GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-082

JOHNNIE SHORT,

Claimant–Respondent,

v.

KOCH CO. PUBLIC SECTOR/INVISTA and OLD REPUBLIC INSURANCE COMPANY,

Employer and Carrier-Petitioners.

Appeal from a Compensation Order by
The Honorable Belva Newsome
AHD No. 12-015, OWC No. 655721

Cheryl D. Hale, Esquire for the Petitioner
Mark L. Schaffer, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] JEFFREY P. RUSSELL,[2] and MELISSA LIN JONES *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the May 1, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for permanent partial disability benefits in the amount of 32% to the right lower extremity and 34% to the left lower extremity. We AFFIRM.

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2]Judge Russell is appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was an administrative assistant for the Employer. On November 26, 2008, the Claimant injured her left knee when she struck her knee on the underside of her desk. The Claimant sought medical treatment with Dr. Jeffrey Abend. Dr. Abend diagnosed the Claimant with a left meniscus tear and a Baker's cyst and recommended a surgery which the Claimant underwent on March 17, 2009.

The Claimant began to develop pain in her right knee after treatment to her left knee. The Claimant underwent objective testing which revealed she suffered from a meniscus tear in her right knee. On October 20, 2009, the Claimant underwent right knee surgery performed by Dr. Abend. In a letter dated May 4, 2010, Dr. Abend opined that the Claimant's right knee problems were causally related to "bearing an undue amount of stress on the right knee" because of her left knee condition. Employers Exhibit 3.

The Claimant subsequently underwent two independent medical evaluations (IME) with Dr. Joel Fecther. On June 10, 2010, Dr. Fechter opined the Claimant suffered from a 34% impairment to the left lower extremity as a result of the work accident. On May 11, 2011, Dr. Fecther opined the Claimant suffered from a 32% impairment to her right lower extremity as a result of her left knee injury and subsequent treatment.

The Claimant also underwent an IME at the Employer's request with Dr. William I. Smulyan on October 25, 2010. Dr. Smulyan opined she had a 15% permanent partial disability of the left lower extremity. In an addendum dated February 14, 2012, Dr. Smulyan reviewed additional records and opined the Claimant's right knee condition was not causally related to the work injury.

A Formal Hearing was held on February 15, 2012. At the Formal Hearing the Claimant requested an award of permanent partial disability in the amount of 32% to the right lower extremity and 34% to the left lower extremity. The Employer contested the medical causal relationship of the Claimant's right lower extremity and the nature and extent of the disability sought. A CO was issued on May 1, 2012 granting the Claimant's claim for relief.

The Employer timely appealed. On appeal, the Employer argues that the CO is not supported by the substantial evidence in the record. The Employer argues that the ALJ was in error in finding the evidence supported a casual relationship between the Claimant's right knee and the left knee work injury. The Employer also argues the ALJ was in error in disregarding the IME opinion of Dr. Smulyan.

The Claimant argues that the CO is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §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 uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

As a preliminary matter, we note that the Employer attached several exhibits to the application for review including medical reports. The Employer is reminded that 7 DCMR § 258.3, states,

> An Application for Review must include the following:
>
> (a) An original and three (3) copies of the Application for Review, and
>
> (b) An original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review.

While Employer's attaching documents it deems helpful for our review is appreciated, it would be helpful if in its submission Employer would acknowledge that only documents admitted into the record have been attached, and they should be identified by the exhibit numbers that were assigned to them at the formal hearing. Only such documents as were admitted into the record can be considered by us in assessing whether the Compensation Order is supported by substantial evidence.

The Employer first argues that the ALJ erred when dismissing the opinion of Dr. Smulyan. The Employer argues that Dr. Abend's opinion should be given no greater weight than that of an IME and that Dr. Abend's opinion is deficient as he did not consider the Claimant's pre-existing arthritis, did not refer to the November 26, 2008 work injury in his treatment notes, and did not consider a 19 month gap in treatment.

A review of the CO reveals the ALJ began her discussion by correctly noting that in the District of Columbia there is a presumption of compensability.[3] It is also well settled that the Act's presumption of compensability operates only "in the absence of evidence to the contrary." In *Ferreira,* the District of Columbia Court of Appeals (DCCA) 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."[4] Where the Employer has presented evidence "specific and comprehensive" on the question of causality, the presumption

[3] *Parodi v. DOES,* 560 A.2d 524, 525-26 (D.C. 1989)

[4] *Ferreira, supra,* at 655; *Parodi*, supra, at 526; *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001).

falls from the matter and the conflicting evidence is weighed without reference thereto.[5] *Ferreira, supra*.

The ALJ then went on to state:

> Dr. Abend, Short's treating physician, opined a causal relationship between Short's November 26, 2008 work-related injury to her left knee and her right knee injury. (Finding of Facts (hereinafter "FF") 6.[6] KCPS relies upon the opinion of the IME, Dr. Smuylan, that no casual relationship exists between Short's left knee injury and right knee torn meniscus. FF 13.[7]
>
> It is well established in this jurisdiction, a preference is accorded to the opinions of treating physicians as more reliable than the medical opinions of independent physicians who have not rendered medical treatment. *Short v. District of Columbia Dept. of Employment Services*, 723 A.2d 845 (D.C. 1998); *Stewart v. District of Columbia Dept. of Employment Services*, 606 A.2d 1350 (D.C. 1992). Where there are persuasive reasons to do so, a treating physician's opinion may be rejected. *Mexicano v. District of Columbia Dept. of Employment Services*, 806 A.2d 198 (D.C. 2002).
>
> Short's right knee disability is medically causally related to her November 26, 2008 work-related injury to her left knee.

CO at 5.

We must comment on what appears to be a fundamental misunderstanding in the ALJ's analysis regarding the Employer's burden to rebut the presumption, which is to present evidence specific and comprehensive enough to sever the potential connection between the medical condition and the work injury. 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

[5] For instance, the DCCA 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 and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds).*

[6] This finding of fact states, "on May 4, 2010, Dr. Abend opined that Short had exacerbated the problems that she had with her right knee, due to the fact that she was bearing undue stress on her right knee. Dr. Abend opined that the problem with Short's left knee unduly stressed her right knee leading to surgery of the arthroscopic variety on her right knee. Short Ex. 3 supp." CO at 3.

[7] Finding of fact 13 states, "on October 25, 2010, Dr. William I. Smulyan conducted an Independent Medical Evaluation (hereinafter, "IME") examining Short and reviewing her radiographic and medical records. The records reviewed by Dr. Smulyan did not include the operative report of Dr. Abend for Short's right knee on October 28, 2009. Based on the IME, Dr. Smulyan opined that Short had 15 impairment to her left knee taking into account such factors as pain, atrophy, weakness, loss of function, and loss of endurance; and the AMA Guides to the evaluation of Permanent Impairment, Fourth Edition. KCPS Ex. 1." CO at 4.

disability.[8] If the Employer has successfully rebutted the presumption through the unambiguous opinion of a physician, then the presumption drops from the case and the evidence is weighed without reference thereto.

While the ALJ's analysis fails to expressly address whether or not the Employer had rebutted the presumption in this case, we hold this to be harmless error, as it is clear that in weighing the evidence, the ALJ implicitly found that the Employer had rebutted the presumption through the IME of Dr. Smulyan. A review of Dr. Smulyan's report supports this conclusion as he explicitly opines that the Claimant's right knee condition is not related to the work injury or the Claimant's left knee surgery.

After implicitly finding the presumption rebutted, the ALJ weighed the evidence without benefit of the presumption and found Dr. Abend's opinion more persuasive, according him the treating physician preference.[9] The ALJ took into consideration the entirety of the evidence, including the medical reports of Dr. Abend and the IME of Dr. Fecther and found the Claimant's right knee condition was casually related to the left knee work injury. We find no error in this. In arguing that the opinion of Dr. Smulyan is more persuasive, the Employer is asking us to reweigh the evidence in its favor, a task we cannot do.

The Employer next argues the ALJ was in error in finding Dr. Fecther's opinion more persuasive of the Claimant's permanent partial disability over that of Dr. Smulyan. The Employer argues that "Dr. Smulyan's opinions, and lower rating, are more in keeping with the treatment records." Employer's argument, unnumbered. We disagree.

The ALJ correctly noted the Claimant is not afforded a presumption when nature and extent is at issue and that the Claimant must prove her case by a preponderance of the evidence.[10] The ALJ then adopted, in its entirety, the medical opinion of Dr. Fecther in awarding benefits. The ALJ found that "Short's testimony, the medical opinion of Dr. Fecther and the medical causal relationship opinion of Dr. Abend meet Short's burden of the preponderance of the evidence." CO at 6. In coming to her conclusion to adopt Dr. Fecther's rating, the ALJ rejected Dr. Smulyan's rating as he engaged in an apportionment type analysis when coming to his ultimate opinion. As with the first assignment in error, we cannot reweigh the evidence in the Employer's favor and find Dr. Smulyan's opinion more persuasive then Dr. Fecther's, as the Employer urges us to do. This is beyond our statutory authority.

Thus, we affirm the ALJ's reliance on Dr. Fecther's opinion over that of Dr. Smulyan and find the CO supported by the substantial evidence in the record.[11]

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[8] *Reynolds, supra.*

[9] It is well settled in the District of Columbia, that there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *see also, Stewart v. DOES* 606 A.2d 1350 (D.C. 1992).

[10] *Golding-Alleyne v. DOES, No. 07-AA-1281, CRB 07-168, (D.C. 2009)*

[11] We note that neither party, at the Formal Hearing or in the arguments before us argue any entitlement to permanent partial disability based on any economic impact the Claimant may, or may not, suffer which could have influenced the ALJ's ultimate determination.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the May 1, 2012 Compensation Order are supported by substantial evidence in the record and in accordance with law. The Compensation Order is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

October 12, 2012
DATE