

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-087

**NUBIA MONROY,
Claimant-Petitioner,**

v.

**NFCGC CAFÉ, LLC and
TRAVELERS INSURANCE COMPANY,
Employer/Carrier-Respondent.**

Appeal from an August 1, 2017 Compensation Order on Remand
by Administrative Law Judge Nata K. Brown
AHD No. 16-265 OWC No. 732307

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 NOV 2 PM 12 02

(Decided November 2, 2017)

David M. Snyder for Claimant
Scott E. Snyder for Employer

Before GENNET PURCELL, JEFFERY P. RUSSELL and LINDA F. JORY, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Nubia Monroy (“Claimant”) has worked for NFCGC Café, LLC (“Employer”) as a barista since January of 2011. On August 5, 2015, Claimant was injured when she slipped on a wet floor while carrying two trays, weighing about 2 pounds each. Claimant sought emergency care at Inova Alexandria Hospital where Dr. Sora Chung performed a physical exam, took x-rays and diagnosed Claimant with contusions of her left index finger, her left elbow and her back, with an unspecified laterality.

On August 12, 2015, Claimant returned to the hospital with complaints of back pain and was diagnosed with right-sided low back pain without sciatica and a left elbow contusion.

On August 19, 2015, Claimant was seen by Dr. Nadim Hallal who diagnosed an elbow contusion and a lumbar strain. He opined that the elbow contusion did not need any further treatment; however he referred her to spine specialist, Dr. Robert Nirschl.

On September 17, 2015, after an examination, Dr. Nirschl opined that Claimant had pre-existing osteoarthritis of the lumbar spine, evidence of lateral tennis elbow with a small bony spur, bursitis at the tip of her left elbow olecranon, and a lumbar muscle strain.

On October 8, 2015, Dr. Nirschl opined that the bursitis of Claimant's left elbow had resolved.

Claimant was next referred to Dr. Alexander S. Mark, a radiologist, for magnetic resonance imaging ("MRI") of her lumbar spine. Dr. Mark opined that although the alignment was normal the spinal canal was congenitally large, and that the conus and vertebral bodies were normal. His overall impression was that the multi-level disc bulges apparent in the MRI were without spinal stenosis or extruded fragment.

Claimant was referred to Dr. Abraham Kader, a neurosurgeon, for an initial neurosurgical evaluation of her back condition. On December 8, 2015, Dr. Kader reviewed the MRI of Claimant's lumbar spine and gave Claimant transforaminal injections on the right, at the level of L5-S1. Dr. Kader gave Claimant a work excuse form for the duration of four weeks, as she was unable to work due to pain. Claimant was also referred by Dr. Kader to Dr. Assaf T. Gordon for pain management.

On March 1, 2016, Claimant again saw Dr. Kader, who held Claimant out of work until her next evaluation on March 8, 2016. Dr. Kader, in his March 8, 2016 treatment plan, stated that he would follow-up with Dr. Nirschl to discuss the results of Claimant's left-elbow MRI and treatment options. In discussing surgical options for Claimant's back and right leg pain, Dr. Kader opined a 90% chance of significant improvement of her pain as a result of the recommended minimally invasive microdisectomy at L5-S1 procedure.

At Employer's request, on March 17, 2016, Claimant underwent a spine-related IME with Dr. Dhruv Pateder, a neurological spine surgeon. Dr. Pateder opined that Claimant's symptoms should have resolved, that she was at maximum medical improvement ("MMI"), and that she could return to full duty work.

On August 11, 2016, Dr. Pateder informed Employer had he read the deposition of Dr. Kader and that he disagreed that a microdisectomy was necessary.

At Employer's request, on March 28, 2016, Claimant underwent a left-elbow-related IME with Dr. Richard W. Barth, an orthopaedic surgeon. Dr. Barth opined that the medical documentation supported a causal relationship between the accident and Claimant's left elbow pain. He further opined that Claimant required no further treatment, had reached MMI and could return to work as a barista without restriction.

On September 13, 2016, a Utilization Review (“UR”) report prepared by Dr. Francis Rodkell stated that the surgery recommended by Dr. Kader was not reasonable or necessary.¹

A dispute arose regarding Claimant’s claim and entitlement to benefits and a full evidentiary hearing was held before an Administrative Law Judge (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”).

The Compensation Order issued on December 7, 2016, and denied Claimant’s claim for relief. Claimant appealed the CO to the Compensation Review Board (“CRB”). *Monroy v. NFCGC Café, LLC*, AHD No. 16-265, OWC No. 732307, (December 7, 2016) (“CO”).

On April 11, 2017, the CRB issued a Decision and Partial Remand Order affirming the CO’s denial of temporary total disability (“TTD”) benefits, vacating the CO’s denial of medical treatment and remanding the issue to AHD for a reevaluation of the Utilization Review report in accordance with the law. *Monroy v. NFCGC Café, LLC*, CRB No. 17-002 (April 11, 2017) (“DPRO”).

On July 31, 2017, AHD issued a Compensation Order on Remand. On August 1, 2017, AHD issued a second amended Compensation Order on Remand containing three additional paragraphs of the procedural history of this case not contained in the July 31, 2017 version.

For the purposes of this review on appeal, we determine the amended Compensation Order on Remand issued on August 1, 2017, to be the governing order (“COR”).²

On August 9, 2017, Claimant filed an Application for Review of both the July 31, 2017 and August 1, 2017 Compensation Orders on Remand and a Memorandum of Points and Authorities in Support of Application for Review (“Claimant’s Brief”). Claimant argues that she “disagrees with the CRB’s logic regarding the finding that she was not temporarily and totally disabled, and must appeal to this Board in order to exhaust her administrative remedies.” Claimant also asserts that she “does not appeal the conclusions in the subsequent Compensation Orders on Remand granting her claim for lumbar surgery or awarding temporary total disability benefits as of the date of said surgery.” Claimant’s Brief at 6-7.

On September 13, 2017, Employer filed its Opposition to Claimant’s Application for Review (“Employer’s Brief”). Employer asserts that the CO’s denial of TTD benefits is the law of the case and cannot be revisited by AHD, and that the COR “declines that same UR report without analysis...” and “fails to specifically address the report and articulate reasons why it is being rejected...”. Employer did not appeal the COR’s award of microdiscectomy surgery.

The COR concluded the following:

CONCLUSION OF LAW

¹ The Compensation Order on Remand incorrectly lists the date of the utilization review report as September 7, 2016.

² Both of the Compensation Orders on Remand reflect the same conclusions.

Claimant is temporary totally disabled. The microdiscectomy surgery at L5-S1 is necessary.

ORDER

It is hereby **ORDERED** that Claimant's claim for surgical treatment for her back and temporary total benefits be, and hereby is, **GRANTED**.

COR at 7.

ANALYSIS

Claimant argues that she is not appealing the specific findings of fact and conclusions of law "unique to the July 31/August 1, 2017 Compensation Order on Remand insofar as her claim for surgery was granted." Claimant's Brief at 7. Claimant argues:

Ms. Monroy is instead attempting to appeal the findings of fact and conclusions of law found by the CRB in the April 11, 2017 Decision and Remand Order and affirming the underlying Compensation Order. *See Messle, [v. The Apolline]*, CRB No. 17-050 (July 26, 2017) *supra* at *3. However, owing to a decision of the Court of Appeals that was issued between the CRB's affirmation of the nature and extent findings in the original Decision and Remand Order reflect a material misconception in the law [sic]. *See Brown*, 140 A.3d at 1146-47. Therefore, the CRB must reconsider and reverse the April 11, 2017 Decision and Remand Order portions that affirm the initial findings of fact.

Claimant's Brief at 7-8.

Citing to *Providence Hospital v. DOES and Poznanski*, 163 A.3d 115 (D.C. 2017) ("*Poznanski*"), Claimant asserts that the CRB's legal analysis used to examine the ALJ's determination of the nature and extent of Claimant's disability "does not appear to be consistent with a case decided by the [District of Columbia] Court of Appeals [{"DCCA"}] during the time period between the Decision and Remand Order and the issuance of the Compensation Order on Remand, and thus reconsideration and reversal of part of the April 11, 2017 Decision and Order is necessary." We disagree with Claimant's argument.

In determining a claimant's eligibility for temporary awards and discussing an employer's burden to establish that a claimant has voluntarily limited her income, the DCCA recently discussed the employer's burden to prove that there are jobs reasonably available in the community for which the claimant is able to compete and which she could realistically and likely secure. *See Poznanski, supra* 163 A.3d at 121.

Indeed, as it relates to this employer-placed burden, in the context of the defense of voluntary limitation of income, the DCCA stated:

Finally, petitioner has failed to meet its burden in establishing intervenor voluntarily limited her income. As mentioned above, petitioner must establish job

availability in fact, which means the petitioner must prove that there are jobs reasonably available in the community for which the intervenor is able to compete and which she could realistically and likely secure. *Washington Post*, 675 A.2d 37, 41 & n.4; *Joyner*, 502 A.2d 1027, 1031 n.4. All petitioner has done is argue that Dr. Johnson's concern that overuse will cause more damage is obviated because intervenor no longer has a full-time job that will cause her to overuse her shoulder. Like the CRB, we recognize the logical appeal of this argument, but similarly reject it. This argument does not establish that there is in fact an available job for intervenor to work. At best, it establishes that intervenor has the ability to work an available job.⁵

⁵ Ability may require a claimant to search, but it is the employer's burden to first prove that there is in fact a job available. Lack of diligence is an element of the claimant's rebuttal, *Logan*, 805 A.2d at 243, but rebuttal is only necessary after the employer has established job availability in fact.

Id.

We acknowledge the Court's analysis in *Poznanski* but disagree with Claimant's assertion of the impact of this analysis on the case *sub judice*. As we discussed in the DPRO:

While the CO did reference Dr. Pateder's opinion that Claimant had no lasting aggravation of her work-related injury and was at MMI, cleared to work full duty, and did not need any additional medical treatment, the ALJ did not discuss whether the Employer provided any evidence that there was a job for Claimant to perform pursuant to *Logan*. It is reasonable to assume that because Dr. Pateder's opinion was that Claimant could return to her full duty job at Employer, a discussion as to any other position or light duty job offered by Employer was not addressed. The ALJ was obviously aware that Dr. Pateder's opinion stated that as it relates to her work injury, Claimant could return to her former occupation, full duty as findings were made supporting these facts. While there are no findings of fact or discussion of Employer's offer of work or a return to work in the CO, as required by *Logan*, the ALJ did summarize Employer's opposing medical evidence as to the extent of claimant's disability--an alternative approach permissible when analyzing the nature and extent of a claimant's condition. See *Dunston*, [v. *DOES*, 509 A.2d 109, 111 (D.C. 1986)] *supra* at 111.

The ALJ also found that the opinions of treating physicians Drs. Kader, Gordon and Nirschl, who noted Claimant's unrelated history of anxiety-related symptoms and reflex sympathetic dystrophy secondary to lack of movement, were major components of Claimant's overall current condition. Dr. Nirschl also noted that the bursitis of Claimant's left elbow had resolved and that MRI's of Claimant's lumbar spine and left elbow, previously symptomatic, was normal and showed a normal alignment.

While not noted in the CO, the prevailing law dictates that in assessing the weight of competing medical testimony in workers' compensation cases, attending

physicians are ordinarily preferred as witnesses rather than those doctors who have been retained to examine injured workers solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). Even with this preference however, the trier of fact may choose to credit the testimony of a non-treating physician over a treating physician. *Short v. DOES*, 723 A.2d 845 (D.C. 1998). And where there are persuasive reasons to do so, a treating physician's opinions may be rejected. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

Accordingly, addressing the third prong of *Logan* whether the Claimant refuted Employer's rebuttal evidence, the ALJ rejected the treating physician opinions of Drs. Kader and Gordon, both whom opined that Claimant required further medical attention for her elbow and back. The ALJ then accepted the third treating physician opinion of Dr. Nirschl, who opined that there was no objective evidence of Claimant work-related injury, and upon further weighing of the evidence, also credited the opinions of Drs. Pateder and Barth.

The ALJ discussed the March 28, 2016 opinion of Dr. Barth who after taking a complete history opined that although the "medical documentation supported a causal relationship between the accident and Claimant's left elbow pain [,]" Claimant was at MMI and [Dr. Barth] "saw no reason why Claimant may not return to work, without restriction, as a barista." Dr. Barth noted further that Claimant's MRI was normal and that he could not find an anatomic reason for her ongoing complaints. CO at 6-7.

Indeed substantial evidence supports Claimant's inability to refute Employer's rebuttal of her *prima facie* case regarding the nature and extent of her disability. The ALJ's conclusions on this issue in the CO, although lacking analysis and precision in phrasing, flows rationally from the facts, are sufficiently premised on substantial evidence in the record and are otherwise in accordance with the law. The CO's conclusions with regard to the nature and extent of Claimant's injuries are affirmed.

DPRO at 6.

Facts similar to those in this case were presented in *Dunston* where the Court upheld a denial of disability benefits based upon substantial medical evidence supporting Claimant's ability to return to work:

In this case, it is undisputed that petitioner's injury arose out of and in the course of his employment. With that fact established, the presumption is no longer part of the case and has no application to a determination of the nature and extent of petitioner's injury. Petitioner is entitled to a presumption that his claim is compensable, i.e., that his injury "arises out of" his employment. He is not entitled to a presumption that his injury has left him totally and permanently disabled. *Wheatley v. Adler, supra*, 132 U.S. App. D.C. at 182, 407 F.2d at 312.

We also conclude that substantial evidence supports the hearing examiner's decision to deny petitioner's claim. Among the competing opinions presented to

the examiner was that of Dr. Robert Gordon. It was Dr. Gordon's opinion that based upon a shoulder x-ray that looked "fine," and a substantially normal neurological examination, that petitioner did not have any orthopedic condition that prevented him from working. As to the claimed psychological disability, Dr. Martin Allen testified that there was no emotional impediment to petitioner's returning to work.

We should not disturb a decision if it rationally flows from the facts relied upon and those facts or findings are substantially supported by the evidence of record. *McEvily v. District of Columbia Department of Employment Services*, 500 A.2d 1022, 1023 (D.C. 1985).

Here, the testimony of Drs. Gordon and Allen, credited by the examiner, provided a substantial basis from which to conclude that petitioner was not totally and permanently disabled from either an orthopedic or psychological standpoint. Accordingly, we find substantial evidence to support the conclusion that petitioner's claim be denied. D.C. Code § 1-1510 (a) (3) (E) (1981).

Dunston, supra 509 A.2d at 111-112 (Emphasis added).

We reject Claimant's argument that the discussion in *Poznanski* mandates revision of our decision set forth in the DPRO. We reincorporate our original determinations concerning the arguments and issues as contained in our April 11, 2017, DPRO, on this issue.

We also note that the ALJ erred in reversing Claimant's entitlement to TTD benefits in the COR. This was clear error as the CO's denial of TTD benefits was affirmed by the DPRO and is the law of the case. Accordingly, the COR's conclusion that Claimant was temporarily and totally disabled and the award of TTD benefits was outside of the scope of the CRB's remand, and is reversed.

On remand, the ALJ was directed to reevaluate the UR report and the reasonableness and necessity of Claimant's request for surgical treatment for her back taking into consideration the medical evidence. We find that the COR under review rejected the analysis set forth in the UR report determining that the proposed surgery of microdiscectomy is not reasonable or necessary and awarded the medical treatment. Claimant asserts that she does not appeal the specific findings of fact and conclusions of law unique to the COR under review insofar as her claim for surgery was granted. Employer has not appealed the COR's award of medical care. As such, there is no issue before us related to this claim. The award of medical care is affirmed.

Finally, Claimant requests that the CRB's reconsider certain contradictory findings made in the CO not addressed in the previous DPRO. Specifically, Claimant argues that the ALJ's conclusion that Claimant was a credible witness and the ALJ's crediting of Dr. Pateder's medical opinion containing notes that Claimant was a malingerer conflict. Claimant concludes that this conflict renders the CO's finding that Dr. Pateder's "personal adverse credibility opinion" constitutes substantial evidence in support of the CO conclusion, which constitutes error. Claimant requests reversal of the CO's conclusion as a result.

We acknowledge that Claimant made the following argument in Claimant's January 6, 2017 Application for Review requesting reversal of the CO:

Furthermore, the Compensation Order made two contradictory findings: the Compensation Order found that Ms. Monroy testified credibly with regards to her complaints about the mechanism of injury and its affects [sic] on her. CO at 2. However, Dr. Pateder's medical opinion is founded on Dr. Pateder's personal credibility evaluation of Ms. Monroy: that she was a malinger [sic]. EE at 1-3. The conflict upon Dr. Pateder's credibility opinion versus the Compensation Order's credibility opinion is unresolved, and so the finding that Dr. Pateder's personal adverse credibility opinion is substantial evidence in support of the Compensation Order's conclusion of law that Ms. Monroy can return to work does not flow rationally from the substantial evidence or the remaining text of the Compensation Order, and reversal is thus required.

Claimant's January 6, 2017 Application for Review at 11.

Addressing this argument now, we disagree with Claimant's assertion of an unresolved conflict between Dr. Pateder's assessment of Claimant as a malingerer and the CO's credibility findings. We determine that Dr. Pateder's characterization of Claimant as a "malingerer" was based upon his evaluation of Claimant's description of her symptoms, etiology and other medically-based deductions witnessed during his examination of Claimant. Dr. Pateder performed a physical examination where he effectively concluded that Ms. Monroy's pain symptoms were "inconsistent" with his physical findings. An evaluation such as Dr. Pateder's as such, is distinctly different from the assessment of a claimant's testimonial credibility by an ALJ during a formal hearing.

The CO relied on Dr. Pateder's medical opinion to say that Claimant could return to work because "she has no significant injury as a result of the work [injury] of 2015." He stated further that her symptoms did not have an "organic basis" and was further supported by the imaging studies, which show only mild "age appropriate and pre-existing degenerative changes at the L4-L5 and L5-S1 levels." Dr. Pateder concluded that the injury did not cause nor exacerbate these findings. Finally, and most relevant to Claimant's argument on this issue, was Dr. Pateder's medical opinion that "the accident did not cause nor exacerbate these findings."

Conversely, an ALJ's credibility findings are based upon her first-hand ability to observe the claimant's testimony, demeanor, and mannerisms and weigh the overall trustworthiness while giving testimony. An ALJ's credibility determination is to be given great deference, due to the ALJ's opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985); *Georgetown University v. DOES*, 830 A.2d 865, 870 (D.C. 2003). The ALJ's finding that Claimant was a credible witness does not by itself support Claimant's claim regarding the nature and extent of her injury. Stated otherwise, an ALJ's credibility finding does not necessarily control other findings that may include making a medical determination regarding the validity of a claimant's complaints regarding symptomology, restricted abilities due to injury, or the specific location and duration of pain.

The record has been reviewed and we find that the ALJ's factual finding regarding Claimant's credibility is supported by substantial evidence. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003); D.C. Workers' Compensation Act of 1979, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d) (2)(A).

CONCLUSION AND ORDER

The Compensation Order on Remand's award of temporary total disability benefits is **REVERSED** as the Compensation Review Board's determination as set forth in the April 11, 2017 Decision and Partial Remand Order is the law of the case. The remainder of the Compensation Order on Remand's award has not been challenged by either party and is **AFFIRMED**.

So ordered.