GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-149

LINDA A. RASH,
Claimant–Petitioner,

v.

D.C. DEPARTMENT OF RISK MANAGEMENT,
Employer-Respondent.

Appeal from a August 22, 2012 Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.,
AHD No. PBL11-040, DCP No. 30100939092-0001

Linda A. Rash, self-represented Petitioner
Andrea Comentale, Esquire, for the Respondent

Before MELISSA LIN JONES and HENRY W. MCCOY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD, PROCEDURAL HISTORY, AND ISSUES

On September 15, 2010, Ms. Linda A. Rash injured her back while working as a legal documents examiner for the District of Columbia Department of Corrections.[1] Initially, her claim was accepted, but on June 23, 2011, the Public Sector Workers' Compensation Program issued a Final Decision on Reconsideration terminating Ms. Rash's wage loss and medical benefits. Ms. Rash has not returned to work.

The parties proceeded to a formal hearing to determine if Ms. Rash has "any remaining disability as a result of the work injury and if so, what is the nature and extent thereof?"[2] From

[1] Although the caption of the August 22, 2012 Compensation Order lists the District of Columbia Department of Risk Management as the employer, Ms. Rash worked for the District of Columbia Department of Corrections. Employer.

[2] *Rash v. D.C. Department of Risk Management*, OHA No. PBL11-040, DCP No. 30100939092-0001 (August 22, 2012), p. 2.

this statement of the issue, however, it is unclear if the actual issue for resolution was causal relationship or the nature and extent of Ms. Rash's disability. The uncertainty is compounded by the opening paragraphs of the Discussion section of the Compensation Order: "Claimant contends she continues with remaining impairment as a result of her employment. Employer contends that Claimant has no remaining disability as a result of her employment."[3] Although the administrative law judge ("ALJ") later states

> [t]he parties did not raise a question of medical causal relationship and therefore, no discussion is found here on the issue. However, having found Claimant continues with impairment to her back since her claim was accepted for low back pain, it is necessary to decide the nature and extent of Claimant's disability.[4]

In denying Ms. Rash's request for benefits because her work injury resolved as of October 24, 2010, the ALJ essentially found there is no causal relationship between Ms. Rash's current symptoms and her work-related injury.

On appeal, Ms. Rash raises a number of issues which can be summarized as

1. Is her treating physician's opinion entitled to a preference?

2. Is the August 22, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

In response, employer asserts any errors committed by the ALJ are harmless because even if the errors had not been committed, Ms. Rash is not entitled to prevail.

ANALYSIS[5]

To begin, effective September 24, 2010, the "treating physician preference" that had been codified at §1-623.23(a-2)(4) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code §1-623.1 *et seq*. ("Act") was deleted by the City Council. As a result, although prior cases had relied upon such a preference, it no longer is appropriate to do so. We, therefore, find no error in the ALJ's failure to afford a treating physician preference.[6]

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[3] *Id*. at p. 4.

[4] *Id*. at p. 7.

[5] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[6] Nonetheless, it may have been helpful for the ALJ to identify Ms. Rash's treating physician.

Next, although we agree with Ms. Rash that the many typographical and spelling errors in the Compensation Order she points out are distracting, unless the ALJ's errors rise to a level that demonstrates substantial evidence does not support the findings of fact or the conclusions of law do not flow rationally from supported facts, we are without authority to address the apparent lack of proofreading by the ALJ.[7] With that in mind, we turn to the fundamental question of whether the August 22, 2012 Compensation Order, in fact, is supported by substantial evidence.

Throughout the Compensation Order, the ALJ inconsistently refers to the date of Ms. Rash's injury as September 10, 2010,[8] September 15, 2012,[9] and an unspecified month and day in 2011.[10] In order to adequately analyze Ms. Rash's medical treatment and progress, it is important to consider her medical evidence in the context of the actual date of her injury at work.

In addition, although the ALJ states Ms. Rash received 2 pre-injury epidural injections in May 2010,[11] a review of Dr. Naurang S. Gill's September 21, 2010 medical report seems to indicate those injections may have been administered in May 2009;[12] there is a handwritten correction initialed in the typed report, and a 2009 date appears to be supported by other medical evidence in the record.[13] Because the effect of a previous back condition plays a role in this matter, understanding Ms. Rash's prior medical treatment is an important consideration for resolving her claim.

Similarly, it is unclear whether Ms. Rash has undergone 2 or 3 MRI's. One MRI appears to have been performed in 2009,[14] and the ALJ refers to a repeat MRI conducted on August 16, 2011[15] as well as a repeat MRI on October 6, 2011.[16] We are unable to resolve this uncertainty.

All of these errors demonstrate a lack of substantial evidence to support the ALJ's findings. Equally if not more importantly, the evidence that is in the record does not support the ALJ's rulings.

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[7] *Marriott*, *supra*.

[8] *Rash*, *supra*, at p. 2.

[9] *Id*. at p. 2.

[10] *Id*. at p. 7.

[11] *Id*. at p. 2

[12] Employer's Exhibit 7.

[13] See Claimant's Exhibit 3.

[14] Ms. Rash argues that her 2009 MRI scan is not in evidence; however, Dr. Azzam references the results of that MRI in his August 4, 2011 letter to Dr. Reza Golesorkhi. (Claimant's Exhibit 3.) Consequently, the ALJ was free to rely upon those results in reaching his conclusion.

[15] *Rash*, *supra*, at p. 3.

[16] *Rash*, *supra*, at p. 4.

The ALJ, at least in part, based his decision on Ms. Rash's back pain which pre-dated her on-the-job injury. As support for this determination, he states, "The doctors who have treated Claimant since 2009, *ie*. [*sic*] Dr. Gill, and Dr. [Charles J.] Azzam both opine that Claimant's symptoms of back pain pre-date the 2011 [*sic*] work injury, and that her degenerate [*sic*] disc disease is the cause of her complaints."[17]

Taking Dr. Azzam's report first, we are unable to ascertain how the ALJ reaches the finding that "Dr. Azzam relates [Ms. Rash's] current spinal degeneration and complaints to her 2009 injury. (CE 3)."[18] Dr. Azzam's Assessment and Plan on August 9, 2011 reads:

> This patient['s] symptoms related to lumbago, mild lumbar radiculopathy and lumbar MRI finding is [*sic*] not conducive for any surgical intervention. She will be continuing her treatment in a pain management setting. Her condition was discussed with her. All of her questions were answered.[19]

We are unable to find anything in Dr. Azzam's August 4, 2011 report that causally relates Ms. Rash's current symptoms to pre-existing degenerative disc disease.

Turning to Dr. Gill's September 21, 2010 medical report, we find no support for the ALJ's view that Ms. Rash's degenerative disc disease is the cause of her current complaints; to the contrary, Dr. Gill finds

> a chief complaint of low back pain radiating into the right gluteal region and to the right of the front thigh. The patient reportedly was sitting on a stool when she noticed her right leg started feeling numb with pain on the right side of the lower back while she was reaching for the files at her workplace. The patient then started noticing similar symptoms radiating to the front of her right thigh.[20]

Similarly, there is no such opinion in Dr. Gill's October 7, 2010 medical report:

> Ms. Rash returns for follow-up evaluation of her low back pain with right lower extremity radiation. The patient continues to have back pain radiating into the right thigh with tingling sensations in the right foot. The patient reportedly was sitting on a stool when she had to lean to pull the records and while getting up, she felt a pulling sensation in her lower back which triggered numbness in her right leg and foot. The patient also has reportedly fallen down due to weakness in her right leg.[21]

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[17] *Rash*, *supra*, at p. 7.

[18] *Id*.

[19] Claimant's Exhibit 3.

[20] Employer's Exhibit 7.

[21] *Id*.

Because Dr. Gill was not an approved OCCUNET provider, Ms. Rash's care was transferred to Dr. Keith S. Albertson who was an approved OCCUNET provider.[22] The ALJ contradicts himself by stating, "There are no reports from Dr. Albertson in the record"[23] when he previously had found

> [o]n October 21, 2010, Claimant was under the care of Dr. Keith Albertson an orthopedic surgeon. He ordered an MRI and x-rays of claimant's back. The MRI showed mild degenerative disc disease; right side disc bulge, but no disc herniation; and only mild nerve root encroachment. Dr. Albertson recommended Claimant be treated with epidural injections.[24]

In turn, Dr. Albertson referred Ms. Rash to a neurosurgeon. Because the neurosurgeon she was referred to was not an approved OCCUNET provider, Ms. Rash went to neurosurgeon, Dr. Guy W. Gargour who is an approved OCCUNET provider. It is important to note that Ms. Rash stated this information regarding the referral in her opening statement prior to being sworn in for her direct examination;[25] however, given Ms. Rash's *pro se* status we are unwilling to hold it against her that she did not repeat this information during the course of her sworn testimony.

Given that the facts are not clearly or accurately enunciated by the ALJ in this case, we agree with Ms. Rash that it is not a fair reading of the evidence to say

> [o]f the credible medical evidence remaining, *ie.*, [*sic*] the reports of Dr. Gill, Dr. Azzam, Dr. Gargour and Dr. [Marc B.] Danzinger, it is determined that on September 15, 2010 Claimant had degenerative spinal disc disease that was aggravated by the low velocity soft tissue injury at work. She was treated conservatively, and then released to return to work on October 24, 2010. Five months later without any documented formal treatment Clamant came under the care of a new physician Dr. Gargour. Dr. Gargour recommended pain management and physical therapy, and released Claimant to return to work in April 2011. Therefore, it is determined that Claimant [*sic*] impairment resulting from the work injury completely resolved as of October 24, 2010. Any remaining impairment is the natural progression of her pre-existing condition.[26]

Furthermore, we find the ALJ's summary of Dr. Gargour's opinion regarding Ms. Rash's work capacity to be based upon a very selective reading of the medical evidence. The ALJ states,

> Therefore, the essence to [*sic*] Dr. Garbour's opinion is that Claimant requires further medical treatment, and, with that treatment, Claimant *should* return to work. (EE 3) The reports of Dr. Garbour [*sic*] were based on his

[22] Hearing Transcript, p. 73.

[23] *Rash*, *supra*, at p. 8. See Employer's Exhibit 1.

[24] *Rash*, *supra*, at p. 3.

[25] Hearing Transcript, p. 59-60.

[26] *Rash*, *supra*, at p. 8.

> treatment of Claimant for three months his examinations of Claimant and the results of objective tests such as MRI, EMG and x rays [*sic*]. I find no reason to reject the report of Dr. Gargour who treated Claimant from February 2011 until she received notice that her benefits were being terminated in May 2011.[27]

Dr. Gargour actually noted his February 2, 2011 disposition as

> [t]he patient was given a two months' [*sic*] off work notes [*sic*] so she can have pain injections and have modalities and physical therapy. I would like to reevaluate her in about two months and appreciate having the reports of the doctors who will be seeing her during those two months.[28]

When he did see Ms. Rash approximately 2 months later his discussion is

> I believe the patient's problems was [*sic*] analyzed by me last time and today I reiterate my recommendations. Maybe her main problem appears to be in the facets that the best form of treatment would be to be seen by a pain specialist who would do facet injections of the synovial inflammation and when this gets better to start with physical therapy with the aim of improving myofascial symptoms. I have given her two months off last time and unfortunately feel that her condition has not improved. I believe that she should return to work but that some provision should be made for her to be evaluated by an interventional pain management specialist who would do the facet injection and pursue that avenue until she gets better. I remain available to see her in the neurosurgical consultation, but would like to make sure that she has seen the pain specialist, she has had the physical therapy and I get a report from those persons. In that manner, I should be able to coordinate her care and give you my best opinion.[29]

Dr. Gargour's release is conditional at best. In addition, it is unclear if this release is to pre-injury work or to work in general.

Ms. Rash raises many other arguments of a factual nature, but the essence of those arguments is that the ALJ afforded inappropriate weight to specific evidence such that she should have prevailed. Reweighing the evidence is beyond our authority.[30] Although we have undertaken a far more detailed review of the facts than ordinary; however, in this case, the misstatements of the facts in the Compensation Order renders it invalid.

Finally, in shifting the burden of proof to Ms. Rash, the ALJ ruled

> [g]iven that both medical reports relied upon by Employer indicate that Claimant has some remaining impairment, but nothing that affects [*sic*] her ability to work.

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[27] *Rash*, *supra*, at p. 5. (Emphasis in original.)

[28] Claimant's Exhibit 5, Employer's Exhibit 3.

[29] *Id*.

[30] *Marriott*, *supra*.

> [*sic*] Thus, Employer has presented substantive [*sic*] evidence of a change in Claimant's medical condition.[31]

This shorthand explanation does not satisfy the actual burden shifting requirement in a public sector case that has been accepted by the Public Sector Workers' Compensation Program. Once a claim for disability compensation has been accepted and benefits have been paid, Employer must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits.[32] If Employer fails to meet its burden, the claimant prevails;[33] if Employer meets its burden, the claimant then has the burden to present evidence that benefits should continue. We cannot affirm an administrative determination that "reflects a misconception of the relevant law or a faulty application of the law."[34]

CONCLUSION AND ORDER

The line between causal relationship and nature and extent may be a thin one considering that an employer only is responsible for disability caused by the work-related injury, but given the inaccurate findings of facts and muddled conclusion of law in the Compensation Order, the ALJ is required to make some reasonable effort to justify the result that Ms. Rash's work-related injury resolved as of October 24, 2010. Thus, the August 22, 2012 Compensation Order is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order. Despite the detailed review of the record required by this appeal, on remand, the ALJ is free to make appropriate findings of fact which lead to reasonable conclusions of law, but in order for the conclusions of law to be reasonable, those findings of fact must be accurate and supported by the evidence of record.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

February 28, 2013
DATE

[31] *Rash*, *supra*, at p. 6.

[32] *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs,* ECAB No. 94-25 (July 30, 1996).

[33] *Byrd v. D.C. Department of Human Services*, OHA No. PBL 03-015A, DCP No. LT4-DHS000775 (June 16, 2004) (As the DCP failed to sustain its initial burden, there was "no need to discuss claimant's testimony and evidence.")

[34] (Internal citations omitted.) *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (2011).