

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-096

**ELVIN UMANZOR,
Claimant-Petitioner,**

v.

**TRICON CONSTRUCTION, INC. and ERIE INSURANCE EXCHANGE
Employer and Carrier-Respondents.**

Appeal from a May 30, 2012 Compensation Order on Remand by
Administrative Law Judge Amelia G. Govan
AHD No. 10-383A, OWC No. 659635

Michael Kitzman, Esquire for the Petitioner
Jeffrey Ochsman, Esquire for the Respondent

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

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board,

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the May 30, 2012, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for temporary total disability benefits. We AFFIRM.

FACTS OF RECORD AND PROCEDURAL HISTORY

On May 11, 2009, the Claimant suffered an injury to his neck, head, back left hand and right knee when he fell through a glass window. The Claimant sought medical treatment, ultimately coming under the care and treatment of Dr. Joseph Lieberman.

Throughout his treatment, Dr. Lieberman noted complaints of headaches, neck pain, occipital nerve area pain, left wrist pain and hand pain, and. Dr. Lieberman opined that the Claimant was unable to work indefinitely. Because of his continued complaints, Dr. Lieberman recommended the Claimant consult with Dr. Joshua Ammerman and Dr. Ivan Ducic.

Dr. Ammerman examined the Claimant at the request of Dr. Lieberman. After taking a history, reviewing medical reports and performing a physical examination, Dr. Ammerman opined the Claimant suffered from occipital nerve irritation with continued occipital neuralgia. Dr. Ammerman recommended an updated MRI to determine the next course of treatment. After review of the new MRI, Dr. Ammerman determined that the Claimant was at maximum medical improvement with regard to the neck and restricted the Claimant to modified duty. Dr. Ammerman also referred the Claimant to Dr. Joel Fetcher for an orthopedic consult for evaluation of his left shoulder.

The Claimant saw Dr. Fechner on March 3, 2011. Dr. Fetcher took a history of the Claimant's injury and treatment, performed a physical examination, and reviewed objective testing available, including a 2011 MRI. Dr. Fetcher found no evidence of a left shoulder injury but recommended an MRI to his left wrist due to continued complaints. After a normal MRI result, Dr. Fetcher noted the Claimant will follow up on an as needed basis in the future.

The Employer sent the Claimant for an Independent Medical Evaluation (IME) with Dr. Gary W. London on two occasions, November 4, 2009 and August 4, 2010. Dr. London opined that the Claimant could return to work full duty and that any complaints were unrelated to the work injury.

A Formal Hearing was held on June 28, 2011. The Claimant sought an award of temporary total disability from December 15, 2010 to the present and continuing. The only issue to be adjudicated was the nature and extent of the Claimant's alleged disability. A CO was issued on July 28, 2011 denying the Claimant's claim for relief in its entirety. The CO found the Claimant to be an incredible witness¹ and gave greater weight to the opinion of the Employer's IME physician over that of the treating physician.

The Claimant timely appealed the CO with the Employer opposing. On April 4, 2012, the CRB issued a Decision and Remand Order. In that order, the CRB noted the ALJ utilized the wrong burden of proof when analyzing the issue of nature and extent. Pursuant to *WMATA v. DOES and Payne Intervenor*, 992 A.2d 1276 (D.C. 2010), the CRB remanded the case for analysis under the correct burden of proof, that of a preponderance of the evidence.

On May 30, 2012, a Compensation Order on Remand (COR) was issued, denying the Claimant's claim. The Claimant timely appealed on June 22, 2012. The Claimant argues the COR is not supported by the substantial evidence in the record and is not in accordance with the law. Specifically, the Claimant argues the treating physician preference was improperly applied, the COR improperly credited the Employer's IME physician, and the COR improperly considered the issue of medical causal relationship by relying on Dr. London's diagnosis.

¹ This finding was not appealed by the Claimant.

The Employer opposed on July 9, 2012. The Employer argues the findings of fact and conclusions of law in the COR were rational, supported by the substantial evidence in the record, and was in accordance with the law and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (the "Act") at §32-1521.01(d) (2) (A) and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Claimant mainly takes issue with the ALJ crediting the IME opinion of Dr. London over that of Dr. Lieberman, the treating physician. The Claimant argues first that the ALJ improperly applied the treating physician preference by failing to articulate specific reasons for rejecting the treating physician's opinion and by mis-stating what Dr. London actually did in the IME.

A review of the COR shows the ALJ, after acknowledging the treating physician preference in the District of Columbia, found the IME opinions of Dr. London to be "extensive" and consisting of,

Multiple imaging studies, neurological examination, objective laboratory studies, blood pressure tests and a CT scan of Claimant's brain (EENo. 1).

COR at 7.

We do not read the COR as stating that Dr. London actually performed any of the diagnostic testing as the Claimant urges us to do, but rather Dr. London had the objective testing to review when rendering his opinions. Indeed, nowhere in the COR does the ALJ state that Dr. London "performed" any of the objective testing as the Claimant urges us to find. We reject this argument.

The ALJ listed several reasons why he found the opinion of Dr. London more persuasive than that of the treating physician including the review of multiple records from several physicians, including Dr. Lieberman. The ALJ noted that Dr. London's opinion was in line with other physicians all of whom opined the Claimant could return to work without restrictions and needed no further treatment.

We are mindful that even with the treating physician preference the trier of fact may choose to credit the testimony of a non-treating physician over a treating physician.² Where there are persuasive reasons to do so, a treating physician's opinions may be rejected.³ Among the reasons that have resulted in such a rejection are sketchiness, vagueness and imprecision in the reports of the treating physician.⁴ Additional reasons that have been found to be relevant to this determination are the fact that the IME physician had examined the claimant personally, had reviewed all the available medical reports and diagnostic studies, and had superior relevant professional experience and specialization.⁵

It is clear that the ALJ found the medical opinion of Dr. London to be more persuasive than that of Dr. Lieberman in part because of his review of the medical records and objective testing rendered by other physicians when compared to the medical opinion rendered by Dr. Lieberman. We are aware in his deposition, Dr. Lieberman acknowledged having reviewed the objective testing in the record, however, he also acknowledges not having the records of Dr. Haim and Dr. Rodriguez. Ultimately, the ALJ found the opinion of Dr. London to be more comprehensive and consistent with that of other physicians of record, that the Claimant could return to work without restrictions and he did not require any further treatment.

The Claimant next argues that the ALJ only focused on the opinion of two physicians, Dr. London and Dr. Lieberman, and ignores the opinions of Dr. Fetcher and Dr. Ammerman. The ALJ begins her analysis with the following language,

While each documentary exhibit received into evidence is not specifically referenced in the analysis, all evidence of record was reviewed as part of this deliberation.

COR at 6.

A review of the COR shows the ALJ did not specifically mention the opinions of Dr. Fetcher or Dr. Ammerman, however, in line with the language above, we are satisfied the ALJ did review the opinions of both physicians.⁶ As we have stated before, ALJ's are not required to inventory all the evidence in a decision.⁷ Moreover, Dr. Ammerman specifically states no further treatment is necessary for the Claimant's occipital neuralgia. Dr. Fetcher only opines that the Claimant is to expand and continue home exercises but does not recommend any further treatment. Thus, contrary to the Claimant's argument that only Dr. London indicates no further treatment is necessary, both Drs. Ammerman and Fetcher state the same.

² *Short v. DOES*, 723 A.2d 845 (D.C. 1998).

³ *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

⁴ *Erickson v. Washington Metropolitan Area Transit Authority*, H&AS No. 92-63, OWC No. 181489 (October 28, 1993), aff'd. Dir. Dkt. No. 93-82 (June 5 1997).

⁵ *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999).

⁶ It is interesting to note that Dr. London was provided with Dr. Fetcher's medical records to comment on in his April 18, 2012 IME.

⁷ See *Sturgis v. DOES*, 629 A.2d 547, 554 (D.C. 1993).

While first stating the ALJ only focused on the opinion of Dr. London and Dr. Lieberman, the Claimant does acknowledge later that the ALJ references the opinions of Dr. Haim and Dr. Rodriguez. The Claimant specifically takes issue with the ALJ's summary of Dr. Rodriguez's opinion that he released the Claimant from care and was at maximum medical improvement. A review of Dr. Rodriguez's last medical report of September 3, 2009 supports the Claimant's argument. Dr. Rodriguez does not opine the Claimant is at maximum medical improvement and indicates the Claimant should follow up with Dr. Rodriguez in a month. We hold this error harmless, however, as there is substantial evidence in the record, in the form of the other physicians' opinions that the Claimant is at maximum medical improvement and does not require further treatment. Moreover, Dr. London's summary of Dr. Rodriguez's opinion is in line with the records submitted, thus negating any perceived error on the part of the ALJ as ultimately the opinion of Dr. London was relied upon.

Finally, the Claimant argues that by accepting the opinion of Dr. London, the ALJ improperly considered the issue of medical casual relationship as Dr. London opined the Claimant did not suffer from the conditions claimed. We reject this argument. The sole issue the ALJ addressed was the nature and extent of the Claimant's disability. Dr. London opined the Claimant was capable of working full duty without restrictions in light of his physical examinations and review of the objective testing performed upon the Claimant, an opinion the ALJ found more persuasive than Dr. Lieberman.

The ALJ, after citing the burden shifting scheme outlined in *Logan v. DOES*⁸, found the Claimant had failed to demonstrate, by a preponderance of the evidence, that he was unable to perform his usual job. The ALJ determined this by not only the medical records, but also by the incredible testimony of the Claimant, a finding which was not appealed. What the Claimant is essentially asking this panel to do is to re-weigh the medical evidence in his favor and ignore the credibility finding. This we cannot do.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the May 30, 2012 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

May 29, 2013
DATE

⁸ 805 A.2d 237 (D.C. 2002).