

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. 03-109

LARETTA JACOBS,

Claimant–Respondent,

v.

WASHINGTON HOSPITAL CENTER AND KEMPER INSURANCE CO.,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan.
AHD No. 03-263, OWC No. 571125

Benjamin T. Boscolo, Esquire, for the Respondent

Joel E. Ogden, Esquire, for the Petitioner

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

LINDA F. JORY, *Administrative Appeals Judge*, for the Compensation 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 August 1, 2002, the Administrative Law Judge (ALJ) granted Petitioner's claim for temporary total benefits from August 22, 2002 to the present and continuing, with interest, and causally related medicals expenses based upon a finding that Respondent's current lumbar symptoms are causally related to her July 26, 2001 work injury. Petitioner now seeks review of that Compensation Order, asserting as grounds for this appeal that the ALJ's finding that Petitioner had not presented substantial evidence to rebut the presumption of compensability and her finding of a lack of causal relationship is unsupported by substantial evidence, and asserting further that, the ALJ erred in departing from the opinion of the treating physician on the issue of nature and extent without providing any legitimate reason for doing so.² Concurrently with its Memorandum of Points and Authorities, Petitioner also filed a Motion for Remand to Adduce Additional Evidence and a Motion for Stay or Application for Review. Petitioner also filed a Motion for Leave to Reopen the Record to Adduce Additional with AHD/OHA.

Respondent asserts employer failed to produce evidence to establish there was no potential connection between her disability and the work injury. Respondent further asserts the ALJ articulated specific and legitimate reasons for disregarding the opinion of the treating physician and that the Compensation Order should be affirmed.

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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard 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.

² The Panel notes Petitioner filed a Motion for Leave to Reopen the Record to Adduce Additional Evidence with OHA on August 29, 2003, however as of the date of the instant order, a supplemental order has not issued by OHA concerning the Motion. Given the extended amount of time that has lapsed, the Panel finds it reasonable that the ALJ will not be addressing Petitioner's motion, and as a matter of judicial economy to shall proceed with Petitioner's Application for Review.

Turning to the case under review herein, the Panel first addresses the alternative motions filed by Petitioner with its Application for Review. The Panel has reviewed the administrative file and notes AHD has not addressed Petitioner's Motion to Adduce Additional Evidence. In *Bennett v. District of Columbia Department of Employment Services*, 629 A.2d 28, (D.C. 1993), the Court of Appeals held that once a request is made by the petitioner to introduce new evidence, the Director was required to determine whether "reasonable grounds existed for not introducing [the evidence] at the initial hearing" and whether the evidence is material i.e., whether it relates to the original claim for compensation.", citing *King v. District of Columbia Department of Employment Services*, 560 A.2d 1067 (D.C. 1989). Consistent with the Court of Appeals and the limited nature of the Board's jurisdiction, 7 D.C.M.R §264.1 and 264.2 states: "Where a party requesting leave to adduce additional evidence must establish (a) that the additional evidence is material and (b) that there existed reasonable grounds for the failure to present evidence while the case was before the Administrative Hearings Division . . .".

Petitioner's basis for its request to adduce additional evidence is premised only on the Petitioner's proposition that "neither party could have foreseen the ALJ's determination that there was some type of improper relationship between Petitioner and the treating physician and there is accordingly a reason that this evidence was not presented at the Formal Hearing". Having reviewed Petitioner's request and its basis for a remand to adduce additional evidence, the Panel concludes that offering a response to an ALJ's determination is not sufficient to be deemed reasonable grounds for not introducing the evidence at the initial hearing and further concludes that further questioning of the treating physician in response to the ALJ's inference is not material evidence after the ALJ has issued a Compensation Order. Petitioner's Motion to Remand to AHD to Adduce Additional Evidence is accordingly denied.

With regard to the Motion to Stay Payment, Petitioner asserts the stay is requested based on the reasons set forth in their Application for Review; and that it is filing a Motion with OHA/AHD to adduce additional evidence. Pursuant to D.C. Official Code § 32-1522(b)(2), "the payment of any amounts required by a compensation order shall not be stayed pending final decision on review unless so ordered on the grounds that irreparable injury would otherwise ensue to the employer." In that Petitioner provided no evidence to establish that payment pursuant to the Compensation Order would result in irreparable injury, Petitioner's Motion to Stay payment is hereby denied.

Turning to the merits of the Application for Review, Petitioner alleges that the ALJ erred in determining that there was insufficient evidence to rebut the presumption of causal relationship between Respondent's current complaints and her July 26, 2001 injury. Specifically, Petitioner asserts the opinion of independent medical examiner Dr. Robert Gordon, board certified orthopedist that respondent "has long since reached maximum medical improvement as related to any injury that occurred at work on July 26, 2001 and probably did within about six weeks of the date of that injury" is sufficient evidence to rebut the invoked presumption. Petitioner correctly refers to the Court of Appeals' decision in *Safeway Stores, Inc. v. District of Columbia Dep't of Employment Servs.*, 806 A.2d, 1214, 1220 (D.C. 2002) and the Court's concession that it has declined to establish a precise quantum of proof needed to meet the substantial evidence threshold, but that employer does not retain burden to show employee's injury "could not have been caused" by the work incident. Since the issuance of the instant Compensation Order, the Court of Appeals has revisited the issue of employer's burden to rebut in *Washington Post v. District of Columbia*

Department of Employment Services and Raymond Reynolds, Intervenor, 852 A.2d 909 (D.C. 2004) (*Reynolds*).

In *Reynolds*, the 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”.

Notwithstanding the Court’s pronouncement in *Reynolds*, the Panel has reviewed Petitioner’s rebuttal evidence and agrees with the ALJ’s determination that Petitioner has not put forth sufficient evidence to rebut the existing presumption. The Panel agrees Dr. Gordon’s concession that it was certainly possible Respondent strained her back at work on July 26, 2001 but that her condition “probably” reached maximum medical improvement within about six weeks of that date is not a stated unequivocal nor unambiguous opinion contrary to the causal relationship of the injury to the disability. Accordingly, we conclude the ALJ’s determination that Respondent’s disability was causally related to the work injury is in accordance with the law.

With regard to the ALJ’s alleged error of departing from the opinion of the treating physician on the issue of nature and extent without providing any legitimate reason for doing so, Petitioner asks the Board to determine whether the ALJ’s stated reasons for disregarding the opinion of Dr. Robert Collins are specific and legitimate and whether the inferences drawn were “reasonable”, citing *Olson v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). See also *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

Review of the Compensation Order reveals the ALJ set forth three reasons for disregarding the opinions of Dr. Collins on the issues of causation and nature and extent. With regard to the nature and extent of Respondent’s disability, Petitioner asserts Dr. Collins advised the Claimant to return to work in her full duty capacity his report of October 22, 2002. In his report of October 22, 2002, Dr. Collins noted that the Claimant still complains of back pain and right leg pain but he “could not find a reason to keep her from going back to her regular duty she was doing before and have sent her back with slips to go back to regular duty”. CE 6. Petitioner challenges the ALJ’s conclusion that Dr. Collins return to regular duty was ambiguous and asserts Dr. Collins’ could not have been clearer.

We refrain from repeating the ALJ’s remarks about Dr. Collins’ opinions and the inference of some type of collusion between Petitioner and Dr. Collins and agree with Petitioner that Respondent put forth no evidence to support a theory that Petitioner had improperly influenced the treating physician.

The Panel agrees that there was no evidence in the record, i.e., deposition testimony of Dr. Collins or testimony from employer which contacted Dr. Collins, to base the ALJ’s belief that Dr. Collins’ opinion was the result of “switching hats” at the request of Petitioner. Nevertheless, the Panel rejects Petitioner’s argument that the record must be re-opened to allow additional evidence on this point.

Despite the ALJ's questionable "switching hats" statement, based allegedly upon an inference of collusion, she has sufficiently supported her finding that Respondent remained temporarily and totally disabled as of August 22, 2002 with her reliance on the Respondent's treating physicians at Kaiser Permanente. In stating that the opinions of Dr. Collins and IME physician, Dr. Gordon were not consistent with the "notes and reports from [claimant's] care providers at Kaiser Permanente" the ALJ did not elaborate on the Kaiser physician's opinions regarding Respondent's capacity to work. *See* CO at 8. Nevertheless, review of the records from Kaiser reveals the opinion rendered on January 2, 2003 that Respondent has indefinite restrictions of no heavy lifting, pushing, pulling of any kind. Accordingly, while her reasoning for not relying on Dr. Collins, a treating physician of record, is not in the Panel's opinion, supported by any evidence of record, her finding of temporary total disability based upon an alternative treating physician's opinion, nonetheless, is supported by substantial evidence and while the panel may have reached a different conclusion, we find no reason to disturb this conclusion. *See Marriott*, 834 A.2d 885, *supra*.

Conclusion

The ALJ's finding that there is a causal relationship between the stipulated work injury of July 26, 2001 and the claimed lumbar symptoms and wage loss supported by substantial evidence, is in accordance with the law, and is affirmed. It is further concluded that the ALJ's findings of temporary total disability as of August 22, 2002 and that the lumbar symptoms require medical treatment are also supported by substantial evidence.

ORDER

The Compensation Order of August 1, 2003 is supported by substantial evidence and in accordance with the law and is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 4, 2006

DATE