

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-062

**ANNE H. NELSON,
Claimant-Petitioner,**

v.

**GEORGETOWN UNIVERSITY HOSPITAL
and SEDGWICK CLAIMS MANAGEMENT SERVICE,
Self-Insured Employer/Third-Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 JUL 22 PM 2 06

Appeal from an April 15, 2014 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 13-455, OWC No. 640321

David M. Snyder for Petitioner
William R. Sands, Jr. for the Respondent

Before: JEFFREY P. RUSSELL, HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

Background and Facts of Record

Claimant Anne Nelson sustained an injury on June 22, 2007, when she fell backwards over a box while employed as a nurse working for Employer Georgetown University Hospital (GUH). GUH provided a period of temporary total disability benefits and provided medical care, principally through Dr. F. Clarke Holmes. Dr. Holmes authorized Ms. Nelson to return to work without restrictions in April 2008, and she did so.

In August 2011, Ms. Nelson tripped and fell while at work when she attempted to exit an elevator whose cab floor was not level with the floor of the hallway. She sought and obtained treatment from Dr. Mark Zawadsky following this fall.

Thereafter, Ms. Nelson sought additional medical care for both her knees. GUH had Ms. Nelson examined on May 21, 2012 by Dr. Kevin Hanley, and Dr. Marc Danziger on October 8, 2013, for the purpose of independent medical evaluations (IMEs). Based upon their reports, GUH declined to provide any further medical care, alleging that any problems with Ms. Nelson's right knee that were caused by her first fall that had resolved as of April 2008, and any pathology or other problem with either of her knees thereafter were mere temporary exacerbations or aggravations of the first fall and are the result of the natural progression of Ms. Nelson's pre-existing degenerative arthritis, and not work incident.

Ms. Nelson presented her claim for additional medical care for resolution at a formal hearing on November 4, 2013 before an Administrative Law Judge (ALJ) in the hearings section of the Department of Employment Services. Following the formal hearing, the ALJ issued a Compensation Order on April 15, 2014. In the Compensation Order, the ALJ determined that Ms. Nelson's current knee complaints are not causally related to her work injury, and denied the claim.

Ms. Nelson filed a timely Application for Review (AFR) and Memorandum in Support of Claimant's Application for Review, to which GUH filed a timely Opposition to Application for Review and Memorandum in Support of Opposition to Application for Review.

Because the cited basis of the ALJ's acceptance of IME opinion over that of the treating physician in this case contained a significant, material error, we vacate the Compensation Order and remand for further consideration of the claim, taking into consideration the entire record.

DISCUSSION AND ANALYSIS¹

There is no dispute that Ms. Nelson's testimony concerning the two events and the reports of Dr. Holmes were sufficient to invoke the statutory presumption that Ms. Nelson's bilateral knee complaints are causally related to her employment. Ms. Nelson argues on appeal that the evidence relied upon by the ALJ in determining that the presumption had been overcome is unsound and insufficient for that purpose. Further, she argues that even if the presumption has been rebutted, the evidence relied upon by the ALJ in weighing the evidence is legally inadequate to conclude that Ms. Nelson hasn't met the preponderance standard, both because there are insufficient grounds to accept the IME opinion of Dr. Danziger over that of Dr. Holmes under the treating physician preference rules, and because Dr. Danziger's opinion is fatally flawed due a factual error.

In opposition, GUH argues that the ALJ's decision is supported by substantial evidence and should be affirmed.

¹ The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm 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.

The ALJ concluded that only Ms. Nelson's right knee was injured in the earlier incident when she tripped over a box, and that that injury had resolved completely by the time of the second incident involving the unlevelled elevator, in which incident both knees were injured, but that those injuries had resolved by the time of Dr. Danziger's IME. The ALJ's reasoning that Ms. Nelson's current knee complaints are the result of the natural progression of Ms. Nelson's concededly pre-existing degenerative bilateral knee conditions and not from the work injury or injuries was based primarily upon that IME. In concluding that GUH had rebutted the presumption of compensability, the ALJ wrote:

To rebut the presumption of compensability Employer presents the October 8, 2013 IME report authored by Dr. Marc Danziger in which he opines that the Claimant has significant bilateral osteoarthritis with "end stage arthritis to the left knee and nearly end stage arthritis to the right knee". (EE 16) Dr. Danziger opined that that the Claimant suffered a right knee contusion on June 22, 2007 and that she aggravated the left knee in the course of medical treatment, and both knees resolved in April 2008 *when she was released from medical treatment*. (EE 16 pg.3) After reviewing the medical history Dr. Danziger also opined that any and all future treatment, such as medication, therapy, or surgical treatment with knee replacement, has nothing to do with the 2007 slip and fall. (EE 16 pg. 3)

Compensation Order, page 4 (emphasis supplied).

Review of the cited exhibit confirms that Dr. Danziger expressed the opinions as described, including "she was effectively treated by 4/08 when she achieved maximum medical improvement *and was dismissed from care by Dr. Holmes*." (EE 16, page 3, emphasis supplied).

Petitioner's complaint concerning the ALJ's acceptance of this opinion is stated as follows:

Although Dr. Danziger presents an alternative theory of causation of the present complaints, *his opinion is founded upon a mischaracterization of the facts*. Ms. Nelson was not, as Dr. Danziger indicated, released from treatment in May 2008. A letter from Dr. Holmes dated May 2, 2008, noted the need for ongoing, causally related medical care.

Petitioner's Memorandum, page 7 (emphasis supplied).

Although not identified by exhibit number in her Memorandum, review of Ms. Nelson hearing exhibits reveals a letter dated May 2, 2008 from Dr. Holmes addressed to "Ms. Norma Thompson, Worker's Compensation", followed by a fax number. In the letter Dr. Holmes writes:

Anne Hunter Nelson is currently a patient of mine [...]. I have been following her for a work-related injury involving her right knee contusion and also demonstrated significant degenerative changes in her knee. Prior to this injury she did not have any associated knee pain. It is my belief that her pain is a direct result of this injury and this caused an acute and now chronic flare of her knee degenerative joint disease. [...] I have recommended over the past several months that we initiate some viscosupplementation type injections over a five-week period. [...] We have not found any intra-articular pathology at this point that would warrant surgical intervention. Once again, although her pain is directly related to degenerative joint disease, these symptoms are seemingly a direct result of her work-related injury.

EE 4, letter of May 2, 2008.

Further, review of Ms. Nelson's hearing exhibits reveals that on April 4, 2008, Dr. Holmes had written a letter addressed to "Sedgewick" followed by a post office box address. It reads:

Anne returns today to discuss her right knee. It has not significantly changed. However, she is having some trouble obtaining the Hyalagen injections as agreed due to the fact that worker's comp is not willing to approve these. She is still somewhat disabled by her right knee. She has intermittent swelling and is now taking the Meloxicam up to three or four times a week.

[...]

Plan: The patient's right DJD preceded her injury, however, she had no pain prior to the knee injury that occurred while at work. Thus, I feel like her symptoms are directly related to that injury and her flare of knee arthritis occurred due to that injury. Thus, any treatment that I am suggesting for her right knee arthritis I believe should hopefully be covered by worker's compensation. [...] Thus far there has been no indication for any operative management although this certainly could be considered if she is not improving with the suggested viscosupplementation in the form of Hylagen injections. At this time if we can get these Hylagen injections approved [sic] will begin immediately and will be five injections total, one each week x five weeks. Currently there are no significant work restrictions.

EE 4, letter of April 4, 2008.

In reading the record as a whole the CRB concludes that Dr. Danziger's statement that Ms. Nelson was "dismissed from Dr. Holmes's care" in April 2008 is an inaccurate assessment of the situation. While it is true that he authorized an unrestricted return to work at that time, he did not in any way suggest that he viewed her work-related right knee injury to have resolved and he did not dismiss her from his care. Quite the opposite: he was actively seeking authorization to provide specific additional medical care to Ms. Nelson's right knee which he opined was necessitated by the work injury.

While not every error contained in a medical report, IME or otherwise, is grounds to reject the opinions contained therein, in this case the error is of singular significance: the only fair reading of the report of the IME physician is that it was premised in part upon the belief or assumption that the *treating physician* had dismissed the patient from further care, a fact that if true is of obvious relevance and would militate strongly in favor of a finding of no ongoing causal relationship thereafter.

We are cognizant of the fact that the IME report is not the only cited basis for the ALJ's concluding that the presumption of compensability had been overcome, that Ms. Nelson did not ultimately prove her claim by a preponderance of the evidence, nor is it the only evidence proffered by GUH or existing in the record in opposition to some or all of Ms. Nelson's claims. We also recognize that the April and May 2008 records from Dr. Holmes are conspicuously silent with respect to any pathology in Ms. Nelson's *left* knee. For these reasons, we are not prepared to rule that any particular outcome is compelled by the record evidence.

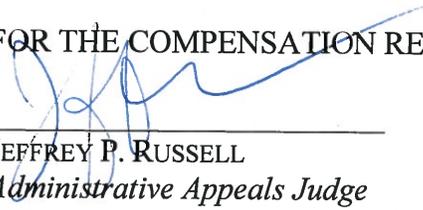
However, we conclude that the significance of the error in Dr. Danziger's report and repeated in the Compensation Order is such that, if his opinion is going to be a primary basis of the ALJ's decision, the apparent error must at least be acknowledged by the fact finder and justification given for continuing to accept his opinion, especially over the contrary opinion of the treating physician.² A finding of fact that is premised upon evidence that is clearly erroneous cannot be said to be supported by substantial evidence. *Ramirez v. Securitas Security*, CRB No. 12-178, AHD No. 10-608A, OWC No. 672756 (December 17, 2012). Accordingly, we must vacate the Compensation Order and remand the matter for further consideration based upon the record as a whole.

Because the ALJ will be addressing and re-assessing the evidence anew, we need not discuss Ms. Nelson's contentions concerning the alleged misapplication of the treating physician preference rules. We trust that on remand, they will be properly applied.

CONCLUSION AND ORDER

The Compensation Order of April 15, 2014 is not supported by substantial evidence and is vacated. The matter is remanded the matter for further consideration based upon the record as a whole.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

July 22 2014
Date

² As Ms. Nelson properly points out, the medical opinions of treating physicians are ordinarily accorded a preference over that of IME opinion, and where IME opinion is ultimately accepted over that of treating physician opinion, legitimate reasons for accepting the IME opinion and rejecting that of a treating physician must be given. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992); *Lincoln Hockey LLC v. DOES*, 831 A.2d 913 (D.C. 2003).