

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. 09-001

MAXINE OLIVER,

Claimant – Respondent,

v

GEORGE WASHINGTON UNIVERSITY AND FRANK GATES SERVICE, Co.,

Employer/Carrier –Petitioner.

Appeal from a Compensation Order of  
Administrative Law Judge Karen R. Calmeise  
AHD No. 95-376E, OWC No. 282571

Donald P. Maiberger, Esquire, for the Petitioner

Benjamin T. Boscolo, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS AND  
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

FLOYD LEWIS, *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 § 250 *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

### OVERVIEW

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 Order, which was filed on September 5, 2008, the Administrative Law Judge (ALJ) granted the claim for relief by Claimant-Respondent (Respondent) concluding that her disability is now

permanently and totally disabled. On October 2, 2008, Employer-Petitioner (Petitioner) appealed that Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is unsupported by substantial credible evidence in the record and is not in accordance with the law.

Since the ALJ's decision is supported by substantial evidence and is in accordance with the law, the granting of Respondent's request for permanent total disability benefits because of her dependence on narcotic pain medication should not be disturbed.

#### 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. D.C. Official Code §32-1522(d)(2). "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 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.

On April 2, 1997, ALJ Amelia Govan issued a Compensation Order awarding Respondent temporary total disability benefits from April 17, 1996 to the present and continuing for injuries to her back, right hand and right ankle due to a work incident. After Petitioner filed an Application for Review, the Compensation Order was affirmed by the Director and Petitioner continued to pay Respondent temporary total disability benefits as a result of her work-related injuries. After a full evidentiary hearing in which Respondent was seeking a default order against Petitioner for non-payment of previously awarded medical expenses, ALJ Linda Jory issued a January 15, 1999 Compensation Order ordering Petitioner to pay certain medical expenses. In addition, ALJ Jory found that Respondent voluntarily limited her income by not accepting Petitioner's offer of suitable employment. As such, ALJ Jory found that Respondent was no longer entitled to temporary total disability benefits, but was entitled to temporary partial disability benefits for her failure to accept suitable employment.

In the instant Compensation Order, the ALJ found that Respondent continues to have residuals of her February 18, 1995 work related injury to her low back, which have aggravated her pre-existing back condition. In addition, the ALJ determined that Respondent continues with chronic lumbar back pain for which narcotic pain medication has been prescribed. The ALJ found that Respondent's narcotic pain medication causes

the loss of concentration and extreme drowsiness which does not allow her to perform sedentary work on a regular basis. As such, the ALJ concluded that Respondent is permanently and totally disabled until efforts are taken to decrease her use and dependence narcotic pain medications.

Turning to the case under review herein, Petitioner asserts that the ALJ erred as the Compensation Order is not supported by substantial evidence. Petitioner contends that the ALJ did not find Respondent's testimony to be credible concerning the nature, extent and severity of her symptoms, the treating physicians records were inconsistent and the medical opinions of its physicians, Drs. Mark Rosenthal and Shelley Freimark, were not relied on. Respondent counters that there is substantial evidence in the record that Respondent's dependence on medication was caused by back pain from the work accident in 1995 and that she is permanently and totally disabled.

In this matter, Respondent filed for a review of her benefits due to a change of condition. Under the Act, the presumption of causal relationship between the allegedly worsened condition and the initial work injury applies to a review proceeding on modification. *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998). Upon presentation of credible evidence of an injury and a work-related event or activity that has the potential of resulting in or contributing to the injury, a claimant invokes the protection of the presumption. *Ferriera v. District of Columbia Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The focus then shifts to the employer to produce evidence specific and comprehensive enough to sever the presumed connection between the employment-related event and the injury. Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). In addition, the scope of the application for the presumption has been expanded to include the causal relationship between the current disabling condition and the injury. *Whittaker v. District of Columbia Department of Employment Services*, 668 A.2d 844, 846-847 (D.C. 1995).

While the ALJ specifically did not find Respondent's testimony to be credible concerning the nature, extent, severity or chronology of her symptoms related to her work injury in 1995, Respondent submitted medical evidence that her disc problem has worsened and that she no longer can perform alternating sitting and standing duties. In addition, the ALJ noted that it is uncontested that Respondent depends on a wheelchair for mobility. As such, the ALJ found that Respondent successfully invoked the presumption of compensability.

To rebut the presumption, Petitioner relied on the independent medical examination report of Dr. Mark Rosenthal who opined that any ongoing symptoms that Respondent experienced were not related to her work incident. In addition, Petitioner relied on Respondent's medical records which indicate that she was involved in an automobile accident and received treatment for five fractured ribs, a fractured left ankle and a collapsed lung and that Respondent suffered several non-work related falls injuring her knees and shoulders. As such, the ALJ found that Petitioner rebutted the presumption of

compensability and the evidence of record was weighed without reference to the presumption.

In reviewing this matter, the ALJ found that while Respondent's treating physician's reports were not credible in some aspects and did not prove that Respondent's low back condition had worsened to the point that she should be awarded permanent total disability benefits, the ALJ ultimately concluded that Respondent's present dependence on prescription pain medication, has, in fact, rendered her permanently totally disabled.

In great detail, the ALJ described the various and repeated inconsistencies in the medical reports of Respondent's treating physician, Dr. Hampton Jackson, which usually would "warrant this evidence to be of minimal consideration." Compensation Order at 7. However, the ALJ stressed that Dr. Jackson's medical evidence was notable for its consistent documentation of and reference to Respondent's complaints of lower back spasms and pain. The evidence of record reveals that even the IME report of Dr. Mark Rosenthal clearly references the pain in Respondent's lower spine. The ALJ noted:

The Claimant's treating physician medical records, diagnostic tests, and the IME report support a finding that since the 1998 Formal Hearing and 1999 Compensation Order, Claimant continues with low back pain and spasm and the prescribed restricted physical activity minimizes her symptoms. Even if it can be found that the pain and spasmic symptoms from the aggravated lumbar spine condition has not worsened since the 1998 Formal Hearing, based on the medical opinions of Drs. Rosenthal and Freimark, my observance of the Claimants' behavior and demeanor at the Formal Hearing, and my consideration of the medical record, in total, Claimant is not employable in her current condition.

Compensation Order at 8.

Most importantly, the ALJ stressed that Respondent's current dependency on and use of medications contributes to her pain condition and specifically referred to Dr. Rosenthal's report, stating:

The Employer's IME noted in the May 21, 2007 report that her current medical care and use of medications is contributing to her chronic pain syndrome:

It is doubtful any further improvement will occur. Appropriate future treatment for Ms. Oliver would be to wean her from her current medical care. She should be gotten off her narcotic medications . . . Ongoing treatment, including multiple visits to physicians, medications, injections, etc., are only leading to her chronic pain should be discontinued.

(EE No. 1)

I find even if such dependence is the result of overprescribed and over use of narcotic medications, her reliance on the pain medications is incompatible with gainful employment . . . Claimant's disability is now permanent and she remains totally disabled until such time as efforts are taken to decrease her use and dependence on narcotic pain medications.

*Id.*

While Petitioner protests that the ALJ ignores that Drs. Rosenthal and Freimark opined that Respondent's current medical condition is unrelated to the work injury and that there is no reasonable way to attribute her current symptoms to her work injury of 12 years ago, it must be emphasized that the ALJ clearly acknowledged and found that Respondent's own medical evidence did not prove that Respondent's low back injury had worsened to the point that she should be awarded permanent total disability benefits.

However, the crucial point is that the ALJ awarded Respondent benefits due to her dependence on narcotic medications which make her not employable in her current condition. Dr. Rosenthal clearly opined that Respondent would not improve until her dependency on and use of these medications is decreased and, as Respondent points out, there was no finding by Dr. Rosenthal that Respondent would have become dependent on these narcotic pain medications if she had not suffered the February 18, 1995 work injury.

The record reveals that Dr. Jackson opined that Respondent had reached maximum medical improvement and that there was no way to treat Respondent's pain condition other than with prescribed narcotic medication. Dr. Rosenthal also found that Respondent had reached maximum medical improvement, but while acknowledging that she still suffers from low back pain, Dr. Rosenthal did not offer an opinion as to how to ease Respondent's pain.

As noted, the ALJ found many of Dr. Jackson's medical records inconsistent and not credible with the other evidence of record and earlier Compensation Orders issued in this matter. However, the ALJ did specifically credit Dr. Jackson's reports as they related to Respondent's consistent, continuing low back spasms and pain, as this finding was consistent with the previous determination that Respondent's low back pain was related to her work injury.

Petitioner argues that the ALJ erred by discounting Dr. Rosenthal's opinion that Respondent's current condition is not causally related to her work injury, while clearly acknowledging that Dr. Jackson's reports were inconsistent. However, the ALJ, referencing the treating physician preference, had authority to credit that portion of Dr. Jackson's opinion concerning Respondent's pain condition, especially when Dr.

Rosenthal clearly admits that Respondent's use of medications contributes to her chronic pain syndrome and any further improvement will probably not occur.

The CRB, in the past, has stressed that the treating physician preference is so strong, that when the ALJ relies on the opinion of a treating physician to the detriment of conflicting evidence, the ALJ does not need to provide an explanation for not accepting the opinions of the other medical experts of record. *Ransome v. Ft. Meyer Construction*, CRB No. 08-014, AHD No. 07-093A (December 5, 2007); *McManus v. Dept. of Corrections*, CRB No. 07-34, AHD No. PBL 02-017D (March 29, 2007); *Gooden v. The Washington Post*, CRB No. 04-44, OHA No. 97-25A (March 29, 2007). Thus, this Panel must reject Petitioner's argument that the ALJ erred in rejecting the opinion of Dr. Rosenthal that Respondent's current condition is not related to her work injury.

Petitioner also argues that the ALJ erred by not accepting the Utilization Review report and opinion of Dr. Freimark. However, as the ALJ pointed out, the issue in this matter is medical causal relationship and the nature and extent of Respondent's current disability, not the medical necessity of treatment. Utilization Review reports are used for the issue of reasonableness and necessity, as causal relationship and other such issues of compensability and disability are not the appropriate areas to be addressed by Utilization Review. See D.C. Official Code § 32-1507, *Gonzalez v. UNICCO Service*, CRB No. 07-005, AHD No. 06-155 (February 21, 2007).

Accordingly, after reviewing the evidence of record, this Panel concludes the ALJ's determination that Respondent's disability is now permanent and that she remains totally disabled until efforts are taken to decrease her use of and dependence on narcotic pain medication, is supported by substantial evidence and is in accordance with the law.

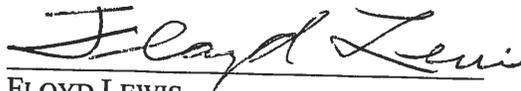
#### CONCLUSION

The Compensation Order of September 5, 2008 is supported by substantial evidence and is in accordance with the law.

#### ORDER

The Compensation Order of September 5, 2008 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW  
BOARD:



FLOYD LEWIS  
Administrative Appeals Judge

November 17, 2008  
DATE