

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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir.Dkt) No. 03-152

JAMES RUSSELL,

Claimant - Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
OHA No. 03-241, OWC No. 560813

Heather C. Leslie, Esquire for the Petitioner

Eugene I. Kane, Jr., Esquire for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, and FLOYD LEWIS, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the 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.

¹Pursuant 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 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 Order which was filed on November 28, 2003, the Administrative Law Judge (ALJ) concluded Petitioner's work related injury on April 17, 2000 resulted in a 1% permanent partial disability to the upper left extremity and that claimant was entitled to causally related medical care rendered by Dr. Fechter.

As grounds for this appeal, Petitioner alleges the ALJ erred by failing to defer to the opinion of the alleged treating physician, Dr. Joel Fechter, who found Petitioner had sustained an 18% permanent partial impairment to his upper left extremity as a result of the work injury.

Respondent has filed a response asserting that the ALJ's decision is supported by substantial evidence and must be upheld.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. D.C. Official Code § 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. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner asserts the ALJ erred by not affording the treating physician preference over the IME physician's opinion. The ALJ supported the weight she apportioned Respondent's IME physician, Dr. Danzinger, by explaining that Dr. Fechter's 18% rating does not substantiate his opinion nor is it supported by his clinical findings. The ALJ pointed to Dr. Fechter's acknowledgement of the full range of motion Petitioner had in his left upper extremity and the lack of atrophy. The ALJ noted Dr. Fechter found full overhead mobility and full strength although both associated with pain. The ALJ noted, that despite the normalcy of claimant's clinically demonstrated strength, function and endurance, Dr. Fechter considered Petitioner's pain while lifting, pushing, pulling and overhead work paramount in attributing 3% each, for pain, weakness, loss of endurance and loss of function (for a total of 12 percent).

The ALJ found that “Dr. Fechter’s misplaced reliance on [Petitioner] undermines the reason for granting treating physicians an evidentiary preference, which is that their ongoing treatment and concordant greater familiarity with claimant ought to give them a better vantage point from which to form a medical opinion”². The ALJ also pointed out that Dr. Fechter’s analysis is flawed because pain is a separate factor, already taken into account and ascribed its own rating component. With regard to Dr. Fechter’s assignment of 6% for crepitation, the ALJ explained this rating is eviscerated by Dr. Danzinger’s explanation that “due to its location in a joint which sustained no laceration, any crepitation was due to mild preexisting arthritis and therefore non-assault related.

Petitioner also argues that the ALJ erred in disregarding subjective factors in determining Petitioner’s permanency rating. The Panel agrees with Petitioner that the ALJ’s finding of Petitioner’s demonstrated strength, function and endurance may not square with Dr. Fechter’s assignment of 3% each for a lack of clinical finding for weakness, loss of endurance and loss of function (for a total of 12 percent). We do not, however, find the ALJ has supported her rejection of Dr. Fechter’s PPD rating as a whole, because of Dr. Fechter’s misplaced reliance on Petitioner’s subjective complaints. In so finding, we do not agree the ALJ has explained her statement that “claimant’s credibility has been impugned due to his hyperbolic behavior during Dr. Danzinger’s examination of him or “Claimant’s testimony is also reflective of some disingenuousness”. CO at 5.

The ALJ explained that her lack of credibility conclusion was based upon Petitioner’s behavior during Dr. Danzinger’s examination of him, particularly his limited motion and hyper-reactive pain response upon laceration palpitation and symptom magnification. The ALJ explained she found Petitioner disingenuous because he testified he refrained from taking narcotic medication as it might cause him to be impaired while driving, but, as the ALJ describes “when pressed further, Petitioner admitted that neither Dr. Ford nor Dr. Fechter had even prescribed medication, narcotic or otherwise.

Having reviewed the Compensation Order and record thoroughly, the Panel cannot find the ALJ’s credibility assessment is supported by substantial evidence, not to mention that her assessment such as it is, is not sufficient to discredit the treating physician’s opinion which she did because he relied on Petitioner’s subjective complaints.

With regard to credibility determinations, the Director of the Department of Employment Services (the Director) has held:

A determination of the credibility of a witness ought involve more than a consideration of the witnesses’ demeanor and appearance. It should apprehend the over-all evaluation of testimony in the light of its rationality, internal consistency, and the manner in which it hangs together with other evidence of the record.

² Citing *Butler v. Boatman & Magnini*, OHA No. 94-384, OWC No. 044699 (1986)

See Cohen v. A&A Hardware, Dir. Dkt. No. 88-93, OHA No. 86-272(A), OWC No. 075694 (1990), *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985).

It appears from a review of the Compensation Order that the ALJ based her finding that the Petitioner is not credible primarily upon Dr. Danzinger's observations. The ALJ referred to statements in Dr. Danzinger's reports, as well as in his deposition testimony, to demonstrate the Petitioner's incredibility. CO at p. 5. As to her own observations, the ALJ only referenced the Petitioner's one comment regarding taking narcotic medication. CO at pp. 5-6. The ALJ did not comment on the Petitioner's demeanor and appearance or make an evaluation of his testimony in the light of its rationality, internal consistency, and the manner in which it hung together with the other evidence of the record. Although generally, the credibility findings of an adjudicator are accorded special deference, the Panel determines that in this case, the ALJ's credibility finding must be disregarded because it is not supported by substantial evidence in the record.

The Panel further finds a determination of the credibility of a witness ought to involve more than the opinion another party specifically an IME physician's observation or assessment of an injured person's behavior during an independent examination with a physician who is possible viewed as adverse.

The Panel finds Petitioner has presented a cogent argument that there is nothing in the record to warrant disregarding the opinions of the treating physician. In support thereof, Petitioner asserts and the Panel agrees there is no known discrepancy between the qualifications of the treating physician and the IME physician, retained specifically for the purpose of offering opinions in litigation. We also agree with Petitioner's statement that "The motive of the medical evaluator, of the employer's choosing to assist the party who retained them is shown by Dr. Danzinger's attempt, after only a 20 minute examination, to attack the credibility of Petitioner by stating he shows symptom magnification".

Thus, based upon the ALJ's failure to support a lack of credibility on Petitioner's part, her disregard of the treating physician's opinion based on Petitioner's subjective complaints is not supported by substantial evidence.

Notwithstanding the ALJ's failure to make actual credibility findings in her Findings of Fact, the Panel notes that the ALJ made numerous specific findings (delineated below) with regard to the ongoing pain Petitioner suffered in his upper extremity which are contradictory to her agreement with Dr. Danzinger that Petitioner is only entitled to 1% impairment due to pain.

1. Despite his return to work, claimant still experienced headaches, left shoulder pain and numbness in the fingers of the same side.
2. During the year that he received no medical treatment (2001) claimant took care of his arm by taking over-the-counter pain relievers such as Tylenol and kept his left arm covered at nights by wearing long sleeved clothing. Claimant returned to Dr. Fechter due to the increasing pain, accompanied by numbness and tingling he was experiencing.
3. He was noted to have left-sided neck and shoulder pain, which increased upon pushing, pulling, lifting and overhead activities.

4. Although there was pain associated with them, his overhead mobility was full, as well as his rotator cuff strength full.
5. Albeit with, pain claimant can perform all the required routine functions of his job.

CO at 3, 4.

Based on the foregoing, the Panel concludes the record does not support the ALJ's decision and the Panel therefore, cannot adopt the reasoning and legal analysis expressed by the ALJ in that decision.

CONCLUSION

The ALJ's Conclusion that Petitioner has suffered a 1% permanent partial impairment to his left upper extremity is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of November 28, 2003 is hereby vacated and remanded to AHD for further proceedings, including the issuance of findings of fact and conclusions of law, on the nature and extent of the Petitioner's disability, if any.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

September 28, 2005

Date