

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



GERREN PRICE
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-102

**RONALD FALWELL,
Claimant-Respondent,**

v.

**PEPCO and
ESIS INSURANCE COMPANY,
Employer/Insurer-Petitioner.**

Appeal from an July 31, 2014 Compensation Order on Remand by
Administrative Law Judge Karen R. Calmeise
AHD No. 14-230, OWC No. 700142

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JAN 28 PM 1 25

Shawn M. Nolen for the Employer/Insurer
Danny R. Seidman for the Claimant

Before MELISSA LIN JONES, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 3, 2013, Mr. Ronald Falwell was employed as a cable splicer for PEPCO. While driving to a worksite that day, his company vehicle was rear-ended.

At Howard University Hospital, Mr. Falwell complained of neck and low back pain. By April 2013, Mr. Falwell recovered and was released to his pre-injury work with no restrictions.

When Mr. Falwell returned to work, he began feeling tingling and sharp pains in his neck that radiated into his arm. Disputes arose over whether Mr. Falwell's right arm condition is medically causally related to his work-related accident and whether Mr. Falwell is entitled to permanent partial disability benefits for his right arm; therefore, the parties proceeded to a formal hearing before an administrative law judge ("ALJ"), and on July 31, 2014, an ALJ issued a

Compensation Order finding that Mr. Falwell's right arm injury is compensable and that he is entitled to an 8% permanent partial disability award for his right arm. *Falwell v. PEPCO*, AHD No. 14-230, OWC No. 700142 (July 31, 2014).

On appeal, PEPCO argues Mr. Falwell only sustained a disability regarding his neck and back because his

subjective complaints of pain in his arm do not amount to a disability under the Act. This condition did not begin until the Claimant had already returned to work and after he had ceased receiving medical treatment. This condition was never formally diagnosed by the treating physician and it did not result in the Claimant missing any time from work. Further, there is no evidence in the record that the Claimant's right arm condition resulted in a loss of wages or will result in a loss of wages in the future.

Memorandum of Points and Authorities of Employer in Support of Application for Review, pp. 5-6. PEPCO also argues the ALJ erred by ruling it had not rebutted the presumption of compensability. Finally, PEPCO argues the ALJ erred by not affording Dr. Ruth Robinson's opinion the treating opinion preference. For these reasons, PEPCO requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In response, Mr. Falwell asserts the Compensation Order is supported by substantial evidence. He requests the CRB affirm the Compensation Order.

Neither party appeals the ALJ's assessment of the amount of 8% for permanent partial disability to Mr. Falwell's arm.

ISSUES ON APPEAL

1. Did the ALJ err by ruling PEPCO did not rebut the presumption of compensability?
2. Did the ALJ err by not affording Dr. Robinson's opinion the treating physician preference?
3. Is the July 31, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

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.” In order to benefit from this presumption of compensability (“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. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). “[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.” *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000). There is no dispute the ALJ appropriately ruled the Presumption had been invoked.

Once the Presumption was invoked, it was PEPCO’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.” *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted). Only upon a successful showing by PEPCO would the burden return to Mr. Falwell to prove by a preponderance of the evidence, without the benefit of the Presumption, his current right arm condition arose out of and in the course of employment. See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

To rebut the Presumption, the ALJ considered the independent medical examination report of Dr. Kenneth Hanley, PEPCO’s expert:

To rebut the presumption, Employer submits the IME report of Dr. Kenneth Hanley, however; the medical opinion presented does not address medical causal relationship. Although Employer argues that Claimant did not report right arm pain or complaints while he was undergoing medical treatment, Employer presents no evidence that is sufficient, specific or comprehensive that severs the connection between the vehicular accident and the Claimant’s neck and right arm complaints. (See *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

While it is arguable that an opinion that states there is no ongoing impairment, is tantamount to an opinion that there is no medical causal relationship between a work injury and a disability, the function of the presumption is to establish that a relationship exists where a work injury has the potential to cause a disability, if one is shown to exist. Dr. Hanley’s report does not present an alternative cause for Claimant’s current condition but rather asserts

¹ 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).

that Claimant has no ongoing disability. Thus, I conclude that Employer has failed to rebut the presumption that any disability found to exist is medically causally related to the work injury. (EE 1)

Falwell, supra, at p. 4 . PEPCO contends this ruling is flawed because Dr. Hanley opined there is nothing wrong with Mr. Falwell; therefore, there is no disability. Moreover, PEPCO contends the ALJ misinterpreted Dr. Hanley’s report:

In discussing this opinion, the ALJ has erroneously attributed the word “ongoing”, there is “no ongoing disability”, to the opinion of Dr. Hanley. This addition is nowhere to be found in Dr. Hanley’s report and it materially changes the substance of his opinion to suggest that further action would be needed, namely the attribution of a cause. However, given Dr. Hanley’s opinion that there is no disability, there can be no cause and it would therefore obviate the Employer’s burden to render an opinion that the work injury did not cause or contribute to the non-disability. Through the report of Dr. Hanley, the Employer unquestionably produced sufficient evidence to overcome the presumed relationship between the work injury and the Claimant’s right arm condition, so the July 31, 2014 Compensation Order must be remanded to address this mistake.

Memorandum of Points and Authorities of Employer in Support of Application for Review, p. 8. The CRB will not disturb the ALJ’s ruling.

Dr. Hanley’s opinion that Mr. Fuller “has absolutely nothing wrong with him” (Employer’s Exhibit 1) must be read in conjunction with his diagnoses:

1. History of musculoligamentous straining injury to the neck and back resolved.
2. There is no evidence whatsoever of extremity injury.

and his comment “All of the presentation today is feigned. From the standpoint of impairment, there is absolutely no evidence of any impairment whatsoever.” *Id.* In context, the ALJ correctly ruled Dr. Hanley’s opinion is insufficiently specific to rebut the Presumption.

The Presumption is rebutted when the record demonstrates a physician has performed a personal examination of the claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the causal relationship presumption, *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004), but Dr. Hanley’s opinion is susceptible to precisely the interpretation attributed to it by the ALJ. That there purportedly was nothing wrong with Mr. Falwell’s arm at the time of the independent medical examination is not an unambiguous equivalent of an opinion that Mr. Falwell did not sustain an injury to his right arm that is medically, causally related to his compensable accident; therefore, Dr. Hanley’s opinion is not sufficient to rebut the Presumption.

Next, PEPCO contends the ALJ erred by not affording Dr. Ruth Robinson’s causation opinion the treating physician preference. Because Dr. Robinson did not diagnose Mr. Falwell with any

right arm condition and because she opined Mr. Falwell had recovered from the car accident, PEPCO asserts the Compensation Order is not supported by substantial evidence.

Based upon the medical records in evidence, Dr. Robinson treated Mr. Falwell from February 6, 2013 until March 12, 2013. Claimant's Exhibit 2. Mr. Falwell did not begin to experience arm pain until April 2013 when he returned to work, and PEPCO is correct that Dr. Robinson did not render an opinion regarding the causal connection between Mr. Falwell's arm condition and his car accident; however, such an omission by the treating physician is not fatal to Mr. Falwell's claim.

First, there is no causal relationship opinion by the treating physician entitled to the treating physician preference or sufficient to rebut the Presumption invoked by Mr. Falwell's testimony. Furthermore, disability experienced in a schedule member may be compensable even if the anatomical situs of the injury is in a non-schedule body part, *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996), and Dr. Harvey Mininberg noted Mr. Falwell's neck pain radiated into Mr. Falwell's right arm and wrote in his November 25, 2013 report, "He notices pain with bending or lifting, pushing, pulling or twisting. There is fatigue type pain with prolonged sitting. There is stiffness and difficulties with sleeping." Claimant's Exhibit 1. Thus, Dr. Mininberg's opinion establishes a basis for an award of permanent partial disability to Mr. Falwell's arm.

Finally, in the absence of a clear argument that PEPCO appeals the assessment of the amount of 8% for permanent partial disability to Mr. Falwell's arm, PEPCO's statement that "there is no evidence in the record that the Claimant's right arm condition resulted in a loss of wages or will result in a loss of wages in the future" may not be intended to raise an issue regarding the appropriateness of Mr. Falwell's award of schedule member permanent partial disability; however, out of an abundance of caution, the CRB notes that pursuant to *Smith v. Department of Employment Services*, 548 A.2d 95 (D.C. 1988), a claimant may recover permanent partial disability benefits for a schedule member even if the claimant has returned to pre-injury work on full duty.

CONCLUSION AND ORDER

The ALJ properly ruled PEPCO did not rebut the presumption of compensability and did not err by not affording Dr. Robinson's opinion the treating physician preference. The July 31, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones

MELISSA LIN JONES
Administrative Appeals Judge

January 28, 2015

DATE