

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services  
Labor Standards Bureau

Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD



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CRB No. 10-109

ROYSTON L. CLEMENT,

Claimant-Respondent,

v.

STERNE, KESSLER, GOLDSTEIN & FOX AND CNA INSURANCE COMPANY,

Employer/Carrier-Petitioner.

Appeal from a Compensation Order of  
Administrative Law Judge Joan E. Knight  
AHD No. 03-575D, OWC No. 552839

2010 SEP 9 AM 11 04

COMPENSATION REVIEW  
BOARD

Joseph C. Veith, III, Esquire, for the Petitioner

Matthew J. Peffer, Esquire, for the Respondent

Before: HENRY W. MCCOY, MELISSA LIN KLEMENS, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Panel.

**DECISION AND REMAND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, et seq., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). The CRB replaces the Department of Employment Services Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 31-1501 *et seq.*

## OVERVIEW

Claimant-Respondent (Respondent) was working for Employer-Petitioner (Petitioner) as an office assistant when he sustained a compensable work-related injury to his left leg and back on April 13, 2000. In addition to treating with an orthopedist for his physical injuries, Respondent started treating with a psychologist in July 2001, was diagnosed with a low level depressive disorder, and was eventually released from treatment in September 2002.

In November 2003, Respondent started treating with a psychiatrist who diagnosed a depressive disorder associated with his work injury. After being prescribed anti-depressants and undergoing psychotherapy sessions, Respondent's care was terminated in June 2004.

On January 14, 2009, Respondent saw psychiatrist Dr. Patrick Sheehan for complaints of anxiety, panic attacks, and chronic sleep disturbance. Respondent was diagnosed with a major depressive and panic disorder associated with his work injury. Petitioner had Respondent examined by Dr. Brian Schulman, also a psychiatrist, who diagnosed a mild depressive disorder but opined that Respondent's psychological problems were not related to his work injury.

Alleging that his psychological condition was related to his work injury, Respondent filed for a hearing seeking authorization for cognitive therapy. In the resulting Compensation Order, Respondent's depressive disorder was found to be causally related to his work injury and his claim for treatment was granted. *Clement v. Sterne, Kessler, Goldstein & Fox*, AHD No. 03-575D, OWC No. 552839 (March 31, 2010). Petitioner filed a timely appeal.

In appealing Respondent's award, Petitioner argues that the ALJ erred in according the opinion of Dr. Sheehan the greater preference of a treating physician and failed to take into consideration other pertinent facts, which makes the Compensation Order (CO) neither supported by substantial evidence nor in accordance with the law. In his opposition, Respondent argues that as Dr. Schulman's opinion is not specific or comprehensive enough to rebut the statutory presumption, the ALJ's decision should be affirmed.

After a review of the record, because the Panel concludes the ALJ incorrectly applied the law to the facts of this case in designating Dr. Sheehan as Respondent's treating physician and that designation is not supported by substantial evidence in the record, the Compensation Order is REVERSED AND REMANDED.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. § 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott*

*International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Neither party takes issue with the ALJ's application of the standard established by the D.C. Court of Appeals in cases alleging a causal connection between a work-related physical injury and a resulting psychological injury. Pursuant to that standard, the claimant is entitled to the statutory presumption and must show that the physical accident had the potential of resulting in or contributing to the psychological injury. *McCamey v. D.C. Dept. of Employment Services*, 947 A.2d 1191, 1213 (D.C. 2008).

The ALJ found that Dr. Sheehan evaluated Respondent on January 14, 2009 for complaints of anxiety, panic attacks, and chronic sleep disturbance. CO at 3. From that examination, Dr. Sheehan produced a report on March 30, 2009, wherein he noted Respondent failed to appear at a follow-up session scheduled for January 22, 2009. In addition, on September 11, 2009, Dr. Sheehan produced a report responding to a series of questions from Respondent's counsel. The ALJ also found that Respondent was examined by Dr. Schulman on May 18, 2009 at Petitioner's request. *Id.*

The ALJ determined that Respondent's testimony supported by the medical and psychiatric reports of Drs. Hampton Jackson, Sheehan, and Philip Briley were sufficient to invoke the presumption of a causal relationship between his work-related physical injury and his current alleged psychological injury. CO at 4-5. The ALJ then determined that the IME report of Dr. Schulman was specific and comprehensive enough to rebut the presumption, thus requiring the evidence to be weighed without the benefit of the presumption and also requiring Respondent to prove by a preponderance of the evidence that any psychological injury is causally related to his physical work injury. *Id.* at 5.

The ALJ noted the preference accorded the opinions of treating physicians and then proceeded to undertake a weighing of the medical reports submitted into evidence, with a particular focus of the reports of Drs. Sheehan and Schulman. The ALJ then accorded the treating physician preference to Dr. Sheehan by stating:

The treating psychiatrist, Dr. Sheehan is in a better position to assess and recommend treatment of the Claimant's depressive disorder than Dr. Schulman, who has not rendered any treatment for the Claimant's condition. Although, it appears the Claimant was seen by Dr. Sheehan only on January 14, and January 22, 2009, the record reflects Dr. Sheehan prescribed anti-depressant medication, psychotherapy and advised him of possible interaction with other medication prescribed earlier by Dr. Jackson.

CO at 8. The ALJ went on to state that Dr. Schulman had not reviewed the previous treatment records of Drs. Briley and Matkovitz in making his assessment of Respondent's current condition. This led the ALJ to conclude:

The undersigned is not persuaded by Dr. Schulman's IME opinion and assessment and finds Dr. Sheehan's treatment records more reliable and worthy of greater weight.

*Id.*

While no issue is taken with the ALJ's finding that the presumption was invoked and then rebutted, Petitioner argues on appeal that the ALJ improperly accorded the opinion of Dr. Sheehan greater weight as a "treating physician" when the record does not support such a designation. Petitioner takes issue with the ALJ according Dr. Sheehan treating physician status when he, like IME psychiatrist Dr. Schulman, only saw Respondent once.

Petitioner contends that the ALJ erred in designating Dr. Sheehan as a treating physician and thereby according his opinions greater weight in making her ultimate finding that Respondent's psychological condition was causally related to the work injury. Petitioner argues that Dr. Sheehan only saw Respondent once, the same as Dr. Schulman, and, provided no ongoing treatment, as is generally the case with a treating physician, that would have given him greater insight as to Respondent's medical condition.

It is settled in the law in this jurisdiction that the opinions of a treating physician are accorded a preference and thus considered more reliable over the conflicting opinions of a non-treating physician who has been retained solely for purposes of litigation. See *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845 (D.C. App. 1998); and *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350 (D.C. 1992). As compared to a doctor retained solely for litigation purposes, a treating physician is "(1) less apt to be consciously or unconsciously biased by the litigation, and (2) more likely to be familiar with the patient's condition because he or she has typically spent a greater amount of time with the patient." *Kralick v. D.C. Dept. of Employment Services*, 842 A.2d 705, 712 (D.C. 2004). This rule is premised upon the well established axiom and has at its core the common sense principle that a physician who has treated a patient numerous times over a number of weeks, months, or years is likely to have a greater and more reliable insight into the condition of that patient than does a physician who has merely had only very limited exposure to the patient and who examined him in the context of possible or actual litigation. See, e.g., *Cuppett v. Covington & Burling*, H&AS No. 96-563, OWC No. 293552 (December 25, 1998).

We find merit in Petitioner's argument. Dr. Sheehan's singular interview and examination of Respondent does not make him more likely to be familiar with the patient's condition as he has not treated Respondent numerous times over a number of weeks, months, or years so as to gain a more reliable insight into the Respondent's condition. In this case, Dr. Sheehan has had only very limited exposure to the patient as did the IME psychiatrist, Dr. Schulman. Given he has had the same very limited exposure to Respondent, Dr. Sheehan does

not qualify as a treating physician and thus his opinion has no greater or more reliable insight into Respondent's condition than does that of Dr. Schulman.

In addition, while Dr. Sheehan stated on page 2 of his March 30, 2009 report that Respondent was being "seen for Evaluation and Treatment on January 14, 2009", he went on to state:

I explained to him that this was a Workers' Compensation Case (sic). There is a lack of confidentiality. Both the records and I can be subpoenaed. I explained the difference between a treating Psychiatrist and an Expert.

It can be fairly interpreted from this statement that Dr. Sheehan considered himself to be an expert consulted and retained for purposes of litigation and not engaged to provide ongoing treatment.

Upon remand, the ALJ shall evaluate the opinions of Drs. Sheehan and Schulman in the same posture as IME psychiatrists. In addition, the ALJ should be mindful that while she discounted the opinion of Dr. Schulman for its lack of consideration of the prior medical records of Drs. Briley and Matkovitz, a review of Dr. Sheehan's report reveals that he likewise did not have access to those prior records and, if he did, there is no indication that he factored them into his assessment of Respondent's condition.

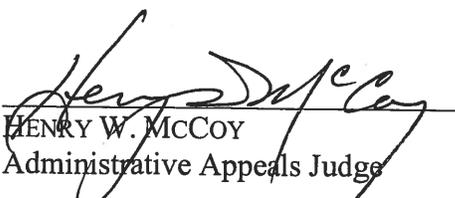
#### CONCLUSION

The Compensation Order of March 31, 2010 accorded the opinion of Dr. Sheehan the preference as a treating physician when such designation was not supported by substantial evidence in the record and thus not in accordance with the law.

#### ORDER

The Compensation Order of March 31, 2010 is hereby REVERSED AND REMANDED.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
Administrative Appeals Judge

September 9, 2010

DATE