

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-038

ERIC GUNN,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer–Respondent.

Appeal from a March 10, 2014 Compensation Order on Remand
of Administrative Law Judge Nata K. Brown
AHD No. PBL 09-076A, DCP No. 30100527985-001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 JUN 25 PM 1 07

Henry A. Escoto for the Petitioner
Andrea G. Comentale for the Respondent¹

Before JEFFREY P. RUSSELL, HENRY W. MCCOY and HEATHER LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

This case was originally before the Compensation Review Board (CRB) on the request of the District of Columbia Department of Corrections (DOC) for review a Compensation Order of October 7, 2011 (CO 1) issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division of the District of Columbia Department of Employment Services (DOES). In CO 1, the ALJ granted Eric Gunn’s request for an award of disability compensation benefits for a medical condition known as methicillin-resistant *Staphylococcus aureus* (MRSA), which benefits had been denied by the Office of Risk Management (ORM), the government agency charged with administering the Disability Compensation Program (DCP) covering work related injuries suffered by District of Columbia employees under the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (CMPA), and currently known as the Public Sector Workers’ Compensation Act (PSWCA). In so doing, the ALJ determined that Mr. Gunn’s MRSA was causally related to his employment as a prison guard.

On November 7, 2011, DOC filed an Application for Review (AFR) challenging the award, which AFR Mr. Gunn opposed, seeking either dismissal of the AFR as being untimely, or affirmance of

¹ Justin Zimmerman appeared on behalf of Employer before the Administrative Hearings Division and represented Employer in prior appeals before the Compensation Review Board.

the CO as being supported by substantial evidence and being in accordance with the Act. On April 5, 2012, the CRB concluded that the appeal was timely, but that:

CONCLUSION

The underlying basis for the ALJ's conclusion that the evidence is of a causal relationship between Mr. Gunn's condition and his employment is "unrefuted" is not supported by substantial evidence, and the failure to identify the applicable burden of proof, coupled with the statement that a claimant's burden is one of producing "substantial evidence" in support of a claim, renders the conclusion that medical causal relationship has been established contrary to law.

ORDER

The award of compensation and medical benefits is vacated and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

Decision and Remand Order of April 5, 2012 (DRO 1), pages 5 – 6.

On September 27, 2012, the ALJ issued a Compensation Order on Remand (CO 2), in which the claim for relief was again granted, the matter was again appealed to the CRB, and the CRB again concluded and ordered:

CONCLUSION

The ALJ applied the wrong burden of proof to this public sector case. The September 27, 2012 Compensation Order on Remand is vacated, and this matter is remanded for further consideration consistent with this Decision and Remand Order as well as the April 5, 2012 Decision and Remand Order.

Decision and Remand Order, December 19, 2012 (DRO 2).

On March 10, 2014, the ALJ issued a Compensation Order on Remand (CO 3), in which she denied the claim.

Claimant appealed CO 3 to the CRB, to which Employer filed a timely opposition. Claimant's sole argument on appeal is "even if a medical physician cannot determine the exact time and location Mr. Gunn contracted the infection, a doctor's opinion as to what likely caused the infection in addition to evidence of other DOC employees who have contracted the infection does qualify as "substantial" and "credible" evidence. Therefore, Mr. Gunn "has met his burden of proof and is entitled to the relief requested". Application for Review of Compensation Order, page 1.

Employer filed a timely Response in Opposition to Application for Review, arguing that the ALJ's decision is supported by substantial evidence and should be affirmed. According to Employer

Claimant “provided evidence that did nothing more than establish work related events and activities which have the *potential* for resulting in the MRSA injury” and that “the record is devoid of any rationalized medical evidence on the issue of causation relating claimant’s MSRA injury to [his employment at the DOC.” Employer’s Opposition, page three.

We vacate and remand for further consideration.

DISCUSSION

The Compensation Order under review herein, CO 3, is, the third Compensation Order that has come before us in this case. It is the first in which the claim was denied. The first two remands, were the result of the ALJ making a significantly erroneous finding that there was “no record evidence” in opposition Claimant’s evidence of a causal relationship (in CO 1), applying the wrong standard of proof, i.e., either affording Claimant the benefit of the private sector presumption of compensability in this public sector case, or applying a “substantial evidence” as opposed “preponderance of the evidence” standard (in CO 1 and CO 2).

Further, both remands noted that these problems were compounded by the fact that there was no medical opinion evidence from any of the multiple doctors whose records and/or testimony was in evidence to the effect that Claimant’s infection was causally related to his work environment. Rather, it was noted by the CRB in the two earlier remands that the Compensation Orders failed to explain how the record evidence overcame the only expressed medical opinion as to causation, which was that the condition was not caused by work exposure, but rather by exposure to Claimant’s similarly infected girlfriend.

In neither of the first two Decision and Remand Orders (DROs) did the CRB rule that an affirmative medical opinion was a prerequisite to an award. Had that been the position of either of the prior CRB panels, the matter would have been remanded not for further consideration, application of the proper burden of proof, and explanation how the evidence in a case whose sole issue was a medical question could resolve that question in a manner inconsistent with the only medical opinion in evidence on the issue, but rather the remand would have instructed that an order be entered denying the claim.

In CO 3, the claim was denied. The reasoning for the denial is found in the Conclusions of Law section, which reads as follows:

It is the opinion of the undersigned, under the *Travelers* doctrine, that Claimant was temporarily totally disabled from October 22, 2009 through March 1, 2010 as a result of the work-related acquisition of MSRA. However, *I am constrained by the CRB’s December 19, 2012 DRO to “accept that it is not sufficient that Claimant was exposed to conditions that could offer a ‘potential connection’ between his employment and MRSA—he must prove by a preponderance of the evidence his*

work conditions did cause his MSRA". Therefore, I conclude that, because of a lack of a medical opinion specifically relating Mr. Gunn's MRSA to his employment, Employer prevails.

(bold supplied).

This conclusion is internally inconsistent and along with other portions of CO 3, represents a misapprehension of the fact that the PSWCA has no presumption of compensability. This is made most evident by the reference to *Travelers Insurance Company v. P.J. Donovan*, 221 F.2d 886, 95 U.S. App. D.C. 331 (1955) and the "*Travelers doctrine*" as "the prevailing case law in this jurisdiction." Here is what the ALJ wrote earlier in CO 3 regarding that case:

Pursuant to prevailing case law in this jurisdiction regarding contracting of an infectious disease, *The Travelers Insurance Company v. P.J. Donovan*, supra, there is no requirement that a physician must provide an opinion that definitively states where a claimant contracted an infectious disease in order for the claimant to prove that he or she contracted an infectious disease in the course of his or her employment.

CO 3, page 6.

However, this is what *Travelers* has to say:

The statute creates a presumption, for the benefit of the claimant, that 'the claim comes within the provisions of this Act' [footnote 3]. Accordingly, absent substantial evidence to the contrary, a disability occurring in the course of employment 'must be presumed to have arisen therefrom.' *Robinson v. Bradshaw*, 1953, 1292, 92 U.S.App.D.C. 216, 220, 206 F.2d 435, 439. And see *O'Leary v. Brown-Pacific-Maxon, Inc.*, 1951, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483. Here it is clear that the disability did occur in the course of employment: * * * the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.' *Cardozo, J., in Marks' Dependents v. Gray*, 1929, 251 N.Y. 90, 167 N.E. 181, 182, quoted and followed in *Lepow v. Lepow Knitting Mills*, 1942, 288 N.Y. 377, 43 N.E.2d 450.

The carrier has brought forward no substantial evidence opposed to the presumption, along the lines of which we spoke in *Robinson*. On the contrary, the agreed statement shows that the risk of contracting tuberculosis in Japan was some five times greater than in the District of Columbia. It is conceivable that the incidence of the disease in both places was so minimal as to require the conclusion that the five-fold ratio was itself de minimis. But the carrier offered no proof to that effect, and

we certainly cannot derive any such conclusion from our own inspection of the record.

Travelers, supra, at 888 – 889.

“The Act” referred to in the footnote 3 is D.C. Code § 36-501 *et seq.*, 1951; 33 U.S.C. § 901 *et seq.*, which at that time stated simply that private sector workers’ compensation claims arising in the District of Columbia would be governed by the Federal Longshore and Harbor Workers’ Compensation Act, which is 33 U.S.C. § 901 *et seq.* (LHWCA).² Thus, while the ALJ in this case goes to some length discussing how in many instances, the PSWCA and the private sector Act “are conceptually close” and that some aspects of one are sometimes considered to be “informative” of the other (CO 3, page 5), such is not the case where the two acts are as substantively different as they are with regard to the existence of the presumption in the private sector Act (and the LHWCA) and its absence from the PSWCA (and FECA). As the District of Columbia Court of Appeals has noted:

In workers' compensation cases where, as here, there is no presumption of compensability, [footnote omitted] the burden of proof "falls on the claimant to show by a preponderance of the evidence that his or her disability was caused by a work-related injury." *McCamey v. District of Columbia Dep't of Employment Servs.*, 947 A.2d 1191, 1199 n.6 (D.C. 2008) (en banc) (citing *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs.*, 744 A.2d 992, 998 (D.C. 2000)). In this case, however, the ALJ repeatedly referred to the less demanding "substantial evidence" standard in evaluating Ms. Rogers' claim. First, he began his discussion of the causal relationship issue by announcing that Ms. Rogers "bears the burden of producing substantial evidence that her carpal tunnel syndrome is causally related to her work injury." He continued: "Substantial evidence is defined as relevant evidence, which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the asserted matter is true." Then, at two separate points, the ALJ framed his conclusion in terms of "substantial evidence," stating, "[c]laimant has shown by substantial evidence that she suffered an accidental injury arising out of and in the course of her employment on May 22, 2003," and "[c]laimant has presented substantial evidence that her disabling condition is causally related to her work injury." At no point in his reasoning did the ALJ mention the preponderance of the evidence standard.

² Federal government employee’s workers’ compensation claims were and remain covered by a separate and substantively different statute, the Federal Employees Compensation Act (FECA). With the advent of home rule, the newly created District of Columbia government passed a new private sector workers’ compensation law which was nearly identical in its terms to the LHWCA. However, after city employees were no longer employees of the Federal Government, the Council of the District of Columbia chose to have District of Columbia Employees covered by an act that was in nearly all respects identical not to the LHWCA, but rather to FECA

D.C. Department of Mental Health v. DOES, 15 A.3d 692 (D.C. 2011) at 698. See also *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004) at 712.³

Thus, the conceptual comparability of the two Acts doesn't appear to have any relevance to the matter presented. To the extent that the ALJ stated in CO 3 that *Travelers, supra*, represents "the prevailing law in this jurisdiction" as it relates to the presumption, she is in error when it comes to the PSWCA, and it has no application to this case precisely because *Travelers'* underlying ruling is premised upon the existence of the private sector statutory presumption.

What is required of us in our review is to assure that a compensation order that is affirmed reflects an accurate understanding of the applicable law, including the applicable burdens of proof, and explains its conclusions in a rational manner by reference to facts that are identified and supported by substantial evidence in the record, and that it does so in a way that is not internally inconsistent and contradictory. In cases where the issue is purely medical, this includes explaining why the ALJ's conclusions are contrary to the only medical evidence in the record. Without such an explanation, the District of Columbia Court of Appeals has been wary in cases where it appears that this agency has decided a case in a manner suggestive of "substituting its judgment" for that of the medical experts. See *Landesberg v. DOES*, 794 A.2d 607 (2002) at 614; *Jackson v. DOES*, 979 A.2d 43 (2009), at 47.

³ *Kralick* is instructive in this regard, because its approving application of the treating physician preference, a rule that first arose in this jurisdiction under the private sector act, to public sector cases, is premised in part upon the fact that the physician's preference rule has nothing whatsoever to do with the private sector acts presumption of compensability, and therefore, the absence of a presumption from the public sector act does not mean that applying the treating physician rule under the public sector act is erroneous.

CONCLUSION AND ORDER

The Compensation Order on Remand of March 10, 2014 is internally inconsistent and self-contradictory, appears to apply an inapplicable burden of proof, and incorrectly interprets the prior CRB remands to permit an ALJ to conclude on the one hand that a claimant has proved entitlement by a preponderance of the evidence and on the other deny that claim due to the lack of medical opinion evidence. The matter is remanded for further consideration of the claim and issuance of a compensation order in which the burden of proof is placed upon Claimant and which includes a rational explanation concerning the rejection of the medical opinions, if they are contrary to the conclusions reached in the Compensation Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

June 25, 2014
DATE