GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-041

CIKEITHIA E. SELLERS,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent.

Appeal from a February 27, 2013 Compensation Order By
Administrative Law Judge Anand K. Verma
AHD No. 12-522, OWC No. 692386

Krista N. Desmyter, Esquire for Petitioner
Mark H. Dho, Esquire for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

Cikeithia Sellers sustained multiple injuries in various incidents. The instant appeal arises out of one such injury which occurred on April 12, 2012, when Ms. Sellers injured her low back while standing up and pulling on the emergency brake of the bus that she was operating while employed by the Washington Metropolitan Area Transit Authority (WMATA). She was treated for her injury by Dr. Eric Dawson, during the course of which treatment an MRI study was performed, and later an EMG/NVS study was performed on July 30, 2012. Ms. Sellers was seen by Dr. Louis Levitt at WMATA's request on June 11, 2012 and September 11, 2012, for the purpose of independent medical evaluations (IMEs).

While Dr. Dawson expressed the view that the MRI and EMG were both diagnostic of nerve impingement, Dr. Levitt did not review the EMG, and opined that the MRI revealed only "mild spondylosis without *significant* disc herniation" (EE 1, IME Report of September 11, 2012,

emphasis added). He opined further that Ms. Sellers' injury was nothing more than a mild low back strain that had resolved, that her complaints were exaggerated or in some cases non-anatomic, and that she could return to work as a bus operator without restriction. WMATA terminated ongoing temporary total disability as of June 12, 2012.

Following a formal hearing conducted on January 10, 2013 before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES), a Compensation Order (CO) was issued denying the claim for temporary total disability benefits from June 12, 2012 to the date of the hearing and continuing, and ongoing medical care. Ms. Sellers appealed the CO to the Compensation Review Board (CRB), to which appeal WMATA has filed an opposition.

Because the ALJ committed numerous procedural and legal errors, we vacate the CO, and remand for further consideration and the issuance of a new Compensation Order.

DISCUSSION AND ANALYSIS[1]

Ms. Sellers's first argument is that the ALJ improperly denied her claim based upon his own personal medical judgment, substituting his judgment for that of the physicians whose opinions were in evidence. Related to this argument, Ms. Sellers asserts that the bases of the ALJ's medical determinations are faulty, specifically, that the ALJ improperly found that there was "no objective evidence" to support Ms. Sellers's claim of injury, characterizing all the medical evidence supporting such claim as merely subjective. In support of this argument Ms. Sellers points to several portions of the CO as examples. These include that, despite the existence of positive findings on both a lumbar MRI and the EMG/NCS, the ALJ wrote "Inasmuch as the record contains no objective indicia of Claimant's continued complaints, she needs no further treatment for her essentially subjective complaints" (CO, page 4). Also, without citing any medical evidence in the record, the ALJ wrote "Axial loading involves pressing down on the top of the head of a standing patient. This maneuver should not produce back pain" (CO, page 4, footnote 3); "When the shoulder and pelvis are rotated in unison, the structures of the back are not stressed. If patient [sic] reports back pain with this rotation, the test is considered positive for nonorganic sources of patient's [sic] complaints" (CO, page 4, footnote 4); "The EMG study included no unequivocal finding of nerve root impingement" (CO, page 5).

Related to this argument as well is Ms. Sellers's fourth argument, that the ALJ evinced a "clear bias" and "injected his personal opinion into the determination of the nature and extent of Ms. Sellers' condition", citing the following colloquy between the ALJ and Ms. Sellers while she was on the witness stand:

[1] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm 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.

JUDGE VERMA: Okay. Are you undergoing any physical therapy or any other therapy for your pain?
THE WITNESS: He wants me to go swimming, so I – I have to go swimming.
JUDGE VERMA: Aqua therapy. Aqua – aqua therapy?
THE WITNESS: Well, it's not – well, I have to swim. I swim on my own.
(HT 50)

….

JUDGE VERMA: The reason I'm asking is I suffer from the same symptoms you have.
THE WITNESS: I'm finding a lot of people do.
JUDGE VERMA: L5/S1. Not – not the fact that my personal symptoms matters here, so I can relate somewhat with your distress or with your pain. So –
(HT 51)

….

JUDGE VERMA: Because I think in my – not medical opinion, my personal opinion, physical therapy not the steroid injections, is more helpful. Therapy is more helpful than the steroid injections. I do not know the long-term side effects of the steroid injections, but they don't relieve -- they relieve very, very – just for a few days or so –
THE WITNESS: Uh-huh.
JUDGE VERMA: -- the steroid injections. They don't provide you any permanent—
THE WITNESS: Your Honor, at this point I was – at the point I'm at, I was trying – going to try anything, but they – you know, Dr. Dawson really doesn't even want to see me now because he hasn't been paid. So, I'm – I'm at a – I just want my life back.
(HT 53 – 54)

WMATA argues that these comments "may be out of the ordinary in terms of style", but they are "nonetheless benign and do not demonstrate any apparent bias" and that "the ALJ clarified that his personal experience had no bearing on the present issues." Employer's Opposition, page 5.

While it is not uncommon for ALJs or for the CRB to cite medical texts such as Dorland's Illustrated Medical Dictionary to illuminate medical terms that are not necessarily known to the lay reader, the ALJ's discourse on the mechanics and interpretation of "axial loading" and torso rotation tests contained in the CO, and the colloquy cited above, are far more than merely citing an accepted source of unimpeachable reliability such as one might do when taking administrative notice of the meaning of a technical or medical term.[2] Rather, in the CO, the ALJ relied upon his

[2] We also note that where an ALJ intends to rely upon an administratively noticed fact that might be dispositive and also subject to dispute, due process requires that the parties be advised of that intention, and given the opportunity object and/or present additional or countervailing evidence relevant to the administratively noticed matter. The ALJ

personal understanding of these medical terms as a pivotal reason for finding that Ms. Sellers's complaints were not credible. The ALJ may or may not be correct in his understanding of the tests, but we have no way of knowing from the record. And we must disagree with WMATA's assertion that the ALJ's on-the-record commentary concerning his and Ms. Sellers's medical conditions are merely "out of the ordinary". They are clear expressions of the ALJ's opinions with respect to the efficacy of various forms of medical treatment, which are un-sourced and which find no record support that we have seen.

These reasons require that the CO be vacated and remanded for further consideration of the claim without recourse to medical opinions and facts that are not in the record. However, in an effort to avoid the need for further appeals, we will address the additional points raised by Ms. Sellers in this appeal.

Ms. Sellers argues that the ALJ improperly applied the treating physician preference rules in rejecting the opinion of Dr. Dawson to the effect that Ms. Sellers is disabled as claimed.

It is difficult to assess why the ALJ faults Dr. Dawson's opinions. The specific discussion of the reasons for its rejection is found on page 7 of the CO, where the following appears:

> In the September 6, 2012 follow up examination report, Dr. Dawson misinterpreted the July 30, 2012 EMG study when he noted his finding, *inter alia*, "right L5 impingement of the ventral root." Recourse to the EMG findings, however, reveals no impingement in a nerve root at right L5; rather, the EMG study was consistent with mild irritation of lumbar paraspinal muscles along with the L5 nerve root. Because compression or impingement of the nerve root was not indicated in Claimant's lumbar magnetic resonance images, Dr. Dawson clearly misconstrued the meaning of impingement *vis-à-vis* irritation of the lumbar muscles and nerves.
>
> [The Act] accords a preference to the opinion of Claimant's treating physician. However, an ALJ is free to reject it with a proper explanation for doing so. See *Mexicano v. District of Columbia Department of Employment Services*, 806 A.2d 198, 205 (D.C. 2002)
>
> Consistent with the aforesaid rationale, the opinion of Dr. Dawson who treated Claimant over a number of months cannot be credited with any significant weight.

The EMG report is in the record as CE 2. The "Conclusions" portion reads as follows:

> There was evidence for a Left low lumbar sacral (L5-S1) radiculopathy noted.
> Mild irritation on the low lumbar sacral paraspinals noted and Rt. L5 nerve root noted.
> No evidence for focal or peripheral neuropathy was noted.

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did not do this in this case. See, *Renard v. DOES,* 673 A.2d 1274 (D.C. 1996); *Majors v. WMATA,* CRB No. 10-060, AHD No. 10-139, OWC No. 657877 (January 26, 2012).

Dr. Dawson's September 6, 2012 report reads, in pertinent part:

> EMG/NCV: The patient did have an EMG study with documented left L5-S1 radiculopathy, as well as to the paraspinous and right L5 impingement of the ventral root. This does match the clinical [findings] and is the gold standard study. This was performed by Dr. Sharma on 7/30/2012.
>
> ASSESSMENT: The patient is still showing improvement, but has significant discopathy.
>
> PLAN: This is a difficult situation for the patient. During her work place duties, she does have to stand for long periods of time with repetitive axial loading, such that she does on the course of her job. She has significant discomfort.

It is not apparent to us from reading these two documents that Dr. Dawson has made an error, and the ALJ does not identify anything in the record that would shed light upon whether the EMG's conclusions are different from Dr. Dawson's description of them. Indeed, the place one would expect to find such light would be in the IME report of Dr. Levitt. But, as Ms. Sellers points out, and the ALJ acknowledges, Dr. Levitt "did not seem to have reviewed the July 30, 2012 EMG study". CO, page 6, footnote 5. There is nothing self-evidently contradictory in comparing the EMG report to Dr. Dawson's note, and it does not assist in assessing the quality of Dr. Dawson's opinion.

Additional reasons given elsewhere in the CO for rejecting Dr. Dawson's opinion are "Dr. Dawson in his examinations consistently noted that Claimant had lymphadenopathy [footnote omitted] SI recesses. Such finding, absent corroboration by any diagnostic testing in the record, defies the evidence, which was adduced at the hearing. Because a mere physical examination cannot conclusively determine the existence of lymphadenopathy SI recesses, Dr. Dawson's finding thereto remains a mystery." CO, page 8.

What relevance Dr. Dawson's reference to this condition has to the work injury is not explained, nor does the record contain any medical evidence concerning what the condition is (other than the ALJ's footnote 6 which, citing Dorland's, identifies it as disease of the lymph nodes), how it is diagnosed, or how it relates, if at all, to Ms. Sellers's complaints. This is not a proper basis for rejecting the opinion.

The ALJ further faults Dr. Dawson for using the word "possible" in conjunction with "nerve root impingement" in his "assessment" of Ms. Sellers's condition. The ALJ wrote "the undersigned further notes unsupported by a diagnostic evidence [sic] in the record, Dr. Dawson's assessment of possible protrusion with nerve impingement L5 and sciatica is also suspect. The insertion of the word 'possible' in his assessment deprives it of a reasonable certainty-- a prerequisite to the credibility and reliability of the medical opinion." CO page 8.

However, review of the medical records reveals only one time in which Dr. Dawson used the word in this context in an assessment, and that was in his April 17, 2012 progress note, written

three and a half months before the EMG. It is obvious from Dr. Dawson's September 6, 2012 progress note that, in his view, the EMG confirmed his suspicion. Further, the ALJ misapprehends the nature of expressing an opinion "to a reasonable degree of professional certainty". There is no requirement that medical assessments be expressed with that specific language. Indeed, it would be an odd world in which doctors or other professionals, in recording their views and impressions in records in the ordinary course of business would add reference to the degree of certainty to which the views or impressions are held. The expression of a preliminary opinion with a caveat does not render it *per se* unreliable, particularly where the impression or opinion is later confirmed by additional evidence, such as the EMG. On this record and in this context it was error for the ALJ to consider the use of the word "possible" as a basis for discrediting Dr. Dawson's views.

We also note that the ALJ focuses upon the fact that Dr. Dawson sometimes refers to Ms. Sellers's injury as "nerve root impingement", and at other times as "Nerve root irritation", or paraspinal muscular irritation. While inconsistent or shifting diagnoses, assessments or impressions are a legitimate basis for questioning the reliability of a medical opinion, there is nothing in this record that suggests that employing these different terms implies any vacillation or lack of understanding of Ms. Sellers's medical condition. The terms employed are not necessarily inconsistent, at least there is no medical evidence in this record suggesting that they are, and if they were significantly inconsistently employed, one would expect to find support for that proposition in either of the two IME reports.

While Dr. Levitt clearly disagrees with Dr. Dawson's overall assessment of Ms. Sellers's condition, nowhere in either IME report does he suggest that Dr. Dawson's reports contain inconsistent diagnoses. Further, as noted before, Dr. Levitt, for unknown reasons, never addresses the EMG results. We also point out that Dr. Levitt's opinions contain qualification language similar to Dr. Dawson's usage of "possible". For example, in the September 11, 2012 report, Dr. Levitt does not say that there is no disc herniation. Rather, he says there is no "significant" disc herniation. Similarly, he wrote in his June 11, 2012 report not that "there is little evidence of compromise to the spinal cord or exiting nerve roots", not that there was "no evidence" of such compromise. We hasten to stress that we are not suggesting that the use of this language necessarily undercuts Dr. Levitt's opinions. Rather, we are merely pointing out that the ALJ appears to hold Dr. Dawson to a higher degree of precision in expression than he does Dr. Levitt. This is error, and is not consistent with the proper application of the treating physician preference.

Ms. Sellers also argues that the ALJ had insufficient basis to find that her testimony lacked credibility. Part of her complaint is that the ALJ appears to accept Dr. Levitt's assessment that Ms. Sellers exaggerates her complaints, and has findings suggesting that her subjective responses to various examinations are fabricated and unreliable. Ms. Sellers argues that Dr. Levitt's views on this subject ought to be rejected as a matter of law, because "Credibility determinations are the province of the Administrative Law Judge, not the province of a medical evaluator of employer's choosing". Sellers's Memorandum, page 14.

We must disagree. There is no error in an IME physician expressing an opinion that a claimant is malingering, exaggerating or inventing complaints, and it is not error for an ALJ consider the

IME physician's assessment that a claimant is being deceptive. A physician's opinion that is premised upon sound medical practice and analysis must include an assessment of the accuracy of the history and complaints. We discern no error in the ALJ considering Dr. Levitt's impressions of the veracity and accuracy of Ms. Sellers's complaints in assessing the medical evidence, or assessing Ms. Sellers's credibility generally.

Lastly, though, we agree that the ALJ seems to have erred when he suggests that Ms. Sellers's credibility is somehow undermined by the fact that her right leg complaints were not expressed until after the EMG revealed right sided abnormalities. While it is true that in the first post-injury report from Dr. Dawson, that of April 17, 2012, there is no mention of right leg issues, three days later, in his progress note dated April 20, 2012, clear reference is made to "pain, spasm and stiffness to the lower back with numbness, tingling, burning and weakness extending down the legs." This reference is repeated in the September 6, 2012 progress note as well.

Whether these complaints are reliable or not is for the ALJ to assess based upon the record evidence. However, it is error for the ALJ to conclude that they are not reliable because they were not voiced until after the EMG, because the record confirms that they were.

CONCLUSION AND ORDER

For the reasons set forth in the aforegoing Decision and Remand Order, the denial of the claim is not supported by substantial evidence and is not in accordance with the law. The Compensation Order is vacated, and the matter is remanded for further consideration.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

October 17, 2013
DATE