GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-057

KERRICK THOMAS,
Claimant-Respondent,
v.

CORRECTIONS CORPORATION OF AMERICA AND CHARTIS INSURANCE COMPANY,
Employer and Insurer-Petitioners.

Appeal from a Compensation Order By
Administrative Law Judge Linda F. Jory
AHD No. 12-088, OWC No. 679206

Krista N. DeSmyter, Esquire, for the Claimant
Julie E. Murray, 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.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the petitioners, the employer and its insurance carrier (employer), for review of the March 13, 2012, (CO) 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 authorized treatment and payment of medical expenses for the claimant's right shoulder, finding that the employer's evidence was insufficient to rebut the presumption of causation. For the reasons stated, we disagree.

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

BACKGROUND FACTS OF RECORD

On April 4, 2011, the claimant, Kerrick Thomas, sustained an accident while working for the Corrections Corporation of America as a corrections officer. On that day, the claimant stood on a stool to look for contraband in a cell's light fixture. He lost his balance and fell against a concrete wall, striking his right elbow.

The claimant completed his work shift and on the following day went to the Franklin Square Hospital where his right elbow was x-rayed. On April 7, 2011, the claimant began treating with an orthopedic surgeon, Dr. Kenneth R. Lippman. Dr. Lippman determined that the claimant had sustained a traumatic injury of his right elbow and forearm, prescribed ibuprofen and physical therapy and reported the claimant could not work

The employer had orthopedist Dr. Robert Riederman examine the claimant for an IME on May 11, 2011. Dr. Riederman's report from that examination contains an accurate description of the claimant's accident and stated that the claimant sustained a contusion injury to his right elbow when he fell on April 4, 2011. Dr. Riederman agreed that the claimant should continue treatment with Dr. Lippman and also agreed with Dr. Lippman's prescription for physical therapy. Dr. Riederman opined that the claimant could do light-duty, sedentary work with restrictions against lifting more than 10 pounds and repetitive use of his right arm.

The claimant started doing light-duty work for the employer on May 29, 2011, and returned to Dr. Lippman on June 3, 2011. The first specific reference to any shoulder problems in Dr. Lippman's reports appears in the report from the claimant's June 3, 2011, examination:

> (The claimant) tells me that he has been ordered back to work light duty. They have him driving all night. They have him lifting restraints. This bothers his arm. It's aggravating his shoulder.

In the report from the September 9, 2011, examination, Dr. Lippman reported:

> (The claimant) went on to describe the mechanism of injury to the right shoulder and its association with the right elbow injury. We then discussed the interconnection and the jamming effect.

On October 14, 2011, Dr. Lippman wrote:

> (The claimant) may come to ulnar nerve release as well as further treatment directed at the right shoulder, this being a result of the injuries that occurred at the workplace 4/4/11 and their sequelae.

Dr. Rieterman examined the claimant for a second IME on November 25, 2011. In his report from this IME, Dr. Riederman noted that the claimant said he first noticed pain in his right shoulder in approximately June 2011 and that the claimant reported he had no complaints regarding his right shoulder at any time prior to June 2011.

Dr. Riederman further stated in this report that he reviewed the September 2011 MRI of the claimant's right shoulder and "reviewed records of treatment by Dr. Lippman." Dr. Riederman concluded that the claimant's work accident had not aggravated his pre-existing right shoulder condition nor were the claimant's problems a compensable consequence of the work accident:

> I do not believe that Mr. Thomas' right shoulder complaints, which he first noticed in approximately June 2011, are causally related to the injury of April 4, 2011. His radiographs revealed findings of type 2 acromion which predisposes the rotator cuff tendinopathy and tears. His MRI findings are consistent with tendinopathy and partial intrasubstance tearing. These findings are not causally related to the injury of April 4, 2011. I do not believe that the injury of April 4, 2011, aggravated Mr. Thomas' pre-existing condition of the right shoulder. I do not believe that his right shoulder complaints are a compensable consequence of his right elbow injury.

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In a letter to claimant's counsel sent two weeks before the formal hearing, Dr. Lippman stated that the claimant continues to have right shoulder problems and that these problems were caused when the claimant fell on April 4, 2011:

> As you know, (the claimant) was working up overhead when he fell against the wall. He struck his arm about the elbow. The shoulder was in an awkward position, injured as well.

In the March 13, 2011, CO, the ALJ found the claimant was entitled to the presumption that there is a causal connection between his right shoulder problems and the accident at work and awarded the claimant medical expenses related to his right shoulder treatment because the employer's evidence was not sufficient to rebut the presumption. The employer has timely appealed the finding that its evidence did not rebut the presumption.

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 CO 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501, *et seq.*, ("Act"), at § 32-1521.01 (d)(2)(A).

Consistent with this standard of review, the CRB is constrained to uphold a CO 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

In our jurisdiction there is a presumption that a claim comes within the provisions of the Workers' Compensation Act when a claimant demonstrates a work-related injury and subsequent disability. Once the presumption is invoked, it operates to establish the causal connection between the injury and the work-related accident. The presumption can be rebutted if the employer offers specific and comprehensive evidence that severs the potential connection between the injury and the accident. If the employer rebuts the presumption, then an ALJ must consider the evidence without the presumption to determine if the claimant's evidence preponderates in establishing that the injury is causally related to the work accident.

The ALJ found that the claimant presented sufficient evidence to invoke the presumption that his right shoulder problems are causally related to the work accident. The employer has not challenged this determination.

The employer attempted to rebut the presumption by the IME reports of Dr. Riederman. In the CO, the ALJ correctly cited the controlling case from the Court of Appeals (DCCA) with respect to the legal standard for determining whether an IME report is sufficient evidence to rebut the presumption, *Washington Post v. DOES and Reynolds, intervenor,* 852 A 2d 909 (D.C. 2004).

In *Reynolds*, the DCCA held:

> We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records renders an unambiguous opinion that the work injury did not contribute to the disability.

Id. at 910.

Applying this authority to the present case, to rebut the presumption, the employer had to present evidence that Dr. Riederman examined the claimant, reviewed his pertinent medical reports, and issued a report that unambiguously stated the claimant's work injury did not contribute to his shoulder problems.

The employer's evidence met the first and third element; Dr. Riederman's IME reports show he twice examined the claimant and his November 25, 2011, IME report unambiguously stated that the claimant's right shoulder problems were not caused nor aggravated by the April 4, 2011, work accident.

The ALJ held the presumption was not rebutted for two reasons, neither of which is supported by the evidence of record.

The ALJ, relying on the CRB's decision in *Baker v. Aramark, et al.*, CRB No. 10-094, AHD No. 09-505A (January 23, 2012), held that Dr. Riederman's IME reports did not rebut the presumption because he had not reviewed Dr. Lippman's June 3, 2011, report in which Dr.

Lippman stated the claimant's shoulder problems were aggravated by the light-duty work the claimant started doing in June 2011.

In *Baker*, the claimant's duties involved two principle tasks: working inside cold places and repetitive lifting, carrying and chopping food items. The claimant filed a claim after she developed problems with her left wrist, arm, neck and shoulder. Dr. Shareer Yousaf was one of her treating doctors.

The employer had Ms. Baker examined twice by Dr. Neal B. Zimmerman for IMEs, with the second examination taking place after Dr. Yousaf had issued a report stating the claimant's problems were caused by the repetitive activities at work. Although Dr. Zimmerman's stated he had reviewed "all the medical reports that were provided," Dr. Zimmermann did not identify the medical reports nor did his report show he knew the claimant did any repetitive activities at work.

The CRB held Dr. Zimmerman's IME reports were insufficient under Reynolds because he did not know of the potential connection between the claimant's conditions and the work activities:

> While the second IME report recites that Dr. Zimmerman had reviewed "all the medical records that were provided", it does not identify what those records were, and there is no mention of them having included Dr. Yousaf's reports, and there is no reference to repetitive work activity. The only work related conditions referenced in the report are, again, exposure to cold conditions in refrigerators. It appears that Dr. Zimmerman was unaware of Dr. Yousaf s opinion that repetitive work stresses resulted in cumulative trauma injuries. That failure renders the employer's evidence insufficiently comprehensive to meet the *Reynolds* standard.

Unlike the *Baker* case, Dr. Riederman's IME reports show he knew of the work activities that the claimant thought caused his shoulder problems—the light duty work to which the claimant returned in late May, early June 2011. Dr. Riederman specifically identified this in his November 25. 2011, IME report:

> I asked Mr. Thomas when he first noticed pain in his right shoulder. He told me that the right shoulder began in approximately June 2011. There was no specific injury that occurred when his right shoulder pain began in June 2011. Mr. Thomas states he had no complaints regarding his right shoulder at any time prior to June 2011.
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> * * *
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> At this point, Mr. Thomas complains of pain in his right elbow, shoulder, and upper arm…He is currently working in a light duty capacity. He works 12-hour shifts. Most of the time he spent either driving or sitting in a vehicle. He also does some lifting and carrying of loads that weigh up to 50 pounds.

The record evidence establishes that Dr. Riederman reviewed the treating doctor's pertinent medical records. See, *Harris v. Davita Health Care*, CRB 11-030, AHD No. 10-538, OWC No.

644436 (August 2, 2011) (An IME doctor must, at a minimum, review all pertinent medical reports).

The ALJ also held that Dr. Riederman's reports did not rebut the presumption because Dr. Riederman did not acknowledge that the claimant's shoulder problems appeared after he returned to light-duty work in June 2011. However, Dr. Riederman did acknowledge the alleged connection between the claimant's shoulder pain and the June 2011 light-duty work in his November 25. 2011, IME report:

> I asked Mr. Thomas when he first noticed pain in his right shoulder. He told me that the right shoulder began in approximately June 2011. There was no specific injury that occurred when his right shoulder pain began in June 2011. Mr. Thomas states he had no complaints regarding his right shoulder at any time prior to June 2011.
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> * * *
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> At this point, Mr. Thomas complains of pain in his right elbow, shoulder, and upper arm…He is currently working in a light duty capacity. He works 12-hour shifts. Most of the time he spent either driving or sitting in a vehicle. He also does some lifting and carrying of loads that weigh up to 50 pounds.

Therefore, Dr. Riederman did acknowledge that the claimant returned to light duty work and did acknowledge the claimant's view that he did not have a specific shoulder injury or experience any shoulder pain before June 2011. Moreover, Dr. Riederman reported the claimant's MRI showed the claimant was predisposed to rotator cuff problems and also stated the reasons why, in his opinion, the work accident did not cause or aggravate the claimant's shoulder problems.

We find the employer has met its burden to rebut the presumption--it proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records rendered an unambiguous opinion negating the connection between the work accident and the claimant's shoulder problems.[2]

For these reasons, we must vacate the award and remand this case to the ALJ so that she may weigh the evidence, without the presumption.

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[2] The employer points out that Dr. Lippman's reports seem to identify two discreet and inconsistent causes of the claimant's shoulder problems. His June 3, 2011, report said the light-duty work caused or aggravated the claimant's shoulder problems while his January 27, 2012, letter to claimant's counsel, seems to state that the claimant's shoulder was injured when the claimant fell on April 4, 2011.The employer asserts that this proves Dr. Lippman "has never been able to produce a solid, cohesive opinion as to the etiology of the Claimant's complaints." Employer's Memorandum at 11.

Since this is, in essence, a factual finding, it would be the ALJ's responsibility on remand, to determine whether Dr. Lippman has issued inconsistent statements and if so, consider the inconsistency in weighing the evidence without the presumption.

CONCLUSION AND ORDER

The March 13, 2012, Compensation Order is not supported substantial evidence and is not in accordance with the law. The Award in that Compensation Order is VACATED, and this case REMANDED for further proceedings consistent with this decision.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR
Administrative Appeals Judge

May 23, 2012
DATE