GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 13-064

KIMBERLY TOMLIN
Claimant–Respondent,
v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer–Petitioner.

Appeal from an April 29, 2013, Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-013, DCP No. 30080945683

Krista N. DeSmyter, Esquire, for the Claimant
Corey P. Argust, for the Self-Insured Employer

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge,* HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Chief Administrative Appeals Judge,* for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the Application for Review filed by the employer, the District of Columbia Public Schools, of the April 29, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication (OHA) in the Department of Employment Services (DOES). In that CO, the ALJ held that the employer failed to prove that the claimant obstructed an additional medical examination and ordered reinstatement of her benefits. We AFFIRM.

FACTS OF RECORD AND PROCEDURAL HISTORY

The claimant, Kimberly Tomlin, worked for this employer as an educational aide. On September 4, 2008, the claimant tripped on a telephone cord while at work and fell, sustaining multiple injuries. The employer, through its Office of Risk Management Disability Compensation Program accepted the claim and paid the claimant temporary total work disability benefits from the date of injury until January 12, 2012.

The current dispute centers on the claimant's actions at Dr. Louis E. Levitt's December 20, 2011, additional medical examination (AME), the second of two AMEs performed on the claimant by that doctor. On January 12, 2012, the employer notified the claimant that her benefits were suspended because she obstructed the AME.

The claimant, who disagreed that she did anything wrong at the AME, requested reconsideration and then a formal hearing. The formal hearing took place on May 1, 2012.

In his April 29, 2013, CO, the ALJ held the claimant did not refuse or obstruct the AME:

> Employer presented no evidence to contradict Claimant [sic] candid and convincing testimony under oath. Further, Employer through Counsel posited that the evidence presented in Dr. Levitt's report states that a complete examination was not possible because of Claimant's hostile and unwillingness to answer questions. (HT94)
>
> The undersigned finds no precedence for suspending an injured worker's benefits for failing to respond favorably to a physician's questions. Claimant appeared at the time of place of the examination and changed her clothes in preparation for a 'physical examination'…
>
> * * *
>
> The evidence of record indicates Claimant has undergone AME's prior to December 2012 and the Claimant, upon being notified, did report to the office of Dr. Levitt for a physical examination. Claimant dressed herself in the appropriate gown used for physical examinations and Dr. Levitt attempted to conduct a fact finding mission by interrogating the Claimant. Therefore, it is determined that the weight of the evidence indicates Claimant presented willing and ready for a physical Examination [sic] be [sic] Dr. Levitt and Dr. Levitt decided not to conduct the examination.

The employer timely appealed.

DISCUSSION AND ANALYSIS[1]

On review, the employer asserts the ALJ erred in several ways. The employer argues that the ALJ abused his discretion in admitting claimant's Exhibit 3. We agree but find that this error does not require reversal.

[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 the record contains substantial evidence to support a contrary conclusion.

At the hearing, claimant's counsel offered Exhibit 3, which is an internal document from claimant's counsel's law firm. This document, titled "Case Note-Page 122 of 158," was written for BTB (apparently attorney Benjamin T. Boscolo) by a staff person at ChasenBoscolo identified as "MBH". This document purports to memorialize a telephone conversation in which the employer's third-party adjuster advised MBH that because the claimant did not cooperate with Dr. Levitt, it would not reinstate the claimant's benefits even if the claimant attended another AME with Dr. Levitt.

At the hearing the employer objected to this exhibit for several reasons, one of which was that claimant's counsel had not presented the proper evidentiary foundation for this document to be admitted as a business record. When claimant's counsel was asked by the ALJ about this, claimant's counsel stated the claimant's testimony would provide the requisite foundation. Despite this promise, claimant's counsel did not question the claimant about this document and no foundation was laid for the document to be admitted as a business record.

The ALJ did not rule on the admissibility of this document at the hearing but announced he was taking the matter under advisement. In the CO, at footnote 1, the ALJ stated he was admitting the document (incorrectly identified as an e-mail and incorrectly stating the sender was employer's adjuster) because "The probative value of the document is not out weighed [sic] by the prejudice to Employer and hearsay is admissible in these proceedings." CO at 2.

We find the ALJ erred by admitting claimant's Exhibit 3.

An ALJ has great discretion with respect to the hearing. An ALJ

> is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure… but may conduct the hearing in such manner as to best ascertain the rights of the claimant. For this purpose, he or she shall receive such relevant evidence as the claimant adduces and such other evidence as he or she determines necessary or useful in evaluating the claim.

D.C. Code §1-623.24 (b) (2).

However, while an ALJ has great discretion with respect to receiving evidence at a formal hearing, he does not have unrestricted discretion. All actions of an ALJ must be consistent with due process and fairness to both parties.

Here, even if we overlook the fact that claimant's counsel failed to lay any foundation for the exhibit, we cannot overlook the fact that the ALJ erred by accepting the document for the truth of what was said in the document without giving the employer any opportunity to cross-examine the author of the document or to challenge the statements made in the document.

Although the ALJ erred by admitting Exhibit 3, his decision was not in any way based on the contents of that exhibit. Whether the claimant did or did not offer to do a make-up AME would be relevant to whether and when the claimant cured her refusal. Since the ALJ found the claimant did not obstruct Dr. Levitt's AME, curing was not an issue that was decided by the LJ. Therefore, the ALJ's decision to admit the exhibit, while erroneous, constitutes a harmless error.[2]

[2] There is another confusing evidentiary matter that needs to be clarified. At the hearing, the employer wanted to admit four exhibits. The ALJ admitted three of the four documents and announced he was taking under advisement

The employer's, assignment of error relates to the ALJ's determination that the claimant did not obstruct the AME.

The two relevant sections of the D.C. Code that pertain to this issue are §§ 1-623-23(a) and 1-623-23(d). D.C. Code § 1-623-23(a) provides:

> An employee shall submit to examination by a medical officer of the District of Columbia government, or by a physician designated or approved by the Mayor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him or her present to participate in the examination.

D.C. Code § 1-623-23(d) states:

> If an employee refuses to submit to or obstructs an examination, his or her right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.

There is no dispute that the claimant appeared for Dr. Levitt's December 20, 2011, AME, that the claimant changed from her clothes into the examination gown and that Dr. Levitt began to ask her some questions. There also is no dispute that the examination was not completed.

Determining what caused the AME to end prematurely depended on whom the ALJ believed because the claimant and Dr. Levitt had very different accounts of what happened at the AME.

Dr. Levitt described what happened at the examination in his medical report:

> I again began asking her questions about the care she has received over the last three years. I raised questions about the extent of treatment that had been provided. She now informs me that she has been told by Dr. Batipps and by the physicians at Kaiser Permanente that has been providing a bulk of her care recently that she needs right shoulder surgery and neck surgery. As I questioned why it has taken so long to consider surgical treatments over a number of years she became increasingly more frustrated by the interaction in the office and increasingly more hostile towards the examiner with the more questions I asked. I then began to probe about her past history of allegedly multiple motor vehicle accidents. At this point, the patient pointed her finger at the examiner and accused me of putting words into her mouth and told me that I was not to ask such invasive questions during the exam. At this point, her level of hostility, not unlike her attitude when I last examined her, led to an abrupt cancellation of the interview. It was quite clear this patient was unhappy with the level of inquiry as

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the request to admit the fourth document; a March 31, 2009, AME report from Dr. Levitt, identified as Employer's Exhibit 3. In the CO, the ALJ inconsistently stated that only Employer's Exhibits 1, 2 and 4 were admitted (CO at 1) but went on to quote extensively from Exhibit 3 in the Discussion Section of the CO. (CO at 5). Therefore, we must assume that this document was admitted into the record.

> to the details of her care and she managed to sabotage the independent exam. It became increasingly more difficult in the interview room with my medical assistant witnessing it that she was unhappy and unwilling to participate as I needed her to do so. I ended the exam with the patient's attitude in a hostile state. It was clear I would not gain the patient's cooperation to do a full evaluation. This is my second attempt to review this case and provide an independent opinion but on both occasions the patient has been quite unsuccessful in preventing complete and comprehensive physical assessment.

The claimant did not agree with Dr. Levitt's version of events.

At the hearing the following exchanges took place:

> Q: (By the ALJ) Okay. Now so it's been alleged that you pointed your finger in the doctor's face and became obstructive for lack of a better word. Did you get emotional with the doctor? Did he make you mad?
> A: (By claimant) No, He—I didn't particularly—how would you put it? I did not point my finger at him.
>
> Q: What did you do?
> A: I just told him he needed to refer to my doctor when he asked me about my past injury. And I did not point my finger at that gentleman.
>
> Q: Did you tell him not to ask you any more questions?
> A: No sir.
>
> Q: So when he asked you why you haven't gotten better, what did you tell him?
> A: I told him he would have to ask the doctor that.
>
> Q: Okay, well, who terminated the examination? Who got up of their chair first?
> A: He did. He said this exam is over, slammed the door and walked out. And he never touched me. I was still sitting in the same chair.

(HT at 58-59.)

Later, during cross examination, these exchanges took place:

> Q: (By employer's counsel) Did you ever point your finger at Dr. Levitt?
> A. No.
>
> Q: Did you ever [ask] Dr. Levitt to stop asking you questions?
> A: No, sir
>
> Q: Did you suggest him to stop asking questions?
> A: No.

Q: Dr. Levitt just stopped asking questions by himself?
A: I'm sure that's what he did.

(HT at 71-72)

Q: In Dr. Levitt's report he said he asked you about multiple other accidents and that you refused to answer the question, but you're saying now that he did not ask you any questions about accidents?
A: What he asked me about the car accident in '81, that's all. And that's when he stormed out the door.

(HT at 82).

In the CO, the ALJ held that the claimant did not refuse or obstruct the AME:

> Employer presented no evidence to contradict Claimant [sic] candid and convincing testimony under oath. Further, Employer through Counsel posited that the evidence presented in Dr. Levitt's report states that a complete examination was not possible because of Claimant's hostile and unwillingness to answer questions. (HT94)
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CO at 6-7.

The employer interpreted the ALJ's opinion as finding that the AME doctor must have started the physical part of the examination before benefits can be suspended. Similarly, claimant's counsel, in her opposition memorandum, argued that there must have been a physical examination before there can be a finding of obstruction under D.C. Code §1-623.23 (d):

> (Dr. Levitt's) own report evidences that no physical examination occurred. Where no examination occurred, there was no examination to obstruct.

Claimant's Opposition at 5.

We disagree with claimant's interpretation. Such an interpretation would lead to results that clearly are contrary to letter and spirit of D.C. Code § 1-623.23. Under this interpretation, a claimant would be in compliance with the Code if a claimant appeared for an examination and prior to be seen by a doctor engaged in such anti-social behavior that required her removal from the doctor's office before being seen by a doctor.

While we disagree with claimant's analysis, we do not, however, interpret the ALJ's decision as requiring the commencement of a physical examination as a prerequisite to finding a violation of D.C. Code § 1-623-23(a). We read the ALJ's decision as finding that the claimant does not have to respond to all of an AME doctor's questions.

There can be no legitimate dispute that a claimant is required to answer an AME doctor's questions such as those related to her accident, history, physical condition, medical care and treatment. Contrary to what the ALJ seems to imply, AME's are not limited to a physical examination only. As the Employer correctly points out, 7 DCMR § 123.13 requires the AME physician to take a history from the claimant and inquire into matters that necessitate dialogue between the physician and claimant. Reasonable questions that are asked during these examinations should be answered by a claimant to the best of their ability in tandem with a physical examination and medical record review. Such inquiries are necessary for an AME to make an informed medical opinion.

The evidence before the ALJ consisted of two opposite statements of fact as to what took place at the AME. The ALJ found the claimant's testimony "candid and convincing." Therefore, the ALJ believed the claimant's version of events and his finding that she did not obstruct the AME is premised on the credibility finding. While reasonable men and women could disagree with this determination, the CRB's authority on review is to determine whether the ALJ's decision is supported by substantial evidence, even if there is contrary evidence in the record and even if we would reach a contrary conclusion if we were the ALJ.

When judged against this standard, we must affirm the ALJ's CO.

CONCLUSION AND ORDER

The ALJ's April 29, 2013, CO is supported by substantial evidence in the record, is in accordance with applicable law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr
LAWRENCE D. TARR
Chief, Administrative Appeals Judge

August 22, 2013
DATE