COMPENSATION REVIEW BOARD

CRB No. 13-085

MILDRED T. WARE,
Claimant–Petitioner,

v.

DIVERSITY SERVICES AND GUARANTEE INSURANCE CO.,
Employer/Carrier-Respondent

Appeal from a June 17, 2013 Compensation Order on Remand by
Administrative Law Judge Linda F. Jory
AHD No. 08-029C, OWC No. 642739

Frank R. Kearney, Esquire, for the Claimant-Petitioner
Todd S. Sapiro, Esquire, for the Employer/Carrier-Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on June 17, 2013 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that COR, the Administrative Law Judge (ALJ) determined that Claimant did not meet her burden to establish that treatment commencing September 1, 2011 was causally related to the original work injury of September 17, 2007 and denied reimbursement for that treatment.[1]

[1] *Ware v. Diversity Services*, AHD No. 08-029C, OWC No. 642739 (June 17, 2013).

Claimant injured her left shoulder, back, neck, legs, and abdomen at work on September 17, 2007. Claimant and Employer entered into a settlement agreement for a lump-sum payment of indemnity benefits, but Employer remained obligated to pay for reasonable medical treatment that was causally related to Claimant's compensable work injuries.

In a September 8, 2010 Compensation Order (CO), Claimant was awarded physical therapy for the period May 6, 2009 through August 1, 2009, with requests for physical therapy before and after that period denied as not being reasonable or necessary. Authorization was also given for a bone scan, visits and treatment with Dr. Peter Moskovitz, prescription opioids, evaluation and treatment for depression, and one epidural injection. Additional epidural injections and facet block injections were denied.

Claimant suffered an exacerbation of her back pain on August, 2011 while in the process of bending over to move a friend's small oxygen tank. The intensity of the pain was such that Claimant was unable to go for treatment with Dr. Moskovitz until the next day, September 1, 2011. Claimant submitted the bills to Employer for payment. Employer refused payment as it disputed the causal relationship between this treatment and the compensable work injury.

In a June 21, 2012 CO, Administrative Law Judge (ALJ) Belva Newsome awarded Claimant payment of the outstanding medical bills and Employer appealed. Employer argued that it presented evidence sufficient to rebut the presumption of compensability and there was no medical opinion to support a ruling that the treatment after September 1, 2011 for Claimant's low back condition was causally related to her September 17, 2007 compensable work injury.

In an October 11, 2012 Decision and Remand Order (DRO), the Compensation Review Board (CRB) determined that it was not completely clear whether the ALJ found Employer's independent medical evaluation (IME) opinion was sufficient to rebut the presumption and remanded for further clarification.[2] In addition, if the presumption was rebutted, the ALJ was instructed to weigh the evidence and provide a clear explanation of how the record evidence preponderated in Claimant's favor.

On June 17, 2013, ALJ Linda Jory issued the COR that is the subject of the instant appeal.[3] Judge Jory determined that Employer's IME rebutted the presumption and upon weighing the evidence without the benefit of the presumption, concluded Claimant failed to show by a preponderance of the evidence that the treatment received after September 1, 2011 was causally related to the original work injury of September 17, 2007. Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred in her assessment of the evidence relating to the incident on September 1, 2011 as to whether it constituted a new injury by failing to accept Claimant's uncontroverted testimony of what occurred and by relying on IME physician Dr. London's mischaracterization of that event. Employer counters that the ALJ properly determined

[2] *Ware v. Diversity Services*, CRB No. 12-103, AHD No. 08-029C, OWC No. 642739 (October 11, 2012).

[3] Judge Newsome retired shortly after issuing the CO and prior to the issuance of the CRB's DRO. The matter was re-assigned to Judge Jory who issued an order to show cause and neither party opposed her issuance of a remand decision based on the existing record created by Judge Newsome. COR, fn. 1.

that the presumption was rebutted and without benefit of the presumption Claimant failed to meet her burden by a preponderance of the evidence.

ANALYSIS

The scope of review by the CRB, 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 CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[4] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

In the CRB's October 11, 2012 DRO, it was determined that it was not completely clear whether Judge Newsome found Employer's IME opinion was sufficient to rebut the presumption and remanded for further clarification. In the COR, Judge Jory addressed that deficiency in the following manner:

> Employer relies on the opinion of Dr. Gary London who examined claimant on January 9, 2012. Dr. London ultimately concluded on February 24, 2012, after he was asked for clarification:
>
> > [Claimant] sustained a new injury on or about 9/01/11 when she moved an oxygen tank and disturbed the preexisting lumbar spondylosis and degenerative disc disease, but this event in no way affects anything, which occurred on September 17, 2007. [Claimant] requires no additional medical care for the injury which occurred on September 17, 2007 within reasonable medical probability.
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> EE 7. It is concluded that Dr. London's opinion is an unambiguous opinion that the work injury no longer contributes to claimant's need for treatment from a qualified independent medical expert who examined claimant and her medical records. The statutory presumption accordingly drops out of the case and the burden reverts to the claimant to prove by "a preponderance of the evidence, without the aid of the presumption" that her work-related injury caused or contributed to the treatment received from Dr. Moskovitz. *See Reynolds, supra citing Washington Hospital Center v. District of Columbia Dep't of Employment Services*, 744 A.2d 992, 1000 (D.C. 2000).[5]

[4] "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. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

[5] COR, p. 5.

In his January 9, 2012 IME report, Dr. London stated:

> [Claimant's] current condition is not causally related to anything that occurred during her 9/17/07 work injury. It is clear that there was some exacerbation of the L4-5 disc pathology due to moving the oxygen tank, but this has nothing to do with the original injury of 9/17/2007. EE 2.

In his original January 9, 2012 report and his clarification provided on February 24, 2012, Dr. London is clear in his opinions that after September 1, 2011, Claimant's treatment by Dr. Moskovitz was for a new injury and not the prior work-related injury. Dr. London specifically states that Claimant's current symptoms are not causally related to the September 17, 2007 work injury. As this constitutes a clear and unambiguous opinion by a medical expert after examining Claimant and reviewing her medical records that her work injury is not contributing to her current condition, the presumption is appropriately rebutted by meeting the test established in *Reynolds*.[6]

Claimant also argues that Dr. London's opinion was based on a mistake by mischaracterizing "a simple, daily movement as a new injury" and therefore "his opinion does not constitute substantial evidence." We find no merit in this argument as the description of the incident by the treating physician and the IME physician are virtually similar.

In his September 1, 2011 treatment report, Dr. Moskovitz describes the incident by stating: "And [sic] oxygen dependent relative required assistance and she attempted to move and [sic] oxygen tank. This caused acute low back if [sic] reinjury with exacerbation of leg pain." CE 4, p. 34. In his description, Dr. London stated: "She is asked about an injury at home that exacerbated her problem, which occurred on or about 9/1/2011. MW states that she was moving a small oxygen tank for a relative and was slightly bent over, which caused acute low back pain and an exacerbation of her leg pain." EE 2, p. 11. As Dr. London describes this incident in the same manner as Dr. Moskovitz, there is no mischaracterization and thus no error.

With the presumption rebutted, the ALJ proceeded to weigh the evidence in its absence with Claimant having the burden of showing by a preponderance of the evidence that her current treatment was still causally related to the 2007 work injury. The ALJ determined that "the record does not contain an opinion that establishes claimant's treatment by Dr. Moskovitz as of September 1, 2011 is related to the original work injury." After reviewing a number of Dr. Moskovitz's reports the ALJ concluded:

> In the remaining reports of record dated November 17, 2011, December 15, 2011, February 22, 2012, March 20, 2012, and April 18, 2010, Dr. Moskovitz states repeatedly that claimant's symptoms have not returned to her recent disabled baseline. Although counsel for claimant asserts that what claimant was doing when she sustained the acute pain was a typical activity of daily living or a simple flare-up, Dr. Moskovitz was never

[6] See *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

> asked to elaborate on his assessment or to confirm claimant's theory. Nevertheless, Dr. Moskovitz never opined that claimant's condition remains the result of the original injury. Without more, it cannot be concluded that claimant established by a preponderance of the evidence, without the aid of the presumption, that her work-related injury caused or contributed to the treatment she received from Dr. Moskovitz as of September 1, 2011.[7]

While Claimant is correct in pointing out that Dr. Moskovitz never changes the date of injury on his reports from the original work injury date of September 17, 2007, it is also correct that starting with the September 1, 2011 medical report, Dr. Moskovitz notes an "acute exacerbation of her low back and leg pain" occasioned by moving the oxygen tank. At the next visit on September 8, 2011, Dr. Moskovitz notes that Claimant is "far from her abnormal baseline of her left-sided low back and leg pain. Her present symptoms are predominantly back pain, more than light pain." It is her "present symptoms" that manifested after the September 1, 2011 incident that are different from her prior baseline symptoms that Dr. Moskovitz has been treating. As the substantial evidence in the record shows that Dr. Moskovitz does not relate the treatment after September 1, 2011 to the work injury of September 17, 2007, there is no basis to disturb the ALJ's conclusion.

CONCLUSION AND ORDER

The ALJ's determination that Employer's IME opinion rebutted the presumption and that upon weighing the evidence without the benefit of the presumption Claimant failed to show by a preponderance of the evidence that the treatment she received after September 1, 2011 was causally related to the September 17, 2007 work injury is supported by substantial evidence and is in accordance with the law. Accordingly, the June 17, 2013 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

October 15, 2013
DATE

[7] COR, p. 6.