

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. 06-13

SUSAN SHIPMAN,

Claimant - Respondent

v.

FRESENIUS MEDICAL CARE HOLDING AND CNA INSURANCE,

Employer - Petitioner

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 05-103A, OWC No. 603796

Benjamin T. Boscolo, Esquire for the Respondent

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

Before LINDA F. JORY, SHARMAN J. MONROE AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND 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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹. Pursuant to 7 D.C.M.R. § 230.04, the authority of the Compensation

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the 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

Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on October 31, 2005, the Administrative Law Judge (ALJ), concluded Claimant- Respondent's (Respondent) right upper extremity symptoms, are medically causally related to an aggravation or new injury on March 31, 2004 and that Respondent was temporarily and totally disabled from her usual employment by an aggravation of the right elbow symptoms for which she sought treatment on April 1, 2004; and that Respondent's right elbow surgery should have been authorized by employer.

As grounds for this appeal, Petitioner alleges the ALJ failed to adequately consider a lack of credible evidence of the accident alleged and the consequent insufficiency of the evidence to trigger the presumption of compensability and also erred in not finding Petitioner had rebutted the presumption. Respondent has filed a response asserting there is substantial evidence to support the ALJ's finding that Respondent was temporarily and totally disabled due to an aggravation of her right elbow condition on March 31, 2004.

Neither party opposes the ALJ's conclusion that there was no evidence to support employer's denial of authorization for Respondent's right elbow surgery.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. D.C. Official Code § 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 Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound 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

amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Petitioner asserts that although the ALJ found Respondent had not testified credibly at the Formal Hearing and during her depositions, and found that there were discrepancies that raised questions about Respondent's general credibility and the persuasiveness of Dr. Azer's medical opinion, the ALJ found Respondent's upper extremity symptoms were medically causally related to an aggravation or new injury on March 31, 2004. Petitioner also asserts that the ALJ failed to adequately consider the lack of credible evidence and the consequent insufficiency of the evidence to trigger the presumption of compensability. Petitioner further argues that even assuming Respondent triggers the presumption, it was rebutted by her testimony and that of her treating physician.

The Panel must respectfully reject Petitioner's assertion that the ALJ found Respondent had not testified credibly as no such finding was made in the Findings of Fact. The Panel must also reject Petitioner's assertion with regard to Respondent's burden of production to trigger the presumption. Under the Act, a claimant is entitled to a rebuttable presumption that he/she sustained injuries as alleged and that the alleged wage loss arose out of and in the course of the employment if he/she produces some credible evidence of an injury and of a work-related event which has the potential of causing the injury and/or disability. See *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651 (D.C. App.1987); *Charles Whittaker v. District of Columbia Department of Employment Services*, 668 A.2d 844 (D.C. December 18, 1995), (*Whittaker*) citing *Ferreira, supra*. The presumption applies and is triggered if claimant produces "**some evidence**" of the two basic facts described herein.

The Panel notes the ALJ began her presumption analysis setting forth that "claimant is entitled to a rebuttable presumption that the claim is compensable if she makes an initial showing of a condition and of employment duties which have the potential of causing the condition", citing *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 9D.C. 1990); *Muller v. Lanman Company*, Dir. Dkt. 86-1, OHA No. 85-346, OWC No. 0070456 (March 15, 1988). The ALJ also properly cited *Whittaker* to include the causal relationship between the current disabling condition and the injury, stating that her discussion would encompass the question of medical causation as well.

The Panel must acknowledge, however, that in applying the presumption to the March 31, 2004 alleged date of injury, the ALJ determined there was *some* evidence to invoke said presumption in the record medical reports. The ALJ stated immediately thereafter, "However, employer relies upon the contradictions in Dr. Azer's reports, as well as in claimant's own reports to argue that the presumption either is not invoked or is rebutted in this case". CO at 4. The ALJ proceeded to list Petitioner's evidence; conclude "these discrepancies do raise questions about [Respondent's] general credibility and the persuasiveness of Dr. Azer's medical opinions"; and add, [Petitioner] has adduced no medical opinion from any expert other than Dr. Azer, to support its defenses " The ALJ then concluded "there is no question that [Respondent's] usual work activities of lifting

and handling bags of bi-carb had the potential to cause or aggravate right upper extremity problems.

The ALJ, in the Panels' opinion, continued to bounce back and forth between analyzing the evidence, to determine if it contained an initial showing of a condition and employment duties which have the potential of causing the condition (a.k.a. as invoking the presumption), and weighing employer's evidence against the evidence which the ALJ found met Respondent's invocation burden. The Panel is unclear why the ALJ found it necessary to weigh the evidence of record in the process of invocation of the presumption, however the Panels finds the ALJ's conclusion that Respondent's usual work activities of lifting and handling bags of bi-carb had the potential to cause or aggravate right upper extremity problems is supported by the record evidence. Although there was no need to evaluate any of Petitioner's evidence at this point, this error on the ALJ's part was harmless.

The ALJ proceeded to analyze the contradictions in Dr. Azer's opinion as presented by Petitioner and concluded that the contradictions as proffered by Petitioner are not sufficient to sever the causal connection between Respondent's symptoms and her employment, therefore she gains the benefit of the statutory presumption. After making this conclusion the ALJ continued to review Petitioner's "rebuttal evidence" and found Petitioner had failed to adduce any expert medical opinion specific and comprehensive enough to sever the potential connection between Respondent's right upper extremity and her employment therefore her symptoms were caused by a new injury occurring on March 31, 2004. For reasons unknown, the ALJ proceeded to weigh the evidence again, (as if the presumption had been rebutted), and accorded "the contradictions suggested by the manner in which Dr. Azer's office and [Respondent] completed the form reports" minimal weight regarding the central issue in dispute". CO at 5.

While it is true that any member of this panel could have reached another result, i.e., that Petitioner's evidence, specifically Respondent's failure to tell Dr. Azer that she had suffered a work injury on March 31, 2004 was sufficient to rebut the presumption, the ALJ's approach is consistent with the Court of Appeals finding that negative evidence is not sufficient to rebut the presumption as it is neither specific nor comprehensive. See *Bobby Brown v. Dept. of Employment Services*, 700 A.2d 787 (1997); *Onofre v. Lorinczi*, Dir. Dkt.95-48, OHA No. 92-302A, OWC No. 209231 (September 15, 2000).

Accordingly, while the ALJ's application of the presumption is confusing and somewhat unorthodox, the Panel finds the end result supported by substantial evidence and in accordance with the law.

CONCLUSION

The ALJ's conclusions that Respondent's right upper extremity symptoms, which became debilitating during the period at issue, are medically causally related to an aggravation or new injury on March 31, 2004, and Petitioner was temporarily and totally disabled from her usual employment from March 31, 2004 and May 3, 2004, are supported by substantial evidence of record, and is in accordance with the law.

ORDER

The Compensation Order issued on October 31, 2005 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge

January 11, 2006
DATE