GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-051

BELINDA PAULS-ANDERSON,

Claimant–Respondent,

v.

WHITMAN WALKER CLINIC,

and

LIBERTY MUTUAL INSURANCE CO.,
Self Insured Employer -Petitioner.

Appeal from a Compensation Order by
The Honorable Belva Newsome
AHD No. 09-049C, OWC No. 648273

Robin Cole, Esquire for the Petitioner
Matthew Peffer, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR, and MELISSA LIN JONES *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the March 7, 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 temporary total disability benefits from June 12, 2011 to the present and

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

continuing, payment of medical expenses and bills, and authorization medical treatment. WE REVERSE AND REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a Phlebotomist for the Employer for nineteen years. The Claimant's duties were to obtain blood samples from HIV/AIDS patients. On April 1, 2008, the Claimant tripped over a fan cord and injured her low back. Prior to her injury, the Claimant did suffer from pre-existing back pain which was aggravated by the work accident.

The Claimant sought treatment for her back injury and was diagnosed with lumbar radiculitis. The Claimant's treatment has included physical therapy, steroid injections and pain management under the observation of Dr. Leeann Rhodes. The Claimant has not returned to work in any capacity and was subsequently terminated by the Employer. Presently, the Claimant is pursuing a degree in psychology.

The Employer paid temporary total disability benefits for a period of time. On June 9, 2011, the Employer sent the Claimant for an Independent Medical Evaluation (IME) with Dr. David C. Johnson.[2] Dr. Johnson noted that this IME was his second performed on the Claimant. Dr. Johnson opined that the injury of April 1, 2008 "did produce an aggravation of this pre-existing condition." Dr. Johnson further opined that the Claimant could return to work full duty as a phlebotomist, assuming that her job duties did not require lifting greater than 10 pounds. Based on this report, the Employer ceased paying the Claimant temporary total disability.

A Formal Hearing was held on January 25, 2012. The Claimant requested an award for temporary total disability benefits from June 12, 2011 to the present and continuing, payment of medical expenses and bills, and authorization medical treatment, specifically lumbar blocks. The issues raised, as recited in the CO, were whether or not the Claimant's current lumbar condition was medically causally related to the work injury, the nature and extent of the Claimant's alleged disability, and whether the requested medical treatment was reasonable and necessary.[3] A CO was issued on March 7, 2012 which awarded the Claimant's claim for relief in its entirety.

The Employer timely appealed. The Employer argues two main points. First, that the opinion of Dr. Johnson was sufficient to overcome the presumption of compensability. Second, that the "ALJ incorrectly concluded that the Claimant is temporarily and totally disabled." Employer's Argument, unnumbered. The Claimant argues that the ALJ's determination that the Claimant has not yet reached maximum medical improvement and is thus temporarily disabled is supported by the substantial evidence in the record. The Claimant further argues that the Employer failed to demonstrate some lesser level of disability in light of the Claimant's *prima facie* showing of disability.

[2] In the finding of facts (#18), the ALJ erroneously stated the IME was on June 29, 2010.

[3] Despite the ALJ identifying this as a contested issue, reasonableness and necessity was not a contested issue raised before the ALJ, as discussed more fully below.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination 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*. ("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

The Employer first argues that the ALJ was in error in not concluding that the opinion of Dr. Johnson does not rebut the presumption of compensability. We will note initially, the ALJ found the Claimant to have invoked the presumption by way of the stipulated injury. The Employer does not contest this finding and as such, we will not consider it on appeal. The ALJ also correctly noted that presumption of compensability extends to the medical causal relationship between an alleged disability and the accidental injury, thereby conferring a causal relationship between a claimant's employment and his/her medical condition. *Whittaker v. D.C. Department of Employment Services,* 668 A.2d 844, 846 (D.C. 1995).

The ALJ then went on to state the following,

> The District of Columbia Court of Appeals (Court of Appeals) has held that once a causal connection is shown between the disability and the work-related event, the claimant is entitled to a continuing presumption that ongoing manifestation of such disability remains the result of the prior job-related injury until rebutted by substantial evidence presented by employer. *Whittaker v. District of Columbia Dept. of Employment Services*, 688 [**sic**] A.2d 844 (D.C. 1995); *Davis-Dodson v. District of Columbia Dept. of Employment Services*, 697 A.2d 1214 (D.C. 1997). The fact-finder is required to "view the causal relation between any present disability and the work-related injury through the lens, as it were, of the statutory presumption unless, the employer has rebutted the presumption by evidence specific and comprehensive enough to sever the potential connection between the two." *Davis-Dodson, supra*, citing *Whittaker, supra*.
>
> To rebut the presumption of compensability, Employer relied upon the Independent Medical Evaluation of Dr. Johnson. Finding of Fact (hereinafter, FF) 17-20. 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). Dr. Rhodes diagnoses Pauls-Anderson with thoracic/lumbosacral neuritis/radiculitis unspecified; spondylosis, lumbar, without myelopathy arising from her preexisting back condition and her work-related injury of April 1, 2008. FF 9-11. Based upon the presumption of compensability, Pauls-Anderson's current condition is medically causally related to her April 1, 2008 work injury.

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 disprove 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 disability. *Washington Post v. D.C. Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004). If the Employer has successfully rebutted the presumption through the opinion of an unambiguous opinion from a physician, then the presumption drops from the case and the evidence is weighed without reference thereto. At this juncture the ALJ would be free to reject (or adopt) the opinion of the IME in favor of that of treating physician.

Here, because the ALJ analyzed the comparative evidentiary weight to be given the treating physician's opinion and the IME opinion, the ALJ appears to weigh the evidence without the benefit of the presumption before determining first whether or not the IME, standing alone, *rebutted* the presumption. This error requires us to remand the case back to the ALJ to determine whether or not the Employer has rebutted the presumption of compensability through the IME of Dr. Johnson. If so, then the presumption drops from the analysis and the ALJ must determine whether or not the Claimant proved, by a preponderance of the evidence, her condition is medically causally related to the injury.

The Employer next argues that the ALJ incorrectly concluded that the Claimant is temporarily and totally disabled. Specifically, the Employer argues that as the Claimant's treating physicians are silent as to what abilities or restrictions she might have, and in light of the IME physician opining she can return to work full duty, the Claimant is no longer eligible for temporary total disability benefits.

After acknowledging the Claimant is not entitled to any presumption when nature and extent is at issue and the Claimant must prove, by a preponderance of the evidence her entitlement to the benefits claimed, the ALJ reasoned,

> Pauls-Anderson relied upon her testimony and her medical evidence to demonstrate that she cannot perform her pre-injury position as phlebotomist. (FF 9-12) The record reflects that Pauls-Anderson has not been released by Dr. Rhodes from treatment, and that she has not worked at her pre-injury position

> since after her work-related injury. By a preponderance of the evidence, Pauls-Anderson has demonstrated that she cannot return to her pre-injury position by testifying that she has days where she cannot leave her bed and by the medical evidence that sets forth that her condition has worsened since her work injury of April 1, 2008. (FF 9-12, 15).
>
> Employer seeks to rebut the nature and extent of Claimant's disability by the IME of Dr. Johnson and Claimant's position description. 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, supra*, and *Stewart, supra*. Employer has not rebutted Claimant's evidence that she continues to be temporarily totally disabled.

CO at 6.

A review of the medical evidence submitted requires remand of this case as we cannot ascertain what medical evidence the ALJ is referencing when concluding the medical evidence supports the Claimant's inability to perform her pre-injury job. We cannot determine what medical evidence the ALJ is relying upon as the treating physicians are silent as to whether or not the Claimant is capable of returning to work, especially in light of the IME's opinion that she can return to work, contrary to the ALJ's conclusion above.[4]

Moreover, we are unable to ascertain what type of analysis the ALJ is utilizing in the last paragraph quoted above. While the ALJ does correctly note the burden shifting analysis enunciated in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), the ALJ after stating the Claimant proved she was unable to return to her pre-injury work by a preponderance of the evidence, then continues her analysis to determine whether or not the Employer rebutted this evidence. After determining that the Employer failed to rebut this evidence, the ALJ determined the Claimant was temporarily and totally disabled. We are unclear if the ALJ is engaging in a presumption type analysis, which would be incorrect as there is no presumption when nature and extent is involved, or if the ALJ is attempting a *Logan* burden shifting analysis. If the ALJ had been conducting a *Logan* burden shifting analysis, one would expect the ALJ to then analyze whether or not the Claimant challenged the Employer's evidence of available employment or demonstrate diligence, but lack of success, in obtaining other employment. *Logan, supra*.

Without the ability to determine what medical evidence the ALJ is relying upon to support the conclusion that the Claimant cannot return to her pre-injury job, we cannot say that the Claimant has satisfied the first prong of the analysis as enunciated in Logan or that she has, by a preponderance of the evidence, proven her entitlement to disability benefits.

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[4] We are cognizant of our recent decision in *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149 (May 9, 2012), *reconsideration denied* (June 5. 2012) wherein we stated that "there is no requirement under the Act or in the case law that mandates that a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss-based award of benefits." However, in *Fuentes,* there was no medical opinion indicating whether or not the Claimant could return to work. In the case *sub judice*, dissimilar to *Fuentes,* there is an IME indicating the Claimant can return to work.

While it is not within our authority to re-weigh the evidence, we are summarizing the evidence in the case at bar to point out why we must remand the case back to the ALJ for further discussion regarding the medical evidence and how the Claimant sustained her burden. We can no more "fill in the gaps" and glean from the record what the ALJ ultimately relied upon in coming to the conclusion that the Claimant had sustained her burden and proved, by a preponderance of the evidence, that she was temporarily and totally disabled. *See Mack v. D.C. Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994).

Finally, we note that one of the issues recited in the CO and disposed of was the reasonableness and necessity of continuing medical care. However, a review of the hearing transcript reveals the only issues raised and acknowledged by the parties is whether or not the Claimant's current medical condition is causally related to the injury and the nature and extent of the Claimant's disability, if any. Hearing Transcript at 6. While neither party has appealed this issue being disposed of in the CO, we are forced to vacate this portion of the CO as reasonableness and necessity was not a contested issue raised before the ALJ.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the March 7, 2012 Compensation Order is not supported by substantial evidence in the record. It is **REVERSED AND REMANDED** consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

June 13, 2012
DATE