

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-113**

ANGELA ASHTON,  
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,  
Self-Insured Employer—Petitioner

Appeal from a Compensation Order on Remand by  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 10-065, DCP No. 30100438785-0001

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2012 APR 30 AM 10 51

Harold Levi, Esquire, for the Claimant/Respondent  
Justin Zimmerman, Esquire, for the Employer/Petitioner

Before: HENRY W. MCCOY, HEATHER C. LESLIE,<sup>1</sup> and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges.*

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

**DECISION AND REMAND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code § 1-623.28, 7 DCMR § 118, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

<sup>1</sup> Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

## PROCEDURAL HISTORY AND FACTS OF RECORD

Claimant worked for Employer as a legal instrument examiner processing various customer transactions such as vehicle registrations, learners' and drivers' permits, title transactions, and residential parking permits. During her years working with this employer, Claimant testified to work injuries in May 2008, October 2008; and August 2009. The current claim relates to an alleged work incident in March 2010. At the time of this incident, Claimant had medical restrictions that prevented her from working in positions of high stress or in an environment where temperatures exceeded seventy-five degrees.

On March 17, 2010, Claimant was working at Employer's Georgetown facility where she testified the temperature exceeded 75 degrees, which caused her to become sick and she was allowed to leave work by her supervisor. That afternoon, Claimant went for an "urgent appointment" at Kaiser Permanente where she was treated by her psychiatrist, Dr. Margaret F. Jensvold. Claimant was diagnosed as having a mood disorder that was bipolar in nature with panic attacks and insomnia exacerbated by stress. EE #4.

Claimant returned to work the next day, March 18<sup>th</sup>, where she testified the temperature was still high and the heat gave her a headache and also elevated her blood pressure. She reported this to her supervisor and was given permission to leave work to receive medical attention.

Claimant went to the emergency room at Holy Cross Hospital on March 22, 2010 complaining of a headache with left-sided weakness. Claimant was discharged on March 23, 2010 with a diagnosis of "probable migraine headache causing symptoms" and a history of a "possible small stroke", and history of hypertension and bipolar disorder. EE #5.

In April 2010, Claimant filed a workers' compensation claim asserting that she suffered a stroke due to heat. Employer denied the claim on April 30, 2010, with a Final Decision on Reconsideration affirming the denial on June 22, 2010. Claimant proceeded to file for a formal hearing.

After a formal hearing, a Compensation Order was issued<sup>3</sup> on October 26, 2010 awarding Claimant temporary total disability benefits from March 18, 2010 to the present and continuing for the claimed injuries of hypertension, headaches, anxiety and stroke.<sup>3</sup> Employer timely appealed.

On August 22, 2011, the CRB vacated and remanded the October 26, 2010 CO because the Administrative Law Judge (ALJ) used the wrong standard of proof in stating that Claimant had to prove his entitlement to disability benefits by the "substantial evidence" standard when the correct standard of proof was by a preponderance of the evidence.<sup>4</sup> The CRB also determined

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<sup>3</sup> *Ashton v. D.C. Department of Motor Vehicles*, AHD No. PBL 10-065, OWC No. 30100438785-0001 (October 26, 2010).

<sup>4</sup> *Ashton v. D.C. Department of Motor Vehicles*, CRB No. 10-193, AHD No. PBL 10-065, OWC No. 30100438785-0001 (August 22, 2011).

that the ALJ committed error in finding the employer liable for the conditions of hypertension, headaches and anxiety when Claimant's only claim was for a stroke.<sup>5</sup>

On September 28, 2011, the ALJ issued a Compensation Order on Remand (COR) that is the subject of the instant appeal. In granting Claimant's claim for TTD benefits, the ALJ concluded that Claimant had proven by a preponderance of the evidence that she left work due to anxiety and headaches and finally suffered a heat stroke due to elevated heat in the workplace.<sup>6</sup> Employer filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues for reversal of the COR asserting that the factual finding that Claimant suffered a stroke on March 18, 2010 is not supported by substantial evidence in the record and the ALJ failed to properly apply the treating physician preference. In opposition, Claimant argues to the contrary.

#### STANDARD OF REVIEW AND ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.<sup>7</sup> Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* ("Act"). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

In seeking reversal of the COR Employer first argues that the record evidence does not support a finding that Claimant suffered a stroke on March 18, 2010. We agree.

With regard to Claimant suffering a stroke on May 18, 2010, the ALJ found

On March 17, 2010, Claimant was working at a facility where to (sic) the temperature was above 75 degrees handling the customers alone. She complained to her supervisor of the heat and an hour later she began feeling sick and reported to her treating physician with complaints of chest pain, head aches (sic), with pain down in her left arm traveling down to her left hand and elevated blood pressure. She was treated with medication and referred to a neurologist. On March 22, 2010, Claimant was rushed to

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<sup>5</sup> *Id.*

<sup>6</sup> *Ashton v. D.C. Department of Motor Vehicles*, AHD No. PBL 10-065, OWC No. 30100438785-0001 (September 28, 2011).

<sup>7</sup> "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

the Holy Cross Hospital by ambulance. She reported with complaints of tingling in her fingers and left side headache. Claimant was treated with CAT scan, and a focal hypo density (sic) was noted in the right basal ganglia of the right corona radiata. She was treated with rest and observation overnight and a referral to a neurologist. Claimant was initially diagnosed as having probable migraine headache symptoms, possible small stroke in the right corona radiata and a history of bipolar disorder and hypertension.<sup>8</sup>

It must first be noted that the ALJ has misstated the diagnosis Claimant received upon discharge from the hospital on March 23, 2010. The actual diagnosis was:

1. Probable migraine headache causing symptoms.
2. *History* of possible previous small stroke in right corona radiata.
3. History of hypertension.
4. History of bipolar disorder.

EE #5 (emphasis added). In restating the diagnosis, the ALJ left out that the doctor writing the discharge report, Dr. Bergit I. Schoellmann, noted there was only a *history* of a possible previous small stroke, not that the symptoms brought on by the adverse workplace conditions resulted in a recent stroke. And, although the CAT scan did show a “focal hypodensity...in the right basal ganglia and the right corona radiate”, the doctor also specifically noted “[T]here was no evidence of any acute intracranial abnormality.” *Id.*

In the discussion, the ALJ, in discussing the reports of Dr. Jensvold, found

The last incident of March 2010 resulted in a stroke. Dr. Jensvold relied on the results of a recent CAT scan and MRI of Claimant’s head which indicated Claimant has suffered a recent stroke. (CE 1 & 8)

COR, p. 7. A review of the record evidence finds no support for these statements. While the ALJ asserts that support for a conclusion that Claimant suffered a stroke on March 18, 2010 can be found in CE 1 and 8, our review of those exhibits does not reveal the existence of any medical opinion to that effect. The ALJ merely referenced the exhibits by their exhibit number, and gave no further explanation or analysis.

As Employer adroitly notes, CE 1 contains medical records from 2008 and 2009 from Dr. Jensvold and the treating physician at Kaiser Permanente, Dr. Jeffrey Wetstone, and they provide no evidence concerning a stroke. In addition, a review of all of Dr. Jensvold’s reports around the date of the alleged stroke fail to show where she opines that the headaches, anxiety, and elevated blood pressure were evidence of having suffered a stroke and even after the CAT scan and MRI there was no such definitive diagnosis.

A review of CE 8 shows a similar lack of medical opinion that Claimant suffered a stroke on or around the date of injury listed. However, we take particular note of a May 1, 2010

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<sup>8</sup> COR, p. 4.

neurological report by Dr. Ejaz Shamim in which he initially states that Claimant “is known to have a lacunar infarct involving the right frontal corona radiata.” He makes an examination finding of an “8 mm focus of T2 hyperintensity within the right frontal corona radiata” and that this is “consistent with a demyelinating process such as multiple sclerosis.” In his assessment and plan, Dr. Shamim notes that Claimant has a “lacunar of unclear etiology.”<sup>9</sup> Dr. Shamim then states

She feels that she knows exactly when the stroke occurred as her blood pressure was really high that day. She may be correct. The single solitary lesion which is not enhancing is likely of little clinical significance as pointed out by Dr. Glor in the past.<sup>10</sup>

While Dr. Shamim entertains the possibility that Claimant is correct that she had a stroke, he does not make a diagnosis, either explicitly or implicitly, that she did and it is not clear to which day Claimant is referring when she claims to remember the day her blood pressure was really high.

In contrast, EE 8 provides substantial evidence that Claimant did not suffer a stroke. Claimant went to Holy Cross emergency room on May 14, 2010 and was discharged on May 17, 2010. Dr. Kanwaljit K. Nagi noted that while Claimant was fixated on whether she had multiple sclerosis and also had a “big stroke”, a CT of the head was negative for any acute stroke. During this hospital stay, Claimant was also seen by Dr. Yvonne N. Rudder who noted that Claimant’s March 27, 2010 MRI showing a lesion on the right corona radiata was thought to be due to a previous ischemic event and that while a diagnosis of multiple sclerosis was very unlikely, her symptoms may be due to atypical migraine.

A May 15, 2010 neurological consultation report by Dr. Shamim noted Claimant stopped working on March 18, 2010 because work restrictions were not being accommodated. Dr. Shamim also noted Claimant’s belief that she may have had a stroke in 2008 and this shows up on the MRI. Finally, in a psychiatric consultation report by Dr. David Lockwood also dated May 15, 2010, the mental status examination specifically notes that “[I]t is also highly questionable whether the patient has had a stroke based on the single density in the right basal ganglia.”

Employer also argues the ALJ committed error in not properly applying the treating physician preference. It is Employer’s position that Dr. Shamim was Claimant’s treating neurologist and that it was his opinion that Claimant did not suffer a recent stroke that should have been given preference over that of a September 16, 2010 clarifying letter from Dr. Jensvold that was produced solely for this litigation. And, as the ALJ did not give any reasons for rejecting Dr. Shamim’s opinion, this matter should be returned.

While this matter will be returned to the ALJ, it will not be due to an improper application of the treating physician preference. We remind Employer that the District of

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<sup>9</sup> CE 8.

<sup>10</sup> *Id.*

Columbia Government Merit Personnel Act of 1978 was amended through the enactment of D.C. Law 18-223, which became effective October 1, 2010. This amendment deleted the former third sentence of D.C. Code § 1-623.23 (a-2)(4), which read:

In all medical opinions used under this section, the diagnosis or medical opinion of the employee's treating physician shall be accorded great weight over other opinions, absent compelling reasons to the contrary.

In other words, at the time the COR was written, the mandatory application of the treating physician preference in public sector workers' compensation cases had been eliminated.

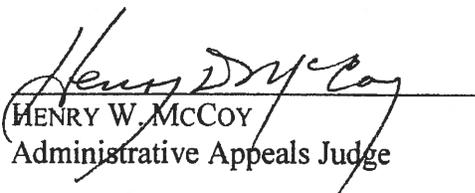
In the COR under review, the ALJ found that Claimant suffered a stroke that arose out of and in the course of her employment. A review of documentary evidence relied upon by the ALJ does not support this finding. In addition, although Claimant is found to be credible, there is no diagnosis by any of her treating physicians that support her claim that she suffered a stroke at work on March 18, 2010. Accordingly, there is no logical and rational basis for the ALJ to conclude that Claimant had proven by a preponderance of the evidence that she suffered a workplace stroke and therefore was entitled to disability benefits.

Our review of the evidentiary record was not done to re-weigh the evidence, which we are prohibited from doing. Rather, this constituted a restatement of the medical opinions in addressing Claimant's condition after she fell ill on March 17<sup>th</sup> and 18<sup>th</sup> and the subsequent treatment she received and the diagnoses made. We were at pains to find any medical reports that support the ALJ's findings and ultimate conclusion that Claimant suffered a stroke. On remand, the ALJ shall review all of the evidence and make new findings of fact to resolve the initial contested issues, insofar as the findings and conclusions of the September 28, 2011 COR are not supported by substantial evidence in the record.

#### CONCLUSION AND ORDER

The Compensation Order on Remand of September 28, 2011 is not supported by substantial evidence in the record and is not in accordance with the law. Accordingly, it is REVERSED and REMAND for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
Administrative Appeals Judge

April 30, 2012

DATE