

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-042

**NATASHA PERSAUD,
Claimant-Respondent,**

v.

**HARCO, INC., and
AMGUARD INSURANCE COMPANY,
Employer/Insurer-Petitioner.**

Appeal from a Compensation Order issued February 25, 2016
by Administrative Law Judge Mark W. Bertram
AHD No. 12-529A, OWC No. 686823

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 8 AM 10 55

(Decided August 8, 2016)

Julie D. Murray for Employer
Steven H. Kaminski for Claimant

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Remand Order (DRO), Compensation Review Board (CRB) described the history of the injury and treatment of the Claimant as such:

On December 9, 2011, Ms. Natasha Persaud worked for Harco, Inc. (Harco) as an assistant comptroller. On that day, she injured her chest, both arms, neck, and both upper thighs when a vertical filing cabinet full of files fell on her.

Ms. Persaud came under the care of Dr. David P. Moss for treatment of her arms. He prescribed physical therapy for Ms. Persaud's right forearm sprain from December 2011 to December 2012.

On February 21, 2012, Ms. Persaud began treating with Dr. Marc B. Danziger. On March 30, 2012, Dr. Danziger suggested physical therapy twice a week for four weeks.

On September 25, 2012, Dr. Danziger and Ms. Persaud discussed a referral to Dr. Fink, a neurologist. Ms. Persaud could not get an appointment with Dr. Fink until January 2013 so on October 29, 2012, Ms. Persaud sought treatment from Dr. S. Shar Hashemi on the referral of her physical therapist Lauri Rogers.

Dr. Hashemi performed surgery on Ms. Persaud's right elbow and forearm on November 6, 2012. He referred Ms. Persaud to physical therapy with Ms. Rogers post-surgery.

On November 28, 2012, Ms. Persaud told Dr. Danziger she had undergone surgery by Dr. Hashemi. Dr. Danziger "reported that he would have claimant continue therapy recommended by Dr. Hashemi." More than a month later, Dr. Danziger suggested a second opinion because Dr. Hashemi had recommended additional surgery; at that time, Dr. Danziger also suggested one more month of physical therapy.

Persaud v. Harco, CRB No. 13-082 (September 19, 2013) (Footnotes omitted).

A dispute arose over Claimant's request for additional physical therapy and the parties proceeded to a Formal Hearing before an Administrative Law Judge (ALJ). Pertinent to this appeal, Claimant's request for additional physical therapy as recommended by Dr. Danziger was ultimately awarded.

As described in the Compensation Order (CO) on appeal, after the first surgery was performed, Claimant underwent an additional four surgeries at the recommendation of Dr. Hashemi. They were:

- Microsurgical decompression of the proximal medial nerve, right arm on January 31, 2013.
- Right brachial plexus decompression on July 19, 2013.
- Left brachial plexus decompression on June 13, 2014.
- Neurolysis of the left ulnar nerve and a submuscular transposition on May 19, 2015.

In a June 9, 2014 deposition, Dr. Hashemi opined that all the surgical procedures performed to date were medically causally related to the work accident. Dr. Hashemi further opined Claimant was not at maximum medical improvement and needed further treatment. Dr. Hashemi was again deposed on October 29, 2015, and reiterated his earlier opinions.

On February 18, 2014, Dr. Danziger performed an independent medical evaluation (IME) at the request of Employer. Dr. Danziger summarized his treatment of Claimant as well as that of Dr. Hashemi. After reviewing his medical notes, performing a physical examination, and reviewing

Claimant's most recent MRI, Dr. Danziger opined the first two surgeries performed by Dr. Hashemi were medically causally related to the work accident. Dr. Danziger further opined that after the second surgery, Claimant's medical condition was related to congenital abnormalities, and that her thoracic outlet syndrome and the brachial plexus claims were not related to her work injury. As it related to her work injury, Dr. Danziger opined Claimant reached maximum medical improvement as of June 2013 and could return to work, with restrictions. Dr. Danziger also recommended a functional capacity evaluation (FCE) to further determine her work capabilities. Finally, Dr. Danziger opined Claimant had a 7% permanent impairment to her right arm due to her work injury.

Based on Dr. Danziger's opinions, the first two surgeries were accepted as medically causally related by Employer. Claimant also underwent an FCE which Dr. Danziger commented upon in an April 21, 2014 addendum to his IME of February 18, 2014. Based upon the FCE and his own observations, Dr. Danziger opined Claimant could return to work where she could alternately stand and sit for up to six hours, with limited typing and light lifting. Dr. Danziger reiterated these opinions on October 9, 2015 and in a deposition on November 5, 2015.

A dispute arose regarding Claimant's entitlement to additional disability benefits and medical benefits. A full evidentiary hearing occurred on June 15, 2015. Claimant sought an award of temporary total disability from May 17, 2014 to the present and continuing, reimbursement for causally related medical bills and out of pocket expenses, as well as interest. The issues to be adjudicated were the medical causal relationship of Claimant's condition, and the nature and extent of disability.¹ A CO was issued on February 25, 2016 granting Claimant's request for benefits.

Employer appealed. Employer argues the conclusions that Claimant's July 19, 2013, June 3, 2014 and May 19, 2015 surgeries were medically causally related to the work injury and that Claimant remains temporarily and totally disabled are not supported by substantial evidence or in accordance with the law.

Claimant opposes the appeal, arguing the ALJ's conclusions are supported by substantial evidence in the record and in accordance with the law and thus the CO should be affirmed.

¹ The CO lists the following as issues to be adjudicated:

1. Were the symptoms/conditions Claimant underwent surgery for on July 19, 2013, June 13, 2014, and May 19, 2015, medically causally related to Claimant's work place injury? Yes.
2. Was the treatment Claimant received from Dr. Hashemi and Dr. Movarid Yousefi preauthorized? No.
3. Is Claimant entitled to reimbursement for her medical and out of pocket causally related expenses she incurred as a result of her surgeries and continued medical treatment? Yes.
4. Is Claimant entitled to TTD benefits for the period requested? Yes.

We note the stipulation form lists only two issues to be adjudicated, medical causal relationship and nature and extent. Whether a recommended medical treatment was preauthorized or not would not have any bearing on either medical causal relationship or the nature and extent of Claimant's disability. Issue number 3 refers to Claimant's requested claim for relief.

ANALYSIS²

Employer first argues Claimant's July 19, 2013, June 3, 2014 and May 19, 2015 surgeries were not medically causally related to the work injury. Specifically, Employer argues:

When considering all of the medical evidence in this case, it is clear that the Claimant cannot meet her burden and show entitlement to the medical treatment for the third, fourth, and fifth surgeries because it is clear that the conditions involved in these surgeries are not in any way medically causally related to the subject accident.

Employer's argument at 12.

In support, Employer relies primarily on the medical opinion of Dr. Danziger summarizing his medical treatment and objective testing and questioning the opinion of Dr. Hashemi.

A review of the CO reveals the ALJ gave greater weight to Dr. Hashemi's medical opinions, stating:

Claimant argues, and I agree, Dr. Hashemi is better suited to diagnose and treat Claimant's injuries because he is a peripheral nerve specialist. See Claimant's Supplemental Brief. While Dr. Danziger has experience treating patients with peripheral nerve injuries, Dr. Hashemi specializes in this particular area.

I find Dr. Danziger ever so slightly alters his opinion the further along Claimant's treatment proceeds. At first, Dr. Danziger did not relate the first two surgeries to the work place accident. However, Dr. Danziger subsequently related these two surgeries to the work place accident because of the positive outcome of the surgeries. In his June 29, 2015 and October 9, 2015 Addendums to Independent Medical Evaluation of February, 18, 2014, Dr. Danziger opines the third-surgery "had marginal indications," and was not causally related. However, in a April 21, 2014 Addendum to Independent Medical Evaluation of February, 18, 2014, Dr. Danziger opines the third surgery helped Claimant to work further, "in no way do I think her third surgery in 8/13 in any way lessened her capabilities but rather improved them." Employers Vol II, Ex.1, p.2.

Dr. Hashemi stated in his deposition that Dr. Danziger is a fantastic orthopedic

² The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

surgeon. CSE 1, p.34. Dr. Hashemi also explains why he, Dr. Hashemi, is better suited as a specialist to treat peripheral nerve problems. *Id.* While I do not find any disparagement with Dr. Danziger's slightly changing opinions, these changes give additional credence and weight to Dr. Hashemi's unchanging opinions regarding the medical causal relationship to the work injury. As is apparent throughout the record, Dr. Hashemi's area of expertise is better suited to diagnose and treat Claimant with regard to upper trunk peripheral nerves.

Dr. Danziger attributes Claimant's symptoms to fibromyalgia. Dr. Danziger opined Claimant demonstrates she meets the requirements for a diagnosis because she has pain at "12 trigger points in various locations." Employer Insurer's Supplemental Brief, Ex .2. Dr. Danziger does not describe the 12 locations of alleged pain, nor do Claimant's medical records show any examination regarding these 12 points. *See also* Claimant's Supplemental Brief, Ex. C, *Diagnosis of Comprehensive Neuropathies in Patients with Fibromyalgia*. *See also* Dr. Hashemi, October 29, 2015, depo. Tr. pp.22-23; Dr. Hashemi explains why Claimant's complaints were not compatible with myofascial pain and fibromyalgia.

Lastly, Regarding Claimant's negative diagnostic test results; *see* Claimant's Supplemental Brief, Ex. E, *Evaluation of patients with thoracic outlet syndrome*, which questions the effectiveness of diagnostic testing at the level of the brachial plexus. I give Dr. Hashemi's opinions greater weight than Dr. Danziger's opinions.

I find Claimant has proven by a preponderance of the evidence that Claimant's symptoms and conditions treated and managed by Dr. Hashemi are medically causally related to Claimant's work place injury.

CO at 9-10.

Employer takes issue with the ALJ giving more credence to Dr. Hashemi's opinion because he is a peripheral nerve specialist, and using this as a basis to reject Dr. Danziger's opinion. Employer points this panel to Dr. Danziger's opinion explaining how Dr. Hashemi's medical findings and opinions were wrong. We decline to follow Employer's argument.

Our statutory authority is to determine whether a CO is supported by substantial evidence in the record and in accordance with the law. As stated above, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. The ALJ weighed the opinions of both Dr. Danziger and Dr. Hashemi, and found Dr. Hashemi's opinion to be more persuasive. What the Employer is asking us to do is to re-weigh the evidence in its favor, a task we cannot do.

Stated another way:

Our task is to determine whether the determination of the ALJ is supported by substantial evidence; we are not concerned with whether there is substantial evidence to support a contrary or different conclusion. *See Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Hairston v. First Transit, CRB No. 16-002 (June 17, 2016).

Employer's next argument is that the ALJ erred by awarding temporary total disability benefits [TTD], stating:

Claimant cannot meet her burden in showing entitlement to ongoing temporary total disability benefits because the medical evidence does not show that her current inability to work is causally related to the subject accident.

Employer's argument at 17.

In argument, Employer relies on the opinion of Dr. Danziger who opined Claimant could return to work, with restrictions, and had reached maximum medical improvement as it related to her work injury. Employer also points out that vocational rehabilitation was offered, but Claimant was unable to participate because of the three unrelated surgeries.

When analyzing the issue of the nature and extent of Claimant's disability, the ALJ noted:

Employer acknowledges that Claimant's request for TTD rises or falls on whether or not Claimant's need for three additional surgeries is medically causally related to the work place accident. HT 18:9-16. I found Claimant's third, fourth and fifth surgeries are medically causally related to the work injury. There was no clear evidence presented by Employer that Claimant was able to work during the period at issue. Dr. Danziger opined that Claimant could return to work with restrictions. ESE-I. However, Employer offered no evidence that it offered suitable alternative employment to Claimant within the restrictions listed by Dr. Danziger. Employer offered no evidence Claimant could return to her pre-injury employment work status. Employer did not rebut Claimant's evidence that she was temporarily and totally disabled for the period requested.

I find by a preponderance of the evidence, Claimant is temporarily and totally disabled for the period of May 17, 2014 to present and continuing.

CO at 11-12.

Similarly, as we have concluded the ALJ's determination that the three contested surgeries were medically causally related to the work injury, Employer's argument fails. The ALJ's conclusion that Claimant is temporarily and totally disabled is supported by the substantial evidence in the record and in accordance with the law.

CONCLUSION AND ORDER

The February 25, 2016 Compensation Order is AFFIRMED.

So ordered.