

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. 07-83

WILLIAM D. BUTLER,

Claimant - Petitioner

v.

GEORGETOWN UNIVERSITY,

Self-Insured Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. 06-374, OWC No. 611238

Heather C. Leslie, Esquire for the Petitioner

Jeffrey W. Ochsman, Esquire, for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* AND E. COOPER BROWN, *Chief Administrative Appeals Judge*.

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.

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 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.

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation 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 March 29, 2007, the Administrative Law Judge (ALJ), concluded there was no causal relationship between Claimant – Petitioner (Petitioner)'s March 29, 2006 lumbar surgery and the injury he sustained at work on April 8, 2005 and denied Petitioner's claim for temporary total disability and medical benefits.

As grounds for this appeal, Petitioner alleges that ALJ misstated and mischaracterized the evidence of record, therefore the Compensation Order is not supported by substantial evidence.

Employer responds asserting that the ALJ properly credited the opinions of Dr. Marc Danziger over the opinions of Dr. Philip Schneider, therefore the Compensation Order should be affirmed.

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

After reviewing the ALJ's application of the presumption which led to his weighing of the evidence of record, the Panel respectfully rejects Petitioner's argument. The Panel notes the ALJ began his analysis of the compensability of the instant claim, applying the presumption and extending it "not only to the occurrence of an accidental work place injury, but also to the medical causal relationship between an alleged disability and the accidental injury", *citing Whittaker v. District of Columbia Department of Employment Services*, 688 A.2d 844 (D.C.

Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

1995). The ALJ announced that, “I find [Petitioner] to be an unreliable witness as to his injuries and symptoms and how and when those injuries and symptoms were reported to his treating physicians. Thus with the exception of how the work place accident occurred, [Petitioner’s] testimony is discounted and reliance in meeting his evidentiary burden is placed upon the treating physician’s medical reports”. Compensation Order (CO) at 5.

Petitioner’s unreliability notwithstanding, the ALJ found Petitioner’s testimony that he suffered an injury which arose out of and in the course of his employment combined with reports of his treating physician sufficient to invoke the presumption that the low back condition is medically causally related to the workplace injury. CO at 6.

Upon analyzing Respondent’s rebuttal evidence, the ALJ relied upon the Court of Appeals decision in *Washington Post v. D.C. Dept. of Employment Servs.* (Raymond Reynolds, intervenor), 852A.2d 909 (D.C. App. 2004 (*Reynolds*)). The ALJ determined that the IME report of Dr. Danziger provided an unambiguous opinion that the need for lumbar surgery was not related to the work place injury and his current condition is the result of subsequent injuries and subsequent surgery and sufficient to rebut the presumption. The Panel accordingly finds no error with the ALJ’s determination that Respondent met its evidentiary burden of producing specific credible evidence sufficient to sever the presumed causal relationship between Petitioner’s lower back condition and the work injury. Specifically, the Panel finds no error with the ALJ’s reliance on the opinion of IME physician, Dr. Danziger and properly citing, *Reynolds*.

Upon weighing the evidence of record to determine if Petitioner’s evidence is sufficient to outweigh Respondent’s on the causal relationship question that exists between Petitioner’s low back condition and the April 8, 2005 accident, without the benefit of the presumption, the ALJ afforded more weight to the opinion of Dr. Danziger, the independent medical examiner over the treating physician, Dr. Philip Schneider². The ALJ acknowledged this jurisdiction’s treating physician’s preference and the requirement that the ALJ must provide specific reasons for rejecting a treating physician’s opinion³. The treating physician’s opinion of record with regard to causal relationship is provided by Dr. Philip Schneider to whom Petitioner was referred by Kaiser Permanente orthopedist Dr. Gregory Ford. Although Dr. Ford saw Petitioner on at least 5 occasions from April 12, 2005 through June 10, 2005, he mentioned Petitioner’s low back on only one occasion and provided no treatment to the lower back until June 13, 2005 when Petitioner reported to him with back pain associated with his fall while getting out of a shower⁴. Similarly, neurologist James Grim examined Petitioner on May 11, 2005; noting the chief

² Having found Petitioner’s testimony lacking credibility, the ALJ deferred to the reports of which the ALJ also found inconsistent. It is well settled in this jurisdiction, when faced with contradictory testimony, the ALJ evaluates the credibility and demeanor of witness and draws conclusions based on that evaluation. Moreover, as the Court of Appeals has emphasized, it is widely accepted that when a fact finder’s conclusions are based on credibility findings those conclusions are entitled to great weight. *Dell v. Department of Employment Services* 499 A.2d 102(D.C. 1985).

³ See *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C.App. 1992). See also *Estella Whitaker v. Washington Metro Transit Authority*, Dir. Dkt. No. 91-12, H&AS No. 90-813.

⁴ Dr. Ford’s treatment prior to June 13, 2005 concentrated on Petitioner’s right shoulder, neck and hip pain for which Dr. Ford prescribed physical therapy, medications and cervical epidural steroid injections.

complaints were neck and hip pain and mentioned Petitioner's lower back only in the context of his prior surgery adding that Petitioner has had little back pain in recent years.

In support of his rejection of Dr. Schneider's opinion that Petitioner's symptoms for which surgery was required was not a result of the lumbar strain of June 12, 2005 but was the result of his injury at work on April 8, 2005, the ALJ noted numerous contradictions and misstatements made by Dr. Schneider which the Panel has confirmed upon review and have found are based upon substantial evidence in the record. The ALJ found a striking contradiction in Dr. Schneider's assessment of the injury Petitioner sustained to his lower back on June 12, 2005 when he was showering and slipped getting out of the shower. Although Petitioner's treatment with Dr. Ford on June 13, 2005 was the first time, the record reveals, Petitioner sought treatment for a low back injury after the work injury of April 8, 2005, Dr. Schneider reported it was impossible for him to give an exact date of when this part of the symptoms subsided but concluded, "However, it is my opinion that [Petitioner's] symptoms for which surgery was required was not a result of the lumbar strain on June 12, 2005 but was the result of his injury at work of April 8, 2005".

Also troublesome for the ALJ, was Dr. Schneider's December 15, 2005 report which indicated Petitioner was back at work but still complained of back pain radiating into the right leg. A December 6, 2005 MRI showed no significant abnormality according to Dr. Schneider and this was unchanged from an MRI on July 15, 2005. Dr. Schneider stated Petitioner could continue working and referred him for epidural blocks. Yet Dr. Schneider reported in his June 15, 2006 opinion on causation, "During the entire time I have been taking care of [Petitioner] he has not worked because there has been no light duty and [Petitioner] would not have been able to work from the time I saw him until he recovered from surgery".

It is noted that Dr. Danziger actually treated Petitioner for a period of four months at Petitioner's request, although there is no indication that Petitioner told Dr. Danziger that he injured his back on June 12, 2005, approximately three weeks prior to the first visit. Nevertheless, the Panel agrees with Petitioner that the ALJ mischaracterized Dr. Danziger's office visits by finding Petitioner registered no complaints of low back pain in any of his visits to Dr. Danziger between July 22, 2005 and November 1, 2005. Dr. Danziger's reported that "The low back shows a somewhat painful area in the right paraspinal and right buttock region" on July 8, 2005 and he included treatment for petitioner's low back pain with his treatment for right shoulder pain, bilateral hip and cervical strain. Moreover, the records indicate that Petitioner was sent to Dr. Danziger by OWC for evaluation and treatment of low back, bilateral hip and right shoulder pain and that Dr. Danziger was not provided with any of the prior medical records but instead relied on what history was provided by Petitioner on the intake sheet.

Before he examined Petitioner and issued his IME opinion on October 17, 2006, however Dr. Danziger was provided with all of the medical records from Petitioner's treating physicians before and after the April 2005 work injury, including the records from Petitioner's 1995 lumbar surgery and Kaiser Permanente's records with regard to Petitioner's slip and fall on June 12, 2005. Having been fully informed of Petitioner's history, with respect to the lower back, Dr. Danziger reported Petitioner had preexisting disease and obviously the surgery at L5-S1 in 1995. "While I think his symptoms had resolved, he really sustained minimal trauma if any trauma to

the low back [in] the April 8, 2005 supposed work related injury. Rather the patient really had neck and shoulder discomfort and his back pain was secondary. Even when he did complain of back pain towards the end of April it really seemed minor in nature. Rather, it seems that his back pain began in earnest in June when he slipped and fell in the bathtub. This is clearly documented from his June 13, 2005 Kaiser Permanente note and from his physical therapy note the following day”.

This evidence of record supports the ALJ’s reliance on Dr. Danziger’s deduction that there was no causal relationship between the work related injury of April 8, 2005 and the necessity of his lumbar spine surgery and his work restrictions are in no way impacted or caused by the April 8, 2005 injury but rather by subsequent injuries and subsequent surgery performed by Dr. Schneider.

Having reviewed the record evidence, the Panel agrees that the findings of fact and conclusions of law contained in the Compensation Order are supported by substantial evidence of record and that the ALJ committed no error of law.

CONCLUSION

The ALJ’s conclusion that there is no causal relationship between Petitioner’s work related injury of April 8, 2005 and the March 29, 2006 lumbar surgery is supported by substantial evidence of record, and is in accordance with the law.

ORDER

The Compensation Order issued on March 29, 2007 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

May 30, 2007
