GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-098

REX A. JENNINGS,
Claimant–Respondent,

v.

E&A PROTECTIVE SERVICES-BRAVO-L-EA and GALLAGHER BASSETT SERVICES, INC.,
Employer/Carrier–Petitioners.

Appeal from a July 9, 2013 Compensation Order by
Administrative Law Judge Saundra M. McNair
AHD No.12-132A, OWC No. 682869

Joel E. Ogden, Esquire, for the Petitioner
Danny R. Seidman, Esquire, for the Respondent

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

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the July 9, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ awarded the Claimant temporary total disability benefits from June 20, 2011 to September 30, 2011, having found the April 4, 2011 injury to have arose out of and in the course of the Claimant's employment. We VACATE and REMAND.

BACKGROUND AND FACTS OF RECORD

On April 4, 2011 the Claimant injured his right leg when looking through the window of a security kiosk. The Claimant sought medical care and came under the treatment of Dr. Adam Ellison. After an MRI was performed, Dr. Ellison opined that the Claimant suffered from an internal derangement of the right knee and a medial meniscus tear. The Claimant underwent a partial right medial meniscus procedure on June 29, 2011. The Claimant missed time from work. Ultimately, the Claimant moved to Oklahoma for reasons unrelated to his injury.

In Oklahoma, the Claimant came under the care and treatment of Dr. Daniel Clinkenbeard. Dr. Clinkenbeard recommended pain medication to treat the Claimant's ongoing problems with his right knee.

On March 6, 2012, the Claimant underwent an independent medical evaluation with Dr. Edward R. Cohen. Dr. Cohen took a history of the Claimant's injury, performed a physical examination, and reviewed medical records. Dr. Cohen opined the Claimant suffered from a degenerative tear of the right medial meniscus, not work related.

A full evidentiary hearing proceeded on March 12, 2013. The issues to be adjudicated were whether or not the Claimant's injury arose out of and in the scope of the Claimant's employment and whether or not the Claimant's current right knee condition was medically causally related to the injury. The Employer initially raised the issue of nature and extent also, but withdrew the issue at the end of the hearing, stating that if the ALJ found the injury arose out of and in the course of the Claimant's employment and was medically causally related, the Employer would not contest the nature and extent of the Claimant's disability from June 20, 2011 to September 30, 2011.

A CO issued on July 9, 2013 granting the Claimant's claim for relief. The CO held that the Employer had failed to rebut the presumption that the Claimant's injury arose out of and in the course of the Claimant's employment, that the Claimant's current right knee condition is medically causally related to the work injury, and that the Claimant was temporarily and totally disabled from June 20, 2011 to September 30, 2011.

The Employer timely appealed. The Employer argues the ALJ erred 1) in determining that the Employer/Insurer did not present substantial evidence to rebut the presumption of compensability; 2) in finding that the Claimant presented sufficient medical evidence of a medical causal relationship between the alleged work injury and the claimed knee disability; 3) in finding the physical demands of the Claimant's employment had the potential to aggravate a pre-existing injury; and, 4) in making findings of fact irrelevant to the issues presented.

The Claimant opposes the Employer's application for review, arguing there is substantial evidence to support the findings in the CO.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must 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, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that the ALJ erred in finding that the Employer had not rebutted the presumption of compensability.[1] The Employer argues that the IME report of Dr. Cohen was sufficient to rebut the presumption. We agree with the Employer.

The Act's presumption of compensability operates only "in the absence of evidence to the contrary." In *Ferreira,* the Court of Appeals held, that "[o]nce the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." *Ferreira v. DOES,* 531 A.2d 651, 655 (D.C. 1987); Parodi v. DOES, 560 A.2d 524, 526 (D.C. 1989); *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001). As the ALJ notes in the "Principles of Law" section, the Court 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. DOES, Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*).

Turning to the ALJ's analysis, the ALJ notes that the Employer presented the IME of Dr. Cohen who stated, "I do not causally relate his right knee complaints and treatment to an occurrence on April 4, 2011." CO at 7. After acknowledging this statement, the ALJ then goes on to discount Dr. Cohen's opinion and conclude the Employer had not provided convincing medical evidence to rebut the presumption. Specifically, the ALJ finds,

> However, despite this opinion from Dr. Cohen, the Act makes allowances for pre-existing conditions and therefore a pre-existing condition is not dispositive to preclude the Claimant from sustaining further injury or exacerbating the pre-existing condition in an accidental work place injury. The amount of walking that the Claimant was required to do on a daily basis has the potential to result in the exacerbation of a pre-existing right knee injury; and was un-rebutted by the Employer. Moreover, the undersigned is dissuaded by the opinion of Dr. Cohen

[1] The Employer does not appeal the finding that the Claimant had invoked the presumption.

> and the Employer has failed to present convincing medical evidence to rebut the presumption.

CO at 7-8.

We find the above statement to be in error. First, Dr. Cohen explicitly declined to causally relate any injury to the Claimant's current condition and opined that the accident, as described by the Claimant, could not have caused the Claimant's knee condition. Dr. Cohen examined the Claimant and reviewed the medical records before rendering his unambiguous opinion. Pursuant to the rational enunciated by the District of Columbia Court of Appeals in *Reynolds, supra*, Dr. Cohen's opinion is enough to rebut the presumption of compensability. The ALJ was in error in concluding the Employer had not rebutted the presumption, requiring remand.

Second, we agree with the Employer that the ALJ, rather than analyzing the injury as a discrete event on April 4, 2011 stipulated to by the parties, instead begins to treat the injury as a cumulative trauma[2] by opining that the walking required by the job has the potential to exacerbate the Claimant's pre-existing right knee injury. Neither party put forth any argument that the Claimant's knee condition was aggravated by prolonged walking. Indeed, the Claimant testified to the event of April 4, 2011 as the injury which aggravated his knee condition. The ALJ's analysis is in error. Upon remand, the ALJ is to analyze whether or not the accident of April 4, 2011 is legally and medically causally related to the Claimant's right knee condition.

Upon remand the ALJ is directed to weigh the evidence without benefit of the presumption and determine whether or not the Claimant proved his case by a preponderance of the evidence. As we have stated before, it is well settled that after the presumption is rebutted, the statutory presumption drops out of this case entirely and the burden reverts to the Claimant to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury or event caused or contributed to her disability and the competing evidence is weighed without reference to the presumption of compensability. *Washington Hospital Center v. DOES,* 821 A.2d 898 (D.C. 2003).

We further note that the ALJ appears to have misapplied the burdens of proof when she wrote:

> Nothing in the medical records of Dr. Ellison and Dr. Clinkenbeard suggest that the Claimant's injury is not the result of a work injury or that the injury could not have occurred in the manner described by the Claimant.

CO at 8.

The burden of proof after the presumption drops from a case is that of a preponderance of the evidence. To satisfy that burden, the Claimant must affirmatively prove that a work-related injury or event caused or contributed to his disability. See *Washington Hospital Center, supra*. To do so, the ALJ must identify record based evidence to support any conclusion that the Claimant proved her case, including medical opinions. The absence of a medical opinion

[2] See *King v. DOES*, 742 A.2d 460, 469 (D.C. 1999).

disproving the Claimant's case does not satisfy the Claimant's burden of proving that a work event caused or contributed to the disability. The ALJ's analysis above is in error. Upon remand, if the ALJ finds the Claimant did prove that a work related injury or event caused or contributed to his disability, record based evidence must be identified affirmatively showing the Claimant's injury was caused by or contributed by the April 4, 2011 injury.

Finally, the Employer argues that the ALJ erred by addressing the issue of the nature and extent of the Claimant's disability. A review of the CO shows the ALJ found,

> The work injury does not allow him to return to the work that he performed prior to April 4, 2011 in that he is unable to run and walk extensively; and the Claimant remains off work and continues to seek more sedentary work that is less physically demanding. The Claimant continues to complain of pain, swelling, and stiffness in his right knee. The Claimant is unable to walk for long distances, ambulate up and down stairs without pain, or continue doing karate, which he enjoyed doing prior to the April 4, 2011 work injury.

CO at 4.

Moreover, the ALJ concluded,

> The Claimant's un-rebutted testimony and the evidence of record establish that as a result of the April 4, 2011 work-related injury, the Claimant aggravated a pre-existing condition; and he continues to be symptomatic. Furthermore, the Claimant was unable to return to work as a security officer after the work injury; prior to moving to Oklahoma, the Claimant was not released to return to work in either a regular or light duty capacity by his treating physician.

CO at 8-9.

As the ALJ acknowledged, at the end of the Formal Hearing the Employer withdrew the issue of nature and extent. Nature and extent was therefore no longer a contested issue for the ALJ to adjudicate.[3] We agree with Employer that the above two paragraphs are beyond the scope of the issues presented. The findings concerning nature and extent are vacated.

[3] It is also well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Official Code § 2-501 *et seq*. (2006), for each administrative decision in a *contested* case, (1) the agency's decision must state findings of fact on each material, *contested* factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984); D.C. Code § 2-509. (Emphasis added.)

CONCLUSION AND ORDER

The Compensation Order of July 9, 2013 is not supported by the substantial evidence in the record or in accordance with the law. It is VACATED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

October 10, 2013
DATE