GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-055

DOMINIQUE HAWKS,
CLAIMANT-PETITIONER,

v.

CORRECTIONS CORPORATION OF AMERICA and CHARTIS CLAIMS, INC.,
EMPLOYER AND INSURER-RESPONDENT.

Appeal from a April 15, 2013 Compensation Order By
Administrative Law Judge Linda F. Jory
AHD No. 12-389A, OWC No. 689422

Michael J. Kitzman, Esquire for Petitioner
Joel E. Ogden, Esquire for the Respondent

Before: JEFFREY P. RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

In a Compensation Order issued by an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on April 15, 2013, it was found that Dominique Hawks was employed by Corrections Corporation of America (CCA) as a correctional officer, a job in which her primary responsibilities involved providing safety and security for inmates while transporting them to and from facilities located outside the jail for court appearances, medical treatment, or transfers to other correctional institutions.

The ALJ found that on December 24, 2010, Ms. Hawks was severely injured in a non-work related head-on automobile collision, in which she sustained two broken ankles, internal injuries including a ruptured bowel, and other serious injuries. It was found that Ms. Hawks spent three weeks as an inpatient at the Maryland Shock Trauma Center (MSTC), and underwent surgical repair of the ankles, performed by Dr. Andrew Pollack. The ALJ determined that following the time in the MSTC, Ms. Hawks was transferred to an inpatient rehabilitation facility for

approximately a month where, among other services, she obtained counseling for anxiety from Patricia Martens, PhD.

It was also found that nearly six months later, Ms. Hawks returned to her job at CCA, with restrictions on walking no more than 100 yards or standing for more than five minutes at a time. The ALJ found that these restrictions were accommodated by CCA's assigning Ms. Hawks to the Office of Fire and Safety, where she performed clerical tasks until September 2011.

In October 2011, the ALJ found that Ms. Hawks was reassigned to the training department to a position that required more standing and walking, which in turn led to increased swelling in her ankles. The ALJ also found that Ms. Hawks was also required to work cafeteria duty where she was required to monitor inmates. The ALJ found that this change caused an increase in her anxiety level, due to her feeling that her ankle condition rendered her vulnerable and unable to defend herself, should the need arise. The ALJ found that Ms. Hawks did not seek additional treatment to her ankles at that time.

The ALJ went on to find that in January 2012, Ms. Hawks was told that she was to be reassigned to her regular duties, and that she advised her supervisor that she was still restricted by her doctor from performing that position, and that Ms. Hawks was instructed to provide a medical update to that effect by February 7, 2012.

The ALJ found that Dr. Pollack was out of town, and Ms. Hawks did not obtain the updated restriction evaluation. Thus, as of February 2 or 7, 2012[1], the ALJ found that Ms. Hawks was told to report to her pre-injury duties. The record before us is not clear as to what date Ms. Hawks last worked.

The ALJ went on to find that on February 14, 2012, Ms. Hawks sought counseling from Phyllis Arnason, PhD, a licensed clinical professional counselor, who recommended an ongoing treatment plan and recommended Ms. Hawks be placed on "stress leave". It was also found that Dr. Arnason saw Ms. Hawks again on February 20 and February 26, 2012, that she was evaluated at CCA's request for the purpose of an independent medical evaluation (IME) by Dr. Brian Schulman, an occupational psychiatrist, on May 29, 2012, and by Dr. Alan Brody, a Board Certified psychiatrist at her own request, also for an IME, on September 17, 2012.

The ALJ concluded that, despite the fact that (1) Ms. Hawks lacked credibility due to what the ALJ characterized as inconsistencies between her testimony and the histories given to the IME physicians, and (2) Dr. Arnason's reports do not contain what the ALJ interpreted as a diagnosis of a specific mental injury or condition, Ms. Hawks's testimony and reports from Dr. Arnason were sufficient to invoke the presumption that she had sustained a psychological injury.

The ALJ also concluded that Dr. Schulman's IME opinion to the effect that Ms. Hawks did not meet the criteria for a mental or behavioral disorder was sufficient to overcome the presumption.

[1] Although the Compensation Order suggests that this occurred February 7, 2012, the hearing transcript states that Ms. Hawks last day at work was February 2, 2012. HT 37. Adding to the confusion is the fact that the claim for temporary total disability commences February 14, 2012.

Upon weighing the evidence as a whole without the benefit of any presumption, and placing the burden of proof upon Ms. Hawks to establish that she has sustained a work related psychological injury by a preponderance of the evidence, the ALJ concluded that Ms. Hawks had not sustained a work related psychological injury.

Ms. Hawks appealed, arguing that (1) Dr. Schulman's opinion is insufficient to overcome the presumption, because it is "inconsistent with his own findings or the results of his evaluation and examination," (2) the Compensation Order failed to adequately address the possibility that Ms. Hawks's work environment aggravated any underlying psychological sequalae from the automobile accident, and (3) the Compensation Order failed to adequately address the treating physician preference with respect to the opinion of Dr. Arnason.

CCA opposed the appeal, arguing that (1) Dr. Schulman's opinion that Ms. Hawks "does not meet the criteria for a mental or behavioral disorder" is sufficient to overcome the presumption, (2) Ms. Hawks's argument concerning aggravation is inapposite, since Dr. Schulman's opinion is that she does not suffer from a mental or behavioral disorder, and any psychological injury sustained in the auto accident has resolved, and (3) the ALJ gave adequately persuasive reasons for rejecting Dr. Arnason's opinion that workplace stress had caused Ms. Hawks to suffer a psychological injury.

Because the ALJ properly found that Dr. Schulman's report was sufficient to overcome the presumption of compensability, because a reasonable person considering all the evidence could conclude that Ms. Hawks does not suffer from a mental or behavioral disorder, because there is no obligation on the part of an ALJ to accord the treating physician preference to non-physician opinion, and because the ALJ nonetheless gave adequate reasons for rejecting Dr. Arnason's opinion, we affirm.

DISCUSSION AND ANALYSIS[2]

As an initial matter, we note that, although Ms. Hawks's memorandum of Points and Authorities makes a passing reference to the fact that Dr. Brody performed an IME and prepared a report expressing his opinion that Ms. Hawks suffers from work related Post Traumatic Stress Disorder, none of her arguments on appeal are premised in any way upon the ALJ's dismissal of that report from an evidentiary point of view. Hence, there is no need to discuss it in connection with this appeal, beyond noting that it played a role in the ALJ's determination that Ms. Hawks's testimony lacked credibility.

Turning then to Ms. Hawks's first argument, that Dr. Schulman's opinion is insufficient to overcome the presumption of compensability[3], because it is "inconsistent with his own findings

[2] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm 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.

[3] D.C. Code §32-1521 provides that "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:
(1) That the claim comes within the provisions of this chapter;

or the results of his evaluation and examination," the argument is premised upon Dr. Schulman's report including reference to "elevated findings based for testing for anxiety, depression, personality disorder and general psychopathology". Hawks Memorandum, unnumbered page 5. This is an apparent reference to the results of the "Mental Status Evaluation" undertaken during the course of his examination as noted on pages 11 and 12 of his 16 page report, found at EE 1.

After noting 14 or 15 normal or unremarkable features in the examination (plus some sleep disturbance issues that had been resolving over time), Dr. Schulman stated that:

> The Hamilton Psychiatric Scale for Depression was minimally elevated. The rating for anxiety was mildly elevated.
>
> The Brief Psychiatric Rating Scale, which is a measure of psychopathology, was minimally elevated.
>
> The Standardized Assessment of Personality- Abbreviated Scale (SAPAS) was scored just below the threshold for personality disorder.
>
> The Global Assessment (GAS) Scale, which measures an individuals lowest level of functioning over the past week on a hypothetical continuum from mental health to illness, was scored at 70. The score suggests that Officer Hawks has mild symptoms, but was basically capable of performing most activities of daily living.

EE 1, page 12.

Three of these four results are characterized as "minimal" or "mild", while the fourth is negative. Ms. Hawks's argument on appeal amounts to a suggestion that these three "mild" or "minimal" results are, as a mater of law, diagnostic of a psychological or psychiatric injury. In other words, Ms. Hawks seeks to have the ALJ and this Board substitute our medical judgment for that of Dr. Schulman. That we are not inclined or empowered to do.

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(2) That sufficient notice of such claim has been given;
(3) That the injury was not occasioned solely by the intoxication of the injured employee; and
(4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection of the disability. The initial demonstration consists in providing some evidence of the existence of two "basic facts": a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability. The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

Once raised, the presumption shifts to the employer the burden to produce evidence that is substantial, specific and comprehensive enough to sever the potential connection. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Stewart v. DOES,* 606 A.2d 1350 (D.C. 1992).

Assuming that the ALJ's conclusion that Ms. Hawks was entitled to invoke the presumption of compensability[4] is correct, there can be little doubt that Dr. Schulman's report satisfies the established evidentiary requirements for overcoming that presumption: it is the result of an in depth review of the documentary record surrounding the claimed mental injuries and an in person examination and evaluation of the patient, and it contains the unambiguous opinion, stated several ways, that Ms. Hawks does not suffer from a mental or behavioral disorder, and that any prior such disorder from which she may have suffered previously as a result of the non-work related accident has resolved.

Ms. Hawks's second argument, that Dr. Schulman failed to adequately address the possibility that Ms. Hawks's work environment aggravated any underlying psychological sequalae from the automobile accident, ignores the fact that Dr. Schulman's reports repeatedly acknowledge the possibility of there being such a prior mental injury, and concludes that it has resolved. By logical necessity, a statement that any previous mental injury has resolved coupled with the statement that a patient has no current mental or psychological injury implies that there has been no "aggravation" of the possible prior condition.

Ms. Hawks's third argument, that the Compensation Order failed to adequately address the treating physician preference with respect to the opinion of Dr. Arnason, is equally unavailing.

First, a *sine qua non* of an opinion from a treating physician is that it be the opinion of a physician. Although both the ALJ and CCA seem to have assumed that Dr. Arnason's opinion should be accorded the preference, the Act defines "physician", somewhat redundantly, as "a [licensed] physician, dentist, or chiropractor…" (D.C. Code § 32-1501 17(A)), which does not seem to encompass a "licensed clinical counselor" who lacks a medical degree or medical or dental license.

Second, the ALJ was unimpressed by the lack of detail, including the lack of a clear diagnosis, characterizing Dr. Arnason's documents as being "vague", a description which we can not state is, as a matter of law, inaccurate. In comparing the notes authored by Dr. Arnason to the report authored by Dr. Schulman, there is little question that one gets a fuller, more comprehensive and coherent review of the medical aspects of this patient's case from the latter.

The question is, could a reasonable person review Dr. Schulman's report in its entirety and rationally conclude, as Dr. Schulman did, that Ms. Hawks has "No Current Evidence of a Mental or Behavioral Disorder", and we feel that the clear answer is yes. The reasons the ALJ gave for its acceptance, including its detail and depth, are supported by the record.

[4] We note that the ALJ reached that conclusion with obvious reluctance, a sentiment with which we sympathize. As the ALJ notes, the reports and documents from Dr. Arnason are far from comprehensive and short on specific diagnostic discussion or evaluative description. We also note that Dr. Arnason is not a physician. We need not address whether Dr. Arnason's views as expressed in this record satisfy the "competent medical evidence" requirement which, following the lead of the District of Columbia Court of Appeals (DCCA), the CRB adopted in *Ramey v. PEPCO*, CRB No. 06-038, AHD 03-035C (July 24, 2008). This is because, even though the ALJ ultimately rejected it, the IME opinion of Dr. Brody would, by all appearances, satisfy the requirement.

CONCLUSION AND ORDER

The determination that the Petitioner failed to adduce a preponderance of the evidence demonstrating that she sustained a work-related psychological injury is supported by substantial evidence and is in accordance with the law. The Compensation Order of April 15, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

July 17, 2013
DATE