

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. 08-035

BERNIE FORD,

Claimant–Petitioner,

v.

GEORGETOWN UNIVERSITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. 07-273, OWC No. 604786

Joshua A. Davenport, Esquire, for the Petitioner

Todd Sapiro, Esquire, for the Respondent¹

Before JEFFREY P. RUSSELL, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND 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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).²

¹Despite the fact that Respondent has not opposed this appeal or otherwise participated therein, Mr. Sapiro is listed as Respondent's counsel because he represented Respondent at the formal hearing.

²Pursuant 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 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and

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 October 31, 2007, the Administrative Law Judge (ALJ) denied Petitioner's request for authorization for surgery to his right knee. Petitioner filed an Application for Review (AFR) on November 7, 2007, seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is not in accordance with the law because, while the sole issue raised and in dispute between the parties was whether the requested knee surgery was causally related to the stipulated work injury, the ALJ's denial of the surgery was premised upon an analysis that appears to be one of reasonableness and necessity³, about which the parties were not in contest and to which they had stipulated. Related to this argument, Petitioner argues that the ALJ failed to provide Petitioner with the presumption that the condition for which surgery was recommended is causally related to the stipulated work injury, and is therefore not in accordance with the law.

Respondent has not opposed or otherwise responded to this appeal.

Because we agree that the ALJ did not address the sole issue raised, that being the issue of whether the requested knee surgery is medically causally related to the work injury of October 6, 2004, and did not accord Petitioner with the presumption of such a causal relationship, we vacate the Compensation Order and remand the matter to AHD for further consideration of the claim for the requested surgery.

ANALYSIS

disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

³ Petitioner erroneously refers to "reasonableness and necessity" of medical care as being somehow a part of "nature and extent" analysis. See, Memorandum of Points and Authorities in Support of Claimant's Application for Review" (Petitioner's Memorandum), page 3, numbered paragraph 4; see also, page 4, numbered paragraph 9. Nature and extent of disability is an issue completely separate from reasonableness and necessity of medical care, and although the burden of proof is upon claimants on both issues, they are not the same thing. Nature and extent of disability issues concern whether a disability (i.e., a wage loss caused by a work related injury) is either non-existent, is partial or is total (extent), and is either temporary or permanent (nature), while reasonableness and necessity deals with whether a particular course of requested and/or recommended medical treatment is, medically speaking, reasonable and necessary to treat a specific medical condition (regardless of the cause of that condition and without regard to whether there is any disability related to the condition). Had the issue to be resolved been that of reasonableness and necessity of the requested treatment (and not of causal relationship of the condition for which surgery was requested to the work injury), the matter would not appear to have been ripe for adjudication, given that there does not appear to have been a completion of the utilization review process which is a prerequisite to formal hearing consideration of reasonableness and necessity issues. See, *Gonzalez v. UNNICO Service Co., et al.*, CRB No. 07-137, OWC No. c2005-604331 (September 20, 2007).

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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 International v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). 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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is unsupported by substantial evidence and is not in accordance with the law, because the ALJ improperly treated this case as one involving the issue of the reasonableness and necessity of the requested medical care, and in so doing (1) improperly placed the burden upon Petitioner to demonstrate by a preponderance of the evidence entitlement to the requested care (under *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986), and (2) failed to accord Petitioner with the presumption that the condition for which surgical intervention is sought is causally related to the stipulated work related injury of October 6, 2004, as required by *Whittaker v. District of Columbia Department of Employment Services*, 531 A.2d 844 (D.C. 1995).

Review of the Compensation Order reveals the following discussion:

Where it is stipulated that a claimant's injury has arisen out of and in the course of that claimant's employment duties and responsibilities, it is unnecessary to consider the application of the presumption of compensability delineated in D.C. Code, as amended, § 32-1521 (1). *See, Dunston [supra]*. However, the Act does not provide claimant with a presumption regarding the nature and extent of his disability. *See Dunston id.* Thus, the claimant has the burden of producing credible evidence that he is entitled to the level of benefits requested. In order to demonstrate entitlement to payment of medical expenses or authorization for surgery recommended by his treating physician, claimant must prove that following a compensable work related injury he has not fully recovered or rehabilitated. D.C. Code [§]32-1507 (a). *See also, Santos v. District of Columbia Department of Employment Services*, 548 A.2d 564 (D.C. 1988).

Compensation Order, page 3. The ALJ is correct to assert that *Dunston* stands generally for the proposition that claimants are not entitled to a presumption relating to the nature and extent of disability or to a presumption that a particular benefit is owed. Thus, there is no presumption that a claimant has suffered a given wage loss; the claimant must prove the wage loss by a preponderance of the evidence. Similarly, a claimant is not entitled to a presumption that a given medical procedure is reasonable and necessary; rather, a claimant has a burden of demonstrating that as well (subject also to the utilization review procedures mandated by the Act; see footnote 2, *ante*).

However, where these issues are subject to stipulation, as they are in this case, a claimant has no such burden of proof.

Contrary to the assertion of the ALJ, however, neither *Santos* nor D.C. Code § 32-1507 (a) contain a requirement that “[i]n order to demonstrate entitlement to payment of medical expenses or authorization for surgery recommended by his treating physician, claimant must prove that following a compensable work related injury he has not fully recovered or rehabilitated”, and such a statement is counter to the long established rule that the statutory presumption of compensability extends to the causal relationship of the complained of condition and the established work related injury. *Whittaker, supra*. The statutory and case authority cited by the ALJ stand for the proposition that the termination of a “disability” (i.e., the end of a work related wage loss) does not terminate entitlement to medical benefits under the Act, which benefits continue for so long as there is a causally related medical condition for which treatment is reasonable and necessary. While *Dunston* operates to deny a claimant a presumption regarding the second part of that formulation, *Whittaker* operates to preserve the presumption regarding the first. The nature and extent of Petitioner’s disability is not an issue in the instant matter thus, *Dunston* does not apply. The sole issue presented in this case was whether the requested medical care is causally related to the work injury.

Placing the burden upon a claimant to demonstrate that he or she “has not fully recovered or rehabilitated” from a work injury improperly denies the claimant of the benefit of the *Whittaker* presumption.

In this case, it was stipulated that the requested medical care is reasonable and necessary; the ALJ’s discussion beginning on page 3 and continuing through page 5, and concluding with “and it is equally difficult to discern from the medical evidence presented by claimant, what *precipitates* claimant’s need for surgery” (emphasis added) makes evident to us that the ALJ denied the claim because of a concern that the requested surgery is not causally related to the stipulated work injury. And, nowhere within the Compensation Order does the ALJ refer to, discuss, cite or analyze any medical evidence other than Dr. Faulk’s various reports and opinions. There is no medical opinion evidence referred to in the Compensation Order that contradicts or challenges the existence of a causal relationship. While there may be evidence in the record that would support a conclusion that Petitioner’s knee condition is not causally related to the work injury, it is not referenced in the Compensation Order.

Petitioner was entitled to the benefit of the presumption that the complained of knee condition and the requested medical care (stipulated to be reasonable and necessary) are causally related to the work injury. As Petitioner is entitled to that presumption, on remand the ALJ must determine whether, on the record evidence, the presumption that the requested medical care is causally related to the work injury has been rebutted, under the principles enunciated by the District of Columbia Court of Appeals in *Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004). If not, the relief must be granted. If so, the ALJ must consider the record evidence as a whole, and without reference to any such presumption, and determine whether Petitioner has established by a preponderance of the evidence, but taking into account the preference that is accorded to the opinions of treating physicians in this jurisdiction under *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. App. 1998), as well as, *Stewart v. District of Columbia Department of Employment Services*,

606 A.2d 1350 (D.C. 1992), and *Butler v. Boatman and Magnani*, OWC No. 0044699, H&AS 84-348 (December 31, 1986), that the condition is causally related to the stipulated work injury.

CONCLUSION

The Compensation Order of October 31, 2007 is not supported by substantial evidence because it did not properly address the issue presented, and is not in accordance with the law, because it improperly denied Petitioner the benefit of the presumption that the complained of knee condition is causally related to the work injury of October 6, 2004.

ORDER

The Compensation Order of October 31, 2007 is reversed and vacated. The matter is remanded to AHD for consideration of the claim for surgery, based upon the record evidence, with Petitioner being afforded the benefit of the presumption that the condition for which surgery is sought is causally related to the work injury, and with the stipulation that the requested surgery is reasonable and necessary.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 20, 2007
DATE