

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 07-108

ETHEL MURPHY,

Claimant – Respondent

v.

BROOKS BROTHERS CLOTHING AND LIBERTY MUTUAL INSURANCE, Co.,

Employer/Carrier –Petitioner

Appeal from a Compensation Order on Remand of
Administrative Law Judge Teri Thompson Mallett
AHD No. 06-255, OWC No. 616890

Christopher Costabile, Esquire for the Petitioner

David M. Schloss, Esquire for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 Order, which was filed on April 13, 2007, the Administrative Law Judge (ALJ) granted the request by Claimant-Respondent (Respondent) for benefits, concluding that Respondent was temporarily and totally disabled from September 8 to September 12, 2005, November 28 to December 13, 2005 and February 13 to March 8, 2006. Employer-Petitioner (Petitioner) now appeals that Compensation Order on Remand.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not 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 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. D.C. Official Code §32-1522(d)(2). "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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.

On October 12, 2006, a Compensation Order was issued granting Respondent benefits. After an appeal, on February 6, 2007, the CRB remanded this matter to the ALJ for further findings of facts and conclusions of law as to whether Respondent's current impairment is causally related to the work injury of September 18, 2002. In its Decision and Remand Order, the CRB determined that Petitioner had, in fact, presented reasonable relevant evidence to support its position of no causal relationship to rebut the presumption and thus the statutory presumption must drop from the case. Therefore, the burden shifted back to Respondent to prove, by a preponderance of the evidence, that her work-injury caused or contributed to her disability, without aid of the presumption.. As such, the CRB remanded this matter to the ALJ to weigh the evidence on causation.

Turning to the case under review herein, Petitioner alleges that there was an error in law in the application of the presumption of compensability, as the ALJ failed to apply the presumption as directed by the CRB and failed to weigh the evidence without the aid of the presumption. Respondent counters that the ALJ properly weighed the evidence without the application of the presumption of compensability and after properly weighing the evidence, the ALJ properly concluded Respondent's disability was medically causally related to her work injury.

An employee's claim is presumed to come within the provisions of the Act. D.C. Official Code § 32-1521(1) (2001). Upon presentation of credible evidence of an injury and a work-related event or activity that has the potential of resulting in or contributing to the injury, a claimant invokes the protection of the presumption. *Ferriera v. Dist. of Columbia Dep't. of Employment Servs.*, 531 A.2d 651, 655 (D.C. 1987). The focus then shifts to the employer to produce evidence specific and comprehensive enough to sever the presumed connection between the employment-related event and the injury. Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. Dist. of Columbia Dep't. of Employment Servs.*, 560 A.2d 524, 526 (D.C. 1989). In addition, the scope of the application for the presumption has been expanded to include the causal relationship between the current disabling condition and the injury. *Whittaker v. Dist. of Columbia Dep't. of Employment Servs.*, 668 A.2d 844, 846-847 (D.C. 1995).

Once an employer offers substantial evidence of non-causation, the statutory presumption drops from the case and the burden then reverts back to the claimant to prove by a preponderance of the evidence, without aid of the presumption, that a work related injury caused or contributed to the disability. *The Washington Post v. Dist. of Columbia Dep't. of Employment Servs.*, 852 A.2d 909, 911 (D.C. 2004).

A careful review of Compensation Order on Remand clearly shows that the ALJ weighed the competing evidence submitted by Petitioner and Respondent. In weighing the evidence, the ALJ found that Respondent credibly testified about her shoulder problems and that an April 28, 2005 MRI indicated that Respondent had a tear in her rotator cuff that was not present before the work injury on September 18, 2002. The ALJ also stressed the Respondent's treating physician, Dr. Alfred Pavot, clearly opined that Respondent's shoulder problems were related to her work injury.

While Petitioner argues that the ALJ did not properly weigh the evidence, a review of the Compensation Order on Remand reveals that the ALJ weighed the competing medical opinions, emphasizing that Petitioner's physician, Dr. Robert Draper, "does not state with any level of precision that Claimant's pre-existing osteoarthritis actually caused her right shoulder injury." Compensation Order on Remand at 6. In addition, the ALJ found that Petitioner failed to present sufficient evidence to conclude that the tear revealed in Respondent's MRI, existed before the work-related accident

Finally, in reviewing this matter, this Panel must note that in the Decision and Remand Order of February 6, 2007, the CRB stated:

Effectively, the evidence offered by Petitioner provided both a medical opinion that the period of claimed temporary total disability was not related to Respondent's work-accident and provided a plausible alternative explanation with respect to the issue of causation. *See Washington Post v. D.C. Department of Employment Services*, 852 A.2d 909 (D.C. 2004) (*Reynolds*).

Having presented relevant evidence that a reasonable person would consider adequate to support its position of no causal relationship, the Petitioner carried its burden. Thus, the statutory presumption drops out of this case entirely and

the burden reverts back to the Respondent to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed to her disability. *See Reynolds*, 852 A.2d at 911. This matter must be remanded for the ALJ to weigh the evidence on causation.

Decision and Remand Order at 3.

As such, after the ALJ, in the initial Compensation Order, had concluded that Petitioner's medical evidence was insufficient to rebut the presumption, the CRB found that Petitioner had, in fact, carried its burden to rebut the presumption. However, this Panel must emphasize that in the Compensation Order on Remand, the ALJ went beyond her authority on remand and erroneously stated, "Employer has failed to provide 'substantial evidence' of a non-employment related basis to sever the potential employment connection Claimant proved." Compensation Order on Remand at 5. Thus, that portion of the Compensation Order on Remand that held that the presumption had not been rebutted must be vacated.

Nevertheless, despite going beyond her authority on remand, the ALJ then proceeded to correctly weigh the evidence on causation, as instructed by the CRB and thus, the ALJ's comments on the presumption were harmless. After weighing the competing medical evidence, without aid of the presumption, and properly noting the treating physician preference in worker's compensation cases, the ALJ gave more weight to the opinion of Respondent's treating physicians than the opinions of Petitioner's medical experts, which were found to be speculative and imprecise. After reviewing the record as a whole, this Panel can find no reason to disturb the ALJ's conclusion to award Respondent benefits, as it is in accordance with the law, as a result of weighing the competing medical evidence.

Accordingly, the ALJ's determination that Respondent's work injury caused the condition that resulted in her wage loss is supported by substantial evidence, is in accordance with the law and should be affirmed.

CONCLUSION

That portion of the Compensation Order on Remand of April 13, 2007 that concluded that the presumption had not been rebutted is vacated. In all other respects, the Compensation Order on Remand is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order on Remand of April 13, 2007 is hereby AFFIRMED in accordance with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

July 18, 2007
DATE