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. 03-157

PATRICIA SIMMONS,

Claimant–Petitioner,

v.

ESPN ZONE AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge E. Cooper Brown
OHA/AHD No. 03-430, OWC No. 586176

Heather Leslie, Esquire, for the Petitioner

Andres K. O'Connell, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

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

[1]Pursuant 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 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including

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 Compensation Order, which was filed on October 31, 2003, the Administrative Law Judge (ALJ) denied Petitioner's claim for benefits, finding that Petitioner was capable of returning to her pre-injury job without restriction for the period of claimed temporary total disability. However, in that Compensation Order, no finding was made in connection with Petitioner's claim for medical care and treatment. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's finding that Petitioner had recovered sufficiently to return to her pre-injury employment is unsupported by substantial evidence and is not in accordance with the law, because in Petitioner's view, the ALJ improperly accepted the opinion of a physician who was not selected by Petitioner for medical treatment over that of physician selected by Petitioner at a time following her terminating her doctor-patient relationship with the physician who Petitioner treated with at Respondent's recommendation.

Respondent opposes the appeal, arguing that the ALJ's decision to accord greater weight to the opinion of the first treating physician rather than the second is in accordance with the law, and that the Compensation Order must therefore be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

The fundamental facts about Petitioner's care and treatment by the two physicians whose opinions are in conflict in this case appear to be in all relevant respects uncontradicted and

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responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

unchallenged in this appeal by either party. As set forth in the Compensation Order, they are that, prior to sustaining the injury in the case under review, Petitioner had sustained an injury while working for the same employer, Respondent herein, and was referred by Respondent to Dr. Marc Danziger for treatment; that Petitioner treated for that prior injury with Dr. Danziger for a period of three weeks (August 4, 2000 through August 28, 2000), at which time she had recovered from this prior injury and returned to work; that she sustained the injury in connection with this case on February 20, 2001, and returned to Dr. Danziger for care, again at Respondent's suggestion; that Dr. Danziger provided medical care and treatment to Petitioner for this injury (a lumbar strain according to his diagnosis)which treatment included physical therapy, medication an MRI study, from February 20, 2001 until "the end of August 2001"; that there was a period of approximately 18 months in which Petitioner sought no additional medical care; that on January 22, 2003 she returned to Dr. Danziger complaining of a recurrence of her low back pain, at which time the doctor wrote a prescription for physical therapy and limited Petitioner to sedentary work (which on this record is clearly inconsistent with Petitioner's pre-injury duties); that on February 5, 2003, Dr. Danziger responded to an inquiry from Respondent to the effect that, while Petitioner required ongoing physical therapy, her condition did not preclude Petitioner's working in a "full duty" capacity; that Petitioner never returned to Dr. Danziger after January 22, 2003; that on April 8, 2003, Petitioner commenced treatment with Dr. Joel Fechter, who diagnosed a lower back muscle strain; Petitioner continued to treat with Dr. Fechther for an unspecified number of times though the date of the hearing, September 16, 2003; and that Petitioner was examined by Dr. William McNamara at Respondent's request for the purpose of an independent medical evaluation (IME) on July 21, 2003. See, Compensation Order, pages 3 – 5, *passim*.

Petitioner's complaint in this appeal is that in evaluating the conflicting medical evidence in this case, the ALJ found "that both doctors [Dr. Danziger and Dr. Fechter] qualify as Claimant's treating physician, albeit during different periods of time. Thus, neither physician's opinion will be accorded greater evidentiary weight." It is Petitioner's contention that, because the only doctor that Petitioner selected on her own to treat her condition is Dr. Fechter, his opinion should be accorded greater weight than the opinion of Dr. Danziger.

The ALJ considered and rejected the argument, made at the formal hearing by Respondent, that the evidentiary weighing preference relating to treating physicians has anything to do with whether a claimant has properly obtained authorization for a change of physicians under the Act or its implementing regulation at 7 DCMR § 212.12 (which requires a claimant to obtain employer's agreement or authorization from this agency to change from an initially selected treating physician to a new treating physician), writing:

> Whether Employer is liable for payment of Dr. Fechter's medical bills does not affect the viability of Dr. Fechter's medical opinion. Rather, the question is whether greater evidentiary weight, pursuant to the treating physician preference, should be accorded the medical opinion of Dr. Fechter. *Lincoln Hockey, et al. v. D.C. Dept. of Employment Services*, 831 A.2d 913 (D.C. 2003).

Compensation Order, pages 7 – 8. The argument made by Respondent at the formal hearing is essentially the same as that made by Petitioner in this appeal, and its rejection by the ALJ was

proper then, and remains so now. That is, Petitioner takes the position on this appeal that the process of selection of a physician is determinative in ascribing "treating" or "attending" physician status for purposes of the preference to be accorded when assessing conflicting medical opinion.

However, as the ALJ noted, the basis of the preference for treating physician opinion over IME opinion is not the identity of the party selecting the physician, rather, it is the relationship of the physician to the patient and to the litigation. We detect no error in the ALJ's decision to accord both Dr. Danziger and Dr. Fechter the mantle of "treating physician" for evidentiary purposes. Further, the ALJ then proceeded to explain in detail the reasons for ultimately accepting the opinion of Dr. Danziger over that of Dr. Fechter, writing:

> In weighing, equally, the opinions of the two treating physicians, I am ultimately persuaded by Dr. Danziger's medical opinion that Claimant's present medical condition does not preclude her from returning to full duty work without restrictions. Dr. Danziger was Claimant's treating physician from the outset of her injury. Dr. Danziger monitored Claimant's medical progress and treated her, up until he released her to return to full duty, over a more extended period of time than did Dr. Fechter. Moreover, I find little if anything to distinguish the objective findings found within the two physicians' respective medical evaluations. Finally, Dr. Danziger's findings and opinion are corroborated by the independent medical evaluation of Dr. McNamara.

Compensation Order, page 8. This passage is fully justified by the record evidence and is in accordance with the law relating to the evidentiary evaluation of treating physician opinion.

However, the ALJ never resolved whether Petitioner's seeking treatment from Dr. Fechter represents an unauthorized change of physicians, and whether Respondent is liable for such treatment under the Act and governing regulations. Since this question was raised as one of the issues to be resolved (Compensation Order, page 2, issue number 5), and since "payment of causally related medical expenses" was part of the claim for relief (Compensation Order, page 5), this matter must be remanded for consideration of Petitioner's request for the provision of medical care by Dr. Fechter, which medical care presumably is the basis of that portion of the claim.

CONCLUSION

The Compensation Order of October 31, 2003 is supported by substantial evidence and is in accordance with the law to the extent that it denied the claim for temporary total disability, but was not in accordance with the law in that it failed to address the issue of whether Petitioner has made an unauthorized change of physician, yet denied the Petitioner's request for payment of causally related medical care without explanation or analysis.

ORDER

The Compensation Order of October 31, 2003, is hereby AFFIRMED IN PART AND REVERSED IN PART, and is remanded with instructions that the ALJ consider the issue of whether Petitioner has made an unauthorized change of physician and Respondent's liability, if any, for medical care rendered by Dr. Fechter.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

September 14, 2005
DATE