

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. 03-143

LINDA D. JACKSON,

Claimant - Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
OHA No. 03-256, OWC No. 567318

Matthew Pfeffer, Esquire for the Petitioner

Donna J. Henderson, Esquire, for the Respondent

Before: LINDA F. JORY, SHARMAN J. MONROE AND FLOYD LEWIS, *Administrative Appeals Judges*.

LINDA F. JORY, *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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹.

¹Pursuant 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 20024, Title J, the 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. Official Code §§ 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.

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

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 November 7, 2003, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner)'s left knee problems were not related to the right knee injury she sustained at work on February 17, 2001 and as such claimant was not entitled to receive temporary total disability benefits.

As grounds for this appeal, Petitioner alleges that although the ALJ found that “the weight of the medical evidence does not support claimant’s contention that her left knee condition is caused (indirectly) by her work-injury of February 7, 2001, she committed an error of law by failing to consider whether [Petitioner’s] pre-existing left knee condition was aggravated by overuse of the left leg caused by the accidental injury to her right knee”. In the alternative Petitioner asserts the ALJ failed to consider whether Petitioner’s left knee condition is a natural or unavoidable result of the right knee injury she suffered on February 17, 2001.

Employer responds asserting that the ALJ properly began with an analysis of the presumption and “after granting the presumption, the ALJ properly considered employer’s evidence” and “after [respondent] rebutted the presumption the ALJ properly found that claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury at work”. Respondent asserts it presented a preponderance of the evidence that Petitioner’s left knee condition was not caused or aggravated by the work injury on February 17, 2001 thus the Compensation Order is supported by substantial evidence and must be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 § 32-1521.01(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. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

The Compensation Order provided the following background as to the nature of the Petitioner's original claim:

Claimant, a bus operator, who hit her right knee on the fare box as she was alighting from her seat, later became symptomatic in her left knee. Claimant seeks authorization for medical treatment of her left knee and payment of causally related medical bills. The Compensation Order further listed the issue as "whether there is a medical causal relationship between claimant's work-related injury to her right knee and the subsequent symptoms of her left knee.

After reviewing the ALJ's analysis and application of the presumption in the Compensation Order, Petitioner's argument is respectfully rejected. The Panel notes the ALJ began her analysis of the compensability of the instant claim, applying the presumption pursuant to the Court of Appeals guidelines in *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651 (D.C. 1987) and subsequently stating "In effect, the aforesaid presumption also confers a medical causal relationship between the condition of claimant's left knee and her work-related injury to her right knee, properly citing *Whittaker v. District of Columbia Department of Employment Services*, 688 A.2d 844 (D.C. 1995) The ALJ announced that "[Petitioner's] credibility has been impugned for several reason and cannot, hence, be relied upon. Foremost [petitioner] has knowingly mislead not only employer's IME [physician] but also her own treating physician, regarding her past medical history of knee pathology". Compensation Order (CO) at page 5.

Notwithstanding the ALJ's extensive two full page discussion with regard to the flaws in Petitioners' evidence and her credibility, the ALJ found "through the opinion of her treating physician, Dr. Yousaf, as reflected in his reports and testimony, petitioner invokes a presumed relationship between the condition of her left knee and the work-related injury"². See CO at 7. The Panel notes that while the ALJ discusses Dr. Yousaf's reports and deposition testimony through the Compensation Order and whether it is reliable based upon Petitioner's credibility flaws, nowhere in the Compensation Order does the ALJ outline exactly what Dr. Yousaf opined. Review of his reports reveal Petitioner did not mention left knee until May 13, 2002, and that Dr. Yousaf did not relate the left knee to the right knee injury until provided with counsel for petitioner's form letter where he responded to counsel's question "Is the left knee condition a direct or unavoidable result of right knee which resulted from the above referenced incident? Dr. Yousaf answered "yes" with no other explanation provided. Dr. Yousaf testified at his deposition that, while not every patient who has a right knee injury will end up with a left knee problem, in this particular case he believes the right knee injury did lead to the left knee symptoms. See CE 3 at 26. Thus while not expanded upon by the ALJ, the panel finds the

² D.C. Official Code § 32-1521 provides that it is presumed that "the claim comes within the provisions of this chapter". See *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651 (D.C. 1987), wherein the Court made clear that "under our Act a claim means nothing more than a simple request for compensation which triggers the process of claim adjudication and a claim is not a specific theory of employment causation and indeed claimants are permitted to argue alternative theories of employment causation in making their claim for compensation. Under our Act, if one theory of employment causation has the potential to result in or contribute to the disability suffered, the presumption is triggered". *Ferreira, supra* at 653.

ALJ's reliance on Dr. Yousaf's opinion to invoke the presumption of compensability pursuant to §32-1521 to be supported by substantial evidence.

Upon analyzing Respondent's rebuttal evidence, the ALJ accepted as credible Dr. Levitt's testimony that Petitioner did not disclose her previous medical history to him, CO at 5, and more damaging did not make any mention of left knee complaints or of a history of left knee pain. The ALJ also found "less than cogent" Petitioner's explanation as to why she did not complain to Dr. Levitt about her left knee symptoms (she was told by a claims adjuster that anything beyond her right knee injury would be considered irrelevant in an IME), therefore she did not mention her left-sided symptoms. CO at 6; HT at 87-88. The ALJ stated "In light of Dr. Levitt's testimony, regarding his thorough examination of both legs, it stands to reason his examination of claimant's left leg would have provided a perfect opportunity for her to voice any complaints, especially during the maneuvering and manipulation of it", and if claimant's left leg was so symptomatic at the time, it logically follows that she would have spontaneously uttered some discomfort upon being examined by Dr. Levitt, despite what any claims adjuster allegedly told her". The ALJ concluded "given the numerous instances in which claimant has been untruthful, as recounted above, Dr. Levitt's version of events is eminently more believable than hers." CO at 6.

The Panel accordingly finds no error with the ALJ's determination that Respondent met its evidentiary burden of producing specific credible evidence sufficient to sever the presumed causal relationship between Petitioners' left knee and her employment. Specifically, the Panel finds no error with the ALJ's reliance on the opinion of IME physician, Dr. Louis Levitt and properly citing, *Washington Hospital Center v. District of Columbia Department of Employment Services*, 746 A.2d 278 (D. C. 2000) in support thereof.

Upon weighing the evidence of record to determine if Petitioners evidence is sufficient to outweigh Respondent's on the causal relationship question that exists between Petitioner's left knee and her right knee injury, without the benefit of the presumption, the ALJ afforded more weight to the opinion of Dr. Levitt, the independent medical examiner over the treating physician Dr. Yousaf's. The ALJ acknowledged this jurisdiction's treating physician's preference and the requirement that the ALJ must provide specific reasons for rejecting a treating physician's opinion but proffered that³:

Given Dr. Yousaf's reliance on claimant, and her impugned credibility herein, his opinion regarding the medical cause of her condition cannot be given the full evidentiary weight normally accorded treating physicians.

CO at 8 ⁴.

³ See *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C.App. 1992). See also *Estella Whitaker v. Washington Metro Transit Authority*, Dir. Dkt. No. 91-12, H&AS No. 90-813.

⁴ It is well settled in this jurisdiction, when faced with contradictory testimony, the ALJ evaluates the credibility and demeanor of witness and draws conclusions based on that evaluation. Moreover, as the Court of Appeals has emphasized, it is widely accepted that when a fact finder's conclusions are based on credibility findings those conclusions are entitled to great weight. *Dell v. Department of Employment Services* 499 A.2d 102(D.C. 1985)⁴.

The Panel notes the ALJ did not include in her analysis or discussion any reference to ⁵ Professor Arthur Larson's "direct and natural consequence rule" adopted by the Director of this agency⁶. The Panel finds this error harmless in light of the ALJ's failure to find Petitioner actually sustained any injury which could be considered causally related to the original injury regardless of whether an injury resulted as a result of an aggravation or natural consequence. The ALJ's Findings of Fact simply contain no finding that the Petitioner sustained any injury to her left knee after the surgery to her right knee-- only that she suffered pain. The Panel particularly notes the ALJ reported that the record contained evidence that Petitioner had been previously diagnosed on November 2, 1997 with chondromalacia of the patella following x-rays on December 2, 1998 and that on December 4, 1998 another doctor, Dr. Bauk treated Petitioner for bilateral, anterior knee pain, brought on by no particular injury. The ALJ also referred to Respondent's Exhibit (RE) No. 20, a July 27, 1999 report of a Dr. Jolly, diagnosing Petitioner with severe bilateral patellofemoral pain syndrome of the left knee, eighty percent of which was caused by her excessive body weight.

This evidence of record supports the ALJ's reliance on Dr. Levitt's deduction that the state of Petitioner's knee was caused by a well-established patella misalignment or chondromalacia, as opposed to being a direct or indirect result of the February 17, 2001 incident. According to the ALJ, Dr. Levitt premised his opinion on two examinations of claimant, in which she made no reports of left knee pain and which essentially produced a normal examination or said knee as well as on her lengthy history of knee pathology. Having reviewed the record evidence, the Panel agrees the findings of fact and conclusions of law contained in the Compensation Order are supported by substantial evidence of record and the ALJ committed no error of law.

CONCLUSION

The ALJ's conclusion that any problems Petitioner has with his left knee are not causally related to the injury Petitioner sustained to her right knee on February 17, 2001 is supported by substantial evidence of record, and is in accordance with the law.

⁵ *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C.App. 1992). See also *Estella Whitaker v. Washington Metro Transit Authority*, Dir. Dkt. No. 91-12, H&AS No.90-813.

⁶ See *Gabriella O' Rose v. Washington Hospital Center*, Dir. Dkt. No. 98-96, OHA No. 97-188A, OWC No. 509537 (1999), citing Professor Arthur Larson's *Larson's Worker's Compensation Law* at 3-503.

ORDER

The Compensation Order issued on November 7, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

September 13, 2005
DATE