

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

CRB 15-112

**EULA D. WRIGHT,
Claimant-Petitioner,**

v.

**FIRST TRANSIT and
SEDGWICK CLAIMS MANAGEMENT SERVICES
Employer and Third-Party Administrator Respondents.**

Appeal from a June 12, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 12-533B, OWC 654546

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 DEC 1 PM 9 03

(Decided December 1, 2015)

David M. Snyder for Claimant
Tony D. Villeral for Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed as a bus operator by the Employer. On October 2, 2008, Claimant was a passenger on a bus when the bus hit a bump, causing Claimant to bounce up from her seat and hit her left shoulder on the bus, injuring her neck. Claimant sought medical treatment, first with Concentra before coming under the care of Dr. Michael Franchetti and his associates at Maryland Orthopedics.

Dr. Franchetti diagnosed Claimant as having a cervical sprain, bilateral cervical radiculopathy, and a disc herniation medically casually related to the work injury. Dr. Franchetti recommended conservative treatment. After further testing, Dr. Franchetti eventually referred Claimant to Dr. Joseph Jamaris for further treatment as Dr. Franchetti believed Claimant could be a surgical candidate. Dr. Jamaris recommended surgical intervention, specifically an anterior cervical decompression and fusion at C5-C6 and C6-C7. Further, Dr. Jamaris medically causally related

the Claimant's neck condition and need for surgery to the work related accident. Employer has not authorized the surgery.

Employer sent Claimant for an independent medical evaluation (IME) with Drs. Ronald J. Cohen, Clifford Hinkes and Edward R. Cohen. All three doctors opined Claimant suffered from a cervical sprain as a result of the work accident and that her condition had resolved.

Subsequent to her work injury, Claimant sustained two injuries on June 7, 2010 and February 6, 2011.

A full evidentiary hearing occurred on December 5, 2014. Claimant sought authorization for an anterior cervical decompression and fusion at C5-C6 and C6-C7 and reimbursement for mileage and expenses associated with surgery. The issue to be adjudicated was whether Claimant's neck condition and need for surgery is a medical causal related to the work accident of October 2, 2008. A Compensation Order (CO) was issued on June 12, 2015 which denied Claimant's request. The Administrative Law Judge (ALJ) concluded:

Claimant's current neck condition, including the positive findings on the MRI exams in 2012 and 2013, is not causally related to the work-related accident on October 2, 2008. The claim for medical benefits, including anterior cervical discectomy at C5-C6 and C6-C7, to treat the positive findings on the MRI, is therefore denied.

CO at 11.

Claimant appealed. Claimant argues that the ALJ erred in concluding Claimant's neck condition is not medically casually related to the work injury and erred in not addressing Claimant's claim for medical reimbursement. Employer opposes the appeal, arguing that the ALJ's conclusion that the neck condition is not medically causally related is supported by the substantial evidence in the record and the CO should be affirmed.

THE STANDARD OF REVIEW

The CRB's authority on review is limited to making a determination as to whether the factual findings of the appealed order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and D.C. Code §32-1521.01(d).

Consistent with this standard of review, the CRB must uphold an order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra*.

ANALYSIS

Addressing Claimant's first argument, Claimant argues the ALJ erred in concluding the neck condition is not medically causally related to the work injury. Claimant takes issue first with the ALJ determining that Employer had rebutted the presumption of compensability. As the ALJ acknowledged, there is a presumption, in the absence of evidence to the contrary, that the claim comes within the provisions of D.C. Code §32-1521(1) (2001) and is compensable. The ALJ determined that Claimant had invoked the presumption of compensability, a finding not appealed.

After having found the presumption invoked, the ALJ then turned to Employer's evidence, to determine if the Employer presented evidence specific and comprehensive enough to rebut to presumption of compensability. *Ferreira v. D.C. Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The ALJ determined that the medical opinions of Drs. Ronald Cohen and Clifford Hinkes were "unequivocal" and satisfied Employer's burden of rebutting the presumption. CO at 5. Claimant argues the opinion of Dr. Cohen is neither specific nor comprehensive enough to rebut the presumption of compensability as "Dr. Cohen simply opined that Ms. Wright's condition was degenerative in nature, but did not discuss the possibility that it was exacerbated by the incident on October 2, 2008." Claimant's argument at 8. We disagree.

As the ALJ noted, the District of Columbia Court of Appeals 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. District of Columbia Dep't of Emp't Servs., and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004).

Turning to the evidence presented, after reviewing Claimant's history, her work injury, and subsequent injuries, as well as medical reports outlining treatment and objective testing, Dr. Cohen opines "her cervical complaints at this time are not causally related to the incident of 10/2/08 for the reasons stated above." Employer's exhibit 1 at 10. We find this statement by Dr. Cohen to be an unambiguous opinion that Claimant's neck condition is not medically causally related to the work injury. Moreover, the ALJ relied on both Dr. Cohen and Dr. Hinkes opinions in rebutting the presumption of compensability. Claimant does not argue that Dr. Hinkes' opinion is not sufficient to rebut the presumption nor points this panel to any evidence to support this contention, but only argues Dr. Cohen's opinion is not sufficient. We affirm the ALJ's determination that Employer had rebutted the presumption of compensability.

Claimant next argues that even if Dr. Cohen and Dr. Hinkes's opinions were enough to rebut the presumption of compensability, "the opinions of all the physicians must be weighed within the context of the litigation." Claimant's argument at 7. Claimant points to the opinions of her treating physicians, Drs. Franchetti and Jamaris, arguing that their opinions are more "comprehensive and logical" compared to the opinions of the Employer's IME physicians. We reject this argument.

What is fatal to Claimant's argument is that the ALJ rejected the opinions of the treating physicians. The ALJ recognized that in the District of Columbia, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. District of Columbia Dep't of Emp't Servs.*, 723 A.2d 845 (D.C. 1998); *see also, Stewart v. District of Columbia Dep't of Emp't Servs.*, 606 A.2d 1350 (D.C. 1992). However, even with this preference, the trier of fact may choose to credit the testimony of a non-treating physician over a treating physician. *Short, supra*. And where there are persuasive reasons to do so, a treating physician's opinions may be rejected. *Stewart, supra*.

After acknowledging the treating physician preference, the ALJ then went on to reject the opinions of Dr. Franchetti and Dr. Jamaris. Specifically, when analyzing the medical opinion of Dr. Franchetti and those of his colleagues at his practice, the ALJ stated:

Dr. Franchetti's opinion is rejected because his records do not reveal complete medical histories, his diagnosis is inconsistent with objective studies and he and his partners' findings on exam are inconsistent depending on the account number/dates of injury.

* * *

Between August 21, 2012 and October 10, 2012, Dr. Franchetti reports Claimant's complaints of severe neck pain with radiculopathy; however, when Claimant is examined by a Maryland Orthopedics' doctor on September 27, 2012, he reports "No radicular symptoms. No numbness or tingling. No neck pain." CE 4, pp. 16 - 20 and CE 8, p. 165. But on October 10, 2012, Dr. Franchetti noted that Claimant complained of severe neck pain, an "8 to 9 out of 10 every day" and "radiating pain down her left arm." Neurologically, Dr. Franchetti found that Claimant had "very depressed left triceps deep tendon reflex." CE 4, p. 16. Dr. Franchetti's discussion of Claimant's condition that "[d]ue to her migrated herniated disc fragment, persistent severe pain, left cervical radiculopathy, and neurological deficient [he] was referring her to Dr. Joseph Jamaris ... " CE 4, p. 17. Although Claimant's Spurling test was previously reported as negative, Dr. Franchetti now reports it is positive. CE 4, p. 16.

Finally, On [sic] October 25, 2012, when Claimant is examined in connection for a permanency rating in connection with her February 6, 2011 injury claim, Dr. Cohen reported that Claimant had reached maximum medical improvement after her February 6, 2011 injuries. At a time when Claimant is complaining of severe radiating pain down into her left arm allegedly as a result of the 2008 injuries (CE 4, pp. 16 - 20), Dr. Cohen rated Claimant's impairment to her left shoulder and added 15% impairment solely as a result of pain, atrophy, weakness, loss of function and endurance as a result of the injuries she sustained in the February 6, 2011 work-related accident without acknowledging any symptoms from the 2008 injury. CE 8, p. 155.

Although afforded the preference, the undersigned finds that the inconsistencies

and Dr. Franchetti's failure to address the inconsistencies between his findings on exam and those of other medical doctors in his practice and his failure to produce all the medical reports, in particular those addressing a subsequent injury involving related body parts, are all significant reasons to reject his opinions. Dr. Franchetti's testimony and opinions are not credible. Dr. Franchetti's opinion on causal relationship is afforded no weight. In addition, his opinion regarding a hastening of her arthritis due to the injury "due to the natural deterioration of this injury" is also rejected and afforded no weight. CE 5, pp. 66-67 and 78. I also afford no weight to his opinion that "if it is ossification, that ossification would have occurred due to the injury of the ligament." CE 5, p. 68-69.

CO at 6, 7-8. (Footnotes omitted.)

The ALJ expressed concern over not only the inconsistencies in the medical reports of Dr. Franchetti and his colleagues, but also over the overlapping treatment between Claimant's work related injury in 2008 and her subsequent injuries and the confusion this caused.

As to the opinion of Dr. Jamaris, the ALJ stated:

Dr. Jamaris opined that Claimant was suffering from chronic cervical disc herniation and nerve root compression. CE 1, p. 1. Dr. Franchetti's report of his review of the first MRI did not demonstrate disc injury or herniation and Claimant's EMG and NCVS were negative for radiculopathy. CE 4, p. 33 and EE 4, p. 31.

Dr. Jamaris' report identifies two dates of injury October 2, 2008 and June 7, 2011 in the caption but Claimant did tell him about the injuries on February 6, 2011 and June 7, 2011. Dr. Jamaris reported that Claimant told him that her last day of work was January 7, 2012 when she did not go to work because she had "severe headaches, neck pain and radiation of pain into both arms." She described the onset of the pain on January 7, 2012 after she "woke up with excruciating left shoulder blade pain for the first time." CE 1, p. 2.

The June 7, 2011 work-related accident involved the mid and low back, not Claimant's bilateral shoulder injury on February 6, 2011. CE 7, p. 112 and 120. This is significant because it was in the records of the February 6, 2011 that Claimant complained of severe neck pain and the file in which the second MRI of Claimant's neck was ordered. *Supra*.

Dr. Jamaris' states in the "Diagnosis" section of his report dated January 22, 2013, "Ms. Wright has had two work-related injuries; the first produced the onset of trauma to both the neck and both shoulders." There were three injuries and the June 7, 2011 injury is not the injury that is relevant to Claimant's neck complaints. It was the February 6, 2011 incident which involved both shoulders. To the extent Dr. Jamaris' offers a causal relationship opinion between Claimant's current condition and the October 2, 2008 accident, it is rejected because it is premised on

an incorrect statement of the facts and combines two different dates of injury. EE 1, p. 2.

Dr. Jamaris' recitation of the onset of Claimant's reports of current severe neck symptoms is significant. According to Dr. Jamaris, Claimant stated that she "woke up with excruciating left shoulder blade pain for the first time" on January 7, 2012, and that "[t]his has occurred on a couple more occasions." The character and location of the pain changed from occasional flare-ups of neck pain radiating into the left arm to "left shoulder blade pain" and radiating symptoms into both arms. EE 1, p. 2.

CO at 8-9. (Footnotes omitted.)

As the quoted paragraphs above show, the ALJ did not accord the opinion of the treating physicians any preference, outlining the reasons why those opinions were rejected. It is unclear in argument whether Claimant is actually appealing the ALJ's rejection of the treating physicians' opinions in favor of the opinions of the Employer's IME physicians. When arguing the CO was in error, the only reference to the rejection of the treating physicians' opinions comes on page 7 of Claimant's argument, where the Claimant states, "the CO is unclear except insofar as it concludes that Ms. Wright's treating physicians' opinions are rejected." While Claimant argues that Dr. Franchetti and Dr. Jamaris' opinions are more comprehensive and logical, at no point in does Claimant argue that the actual rejection of the treating physician's opinions is in fact in error, or refer us to any supporting case law in support of this argument. Regardless, the ALJ gave sufficient reasons why the treating physician's opinions were rejected and we affirm her analysis. What Claimant is asking us to do is to reweigh the evidence in her favor, a task we cannot do.

As the treating physician's opinions were rejected and the IME opinions were found to be more persuasive, and this conclusion was not appealed, Claimant's arguments must fail. It is Claimant's burden to prove by a preponderance of the evidence that her neck condition and need for surgery is medically causally related to the work injury of 2008. After the rejection of the treating physicians, Claimant fails in this burden.

Since the ALJ's conclusions regarding causal relationship are found to be supported by substantial evidence, Claimant's second argument must also fail. Claimants are entitled to reimbursement of mileage and travel expenses for treatment related to work related injuries.¹ Since we have determined that the ALJ's findings regarding the neck injuries are supported by substantial evidence, she is not entitled to any mileage or reimbursements.

¹ We must state for the record, Claimant's exhibit 6 was not transmitted to the CRB. However, as we are affirming the CO's conclusion that the Claimant's neck condition was not medically causally related to the work injury, such omission is rendered harmless.

CONCLUSION AND ORDER

The June 12, 2015 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

So ordered.