

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-158

JOSEPH SLAUGHTER

Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Self-Insured Employer Respondent.

Appeal from a Compensation Order by
The Honorable Nata Brown
AHD No. 12-078, OWC No. 676830

Justin M. Beall, Esquire for the Petitioner
Sarah O. Rollman, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ HENRY MCCOY and JEFFREY P. RUSSELL,² *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 Claimant - Petitioner (Claimant) of the August 29, 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 denied the Claimant's request for temporary total disability benefits, as well as causally related medical bills. We VACATE and REMAND.

¹Judge Heather C. Leslie is appointed by the Director of DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

² Judge Russell has been appointed by the Director of the DOES as a interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

On December 29, 2010, the Claimant suffered an injury to his left knee while exiting a bus. The Claimant, prior to this accident, did have a history of surgery to his left knee. The Claimant sought treatment with Kaiser Permanente. Dr. Omar Akhtar diagnosed the Claimant with left knee post-traumatic arthritis and recommended knee replacement surgery. The Claimant sought a second opinion from Dr. Dennis Carlini. Dr. Carlini also recommended surgical intervention and opined the Claimant was unable to work until surgery was performed.

On March 15, 2011, the Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Richard Conant. Dr. Conant took a history of the Claimant's injury and medical care, and performed a physical examination. Dr. Conant opined the Claimant's complaints were related to chronic preexisting tricompartmental osteoarthritis. Dr. Conant expressed his belief that the Claimant did not sustain any injury to aggravate his pre existing condition warranting surgery.

The Employer also sent the Claimant's records for utilization review (UR). On April 7, 2011, a UR report was issued. In the report, the physician reviewed prior medical records and opined that while the Claimant needed surgery, the surgery was unrelated to the work incident of December 29, 2010.

The Employer paid the Claimant temporary total disability benefits until October 19, 2011. Thereafter, benefits were terminated. The Claimant returned to work as a bus driver, against Dr. Carlini's advice, on or about February 1, 2012.

A Formal Hearing was held on April 12, 2012. The Claimant sought award of temporary total disability from October 20, 2011 through January 31, 2012 and authorization for surgery to his left knee. Hearing transcript (HT) at 12. The Employer contested the nature and extent of the Claimant's disability and whether the left knee condition was medically causally related to the work injury. A CO was issued on August 29, 2012 denying the Claimant's claim for relief in its entirety. The CO found the Claimant's knee condition was unrelated to the work injury and that the Claimant was not temporarily and totally disabled.

The Claimant timely appealed the CO on September 28, 2012. The Claimant argues on appeal that the ALJ failed to apply the presumption of compensability properly. The Employer argues the CO is supported by the substantial evidence in the record and is accordance with the law and should be affirmed.

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.* at §32-1521.01(d) (2) (A) of the ("Act") 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

Initially we note some apparent confusion in the issues presented in the CO. The CO lists four issues to be decided, including whether the Claimant's injury arose out of and in the course of employment as well as whether the Claimant's request for a left total knee replacement is reasonable and necessary. CO at 2. A review of the hearing transcript reveals at no time did the Employer raise reasonableness or necessity as a defense against the Claimant's request for authorization for left knee replacement. The hearing transcript also reflects that while listing legal causation first as an issue, it is clear the Employer withdrew that issue by acknowledging the Claimant's injury "arose out of and in the course of employment." HT at 13. Based upon the hearing transcript, the only two issues to be adjudicated were whether the Claimant's left knee condition is medically causally related to the work injury and the nature and extent of the Claimant's disability, if any.

Furthermore, the claim for relief fails to list authorization for left knee replacement and only lists the closed period of temporary total disability benefits and causally related medical expenses. A review of the hearing transcript reveals the Claimant expressly sought an award of temporary total disability benefits and authorization for surgery. Specifically,

We are here today in this matter asking for temporary total disability from October 20, 2011 through January 31, 2012, as well, as authorization for surgical procedures to Mr. Slaughter's left knee.

HT at 12.

As we are remanding the case back to the ALJ for reasons discussed below, the CO should be amended to properly identify the issues and the claim for relief.

Turning to the merits of the case, the Claimant first argues that "the ALJ did not properly afford the Claimant the presumption of compensability when he presented evidence that his injury was the result of the work related events which took place on December 29, 2010." Claimant's argument at 8. The Claimant argues "in denying Claimant the benefit of the presumption, the ALJ found that the Employer had rebutted the presumption by proffering the independent medical evaluation of Dr. Conant." Claimant's argument at 9. The Claimant takes specific umbrage with the ALJ crediting the report of Dr. Conant over that of the treating physician, Dr. Carlini.

As acknowledged by the ALJ,

To raise the statutory presumption of compensability, the claimant must make an "initial demonstration" of "both an injury and a relationship between that injury and the employment." *Georgetown Univ. v. DOES.*, 971 A.2d 909, 916 (D.C.

2009); *Georgetown Univ. v. DOES*, 830 A.2d 865, 870 (D.C. 2003); *Ferreira, supra*, 531 A.2d at 655. In order to rebut this presumption, the employer must offer substantial evidence that the injury did not arise out of and in the course of Claimant's employment. *McNeal*, 917 A.2d at 656; *Washington Post v. DOES*, 852 A.2d 909, 911 (D.C. 2004); *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001). Employer must come forth with evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Id.* (quoting *Ferreira, supra*, 531 A.2d at 655).

Upon Employer's production of such specific and comprehensive rebuttal evidence, the presumption of compensability falls from the case, and the burden of proof is upon the Claimant to show, by a preponderance of the evidence that the disability was caused by a work-related injury. *Upchurch v. DOES*, 783 A.2d 623, 628 (D.C. 2001). Any conflicting evidence is then weighed without benefit of the initial presumption. *Spartin v. DOES*, 584 A.2d 564, 572 (D.C. 1990).

CO at 5.

The ALJ found the Claimant, "through the submission of Dr. Carlini's reports, has made an initial demonstration of both an injury and a relationship between that injury and the employment." CO at 6. Having found the presumption invoked, the ALJ then found the Employer had rebutted the presumption of compensability through the IME of Dr. Conant. After having found the presumption rebutted, the ALJ correctly noted the presumption drops from the case and the evidence is weighed without further reference thereto, quoting *Ferreira, supra*, 531 A.2d 651, 655 (D.C. 1987); *Parodi v. DOES.*, 560 A.2d 524, 525-526 (D.C. 1989). We find no error in the above analysis and reject the Claimant's argument.

We do find merit, however, in the Claimant's assertions that the ALJ's reasons for rejecting the opinion of Dr. Carlini, are "erroneous and contrary to both the facts found in both Claimant's and Employer's exhibits." Claimant's argument at 10.

The ALJ rejected the opinion of the treating physician stating,

The record evidence contains Dr. Carlini's three treatment records pertaining to Claimant -- January 13, 2011, April 28, 2011, December 1, 2011 -- and a letter dated April 9, 2012. Although Dr. Carlini examined Claimant initially in January of 2011, he did not opine on the issue of medical causal relationship of Claimant's disability to the work-related incident for almost one year, on January 5, 2012, in a short Addendum Note to the December 1, 2011 report. In the note, he states that Claimant's knee has worsened as a result of his December 2010 accident to the point that he requires joint replacement surgery to be able to return to any kind of employment. Just one month later, however, Claimant was back at work as a full-time bus driver as of February 1, 2012. In the April 2012 letter to Claimant's counsel, Dr. Carlini opined that the trauma to Claimant's left knee exacerbated the arthritis in his knee, causing him to need total knee replacement surgery.

Dr. Carlini's 2012 reports are not reliable, nor are they persuasive. In his first report, he failed to give an opinion on medical causation, but he listed a detailed plan for knee replacement surgery, which he obviously thought was going to occur within a short period of time. The provision of the opinion on the causal relationship one year later, in January 2012, contemporaneous with the filing of an Application for Formal Hearing with AHD, is a reactive measure and disingenuous. This report appears to have been prepared in anticipation of litigation, and not in the regular course of medical treatment. Further, Dr. Carlini's opinion that Claimant could not return to any type of employment without a total knee replacement has been proven wrong, because Claimant went back to work on February 1, 2012, less than one month later. As of the date of the Formal Hearing in April 2012, Claimant was still working full-time as a bus driver. As such, Dr. Carlini's January and April 2012 reported opinions with regard to the issue of medical causal relationship are rejected.

CO at 6-7.

We cannot agree with the ALJ's analysis and application of the treating physician preference rule.

The ALJ gave only two reasons for rejecting the opinion of the treating physician: (1) Claimant returned to work prior to having a knee replacement operation, contrary to the doctor's assessment of when such a return would be possible, and (2) the report containing the physician's opinion appeared to be prepared in anticipation of litigation.

Taking the second point first, the fact that a treating physician writes a report to be submitted in support of a claim for benefits has no bearing upon whether the physician is in a superior position to that of an IME physician to assess the medical condition of a claimant who is his or her patient. Indeed, in nearly every contested workers' compensation case, at some point a claimant will need to obtain a report or note written to address matters that are not generally included in a standard progress note. The issue in determining whether the treating physician's opinion is more reliable than an IME opinion is the status and relationship of the physician to the patient. It is error to devalue a treating physician's opinion because the opinion is expressed in a report authored to convey that opinion in a form other than a treatment note.

That leaves but one other reason upon which the ALJ relied, that being that the doctor had stated that the Claimant would not be able to return to work until after the surgery. This single lack of foresight on the physician's part is hardly a sufficient reason to reject the opinion. He was not wrong that the surgery would ultimately be required, and the fact that a claimant returns to work sooner than a physician predicts will be possible (or earlier than he thinks is advisable), without more, is an insufficient basis upon which the "strong preference" accorded to treating physician opinion should be defeated.

On remand, the ALJ should further evaluate the medical evidence in light of the treating physician preference, and if that opinion is again rejected, identify all the reasons for that decision. The fact that the doctor underestimated the Claimant's capacity to return to work as

soon as he did may be one factor, but if there are no other, more compelling reasons, the preference in favor of the treating physician should prevail.

We also must note, in an effort to avoid further remands, that when analyzing the nature and extent of the Claimant's injury, the ALJ stated the Claimant's burden was to "present substantial, credible medical evidence of the disability entitling him to the level of benefits requested," citing *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995). CO at 7. This is in error.

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 by a 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).

Upon remand, if the ALJ, after analyzing the entirety of the medical evidence, including the opinions of the physicians at Kaiser Permanente and Dr. Carlini, in conjunction with the Claimant's credible testimony, determines that the Claimant's left knee condition is medically casually related to the work injury, the ALJ is directed to then analyze whether the Claimant has then proven, by a preponderance of the evidence, he is disabled as a result of the injury.

CONCLUSION AND ORDER

The August 29, 2012 Compensation Order is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

December 14, 2012
DATE