

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-146

DEDE FOLLY DJINDO,
Claimant-Petitioner,

v.

JW MARRIOTT HOTEL and
MARRIOTT CLAIMS SERVICES,
Self-Insured Employer Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JAN 29 PM 9 09

Appeal from an August 12, 2015 Compensation Order
By Administrative Law Judge Gregory P. Lambert
AHD No. 13-259, OWC No. 694310

(Decided January 29, 2016)

David M. Snyder for Claimant
Sarah M. Burton for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Dede Folly Djindo (Claimant) worked for employer as a housekeeper. On June 21, 2012, Claimant complained of shock-like symptoms in her knees while pushing a housekeeping cart. She continued to work for a few hours until a mid-morning fire drill. Thereafter, she took a cab from work to INOVA Mount Vernon Hospital. She reported that her right knee gave out on her while at work. X-rays of both knees and the left ankle were negative. She followed up with Dr. Hugo Davalos, orthopaedic surgeon on June 25, 2012 who advised Claimant to stay off work through July 5, 2012. She saw two primary care physicians and was referred to Dr. William F. Postma, an orthopedic surgeon on March 5, 2013. She reported she fell while pushing a cart. Dr. Postma referred Claimant to pain management specialist, Dr. Rommaan Ahmad.

An Administrative Law Judge (ALJ) with the Administrative Hearings Division (AHD) issued a Compensation Order (CO) on August 12, 2015 which found Claimant did not experience an injury that arose out of and in the course of her employment. *Djindo v. JW Marriott Hotel*, AHD No. 13-259A, OWC No. 694310.

ISSUE ON APPEAL

Is the August 12, 2015 supported by substantial evidence and in accordance with the law?

ANALYSIS

Claimant's Brief titles her first argument on appeals as:

Ms. Wright has established that the recommended surgery is medically causally related to her work injury on October 2, 2008.

This is clearly a "cut and paste" error as there is no mention in the Joint Pre-Hearing Statement or the CO that Claimant was seeking a specific surgical procedure and the CO describes an injury that allegedly occurred on June 21, 2012 not October 8, 2008. Nevertheless Claimant subsequently asserts in her brief:

The CO improperly concluded that the evidence put forth by the Employer rebutted the presumption that there was an injury that arose out of and in the course of Ms. Folly Djindo's employment. *See* CO at 4. The CO notes that the Employer established through its IME physicians that Ms. Folly Djindo's condition was idiopathic and did not arise out of her employment. The CO failed to recognize, however, that the Employer/Insurer had accepted Ms. Folly Djindo's claim and paid her temporary total disability benefits previously. Further, in his IME dated September 11, 2012, shortly after the incident occurred, Dr. Danziger noted that, 'The patient sustained a non-specific strain injury to the knees and ankle from the work related injury of 6/21/12.' Dr. London, the Employer/Insurer's other IME physician, noted that 'it is unclear as to whether [Ms. Folly Djindo] sustained any injury at all on the date.' He notes that, 'If, in fact, she sustained any injury, it was very minor and it was a knee strain.' This opinion is not specific and comprehensive enough to rebut the presumption because it is not definitive.

Claimant's Brief at 5. (citations omitted)

Claimant further asserts the ALJ erred in not affording Dr. Ahmad the treating physician preference.

Employer asserts that it provided substantial evidence to rebut the presumption of compensability and that Claimant's own medical records provide evidence that Claimant suffered an idiopathic condition.

As to whether Employer had overcome the presumption, the ALJ's discussion consists of only:

Marriott argues that her injury was idiopathic and did not arise out of employment. The IME reports of Drs. Levitt and London reflect healthy skepticism that she sustained an injury at all. *See, e.g.*, EE 1 ('With her gross exaggerated behavior, hyperactive pain response and symptom magnification, it is difficult to discern what, if anything, is real vs. secondary on exam today.'), EE 2 ('This is a case of malingering and not hysteria'), Marriott rebutted the presumption that there was an injury that arose out of and in the course of employment.

Ms. Djindo was then obliged to prove by a preponderance of the evidence that her alleged disability arose out of and in the course of employment. *See generally McCamey v. District of Columbia Dep't. of Employment Servs.*, 947 A.2d 1191, 1214 (D.C. 2008). She did not do so.

CO at 4.

As Claimant correctly cites, with regard to the use of IME reports to rebut the presumption, the District of Columbia Court of Appeals (DCCA) has held that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability. *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*).

We note the ALJ failed to acknowledge and apply the well-established standard enunciated by the DCCA in *Reynolds* when IME reports are relied on to rebut the presumption¹. We conclude that this failure renders the conclusion that Employer rebutted the presumption to not be in accordance with the law as it exists in this jurisdiction. "Healthy skepticism" that Claimant sustained an injury at all and asserting that Claimant is a malingerer is not, in our view, sufficient to be an unambiguous opinion that the work injury did not contribute to Claimant's disability. While the record may contain an opinion that equates to an unambiguous opinion that the work injury did not contribute to the back injury, the ALJ did not identify it or discuss it. *See* EE 16. Nevertheless, we are precluded from making our own determination from the record and offer no opinion now as to whether Employer has met its burden. *King v. DOES*, 742 A.2d 460, 465 (D.C. 1999).

As we are reversing the ALJ's determination that Employer met its burden of proof necessary to rebut the presumption that Claimant sustained a work-related injury, it is premature to determine if the ALJ adequately afforded Claimant's physician the treating physician preference. On

¹In *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987), the DCCA held "[o]nce the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." The Court added "If an employer produces evidence specific and comprehensive enough to rebut the potential connection between the work-related incident, the presumption falls from the case and the evidence must be weighed without reference to the presumption". *Ferreira, supra* at 655. The DCCA in *Reynolds* provided a specific standard when employers attempt to rebut the presumption with IME reports.

remand, if after applying *Reynolds*, the ALJ concludes Employer has met its burden, we caution the ALJ to apply the treating physician preference and if necessary provide specific reasons for rejecting the treating physician opinions. See *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999) citing *Short v. DOES*, 723 A.2d 845, (D.C.1998)

CONCLUSION AND ORDER

The August 13, 2015 Compensation Order is not in accordance with the law and is VACATED consistent with this Decision and Remand Order. The matter is remanded for further consideration.

So ordered.