

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-107

**RHONDA MCCORD,
Claimant-Petitioner,**

v.

**EXECUTIVE CHILD DEVELOPMENT CENTER AND AMGUARD INSURANCE COMPANY,
Employer and Insurer-Respondents.**

Appeal from a September 29, 2011, Compensation Order By
The Honorable Karen R. Calmeise
AHD No. 11-130, OWC No. 677580

Matthew Peffer, Esquire, for the Claimant
Jeffrey W. Ochsman, Esquire, for the Employer and Insurer

Before LAWRENCE D. TARR, HENRY W. MCCOY, and HEATHER C. LESLIE,¹ *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board panel.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the claimant, Rhonda McCord, for review of a September 23, 2011, Compensation Order (CO), amended by an Errata order on September 29, 2011 issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In that CO, the ALJ denied the claimant's request for continuing temporary total disability benefits beginning January 3, 2011, finding that the claimant did not prove she sustained an accidental work related injury. We affirm.

¹ Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

BACKGROUND FACTS OF RECORD

The claimant, Rhonda McCord, was employed by the employer, Executive Child Care Center, as a full-time teacher of infants, ranging in ages from about 13 months to about 19 months. The ALJ described the claimant's regular duties as follows:

Claimant was responsible for care for the children during the day. She developed lesson plans, cleaned up, fed meals, changed diapers, move [sic] nap cots, and push [sic] the children in a multi-child buggy. To perform these duties Claimant had to lift children of various weights, pull, push, bend, stoop, and reach.

CO at 2.

At the formal hearing, when asked how she was injured the claimant testified that during the first or second week of November 2010, "I was changing a child, and I had sharp pains in my lower back." HT at 40.²

The claimant continued working, although she said she felt pain, sometimes sharp pain, in her lower back. The claimant was treated by Dr. Lizzy Thomas on November 18, 2011. Dr. Thomas prescribed medicine and recommended that the claimant not work on November 18 and November 19, 2010.

The claimant next received professional medical attention at the George Washington University Hospital's emergency room on November 22, 2010, where she was prescribed medicine, advised to obtain an MRI, and to see an orthopedist. The claimant returned to Dr. Thomas on November 24, 2010, and was treated by her until December 28, 2010.

On January 4, 2011, the claimant began treating with an orthopedic surgeon at George Washington University Medical Faculty Associates, Dr. Warren Yu. Dr. Yu determined the claimant had a herniated disc and performed a microdiscectomy on April 6, 2011.

The ALJ held a formal hearing at which the claimant and her direct supervisor, Carol Reynolds testified. In the September 23, 2011, CO, amended by an Errata order on September 29, 2011, the ALJ determined that the claimant was not a credible witness, held the claimant's evidence was insufficient to invoke the presumption of compensability, and denied the claim. The ALJ held

Importantly, I find Claimant's testimony regarding her actions and communications with Employer and her treating physicians not credible pertaining to her notice of a work related injury or condition stemming from her

² Contrary to claimant's argument, the claimant did not testify that she was injured on November 18, 2010. That is the date the claimant first sought medical treatment. The claimant testified she allegedly sustained injury from a specific incident, changing a child. She did not testify that she sustained cumulative trauma injury that would have permitted establishing the date of injury as the date the claimant first sought medical treatment. See *King v. DOESs*, 742 A.2d 460, 468 (D.C. 1999); *Van Hoose v. Respicare Home Respiratory Care*, CRB No. 07-022, AHD No. 06-342, OWC No. 626066 (July 23, 2007); *Bagbonon v. AFRICARE*, CRB No. 03-121, OHA No. 03-340, OWC No. 579350 (November 1, 2005)

work duties. I so find based on the inconsistencies between her testimony and the witness testimony of record. I further find claimant's testimony was internally incongruent and inconsistent with the adminicular evidence of record.

* * *

First, the Undersigned must note that the Claimant was not an overall credible witness. The Claimant's responses at times lacked sincerity and believability. Much of her testimony seemed self serving and selective to the Undersigned. Moreover, the Claimant's testimony regarding the inception of her low back symptoms was confusing at times and was incredible.

* * *

The Claimant's uncorroborated, convoluted, confusing testimony and lack of documentation confirming the accidental work injury, and lack of supporting medical evidence does not support the Claimants claim of an accidental injury and medical causal relationship to her employment.

CO at 2, 3, 5.

The claimant timely appealed.

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 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. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of Act.

Consistent with this standard of review, 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, supra*.

ANALYSIS

On review, the claimant argues that the ALJ erred as a matter of law in finding that she did not successfully invoke the presumption of compensability. The claimant acknowledges that the ALJ did not believe the claimant's testimony that she sustained an accident but asserts that the ALJ's credibility determination is only relevant at the last step of the presumption analysis, when the ALJ weighs the evidence without the benefit of the presumption.

Section 32-1521(1) of the Act states in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:

(1) That the claim comes within the provisions of this chapter.

In order to benefit from the presumption, the claimant initially must show (1) some evidence of a disability and (2) 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 651,655 (D.C. 1987).

The record evidence established the first element identified in *Ferreira*—some evidence of a disability. However, the ALJ did not believe the claimant as to the second element identified in *Ferreira*. The ALJ found the claimant did not show the existence of a work-related event, activity or requirement which has the potential to cause or to contribute to the disability.

In her written statement, the claimant primarily relies on the CRB’s decision in *Romero v. V & V Construction, Inc.*, CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011), for the proposition that the ALJ erred by weighing or reviewing the evidence at the “presumption invocation stage.” (Claimant’s memorandum at what would be page 5 if her pages were numbered).

However, in *Romero* the parties stipulated to an injury by accident. That case did not involve the issue presented here, whether a claimant is entitled to the presumption when a hearing officer does not believe the claimant was injured at work.³

Here, the ALJ properly held that the claimant did not benefit from the presumption because the claimant did not prove the requisite existence of a work-related event, activity or requirement which has the potential to cause or to contribute to the disability.

CONCLUSION AND ORDER

The September 23, 2011, Compensation Order amended by an Errata order on September 29, 2011, is supported substantial evidence and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
Administrative Appeals Judge

DATE

³ In *Romero*, the CRB affirmed an ALJ’s alternative determination that there was substantial evidence in the record to invoke the presumption that the currently claimed disability to the left shoulder was medically causally related to the work injury. The CRB remanded the case because it determined the ALJ erred in finding that the evidence relied upon by the employer was specific and comprehensive enough to rebut the presumption.

