

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-013

ELFLETA L. NIXON,

Claimant–Petitioner,

v.

HOWARD UNIVERSITY AND SEDGWICK CMS,

Employer and Carrier-Respondents/ Cross-Petitioners.

Appeal from a Compensation Order by
The Honorable Joan E. Knight
AHD No. 11-170, OWC No. 670178

Krista DeSmyter, Esquire for the Petitioner
William Schladt, Esquire for the Respondent

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL,¹ 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 Claimant - Petitioner (Claimant) and the Employer of the December 30, 2011, 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 denied the Claimant's request for disability benefits but granted the Claimant's request for payment of causally related medical bills and interest. We AFFIRM in part, and VACATE in part.

FACTS OF RECORD AND PROCEDURAL HISTORY

¹ Judge Leslie and Judge Russell are appointed by the Director of the DOES as CRB Board Members pursuant to DOES Administrative Policy Issuance Nos. 11-03 and 11-04. (October 5, 2011).

The Claimant was a clinical instructor and course coordinator for the Employer, a contract position. The Claimant's office was located in Annex I. The Claimant suffered from a pre-existing sinus and respiratory condition for which she had been receiving treatment from Dr. Denise Chevalier since 2002.

During 2008, Annex I was under renovation causing conditions which aggravated Claimant's pre-existing sinus condition. Dr. Chevalier recommended the Claimant be relocated from Annex I until renovations were completed. The Employer accommodated this request, moving the Claimant to a temporary location. Afterwards, the Claimant's respiratory symptoms improved. However, the Claimant was required to attend meetings in Annex I. Upon attending these meetings, the Claimant would suffer from coughing and sinus headaches. Because of this, the Claimant was placed on various periods of disability, after which she would return to work.

At the end of the school year, the Claimant's contract with the Employer terminated on or about May 15, 2010. The Claimant was not reappointed. She subsequently found employment with the University of the District of Columbia beginning in January 2011.

On May 19, 2010, Dr. Gail Anderson performed a nasal endoscopy with removal of tissue and of both inferior turbinates. The Claimant continued to treat with Dr. Anderson and Dr. Chevalier.

On November 22, 2010, the Employer sent the Claimant for an independent medical evaluation (IME) with Dr. John Parkerson. Dr. Parkerson performed a physical examination. At the time of his examination, Dr. Parkerson did not have the Claimant's medical records for review. Dr. Parkerson opined that the Claimant had multiple pre-existing allergies and asthma exacerbated by workplace irritants. After being provided with the medical records, Dr. Parkerson concluded that the Claimant's need for a sinus operation was not causally related to her workplace exposure.

A Formal Hearing proceeded on November 21, 2011. The issues presented were whether or not the Claimant's medical condition and need for surgery was related to her employment and, if so, the nature and extent of the Claimant's disability, if any. The Claimant sought an award of temporary total disability from May 16, 2010 to December 21, 2010, payment of causally related medical expenses and interest. A CO was issued on December 30, 2011. In that CO, the ALJ concluded that the sinus surgery was related to the Claimant's employment and awarded payment of related medical expenses.. The ALJ found, however, that the evidence did not support an award of temporary total disability for the periods the Claimant claimed and denied the requested award.

The Claimant appealed the CO's denial of temporary total benefits, arguing that the "substantial evidence in the record establishes that Ms. Nixon was not able to return to her pre-injury job duties and location in the offices of the Annex I building" and that the "Employer failed to establish the availability of other jobs she could perform after May 19, 2010." Claimant's argument unnumbered.

The Employer opposed and cross appealed the finding that the Claimant's surgery was medically causally related to the Claimant's employment. The Employer argues that the denial of disability benefits is supported by the substantial evidence in the record. The Employer also argues that there was no record evidence to support the conclusion that the Claimant's surgery was a result of the workplace exacerbation of the Claimant's pre-existing condition.

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. See District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("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

Addressing the Claimant's appeal first, the Claimant argues that she was "never able to return to her pre-injury employment activity of having her office housed in the Annex I building, and that the restrictions set forth by Ms. Nixon's treating physician, Dr. Chevalier, were not fully accommodated." Claimant's Argument unnumbered. The Claimant further posits that the Employer failed to present evidence why the Claimant was not offered another contract for the following academic year. The Claimant relies upon *Howard University Hosp. v. DOES*, 881 A.2d 567 (D.C. 2005) in support of her arguments.

We initially note that when discussing the nature and extent of the Claimant's disability, the ALJ stated,

To resolve the issue of nature and extent and whether Claimant is entitled to temporary total disability benefits for the periods claimed, there is no presumption regarding the nature and extent of her disability. See *Dunston v. District of Columbia Dept. of Employment Services*, 509 A.2d 109, 111 (D.C. 1986). Therefore, Claimant has the burden of proving by substantial credible evidence that she is entitled to the relief requested.

CO at 9.

This is in error. As the District of Columbia Court of Appeals (DCCA) has held, the correct burden of proof when deciding the nature and extent of a Claimant's disability is preponderance of the evidence. Specifically,

Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the

correct burden of proof is a preponderance of the evidence.

WMATA v. DOES and Browne, Intervenor, 926 A.2d 140 (D.C. 2007). See also *Burge v. DOES*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. DOES.*, 783 A.2d 623, 628 (D.C. 2001).

However, we find this error harmless as the request for temporary total disability was denied because the ALJ found that the employment contract ended before any of the claimed time was lost and the Claimant failed to provide any evidence that she was disabled thereafter. Specifically,

Herein, the Claimant seeks temporary total wage loss benefits from May 16, 2010 to December 21, 2010 based upon her work injury. However, there are no disability slips or notes by treating physicians that Claimant be placed in an off work status in the record evidence for period claimed to support her position. Based on the record evidence, the Claimant earned wages during academic year until May 1, 2010 when her employment contract ended and she was not reappointed. Moreover, Dr. Chevalier was unable to determine if Claimant "was totally restricted from work activity". (FF 9, 11-12, 15).

CO at 9.

Thus, although the ALJ misstated the Claimant's burden of proof, as discussed above, we find this error harmless as there was no evidence presented which would support a claim for temporary total disability, hence there is no standard under which the Claimant could recover. We affirm the ALJ's denial of the temporary total disability claim.

Turning to the Employer's cross appeal, the Employer argues that there was "no evidence that the Claimant's surgery was needed as a result of the exacerbation of her pre-existing condition." Employer's Argument at 7.

A review of the CO reveals the ALJ identified the applicable law, specifically that it is well settled that the Claimant, in order to invoke the presumption of compensability that her injury comes within the act, must show some evidence of work related event, activity or requirement which has the potential of causing the injury claimed. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). Moreover, the ALJ noted correctly that the Claimant was alleging that her pre-existing condition was aggravated by her employment and thus her condition fell under the auspices of the "aggravation rule."²

²It is well settled in this jurisdiction that an aggravation of a pre-existing condition by work related conditions constitutes a compensable injury under the Act. Like the presumption rule, the aggravation rule is intended as an aid to a claimant who might otherwise not be entitled to benefits. See generally, *King v. District of Columbia Department of Employment Services*, 742 A.2d 460 (D.C. 1999), and *Harris v. District of Columbia Department of Employment Services*, 660 A.2d 404 (D.C. 1995).

The ALJ also correctly noted that the Employer conceded that the Claimant's sinusitis condition was aggravated by the workplace exposure.³ After finding the Claimant had invoked the presumption that the surgery was related and that through the reports of Dr. Parkerson the Employer successfully rebutted this presumption, the ALJ then analyzed the evidence without the benefit of the statutory presumption. It is at this juncture the Employer contends the ALJ erred. What the Employer argued in front of the ALJ, as the Employer argues before us, is that the need for surgery was not causally related to this work place exposure.

A review of the CO reveals the following passage:

Applying the standard set forth in *Stewart, [v. DOES*, 606 A.2d 1350 (D.C. 1992], the medical treatment notes and opinions of Drs. Chevalier and Anderson are given greater weight than the independent medical opinion of Dr. Parkerson whose opinion is rejected. Based on the forgoing the undersigned has determined that Claimant's nasal cyst and subsequent need for an endoscopy was causally related to her employment. The Claimant has incurred medical and care expenses, causally related to the work injury and the record evidence established that these expenses are a result of Claimant performing her work duties within the course and scope of her employment.

CO at 9.

A review of the evidence however shows at no time do the treating physicians opine that the surgery is related to the work related aggravation. A review of the operative report and the procedure indicates that the surgery was for chronic conditions related to allergies. As reflected in the findings of fact relied upon by the ALJ, no reports are relied upon that affirmatively relate the surgery to the work related aggravation. The only opinion which directly touches upon whether or not the surgery was related consisted of the Employer's IME physician, Dr. Parkerson who opines that there is no causal connection between the surgery and the workplace exposure.

As a matter of law we find that the Claimant unable to carry her burden, that of a preponderance of the evidence, that her May 2010 surgery was related to her workplace exposure. On this record, there is but one possible result, and that is that Claimant's request for payment of medical expenses and bills related to the May 2010 surgery be denied. Accordingly, we vacate the award of medical expenses.

³The Employer in argument concedes that it paid for, and accepted, the Claimant's treatment for chronic sinusitis, asthma, and allergic rhinitis. Employer's Argument at 3.

CONCLUSION AND ORDER

The finding that the Claimant is not entitled to temporary total disability is supported by substantial evidence in the record is **AFFIRMED**.

That portion of the CO awarding casually related medical expenses related to the sinus surgery is **VACATED**.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

June 25, 2012
DATE
