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. 05-02

KIMBERLY J. DAVIS,

Claimant–Petitioner,

v.

NCO FINANCIAL AND AIG INSURANCE,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA/AHD No. 04-270, OWC No. 590599

Matthew J. Peffer, Esquire, for the Petitioner

Michael S. Levin, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and FLOYD LEWIS, *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 responsibility for

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 September 7, 2004, the Administrative Law Judge (ALJ) denied the claim for temporary total disability from January 3, 2003 through April 3, 2003 and from September 8, 2003 through April 3, 2004, and a request for authorization for surgery, as requested by Petitioner, who now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ failed to properly apply the statutory presumption of compensability in analyzing the evidence presented concerning whether the condition complained of is medically causally related to Petitioner's employment with Respondent. Respondent argues that the ALJ did properly apply the presumption, and in the alternative, that even if the ALJ failed to apply the presumption, said error was harmless, given that the ALJ proceeded to weight the evidence as if the presumption had been invoked.

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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is not in accordance with the law, because the ALJ failed to provide Petitioner with the benefit of the statutory presumption that her complained of knee injuries are causally related to her employment with Respondent, in violation of established principles under the Act.

D.C. Code §32-1521 (1) provides claimants with a rebuttable presumption that the claim for workers' compensation benefits comes within the provisions of the Act. This presumption exists "to effectuate the humanitarian purposes" of the compensation statute, and evidences a strong

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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.

legislative policy favoring awards in close or arguable cases. *Parodi v. District of Columbia Department of Employment Services,* 560 A.2d 524 (D.C. 1989). See also, S*partin v. District of Columbia Department of Employment Services,* 584 A.2d 564 (D.C. 1990); and, *Muller v. Lanham Company,* Dir. Dkt. 86-01, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

The statutory presumption is invoked upon a showing by the claimant of an injury and a work place incident, condition or event that has the potential of causing the injury. *Parodi, supra;* see also, *Ferreira v. District of Columbia Department of Employment Services,* 531 A.2d 651 (D.C. 1987). This presumption extends not only to the occurrence of an accidental work place injury, but also to the medical causal relationship between an alleged disability and the accidental injury. *Whittaker v. District of Columbia Department of Employment Services,* 531 A.2d 844 (D.C. 1995).

In this case, review of the Compensation Order reveals that the ALJ appears to have found, without explicitly so stating, that Petitioner had sustained an accidental injury arising out of and occurring in the course of her employment with Respondent on August 1, 2002. See, Compensation Order, page 2; "On August 1, 2002, claimant, while moving boxes and a computer to a different desk a few rows away, experienced some swelling in her knees. … Initially claimant saw Chen Chang-Nan, M.D., her primary care physician, and then on August 21, 2002, claimant began treating with Dr. [Hampton] Jackson." The ALJ proceeded to discuss, as fact in the "Findings of Fact" section, the history of medical treatment:

> I find Dr. Jackson examined claimant on August 21, September 11, and September 18, 2002, and September 10 and November 12, 2003. I find claimant next saw Dr. Jackson on April 7 and May 5, 2004. I find claimant's August 28, 2002 right knee MRI disclosed a horizontal tear of the posterior horn of the medial meniscus contacting the inferior articular surface without any evidence of lateral miniscal tear. I find claimant's left knee MRI of the same date revealed degenerative signal within the posterior horn of the medial miniscus without evidence of a discrete tear. I find on September 11, 2002, Dr. Jackson performed an arthrocentesis of claimant's left knee. I find claimant also underwent a consultative orthopaedic evaluation on October 8, 2003 by Melissa Yadao, M.D.

Compensation Order, pages 2 – 3. Then, in discussing further, the medical history, the ALJ observed that Petitioner was evaluated by Dr. Robert A Smith, an orthopaedic surgeon, at Respondent's request, for the purpose of an independent medical evaluation (IME) on April 15, 2004 (Compensation Order, page 3). Although the ALJ stated that Petitioner had failed to produce sufficient evidence to invoke the *Whittaker* presumption that the current complaints are causally related to the work injury (Compensation Order, page 4), said conclusion even if erroneous (and we believe it is erroneous) was harmless, because, as Respondent points out in its opposition brief, the ALJ proceeded to evaluate the evidence "Assuming, *arguendo*, … [a] causal link between the purported knee condition and original work incident is established…" Compensation Order, pages 4 – 5.

Thereupon, the ALJ found that Respondent had produced sufficient evidence to overcome the presumption of compensability, considering the contents of that report, and the 13 month lapse in time between the last treatment by Dr. Jackson and the recurrence of symptoms leading to a return

for medical care from Drs. Jackson and Yadao on October 8, 2003. Dr. Smith opined that whatever bilateral knee injuries that Petitioner may have sustained on August 1, 2002 had resolved by the time of the IME.

The law is well established that, once raised, the presumption shifts to the employer the burden to produce evidence that is substantial, specific and comprehensive enough to sever the potential connection. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Stewart v. District of Columbia Department of Employment Services,* 606 A.2d 1350 (D.C. App. 1992). The "specific and comprehensive" standard and the "substantial evidence" standard are fundamentally the same, upon analysis. Where an employer produces evidence that addresses the proposition for which the presumption has been invoked (thereby being relevant), and which, if true *could* lead a reasonable mind to reach a conclusion contrary to that to which the presumption leads (thereby being both specific and comprehensive, in that no reasonable mind could reach a conclusion based upon insufficiently specific evidence, or evidence that does not completely address the relevant question), the presumption falls from the case. Absent such evidence, the presumption will result in the claim being deemed to fall within the Act. On the other hand, where the employer does produce such evidence, the presumption falls from the case, and the evidence is to be assessed by reference to the preponderance of the evidence standard, with the burden of proof being on the claimant. *Ferreira, supra; Spartin, supra.*

Although Petitioner does not mention the details of the evidence presented by Respondent in opposition to the presumption, our review of the IME report discloses that it nowhere addresses the question of whether the work incident as found by the ALJ to have occurred and to have caused the initial bilateral knee injuries caused the complaints with which the Petitioner presented at the time of the IME. Rather, in the only language addressing causal relationship, the IME report states as follows:

> **HISTORY OF PRESENT ILLNESS;** By history, Ms. Davis is a 43 year old female who on August 1, 2002, became aware that she had been bitten by some "bugs" in the office she was working in at the time. She apparently works for a collection agency called NCO and unfortunately, the office had become infested with some small, biting insects that bit her on the legs.
>
> …
>
> **DISCUSSION:** There is no connection, in my opinion, between the fact that she was bitten by a bug and the MRI findings of degenerative meniscal tears.

Employer's Exhibit (EE) 1, April 15, 2004 IME Report, Robert A. Smith, M.D. While the report goes on to discuss the doctor's further opinions to the effect that Petitioner could return to work and was in need of no further orthopaedic care, those additional discussion have no bearing upon the Compensation Order's determination that any current complaints are unrelated to the work injury.

While the record *medical* evidence presented by Petitioner asserting the existence of a causal relationship is exceedingly slight (consisting solely, in Claimant Exhibit (CE) 2, of a single, nearly illegible hand written check mark next to the word "Yes", and sentence fragment, "Twisted knee while lifting at work on 8/1/02", both of which are contained in a fill-in-the-blank form, on Petitioner's counsel's letterhead, following the question "Is the condition you have diagnosed

caused, contributed to or aggravated, even in part, by the above referenced incident [there being no specific "incident" referenced "above" in said document]"), the IME report presents even less in the way of relevant information, and addresses an alleged cause different from the cause as found by the ALJ and as described in CE 2.

On this record, therefore, we conclude that Petitioner presented sufficient evidence, by way of her testimony in HT 22 – 30 concerning the physical exertions involved in moving her office materials and equipment in boxes from one location to another on August 1, 2002, the immediate bilateral knee swelling attendant to that activity, and the contents of CE 2 described above, to invoke the presumption that her knee conditions are causally related to her work activity on August 1, 2002.

Further, in that the IME report does not address whether the activities described by the Petitioner, and found by the ALJ to have occurred, did or did not cause the alleged conditions (documented by MRIs as described in the Compensation Order and discussed by Dr. Smith), we conclude that the Respondent failed to produce sufficiently specific and comprehensive evidence in opposition to the presumed relationship.[2]

The ALJ did not reach or address the second or third issues presented, being the nature and extent of the alleged disability, if any, attendant to the work injury, and the claim for further medical treatment. Accordingly, the matter must be remanded for further consideration of these issues, based upon the evidence presented at the formal hearing.

CONCLUSION

The Compensation Order of September 7, 2004, is not supported by substantial evidence, in that the evidence presented by Respondent in opposition to the presumed causal relationship between the claimed disability and the work incident of August 1, 2002 does not address the relevant alleged cause of said claimed disability, and the conclusion in the Compensation Order that said presumed causal relationship has been severed is therefore not in accordance with the law.

[2] We note further that, even had the IME report addressed the relevant facts concerning the alleged cause of the bilateral knee injuries, the Compensation Order failed to adequately discuss why the IME opinion was accepted in place of the treating physician opinion, given the treating physician preference long recognized to exist in this jurisdiction. *See*, *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). On remand, where there are or may be conflicts in connection with the remaining issues to be decided, the ALJ must address those conflicts in light of this principle.

ORDER

The Compensation Order of September 7, 2004 is reversed and remanded with instructions that on remand, the ALJ make additional findings of fact and conclusions of law concerning the nature and extent of Petitioner's disability, if any, and the claim for authorization for additional medical care.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

November 30, 2005
DATE