GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-082

NATASHA PERSAUD,
Claimant-Respondent,

v.

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

Appeal from a June 4, 2013 Compensation Order By
Administrative Law Judge Linda F. Jory
AHD No. 12-529, OWC No. 631719

Joseph C. Tarpine, III, Esquire for the Petitioner
Steven H. Kaminski, Esquire for the Respondent

Before MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

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,[1] 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."[2] 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.

Harco would not authorize an additional month of physical therapy, and the parties proceeded to a formal hearing before an administrative law judge (ALJ). In a Compensation Order dated June 4, 2013, the ALJ concluded "the surgeries to claimant's right arm have been causally linked to her employment by means of the statutory presumption"[3] because Dr. Robert O. Gordon's opinion is not sufficient to rebut the presumption of compensability. Then, because "the surgeries performed by Dr. Hashemi are causally related to the work injury, claimant has met her burden of establishing that employer remains responsible for payment of the additional month of physical therapy as prescribed by Dr. Danziger."[4]

On appeal, Harco argues Dr. Gordon's opinion is sufficient to rebut the presumption of compensability and Ms. Persaud did not prove her entitlement to physical therapy by a preponderance of the evidence. Harco also argues the recommendation for physical therapy was not made by an authorized treating physician. For these reasons, Harco requests the Compensation Review Board (CRB) reverse the Compensation Order.

In response, Ms. Persaud supports the ALJ's determination that Dr. Gordon's ambiguous opinion is not sufficient to rebut the presumption of compensability because Dr. Gordon did not examine Ms. Persaud and because he did not review Dr. Hashemi's or Dr. Danziger's medical reports. She also asserts she satisfied her burden to prove her entitlement to physical therapy. Consequently, Ms. Persaud requests we affirm the Compensation Order.

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[1] Dr. Fink's full name is not in the record.

[2] *Persaud v. Harco, Inc.*, AHD No. 12-529, OWC No. 631719 (June 4, 2013), p. 3.

[3] *Id.* at p. 5.

[4] *Id.* at p. 6.

ISSUES ON APPEAL

1. Did the ALJ properly apply the presumption of compensability?

2. Was one month of additional physical therapy recommended by an authorized treating physician?

ANALYSIS[5]

The issue for resolution at the formal hearing was "Whether claimant's alleged right arm problems remain causally related to the injury claimant sustained on December 9, 2011."[6] Pursuant to § 32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability ("Presumption").[7] In order to benefit from this Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[8] "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."[9] There is no dispute the ALJ appropriately ruled the Presumption properly had been invoked.

Once the Presumption was invoked, it was Harco's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[10] To rebut the Presumption, Harco relied upon Dr. Gordon's opinion; the ALJ did not find Dr. Gordon's opinion sufficient to rebut the Presumption:

> To rebut the existing presumed relationship, employer relies on the IME reports of Dr. Robert Gordon who examined claimant on June 28, 2012 and July 26, 2012. On June 28, 20212, [*sic*] Dr. Gordon reported:

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[5] 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).

[6] *Persaud*, *supra*, at p. 2.

[7] Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

[8] *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987).

[9] *Washington Hospital Center v. DOES,* 744 A.2d 992, 996 (D.C. 2000).

[10] *Waugh v. DOES,* 786 A.2d 595, 600 (D.C. 2001) (citations omitted). (Emphasis added.)

> Based on my review of all of the medical records and radiographic reports provided, I believe that the injury that occurred on 12/09/11 was a straightforward contusion of the right forearm. Assuming the accuracy of the medical records, I believe that Dr. Moss likely had the right idea when he felt that the patient's condition was likely psychologically-based rather than physically-based.

EE 2 at 2. Dr. Gordon did not proffer any other opinion with regard to the causal relationship of claimant's desire for surgery to her forearm. On July 26, 2012, Dr. Gordon wrote:

> There is nothing in my examination of this patient today to change the opinions that I rendered in my record review report of 6/28/12.[11] I believe that this patient would be best served with reassurance rather than by any further treatment.

EE1 at 2. The remainder of his opinion pertains to claimant's physical capabilities and ability to return to work. Although Dr. Gordon does state claimant is not in need of any further treatment, this opinion, in the undersigned's opinion, standing alone does not meet the standard currently used in determining if employer has submitted specific and comprehensive evidence, i.e., an unambiguous opinion that the work injury did not contribute to the surgeries. *See Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*) [Footnote omitted.]. Thus, it is concluded the surgeries to claimant's right arm have been causally linked to her employment by means of the statutory presumption.[12]

The ALJ's analysis does not address the proper issue. The issue is not "causal relationship of claimant's desire for surgery to her forearm."[13] At issue is whether Ms. Persaud's current right arm symptoms are related to her on-the-job accident. If those symptoms are related to her

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[11] While it is true that Dr. Gordon did not examine Ms. Persaud on June 28, 2012, he did not do so because Ms. Persaud refused to allow him to examiner her with Dr. Gordon's female medical assistant in the room:

> I was scheduled to examine Natasha Persaud in my office today at your request, but when the patient came in for an examination, she did not want to be examined with my female medical assistant in the room. It is my practice and should be the practice, in my opinion, of all male health care practitioners to have a female assistant in the room when they are examining a female patient. I told the patient that I would not examine her in the office without a female assistant in the room, and therefore, she was not examined.

Employer's Exhibit 2.

[12] *Persaud*, *supra*, at pp. 4-5. (Emphasis added.)

[13] *Id.* at p. 4.

compensable accident and the physical therapy has been ordered by an authorized physician to treat those symptoms, Harco is responsible for payment for that treatment because reasonableness and necessity of medical treatment has not been raised as an issue; the only issue is causal relationship.

The ALJ is not the only one to confound the issue in this case. Harco argues

> Dr. Gordon's unambiguous opinion was that Claimant was at MMI, which necessarily includes a conclusion that further medical treatment is unnecessary; thus, the challenged surgeries were unnecessary as they took place after Claimant reached MMI. Accordingly, the Employer rebutted the causal relationship presumption because unnecessary medical procedures after MMI cannot logically be causally connected to the work injury.[14]

Medical treatment may be necessary after a claimant reaches maximum medical improvement, and medical treatment may be unnecessary even though ongoing symptoms are causally related to an on-the-job accident. Harco's argument conflates causal relationship of an injury to an accident with the reasonableness and necessity of medical care to treat an injury, two distinct issues - one of which was not presented to the ALJ for resolution[15] and the other of which has been reviewed above.

Turning to the issue of whether physical therapy was recommended by an authorized treating physician, if a claimant is not satisfied with her medical care, she may make a change of physician after obtaining authorization from the Office of Workers' Compensation or from her employer.[16] In addition, although a claimant's

> attending physician may refer a claimant to another physician for treatment without approval of either the OWC or the employer. Approval to change physicians is not needed for a series of referrals, each from the attending physician. *Medical Associates v. DOES*, 565 A.2d 86 (1989), *Sibley Memorial Hospital v. DOES*, 711 A.2d 105 (1998) *Frazier v. Washington Hospital Center*, CRB 07-41, OWC 624682 (2007). [Footnote omitted.][17]

Unless the attending physician refers the claimant to a treating physician, the employer is not obligated to pay for treatment obtained from an unauthorized treating physician.[18]

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[14] Memorandum of Points and Authorities in Support of Employer/Administrator's Application for Review, p. 8.

[15] See Hearing Transcript p. 10.

[16] 7 DCMR §213.13

[17] *West v. Washington Hospital Center*, CRB No. 99-097(R), H&AS No. 99-276A, OWC No. 281076 (March 14, 2011).

[18] *West v. Washington Hospital Center*, CRB No. 12-181, AHD No. 99-276A, OWC No. 281076 (August 15, 2013).

Ms. Persaud requests authorization for physical therapy initially prescribed by Dr. Hashemi who is not Ms. Persaud's authorized treating physician.[19] Ms. Persaud's request for payment for physical therapy could not be assigned to Harco based upon a recommendation by Dr. Hashemi; however, the ALJ found that because Ms. Persaud returned to Dr. Danziger after her unauthorized surgery performed by Dr. Hashemi and because Dr. Danziger supported an additional month of physical therapy, Harco is obligated to pay for the physical therapy:

> With the submission of the supplements to CE 1 (008.A -- F) and the conclusion herein that the surgeries performed by Dr. Hashemi are causally related to the work injury, claimant has met her burden of establishing that employer remains responsible for payment of the additional month of physical therapy as prescribed by Dr. Danziger.[20]

As noted above, the issue of causal relationship has not been addressed properly. If the physical therapy is not treatment recommended by an authorized treating physician to treat symptoms causally related to an on-the-job accident, Harco is not responsible for paying for that physical therapy; therefore, as written, the ALJ's conclusion does not flow rationally from her findings.

CONCLUSION AND ORDER

Because the ALJ has not properly analyzed the issue of the causal relationship between Ms. Persaud's current right arm symptoms and her compensable accident, the June 4, 2013 Compensation Order is not supported by substantial evidence and is not in accordance with the law. The Compensation Order is VACATED, and this matter is REMANDED for application of the presumption of compensability to the issue of causal relationship of the arm symptoms to the on-the-job accident.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

September 19, 2013
DATE

[19] *Persaud*, *supra*, at p. 5.

[20] *Id*. at p. 6.