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. 04-40

DIANE ELLERBEE,

Claimant–Petitioner,

v.

NAFFCCA AND FIRST UNION NON-PROFIT INSURANCE CO.,

Employer/Insurer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA/AHD No. 03-381, OWC No. 580717

Diane C. Ellerbee, *pro se*[1]

Thomas G. Hagerty, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE 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). [2]

[1] While Petitioner was represented at the formal hearing which resulted in the Compensation Order under review herein, she has represented herself in these proceedings.

[2] 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

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 February 23, 2004, the Administrative Law Judge (ALJ) that Petitioner had sustained an accidental injury arising out of and occurring in the course of her employment with Respondent on July 2, 2002, that she was temporarily disabled as a result of that injury from that date through July 8, 2002, and that she gave adequate and timely notice of the injury to Respondent. The ALJ denied Petitioner's claim for temporary total disability beyond July 8, 2002. In so ruling, the ALJ determined that Petitioner's work injury was limited to her left wrist, and that any injury to or disability resulting from a claimed neck injury was unrelated to the work injury of July 2, 2002. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that:

> [T]he Compensation Order is not (1) based on accurate facts or supported by the record; (2) testimony of witnesses are [sic] conflicting and misconstrued information; (4) [sic] insubordination; (5) credibility and presumption of compensability; (5) [sic] medical opinion of the Evaluator (compensated) for deposition and from insurance company; (6) no weight given to medical records, MRI or treating physicians and therapist.

Application For Review (AFR), page 1. From this language and further review of the AFR, we glean that Petitioner is asserting that the Compensation Order's findings that Petitioner did not sustain a neck injury in the July 2, 2002 work incident, and was not disabled as a result of the injury to her wrist beyond July 8, 2002 are unsupported by substantial evidence, and that the Compensation Order is not in accordance with the law because the ALJ (1) improperly failed to accord her the presumption that the claimed neck injury is causally related to the work injury (IME) opinion in reaching those conclusions, and (2) improperly rejected treating physician opinion and accepted independent medical evaluator.

Respondent opposed the appeal, asserting that the Compensation Order is in all respects supported by substantial evidence and in accordance with the law.

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

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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 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.

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, as to the first identified issue, in denying Petitioner's claim of having sustained an injury to her neck, the ALJ wrote that:

> Claimant [Petitioner] … did not testify with regard to any injury she sustained at work [for Respondent] to her neck nor did she describe any work activities that have the potential of contributing to a neck injury absent a specific incident occurring which involved her neck or aggravated a prior neck injury.
>
> Moreover claimant did not corroborate her testimony or her counsel's assertion that she sustained a neck injury with a contemporaneous medical report detailing her injury. Instead, claimant submitted an "Initial Comprehensive Evaluation" report from Dr. [Hudson] Drakes dated August 14, 2002 which discusses claimant's left wrist only and makes no mention of any neck complaints. Accordingly, for purposes of invoking the presumption, claimant has not, through her own medical evidence or testimony, made even an initial demonstration of a neck injury occurring in July 2002 as alleged by her attorney … .

Compensation Order, page 6. Review of Petitioner's testimony supports the ALJ's statement that Petitioner never mentioned neck pain or other symptoms in her neck in connection with her work duties. Further, review of the medical reports submitted by Petitioner confirms the ALJ's assertion that Dr. Drakes does not make any reference to Petitioner's having complained of such neck symptoms on that initial evaluation date, August 14, 2002. CE 1, Initial Comprehensive Evaluation" report. And, we note that there is nothing in the reports submitted by Petitioner that includes a specific assertion that Petitioner has sustained a neck injury while working for Respondent.

However, review of the exhibits submitted by Petitioner reveals that on September 23, 2002, Petitioner was referred by Dr. Victor Herry, her primary care physician at Kaiser Permanente, for a cervical MRI in connection with a diagnosis of "cervical radiculopathy" (CE 1, "Uniform Consultation Referral Form"), and that on October 23, 2002, December 13, 2002, January 2, 3 or 8 (the exact date being illegible) 2003, January 29, 2003, February 26, 2003, March 26, 2003, and April 16, 2003, Dr. Drakes's reports each make reference to some level of symptoms of a "cervical" nature (CE 1, reports of noted dates). In addition, Petitioner submitted a narrative report authored October 3, 2003 by Dr. Drakes (CE 2), in which he notes continuing evidence (as of a May 12, 2003 electrodiagnostic study not otherwise described) of "cervical radiculopathy" at C5-C6 in connection

with a diagnosis of same. Lastly, it is noted that, although there we have found no direct testimony from Petitioner describing neck pain or linking said pain or any attendant functional limitations relevant to her ability to work, we do note that she testified as follows:

> By Mr. Peffer [Petitioner's counsel at the formal hearing]:
>
> Q Let me ask you this: You've been treating with Dr. Drakes since that time [referencing August 14, 2002], is that correct?
>
> A Yes.
>
> Q Okay. Has Dr. Drakes rendered treatment to any other part of your body besides your left wrist?
>
> A Yes.
>
> Q What part of the body is that, ma'am?
>
> A My neck and shoulder on the left side.
>
> …
>
> Q Okay. Have you had an MRI done?
>
> A Yes.
>
> Q What body part, ma'am?
>
> A My neck and shoulder.
>
> Q Who prescribed that?
>
> A Dr. Drakes—I mean, yes, Dr. Drakes.

HT, page 56 – 57. 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 v. District of Columbia Department of Employment Services*, 560 A.2d 524 (1989).*;* see also, *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651 (1987), in which the quantum of such evidence is "some" evidence. 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 (1995).

Although we acknowledge that this evidence is certainly not so compelling as to establish, as a matter law, that Petitioner sustained either a new injury to her neck while working for Respondent, or sustained an aggravation of her admitted prior neck injury (see, Compensation Order, page 2), we

believe that it does constitute "some" evidence in support of Petitioner's claim that she sustained a cervical, or neck, injury while employed by Respondent and engaged in "moving heavy boxes and lifting heavy objects including an air conditioner and items of that nature while assisting a client in a group home where she was the manager", as described by Dr. Drakes in CE 2. Thus, the determination that Petitioner had not produced sufficient evidence to invoke the presumption that she sustained the claimed neck injury in the course of her employment with Respondent is not in accordance with the law.

However, further review of the Compensation Order makes clear that this error was harmless, because, after determining that Petitioner had not presented sufficient evidence to invoke the presumption, the ALJ nonetheless weighed the evidence by the same standard that would have been appropriate had she first invoked the presumption, then found it to have been rebutted. That is, the ALJ noted in opposition to the claim that the evidence submitted by Respondent in the form of a memorandum authored by Petitioner at the time of the work injury described left hand and wrist complaints, but failed to refer to any neck complaints; there was a similar omission of such references in Dr. Drakes's initial report; there was a total lack of any specific reference to any neck problems in Petitioner's testimony at the formal hearing; the nature of Dr. Drakes's October 3, 2003 written report, was that it was not a medical report generated in the course of providing medical care, but was rather generated to provide "answers posed to him by claimant's counsel"; and that that report's contents "lump[ed] the wrist and neck together" and was specifically linked by Dr. Drakes to his initial report, in which he "made no mention of any neck problems when he first examined claimant, albeit, six weeks after the alleged injuries manifested". Given this discussion, it is apparent that the ALJ conducted an appropriate analysis and weighing of the medical evidence, including a description of the reasons for rejecting the obliquely rendered opinion of Dr. Drakes, as was the ALJ's obligation under *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (1992). Thus, no remand for further evaluation of the evidence is required, the conclusion of the ALJ being supported by substantial evidence and in accordance with the law.

Turning to the nature and extent issues, the ALJ's findings concerning Petitioner's capacity for work were based upon the specific work and activity restrictions imposed by Dr. Drakes, which were no lifting greater than 5 pounds, no repetitive bending, lifting, stooping, climbing or crawling, and the ability to have frequent changes from sitting or standing (CE 2). The ALJ found, and her findings are supported by Respondent's witnesses as well as by Petitioner's own testimony, that Petitioner was offered and refused to accept a position as a Senior Community Living Assistant, (CLA) said refusal having been found to have been made July 24, 2002. As the ALJ found, that position did not conflict with any of the medical restrictions placed upon Petitioner by her treating physicians, and the reasons given by Petitioner in her memorandum refusing the position list, as the ALJ noted, five reasons for the refusal "none of which … had anything to do with her left wrist problems". Nor, we note, do they have anything to do with her neck or cervical problems. Rather, they are (1) a 6:00 p.m. "responsibility" to pick up a grand child from day care; (2) her own opinion as to the lack of wisdom, from a management perspective, of the reassignment; (3) her refusal to "accept" a "senior level" position without getting a raise; (4) her refusal to accept a "non-degree" position, since she was hired in a "degree" position, presumably referring to an educational degree; and (5) refusal to jeopardize an annual increase claimed to be upcoming on August 15th of that year. EE 3. These five points, "bulleted" and indented in the memo, are followed by Petitioner's

"reminder" that she is "still" under her doctor's care and has "limited use" of her left hand. However, that circumstance is not asserted in the memo as a cause for her refusal of the position.

The determination that Petitioner was not entitled to temporary total disability benefits from and after the refusal of the CLA position is therefore supported by substantial evidence and is in accordance with the law.

Lastly, for the period prior to that refusal, the ALJ denied temporary total disability from July 8, through July 24, 2002. The July 2, 2002 through July 8, 2002 period was awarded because Petitioner testified that Dr. Herry had advised her to take "a week off", and despite Petitioner's not producing a disability slip for this period, the testimony was corroborated by being Dr. Barth, Respondent's IME physician, in his deposition testimony, where he described a return to work slip dated July 8, 2002 from Dr. Drakes. The ALJ concluded that Petitioner had failed to demonstrate entitlement to temporary total disability from July 8 through July 24, 2002, because there was no disability slip from any physician covering that time period. The ALJ also noted that Petitioner had been suspended without pay for insubordination from July 11, 2002 through July 16, 2002; that Petitioner testified that she returned to work July 16, 2002, and worked "a couple of hours" on July 22, 2002, "but offered no explanation for not working her regular work schedule nor …submitted any reports from Dr. Harry [sic] or other medical documentation to explain her status at that time". The testimony to which the ALJ was referring is found at HT 46 – 48. In that testimony, Petitioner stated that during this time she returned to her old work (as described by her counsel) for about two days, and stopped working because "I was placed on administrative leave", which apparently is a reference to her suspension. Following the suspension, Petitioner testified that she returned for "one more day on the 16th of July and for about a couple of hours around July 22nd".

We agree with the ALJ's determination that the evidence concerning Petitioner's medical and employment status following the July 8, 2002 authorization to return to work and prior to the July 24, 2002 declining of the offer of a position as a CLA is unclear and incomplete, and we agree that it is Petitioner's burden under, *Dunston v. District of Columbia Department of Employment Serv's.*, 509 A.2d 109 (D.C. App. 1986), it was Petitioner's burden to establish by substantial evidence an entitlement to the claimed benefits. We note that the ALJ did not deny the claim for the period following July 8, 2002 based upon the fact of Petitioner's suspension, but rather because the ALJ found that the claim beyond that date was insufficiently supported by credible evidence of incapacity. In that the award of benefits that was made was based upon a finding that Petitioner was authorized by Dr. Herry to be off work, and there is no evidence that said authorization extended beyond July 8, 2002, the decision to deny temporary total disability benefits from and after that date is in accordance with the law.

CONCLUSION

The Compensation Order of February 23, 2004 is supported by substantial evidence in the record and in accordance with the law.

ORDER

The Compensation Order of February 23, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____October 27, 2005__ _____
DATE