

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-073**

**RICHARD DRAKE,**  
**Claimant-Petitioner,**

v.

**PEPCO,**  
**Self-Insured Employer-Respondent**

Appeal from a Compensation Order by  
The Honorable Amelia G. Govan  
AHD No. 08-296A, OWC No. 564677

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2011 OCT 5 PM 12 04

Michael J. Kitzman, Esquire for the Petitioner  
Shawn M. Nolen, Esquire, for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,<sup>1</sup> and HENRY W. MCCOY, *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, ("Act"), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

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<sup>1</sup> Judge Russell has been appointed by the Director of the DOES as a Compensation Review Board ("CRB") Member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

## FACTS OF RECORD AND PROCEDURAL HISTORY

In July 1999, Mr. Richard Drake injured his back and left ankle when he fell out of his service truck while working as a cable splicer for Pepco. Although he continued to experience back and left ankle pain, he returned to full duty employment with Pepco.

On February 6, 2001, Mr. Drake injured his left ankle and knee on the job. Approximately two months after this accident, Mr. Drake began treating with Dr. Joel D. Fechter for residual left ankle symptoms. Mr. Drake did not report low back complaints to Dr. Fechter until June 2005.

Following a formal hearing, the administrative law judge (“ALJ”) ruled that Mr. Drake had not met his burden of proof that he was entitled to authorization for ongoing medical treatment and payment of medical benefits for his lumbar spine condition. In a Compensation Order dated July 8, 2011, the ALJ denied his request for benefits.

On appeal, Mr. Drake requests we reverse the Compensation Order. Mr. Drake contends the Compensation Order does not apply the treating physician preference properly, his current lumbar condition is causally-related to his on-the-job accident, and the Compensation Order fails to address whether or not his current condition constitutes a compensable aggravation of a previous condition.

Pepco asserts the July 8, 2011 Compensation Order is supported by substantial evidence. Pepco argues it produced evidence sufficient to rebut the presumption of compensability, namely the opinions of Dr. Louis E. Levitt. Pepco also argues the ALJ did not err in giving more weight to Dr. Levitt’s opinions than to Dr. Joel E. Fechter’s opinions even though Dr. Fechter is Mr. Drake’s treating physician.

## ISSUES ON APPEAL

1. Did the ALJ properly apply the treating physician preference?
2. Did the ALJ address all the issues presented for resolution at the formal hearing?
3. Is the July 8, 2011 Compensation Order supported by substantial evidence?

## ANALYSIS

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<sup>2</sup> in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>3</sup> Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order

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<sup>2</sup> “Substantial evidence” is relevant evidence a reasonable person might accept to support a conclusion. *Marriott, International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>3</sup> Section 32-1521.01(d)(2)(A) of Act.

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.<sup>4</sup>

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability (“Presumption”).<sup>5</sup> In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.<sup>6</sup> “[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act.”<sup>7</sup> There is no dispute the ALJ appropriately ruled the Presumption properly had been invoked.

Once the Presumption was invoked, it was Pepco’s burden to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.”<sup>8</sup> The ALJ found Dr. Levitt’s opinion is sufficient to rebut the Presumption because he performed a personal examination of Mr. Drake, reviewed the relevant medical records, and stated an unambiguous opinion contrary to the causal relationship presumption.<sup>9</sup>

Mr. Drake does not dispute that the ALJ properly relied upon Dr. Levitt’s opinion to rebut the Presumption. Mr. Drake asserts that when weighing the medical record, the ALJ did not properly accord Dr. Fechter’s opinion greater weight than the weight given to Dr. Levitt’s opinion.

When assessing the weight of competing medical testimony in workers’ compensation cases, an attending physician ordinarily is preferred as a witness over a doctor who has been retained to examine the claimant solely for purposes of litigation;<sup>10</sup> however, the preference for the opinions of a treating physician is just that, a preference. The preference is not absolute, and when there are specific reasons for rejecting the opinion of the treating physician, the opinion of another physician may be given greater weight.<sup>11</sup>

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<sup>4</sup> *Marriott, supra.*

<sup>5</sup> Section 32-1521(1) of the Act states, “In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter.”

<sup>6</sup> *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

<sup>7</sup> *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

<sup>8</sup> *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

<sup>9</sup> *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

<sup>10</sup> *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004).

<sup>11</sup> See *Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (Remand Order December 31, 1986) citing *Murray v. Heckler*, 624 F. Supp. 1156 (D.C. 1986).

Here, the ALJ determined

Dr. Levitt's November 13, 2007 and August 24, 2010 reports are in accord with the conclusion that any further treatment of Claimant's current lumbar symptoms would be related to Claimant's chronic condition (generally poor health and medical co-morbidities) rather than the 2001 work accident. Dr. Levitt states that Claimant's history, subjective complaints, physical findings, diagnostic studies, and review of the records are consistent with the conclusion that he has been more than amply treated for residuals of the 2001 work accident, and has reached maximum medical improvement for his spinal complaints. (RX 1).<sup>[12]</sup>

When weighing the competing medical evidence, the ALJ rejected Dr. Fechter's opinions because

[a]lthough Dr. Fechter opines that continuing epidural injections could be "helpful", his medical rationale for connecting the need for those injections to the 2001 work injury is not supported by any objective record data. There is no persuasive medical evidence, for the period following Claimant's last injection session in September of 2010, that any need for further medical attention to Claimant's lumbar area is related to the 2001 accident.<sup>[13]</sup>

Thus, the ALJ provided specific reasons for rejecting Dr. Fechter's opinions, and because those reasons are supported by the record, we will not disturb her ruling on appeal.

Mr. Drake's argument that the "Compensation Order contends that no persuasive medical evidence subsequent to September 2010 was presented and relies on this in determining that the present complaints are not causally related"<sup>14</sup> represents a misreading of the Compensation Order. The ALJ determined that even prior to September 2010, the medical evidence fails to support a claim for ongoing medical benefits, not that there is no medical evidence after that date upon which to base a finding in favor of Mr. Drake.

Finally, although an aggravation of a pre-existing condition may be compensable under the Act, in this case, it is important to recognize the ALJ determined that, consistent with Dr. Levitt's opinion, Mr. Drake's current lumbar symptoms are related to generally poor health and medical co-morbidities.<sup>15</sup> Inherent in this ruling, the ALJ determined that none of the low back symptoms addressed by Dr. Fechter (commencing in June 2005) are causally related to the subject work injury and that Dr. Fechter's opinion to the contrary was rejected because that opinion, although

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<sup>12</sup> *Drake v. Pepco*, AHD No. 08-296A, OWC No. 564677 (July 8, 2011), 4.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> Claimant's Application for Review, 7.

<sup>15</sup> *Drake, supra*, at 4.

expressed, was essentially unexplained and was not based upon any identified medical evidence.<sup>16</sup>

CONCLUSION AND ORDER

The ALJ properly applied the treating physician preference when resolving the issues presented for resolution at the formal hearing, and because the July 8, 2011 Compensation Order is supported by substantial evidence, it is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
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MELISSA LIN JONES  
Administrative Appeals Judge

\_\_\_\_\_  
October 5, 2011  
DATE

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<sup>16</sup> See *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).