, 405 (D.C. 1999) ("*Velasquez*"), *citing Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999), the ALJ concluded:

> Claimant relies on her testimony, and on the opinions of her treating physicians, Drs. Fechter and Mininberg. As an initial matter, I did not find credible Claimant's subjective complaints of pain because I found Claimant's testimony inconsistent and contradictory.
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> Dr. Fechter kept claimant totally off work from August 28, 2015 until December 15, 2015, when he released her to light duty. CE 1, 8, 9. However Dr. Fechter opined during his deposition that Claimant had a normal neurological examination and that his range of motion testing was subjective in nature. Moreover, a review of Dr. Fechter's office reports from August 28, 2015 through March 4, 2016, reflects consistent findings of normal upper and lower neurologic examinations. CE 8 at 227, 229, 233. CE 1.
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> Therefore, I do not find persuasive, and I reject, Dr. Fechter's disability opinions because they are based, other than his findings of spasms, on Claimant's subjective complaints, which I found not credible.

CO at 8.

Having already discussed our determination regarding the authority of the ALJ to make credibility findings in this matter, we need not revisit it here and reassert our unwillingness to disturb the ALJ's credibility findings. Moreover, in accordance with *Velasquez, supra*, the ALJ also listed Claimant's consistent normal upper and lower neurological examinations as additional reasons, beyond the incredible testimony of the Claimant, why the treating physician opinion was rejected.

With regard to Claimant's assertion that the CO failed to follow the analysis required by the CRB in resolving the issue of reasonableness and necessity of the requested MRIs, we agree. Where an employee suffers a workplace injury that is medically causally related to a disability that requires treatment, the distinct question of whether a proposed medical treatment is

reasonable and necessary often arises. Utilization review is a process for addressing that question, and in this context it "means the evaluation of the necessity, character, and sufficiency of both the level and quality of medically related services provided an injured employee based upon medically related standards." D.C. Code § 32-1501 (18A) (2001); *see* e.g., *Hisler v. DOES*, 950 A.2d 738, 746 (D.C. 2008).

D.C. Code § 32-1507(b)(6) in pertinent part provides:

> (6) Any medical care or service furnished or scheduled to be furnished under this chapter shall be subject to utilization review. Utilization review may be accomplished prospectively, concurrently, or retrospectively.

We have interpreted the UR statute as requiring that the ALJ must evaluate the opinion of the medical provider and the UR Report on an equal footing and must articulate the reasons for choosing one opinion over the other. Notwithstanding the conclusions that Claimant sustained a compensable injury on August 17, 2015, and proved by a preponderance of the evidence, that she was temporarily and totally disabled from August 18, 2015 to December 7, 2015, the CO *sub judice* omitted an analysis of the UR Report submitted by Employer.

As we have explained:

> [The] framework [requiring an explanation for rejecting a UR Report] set forth by the court in *Sibley* [*Mem. Hosp. v. DOES*, 711 A.2d 105, 107 (D.C. 1998),] is substantially identical to that espoused by the court in the treating physician cases, [see, e.g., *Short v. DOES*, 723 A.2d 845 (D.C. 1998), and we view it as the appropriate manner to treat UR opinion under the Act. While it can be argued that the Act could be viewed so as to grant an even higher preference to UR opinion over treating physician opinion, we note that the processes envisioned by the statutory UR provisions call for consideration of treating physician opinion and UR opinion, without specifying any preference for one or the other by virtue of its being treating physician opinion on the one hand, and UR opinion on the other. Accordingly, we view the statute as placing an obligation upon the ALJ to weigh the competing opinions based upon the record as a whole, and to explain why the ALJ chose one opinion and not the other, but does not require that either opinion be given an initial preference.

Haregewoin v. Loews Washington Hotel and Liberty Mutual Insurance Co., CRB No. 08-068, (February. 19, 2008) at 6.

We recognize the ALJ's crediting of Dr. London's objectively-based opinion regarding the extent and duration of Claimant's injury and do not take issue with the ALJ's findings expressly rejecting Dr. Fechter's opinion and specifically limiting the date span of the award of TTD in this matter. We do not, as Claimant argues, determine the date span of the TTD award to be arbitrary or capricious; the ALJ concluded Dr. London's medical opinion was persuasive and credible on this specific issue. As previously stated, the ALJ's credibility findings are sound and supported by substantial evidence in the record. The ALJ's omission of an analysis of the UR

Report however was in error. We remand the CO for this analysis pursuant to the established framework outlined above.

CONCLUSION AND ORDER

The conclusion that Claimant has proven by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment on August 17, 2015, is AFFIRMED. The conclusion that Claimant proved by a preponderance of the evidence, that she was temporarily and totally disabled from August 18, 2015 to December 7, 2015, is AFFIRMED. The conclusion that the Claimant's request for authorization for the MRIs is denied is VACATED and REMANDED for reconsideration upon an analysis of the Utilization Review report as mandated by statute.

So ordered.