

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARIA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-104

**ROSA MACHADO,
Claimant–Petitioner,**

v.

**COMPASS GROUP, NAD and CAMBRIDGE INTEGRATED SERVICES,
Employer/Insurer-Respondent**

Appeal from an August 30, 2013 Compensation Order issued by
Administrative Law Judge Gerald D. Roberson
AHD No. 09-451C, OWC No. 654683

Carlos A. Espinosa, Esquire, for the Petitioner
Tony W. Torain II, Esquire, for the Respondent

Before: JEFFREY P. RUSSELL, HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND¹

Rosa Machado was injured on September 20, 2008 while employed as a pastry chef by Compass Group, NAD (Compass Group). She received medical care of various varieties, some of which will be discussed below, as well as periods of temporary total disability benefits.

A dispute arose as to Ms. Machado's entitlement medical care and temporary total disability from and after January 3, 2013, with Compass Group taking the position that whatever conditions that Ms. Machado suffered from as of that time were unrelated to the work injury. The dispute was presented to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) for resolution at a formal hearing conducted on July 23, 2013.

¹ 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.

A Compensation Order (CO) denying the reinstatement of benefits was issued August 15, 2013, which Ms. Machado appealed to the Compensation Review Board (CRB), arguing that the ALJ read the medical reports “too narrowly”, failed to apply the “aggravation rule”, and improperly failed to apply the presumption of compensability. Compass Group opposes the appeal, arguing that the ALJ’s determination that Ms. Machado’s evidence is insufficient to invoke the presumption that her current complaints and alleged disability is supported by substantial evidence.

We reverse the finding that Ms. Machado has failed to adduce evidence sufficient to invoke the presumption that her condition and alleged disability is causally related to the stipulated work injury of September 20, 2008, and remand for further consideration of the claim.

DISCUSSION

In this case, the parties stipulated that Ms. Machado sustained an accidental injury arising out of and occurring in the course of her employment with Compass Group on September 20, 2008. While not the subject of stipulation, the ALJ found as facts, and it is undisputed, that the work injury involved, in part, Ms. Machado’s lower back, specifically, a left sided disc herniation of 1.5 mm, and a right sided disc herniation 3 mm, both at L4-5. CO, page 2. It is also undisputed, and the ALJ found, that Dr. Matthew Ammerman performed decompressive surgery on the right sided herniation on December 16, 2010. CO, page 3.

Despite Dr. Ammerman reporting that Ms. Machado obtained significant relief following the surgery, the ALJ nonetheless found that post-operatively Ms. Machado continued to experience L4 radiculitis on the right, that Dr. Ammerman prescribed Vicodin postoperatively for pain, and recommended that a functional capacity evaluation (FCE) be performed to assess Ms. Machado’s ability to perform work. CO page 3.

The ALJ also found that an MRI performed at Dr. Ammerman’s recommendation on June 16, 2011 had findings “consistent with post-surgical change”, and while the doctor detected no recurrence of a *herniation*, he did note the presence of a mild disc bulge and expressed his view that Ms. Machado was suffering from “recurrent radiculitis”. CO, page 3. The ALJ also found, and it is undisputed, that following the FCE, Dr. Ammerman felt that Ms. Machado had reached maximum medical improvement and was left without the physical capacity to return to her pre-injury job, and that following a work hardening program she could work as a cashier. CO, page 4.

The ALJ also found that Compass Group obtained an IME from Dr. Louis Levitt, and Dr. Levitt found Ms. Machado to have sustained a ratable, permanent medical impairment from the injury. CO page 4.

The ALJ also found that an MRI performed on May 30, 2013 revealed a “focal protruded disc at L4-5 ... extending into the right exit foramen with a submandibular tear with the existing [sic] right L4-5 nerve root appearing to be compromised.” CO page 5.

Review of the CO also reveals that the ALJ found that Ms. Machado had complaints of radicular leg pain from the time of the injury in 2008, into 2009 (when the first MRI was performed), that she continued to voice such complaints to Dr. Ammerman in 2010, 2011, and 2013.

All of these findings by the ALJ are supported by the record medical evidence, identified in the CO by the ALJ.

Although the ALJ acknowledges that claimants are entitled under the Act and specifically under *Whittaker v. DOES*, 531 A.2d 844 (D.C. 1995), to a presumption that an allegedly disabling injury is causally related to a claimant's work injury, the ALJ declined to accord Ms. Machado the benefit of that presumption. In doing so, the ALJ stressed that Ms. Machado had been found to have achieved MMI, had left employment with this employer for reasons unrelated to the injury, and had returned to employment with two other employers subsequent to leaving this employment. However, the ALJ also noted that these returns to work were short lived, and the ALJ noted that Dr. Ammerman's release to return to work authorization was guarded and subject to revocation should the strain cause additional problems.

Further, the ALJ notes several times that none of Ms. Machado's treating physicians have rendered an opinion that her current complaints are related to the work injury. However, the ALJ does not find that any of her treating physicians have opined to the contrary, nor does the CO contain any finding that any IME physician has suggested that the current problems and any attendant disability are not medically causally related to the stipulated low back lumbar disc injury.

We conclude that the evidence is sufficient to meet the *Whittaker* standard. While the ALJ did not make any findings concerning Ms. Machado's having obtained specific medical care in 2012, that lack of care is not cited as a reason for finding that the current condition is unrelated to the stipulated work injury.

The CRB stated in *Romero v. V & V Construction, Inc.*, CRB No. 10-169, AHD No. 10-267, OWC No. 657345 (February 10, 2011), p. 3:

the Compensation Order shows that the parties stipulated that on February 13, 2009, the Petitioner sustained an injury which arose out of and in the course of his employment. CO at p. 2. Thus, the presumption of compensability attached in this case. As the court held in *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2d 844 (D.C. 1995), the presumption, once attached to establish a causal connection between the disability and the work-related event, activity, or requirement, also extends to the question of the medical causal relationship between the current disability and the work-related injury. Accordingly, in order to rebut the presumption of medical causal relationship, an employer must present evidence specific and comprehensive enough to sever the potential connection between the disability and work-related injury. See *Whittaker, supra* at 845-846.

We also note that under the Act, while medical opinion evidence is not required in every case in order to invoke the presumption or to establish that a work incident has the potential to cause the present condition (see, *McNeal v. WMATA*, 917 A.2d 652 (D.C. 2007) at 658, citing *Swinton v. Kelly*, 180 U.S. App. D.C. 223 (D.C. App. 1976)) we certainly are willing to accept that the lack of such medical opinion is a relevant factor that an ALJ can consider in weighing the evidence. However, in this case, particularly considering that (1) Ms. Machado has consistently complained of radicular leg symptoms since the injury, (2) it appears without doubt that she injured her L4-5 disc in the stipulated incident, (3) there is no dispute that the work injury was treated surgically but that Ms. Machado continued to experience similar symptoms thereafter, (4) she was found by Compass Group's own IME physician to have sustained a permanent injury, (6) a finding of MMI does not imply a resolution of the injury nor the impossibility of a recurrence or worsening of that injury, and (7) the record lacks any medical opinion contradicting the presumed causal relationship between the stipulated injury and the current condition, we can only conclude that the ALJ erred in not according Ms. Machado the presumption that the condition is a continuation, recurrence or worsening of the original injury.

Having invoked the presumption, the burden shifts to Compass Group to adduce substantial evidence in opposition to the existence of such a causal relationship. If they succeed in meeting that burden, then the evidence should be weighed without reference to any presumptions with Ms. Machado having the burden of establishing the causal relationship by a preponderance of the evidence.

Because the ALJ erroneously determined that Ms. Machado's evidence was insufficient to invoke the presumption, the remaining steps of the analysis, as well as consideration of the remaining issue of nature and extent of disability, was not reached. Thus, we must remand the matter for further consideration, affording to Ms. Machado the presumption that her current complaints and alleged disability are causally related to the stipulated work injury. The ALJ is to take as given that the presumption has been invoked, and is to consider whether the record contains substantial evidence to the contrary. If so, that evidence must be specifically identified, and the matter must then be considered further, with Ms. Machado bearing the burden of proving such a relationship by preponderance of the evidence and without the benefit of any presumption. Lastly, if the ALJ does find that Ms. Machado has met her burden on this issue, the ALJ shall proceed to consider the remaining issues of the nature and extent of disability (i.e., her claim for temporary total disability) and for causally related medical care as recommended by her treating physicians.²

DECISION AND ORDER

The determination that Ms. Machado has failed to adduce sufficient evidence to invoke the statutory presumption that her current complaints and alleged disability are medically causally related to the stipulated work injury is not supported by substantial evidence. The matter is

² We note that as far as we can tell from the record before us, Compass Group has not contested the reasonableness and necessity of the claimed medical care, and the ALJ denied that care solely on the basis of a lack of causal relationship. We also note that reasonableness and necessity of the recommended medical care is not identified in the CO as an issue in dispute.

remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL,
Administrative Appeals Judge

November 20, 2013
DATE