

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-022

VILMA F. CERON,  
Claimant-Petitioner,

v.

CHIMES OF VIRGINIA and  
SISCO,  
Employer/Insurer-Respondent.

Appeal from January 15, 2015 Compensation Order  
by Administrative Law Judge Gregory P. Lambert  
AHD No. 14-535, OWC No. 706782

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 JUN 12 PM 2 45

Michael J. Kitzman for the Claimant  
Barry D. Bernstein for the Employer

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 July 8, 2013, Ms. Vilma F. Ceron fell while working as a housekeeper for Chimes of Virginia (“Chimes”). She injured her left shoulder.

A dispute arose over Ms. Ceron’s entitlement to medical treatment for her alleged, current left shoulder condition, and the parties proceeded to a formal hearing before an administrative law judge (“ALJ”). The ALJ found Ms. Ceron’s testimony is not credible. In turn, he found the medical records based upon Ms. Ceron’s subjective complaints are not reliable. The ALJ ruled Ms. Ceron’s current left shoulder condition, if any, is not related to her workplace accident and denied her claim for relief. *Ceron v. Chimes of Virginia*, AHD No. 14-535, OWC No. 706782 (January 15, 2015).

Ms. Ceron appeals the ALJ's January 15, 2015 Compensation Order. Ms. Ceron asserts "[t]he credibility determinations made in this case are not relevant to the issue of medical causal relationship;" Memorandum of Points and Authorities in Support of Application for Review, p. 3, specifically the ALJ's finding that her testimony is not credible is irrelevant to whether her alleged shoulder condition is related to her on-the-job accident. Next, Ms. Ceron states "it is unclear if the presumption was properly applied in this matter." *Id.* at p. 4. Ms. Ceron requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In response, Chimes asserts the ALJ went to great lengths to support his conclusions with references to the evidence. Chimes requests the CRB affirm the Compensation Order.

#### ISSUES ON APPEAL

1. Is the ALJ's credibility finding supported by substantial evidence?
2. Is the ALJ's credibility finding relevant to his assessment of Dr. Mehrdad M. Malek's medical opinion regarding the causal relationship between Ms. Ceron's work-related accident and her alleged current left shoulder condition?
3. Did the ALJ properly apply the presumption of compensability's burden-shifting requirements?
4. Is the January 15, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

#### ANALYSIS<sup>1</sup>

To begin, Ms. Ceron asserts Dr. Malek's medical opinion that her current left shoulder injury is related to her on-the-job accident is not related to her credibility:

The undisputed evidence in this matter shows that Ms. Ceron sustained an injury to her left shoulder when she fell while cleaning the bathroom. Dr. Malek describes in great detail that the labral [*sic*] tear, which Dr. Malek opines was directly caused by the fall itself. CE-3, 13. The doctor also described how such a fall would aggravate the pre-existing shoulder pathology, resulting in the impingement syndrome that he also diagnosed. CE-3, 13.

Neither of these medical opinions rely upon the credibility of the claimant as a basis for determining the cause of the objective pathology. Rather, Dr. Malek's opinion presents specific and objectively supported conclusions regarding what caused the present physical condition of the claimant's shoulder. In denying the claimant's claim for relief in this matter, the Compensation Order failed to make any findings as to how Dr. Malek's reading and depiction of the

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<sup>1</sup> 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 of 1979, as amended, D.C. Code § 32-1501 *et. seq.* ("Act").

MRI findings should be rejected. This means that the conclusion cannot be supported by the substantial evidence.

*Id.* at pp. 3-4. The CRB disagrees.

There is no dispute that credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole. *See Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992). In turn, when a credibility determination is supported by substantial evidence, the ALJ's credibility ruling is entitled to deference. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

In this case, the ALJ amply supported his credibility finding with references to evidence in the record:

Wearing a sling at the hearing, Ms. Ceron testified through an interpreter. Based on her demeanor and inconsistencies in her testimony, I found her incredible.

Ms. Ceron sustained an injury to her left shoulder when she slipped and fell in the summer of 2013 while working as a housekeeper. After visiting the emergency room, she followed up with treatment from a chiropractor and a physical therapist. The chiropractor recommended an MRI and referred her to Dr. Malek, an orthopedic surgeon. She visited Dr. Malek only once, in April 2014. Based on that consultation, Dr. Malek recommends surgical intervention. She visited Dr. Levitt for an IME in early 2014. He opined that she was feigning her injury.

On the afternoon of November 8, 2014, Ms. Ceron was photographed carrying a green bag in her left hand; she was not using a sling. Although what it contained is unclear, the bag was not empty. Approximately a minute later, she was photographed driving while grasping the wheel with her left hand.

\* \* \*

Ms. Ceron testified that she wore a sling at all times (save for bed) and could not even use her left arm to grab a bottle. HT at 16-17. But after being shown a photograph of her walking through a parking lot while carrying a green bag in her left hand without the sling, she refused-repeatedly-to even admit that she was holding the bag. HT at 20, 23; EE 4; *see also* HT at 23 (same denial-made with unflinching eye contact-in response to my questioning); HT at 25 (similar responses). Fifty-seven seconds after the first photo was taken, another captured Ms. Ceron sitting in the driver's seat of a car, her hand on the wheel.<sup>2</sup> EE

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<sup>2</sup> Footnote in original:

Although she testified that she was not using her left hand in the photo, a simple comparison of the two photographic exhibits reveals that the black stripes on her jacket are only on the outside of the arms. *Compare* HT at 20 ("Q. Are you using your left hand to -left arm to drive? A. No."), *with* EE 4 (walking with bag), and EE 5 (driving). Based on the location of the stripes, the hand grasping the steering wheel is her left. EE 5.

5. Despite unambiguous photographic evidence to the contrary, she simply refused to admit that she was using her left arm. Her willingness to so testify powerfully supports a conclusion that she lacked credibility. Her testimony is rejected as unreliable.

Her subjective medical complaints are unreliable hearsay. Coupled with my finding that Ms. Ceron was an incredible witness, her behavior during Dr. Levitt's examination supports the rejection of her subjective complaints. *See, e.g.*, EE 3 ("She appears to be in no obvious distress but she grimaces and groans with any attempt to handle the left arm."); EE 2 ("She was unwilling to recruit any motors and indicated she had global decrement in sensation."). This is an explicit rejection of both verbal hearsay statements, like complaints of pain, and nonverbal hearsay statements, such as exaggerated difficulties in lifting her arm.

*Ceron, supra*, at pp. 2-3. Furthermore, while Ms. Ceron references one page of Dr. Malek's deposition in support of her application for review, there is ample other evidence in the record to support the ALJ's ruling that Dr. Malek's opinions including his opinion regarding the causal relationship between Ms. Ceron's work-related accident and her alleged, current left shoulder condition are based at least in part on Ms. Ceron's subjective complaints of shoulder pain.<sup>3</sup>

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). Based upon substantial evidence in the record as a whole, including the evidence referenced by the ALJ, there is no legal basis for the CRB to overturn the ALJ's credibility ruling or his assessment of Dr. Malek's opinion.

When it comes to the ALJ's language applying the presumption of compensability ("Presumption"), the words in the Compensation Order are less than precise. Neither the evidence that invokes the Presumption nor the evidence that rebuts it separately is delineated; however, there is no requirement that a Compensation Order contain magic words in order to demonstrate the ALJ properly applied the law. In this case, it is clear from the language that is in the Compensation Order that any error is harmless.

Pursuant to §\_32-1521(1) of the Act, a claimant may be entitled to a Presumption. In order to benefit from the 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).

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<sup>3</sup> See Dr. Malek's only medical report (Claimant's Exhibit 1) and other portions of his deposition testimony (Claimant's Exhibit 3).

Ms. Ceron does not specifically dispute that she invoked the Presumption, and Chimes does not raise any argument as to whether Ms. Ceron invoked the Presumption. The parties, however, stipulated that on July 8, 2013, Ms. Ceron sustained an accidental injury that arose out of and in the course of employment, *Ceron, supra*, at p. 2, and this stipulation, as a matter of law, is sufficient to invoke the Presumption.

Once the Presumption is invoked, it is Chimes' 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 Chimes would the burden return to Ms. Ceron to prove by a preponderance of the evidence, without the benefit of the Presumption, her alleged, left shoulder condition is causally related to her employment. *See Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

Several times, the ALJ quotes portions of Dr. Levitt's opinion wherein he asserts there is no connection between Ms. Ceron's work-related accident and her current complaints. *See Ceron, supra*, pp. 4, 5. Pursuant to the *Reynolds* standard, the Presumption is rebutted when the record demonstrates a physician has performed a personal examination of the injured worker, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the causal relationship presumption. *Washington Post v. DOES and Raymond Reynolds*, 852 A.2d 909 (D.C. 2004). Although not specifically described as such, the ALJ's analysis substantiates that the Presumption was rebutted as a matter of law.

Then, when weighing the evidence, the ALJ reasonably rejected the treating physician preference and ruled in favor of Chimes:

Errors suggest that Dr. Malek's medical records are unreliable. After an apparently normal examination of her shoulders, Dr. Malek concludes that she has a "superior glenoid labrum lesion" and "impingement syndrome of right shoulder." CE 1. But Ms. Ceron complains of injury to her left shoulder, not her right; either Dr. Malek assessed an injury to her right shoulder, which is not at issue, or he inadvertently referred to the wrong shoulder in his report. And despite Ms. Ceron's complaint of a shoulder injury, he initially restricted her from far more than, for example, lifting objects or the use of her arm. He imposed many restrictions, including "limited walking," with two pen strokes. CE 1 at 3. Only at his deposition does he impose more specific restrictions. CE 3 at 16. Dr. Malek's medical records reflect hastiness and inattentiveness, which suggests they are unreliable.

More significantly, Dr. Malek's opinion is less reliable than Dr. Levitt's because Dr. Malek gave considerable weight to Ms. Ceron's subjective complaints, which are unreliable hearsay, when making his diagnosis. CE 3 at 11 ("Her [left shoulder] evaluation ... was not drastically different than the opposite side. She had subjective complaints. And then when I put that together ... with the MRI imag[ing], then it was obvious that the reason for her pain is obviously what was found at the time of MRI imaging."); CE 3 at 13 (referencing Ms. Ceron's pain). In contrast with Dr. Levitt, who concluded she was feigning her injury, Dr. Malek did not suspect her symptoms were exaggerated. CE 3 at 32 *Compare* ("Q.

And did you ever suspect that maybe some of the symptoms were exaggerated? A. I didn't suspect that, no.”), *with* EE 2 (“I am only more confirmed in my opinions as a result of the MRI scan that she is feigning illness ... “), *and* EE 3 (“I believe this is feigned behavior.”). Considering Ms. Ceron’s unreliable testimony and hearsay statements, as well as the errors in Dr. Malek’s notes, Dr. Levitt’s opinion is more reliable than Dr. Malek’s.

Even so, both doctors evaluated the objective evidence. *See, e.g.*, CE 3 at 11 (discussing MRI); EE 2 (Dr. Levitt: “I believe the MRI results I have reviewed today only confirm my opinion that there is clearly not nearly enough pathology on her MRI scan that would explain the ‘paralysis’ to the left upper extremity.”). But even Dr. Malek stated that “objectively[,] there was not much of a finding” based on his examination of her left shoulder. CE 3 at 28.

For the reasons just discussed, Dr. Levitt’s report and addendum are more reliable than the opinion of Dr. Malek. *Compare* EE 2; EE 3, *with* CE 1; CE 3. This finding extinguishes the treating physician presumption. Ms. Ceron must now prove by a preponderance of the evidence that her current impairments, if any, are medically-causally related to the workplace injury.

Ms. Ceron presented evidence that her impingement syndrome was related to the workplace accident. *See, e.g.*, CE 1. But Dr. Levitt writes that “[t]hese are all findings very much consistent with her 54 years of age and do not reflect acute injury from her fall.” EE 2. Even Dr. Malek testified that bony impingement syndrome can be degenerative. CE 3 at 23. Aggregated with this evidence is Dr. Levitt’s opinion, which reads: “there is no clinical indications [sic] for surgery and I believe the pathology he [Dr. Malek] is interpreting doesn’t exist.” EE 2. Ms. Ceron’s unreliable and inconsistent testimony at the hearing reinforces Dr. Levitt’s conclusion that she is feigning her injury. *Compare* HT at 16 (“I cannot lift my arm. I cannot grab a bottle and lift a bottle of water or coffee.”), HT at 17 (“almost always” wears sling, including to sleep; “Because I can’t lift up my am, I don’t work.”), *and* HT at 19 (cannot carry bags or drive with left arm), *with* HT at 20 (denying that she is carrying a green bag or driving with her left hand in two photographic exhibits); EE 4 (photo of her carrying green bag); EE 5 (photo of her driving with left hand). Based on Ms. Ceron’s unreliable testimony and Dr. Levitt’s opinion that her impairment is related to aging rather than acute injury, I find that she has not proven that her impairment is medically-causally related to the workplace injury.

*Ceron, supra*, at p. 4-5. The CRB is not authorized to reweigh the evidence in Ms. Ceron’s favor. *Marriott, supra*.

In closing, the ALJ makes some less than precise word choices when reaching his conclusion that Ms. Ceron is not entitled to her claim for relief:

Because the impairment is not medically-causally related, Ms. Ceron is not eligible for disability benefits under the Act. I do not, therefore, reach the question of whether the requested treatment is reasonable or necessary.

*Ceron, supra*, p. 5. “Disability benefits” when used generally, as here, include medical benefits, and the misuse of the word impairment in place of the word injury or the word condition, here and elsewhere in the Compensation Order, does not warrant remanding the matter. To be clear, the ALJ denied Ms. Ceron’s request for “authorization of medical treatment, specifically arthroscopic surgery to the shoulder, and the payment of causally-related medicals” *Id.* at p. 2, because her current left shoulder complaints are not causally related to her on-the-job accident.

CONCLUSION AND ORDER

The ALJ’s finding that Ms. Ceron’s testimony is not credible is supported by substantial evidence and is relevant to his consideration of Dr. Malek’s medical opinion. Despite some imprecise analysis when applying the presumption of compensability and some poor word choices, the January 15, 2015 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

June 12, 2015  
DATE