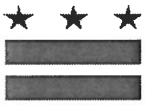
GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-129

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 DEC 31 AM 9 41

CHRISTOPHER LAPLANT,
Claimant–Petitioner,

v.

TRADESMEN INTERNATIONAL, INC. and
GALLAGHER BASSETT SERVICES, INC.,
Employer/Third-Party Administrator-Respondent.

Appeal from a July 15, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 14-061, OWC No. 706474

(Decided December 31, 2015)

Krista N. DeSmyter for Claimant
Alan M. Carlo for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

A formal hearing was conducted in the above-captioned matter on February 11, 2014. The administrative law judge (ALJ) who conducted the hearing left the Administrative Hearings Division (AHD) without issuing a Compensation Order (CO). The matter was reassigned and the successor ALJ determined that another Formal Hearing was necessary to hear Claimant's testimony. The second hearing took place on April 14, 2015.

Claimant alleged that as a result of working in a poorly ventilated building, that included dust and chemicals, he had an aggravation of his pre-existing asthma. Claimant requested temporary total disability from July 1, 2013 to the present and continuing with a credit for any wages earned or unemployment benefits received during that period. Following the hearing, the ALJ issued a Compensation Order on July 15, 2015, in which the claim was denied. The denial was premised

upon the ALJ's determination that Claimant had failed to adduce sufficient evidence to invoke the statutory presumption of compensability found at D.C. Code § 32-1521. The basis of the ALJ's decision was that the ALJ found Claimant's testimony lacked credibility and could not be relied upon, therefore, the ALJ concluded Claimant had failed to invoke the presumption of compensability. The ALJ further concluded that without the benefit of the presumption, Claimant failed to establish that he sustained an accidental injury that arose out of and in the course of his employment on July 1, 2013 or during the week of June 24, 2013.

Claimant filed an Application for Review and Memorandum of Points and Authorities in support thereof (Claimant's Brief) with the Compensation Review Board (CRB), alleging that the ALJ improperly found Claimant did not invoke the presumption of compensability and the ALJ's credibility determination was not based on substantial evidence.

Employer filed a response asserting substantial deference should be given to the ability of the ALJ to assess the credibility of the claimant.

ANALYSIS

At the outset, we must note that although a decision was made to hold a subsequent hearing as the original ALJ departed before issuing a CO, the current ALJ allowed Claimant to rely solely on his original testimony with regard to the working conditions and circumstances of his alleged work injury, taking testimony only of events that transpired after the first formal hearing. *See* HT 3 at 21, 32.

In setting forth the standard to be used to determine if a claimant has adduced sufficient evidence to invoke the presumption of compensability, the ALJ initially cited the CRB decision in *Storey v. Catholic University of America,* CRB No. 15-024, AHD No. 12-306A, OWC 663766 (July 9, 2015) (*Storey*), *citing Murray v. DOES*, 765 A.2d 980 (D.C. 2001) (*Murray*):

> To raise the statutory presumption of compensability, the claimant must produce "some credible evidence" of "both an injury and a relationship between that injury and the employment."

CO at 7.

The ALJ's discussion pertaining to her conclusion that Claimant did not provide credible testimony includes:

> Claimant suffered his asthma symptoms when he did not take his medications and when he had other medical issues such as a cold or an earache. When Claimant went to WHC[1] on June 26, 2013, he was out of his medications. WHC gave him prescription slips, not the medications. When he went to GUH, less than a week later, he again received prescription slips for the same medications, plus another one. If Claimant had had the medications, then he would not have

[1]The findings of fact indicate Claimant actually went to the Winchester Medical Center on June 26, 2013. CO at 4.

needed more prescriptions slips from GUH for the prednisone and albuterol medications.

The medical records establish, contrary to Claimant's statements to his current treating physician, that he had bouts of shortness of breath attributable to his asthma and that, when he ran out of his albuterol he would return to the Winchester Medical Center Emergency Room to obtain more. Furthermore, Claimant was instructed to follow-up with a primary care physician for his asthma symptoms which he did not do. Claimant was referred to Winchester Family Health on February 4, 2013. Claimant's claim that he did not obtain a primary care physician because of finances is without merit because he was referred for free medical care on June 26, 2013. Claimant is now receiving primary care through Dr. Birk. Claimant's medications have not changed and Claimant has not been to the hospital.

Claimant's testimony that he did not use of (sic) his inhaler prior to week of June 24 and July 1, 2013, is not credible. In 2006, the WMC records state that he was "running low" on Proventil "because he has been using it all the time." On that visit, he was prescribed prednisone, Z-Pak, Flonase Inhaler, and albuterol. On November 5, 2012, Claimant reported to the WMC staff that he had an inhaler. On December 28, 2012, when he was suffering an acute exacerbation of his asthma, he reported that he was "out of inhalers." Contrary to Claimant's testimony, he used inhalers prior to the week of June 24, 2013.

On January 3, 2013, Claimant was prescribed another albuterol inhaler. On February 4, 2013, Claimant was given Combivent and prednisone in the emergency department and was given prescriptions for Combivent, albuterol, Z-Pak and doxycycline. Finally, when Claimant went to WMC on June 26, 2013, he reported that he was out of medications. Then he received prescriptions of prednisone, an albuterol inhaler and Duoneb, which was to be used in a nebulizer.

Furthermore, there is no medical opinion suggesting that Claimant's condition was aggravated, or that his pre-existing condition was worsened or hastened by any incident during the week of June 24, or on July 1, 2013. Claimant suffered an acute exacerbation of his pre-existing asthma but, other than his own testimony, which I do not find to be credible, there is no evidence that he suffered an aggravation of his pre-existing asthma.

CO at 8, 9 (citations and footnotes excluded).

Claimant asserts:

> [T]he Compensation Order determined that Mr. LaPlant did not invoke the presumption of compensability because the ALJ determined that his testimony, though uncontradicted, was not credible. It is well settled that findings on credibility are within the sound discretion of the ALJ. *See Ogden v. Bon Appetit*

> *Mang. Co.*, CRB No. 09-031 2009 DC Wrk. Comp. LEXIS 22, *8 (D.C. March 2, 2009). Normally, an ALJ's decision which is based on credibility findings deserve special weight, because the ALJ has the opportunity to observe the appearance and demeanor of the witness. *See WMATA v. DOES*, 683 A.2d 470, 477 (D.C. 1996). However the determination of the hearings examiner, or Administrative Law Judge, is not absolute. Findings of fact based on determinations of witness credibility must still be supported by the [sic] substantial evidence. *See Dell v. D.C. Dep't of Emp't Servs.*, 499 A.2d 102 (D.C1985) (emphasis added).
>
> A basis for the Compensation Order's attack on Mr. LaPlant's credibility is an assertion that he did not share his past history of asthma. CO at 5-6, 8. This finding is not based on substantial evidence because it is untrue. Mr. LaPlant did share his asthma history with Dr. Birk upon his first visit with him. CE 1 at 6. The Compensation Order relied on this mischaracterization of the evidence multiple times while making commentary on Mr. LaPlant's credibility. In addition, the Compensation Order asserts that Mr. LaPlant is not credible because he claimed that he did not use an inhaler prior to the week of June 24 and July 1, 2013 when there was evidence from 2006 and from 2012 that he did. CO at 8. However the Compensation Order cited Mr. LaPlant's testimony on this point and took it out of context. Mr. LaPlant did not deny that he had inhaler prescriptions in the past. He did not deny that he had inhalers that he kept with him. He testified that he did not need to utilize an inhaler in between February 2013 and when he started on the employer's job site in June 2013. This is not contradicted by medical records from 2006 and from 2012. See HT at 49-50. Finally, the Compensation Order states that it finds Mr. LaPlant incredible because of "evasive" testimony at the first formal hearing in this matter. CO at 6. There was nothing evasive about his testimony at the cited passages and the ALJ writing this Compensation Order is not entitled to deference on this finding because a different ALJ presided over that hearing. *Cf Storey v. Catholic Univ. of America*, 2015 DC Wrk. Comp. LEXIS 419 at *10-11. Because the credibility determination of the ALJ is not based on substantial evidence, the Compensation Order erred in determining that the presumption of compensability was not invoked.

Claimant's brief at 6, 7.

Employer's response with regard to the ALJ's credibility findings is:

> The Claimant in his Application for Review attacks the decision of the hearing examiner by disagreeing with the point or two in which the Claimant's interpretation of the evidence is different from that of the examiner Of course the Claimant's interpretation of the evidence is also different from that of the Employer. That is why we have a hearing examiner as an independent fact finder

> and why such deference should be given to her assessment of the credibility of the Claimant.
>
> Note that while the Claimant selects a point or two at which his interpretation differs from the examiner, he does not address at all the statement by the Administrative Law Judge that she found the Claimant's testimony to be generally not credible based upon his demeanor and the tenor of his voice.
>
> * * *
>
> The judge noted that the Claimant's testimony was at times both evasive and non-responsive in his answers to questions (Compensation Order, page 6). The evasive and non-responsive nature of Claimant's testimony is something that is not even touched upon by the Claimant in his Application for Review.

Employer's Brief at 4, 5.

We find the remainder of Employer's response to be concerned with other examples which Employer asserts would lead to a determination that Claimant is not credible. Since the ALJ did not rely on these examples nor do they involve issues addressed by the ALJ we need not discuss them.[2]

As Claimant correctly asserts, Claimant did share his asthma history with Dr. Birk upon his first visit with him. A review of CE 1 reveals that on October 11, 2013, Dr. Birks reported:

> PMH: Asthma, tobacco dependence, seasonal allergies.
>
> Meds: Albuterol inhaler, Prednisone (Winchester Medical), Advil cold and sinus pm.

Further in a separate paragraph Dr. Birk wrote:

> Asthma: hospitalized as a kid before teen years for asthma, never intubated. Has spacer, no peak flow meter, never on inhaled steroids (couldn't afford), he is nasally congested all the time, much of the time he cannot breathe through his nose, he uses Albuterol HFA more than supposed to be (2-8 times per day)

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[2] In Employer's Brief, citation is made to an AHD case from which Employer quotes a lengthy discussion of the law concerning work-place exposures to allergens and irritants, stating that the ALJ "extracted from numerous Court of Appeals and District Director decisions the following concise and comprehensive analysis of the standard for work place conditions…". Employer's Brief, unnumbered p. 9. As we have sometimes been called upon to remind parties before us, AHD decisions are not treated as having precedential value. However, in this case, we note that the entire quote attributed to the ALJ is, in fact, a word-for-word duplication of a portion of the text in *Anamaleche-Oladokun v. District of Columbia Public Schools*, CRB (Dir. Dkt.) No. 09-04, AHD No. PBL 04-002A, DCP No. LT7BOEdu4741 (March 14, 2006. As such, the principle enunciated is an accurate statement of the law, but its precedential value emanates from *Anamaleche-Oladokun*, not the case cited in Employer's Brief.

> Triggers: humidity, allergies, URI, dust, exercise? Never had Asthma Action Plan

CE 1 at 6.

As Claimant's counsel also correctly asserts, Claimant did not deny that he had inhalers that he kept with him.

> Q. Okay. In the time before you were on this job site, in say, from January 2013 till June of 2013 did you have to use your inhaler?
>
> A. I think I ended up going to the emergency room end of January or maybe February due to not being able to breathe.
>
> Q. Okay. And from – since that episode that you're describing on that February of 2013 time frame, between that and June of 2013 when you started on this job site did you have to use your inhaler?
>
> A. No, ma'am.
>
> Q. Okay, Did you have your inhaler with you when you were working on this job site?
>
> A. Yes.
>
> Q. Okay did you use it?
>
> A. Yeah, I did actually. I started using it the second day I was there.

HT 1 at 49, 50.

With regard to the ALJ's description of Claimant's testimony at the first hearing as "evasive", as previously noted, Claimant asserts:

> There was nothing evasive about his testimony at the cited passages and the ALJ writing this Compensation Order is not entitled to deference on this finding because a different ALJ presided over that hearing.

Claimant's Brief at 7.

We agree with Claimant regarding this assertion and we further agree that there is a lack of evidence in the record to support the ALJ's finding that claimant did not produce credible evidence of an injury or disability and a work-related event, activity or requirement which has the *potential* of resulting in or contributing to death or disability. *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987). We agree with Claimant that referring to medical records in 2006 and

Claimant's statement that he was out of inhalers in 2012 does not contradict his testimony that he was not using inhalers prior to the week of June 24 and July 1, 2013.

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. *See* D.C. Code § 32-1521.01(d)(1)(A). 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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

This Panel is mindful that in our decision in *Storey, supra*, we affirmed a denial of benefits made by AHD because the ALJ determined the Claimant (Storey) had not produced credible evidence that she suffered a work related injury. We find, instead, the facts of the instant matter are consistent with those in *Murray v. DOES*, 765 A.2d 980 (D.C. 2001) (*Murray).*

> In *Murray*, the court found fault not with the ALJ's denying the benefit of the presumption because the ALJ doubted the claimant's veracity; rather, the error it found was that the lack of credibility finding was premised upon a demonstrably erroneous reading of the evidence. The court remanded the matter for further consideration as to whether, in the absence of this erroneous reading of the record, the ALJ would reach the same conclusion. And this is sensible: there would be no legitimate reason for the presumption of compensability to be invoked based upon evidence that is not credible. Otherwise put, "some evidence" can reasonably mean "some credible evidence".

Storey at 6.

In some instances, such as *Storey*, a total lack of credibility may be sufficient to deny invocation of the presumption. However, in most cases, such as the present case, where a credibility determination must be made on inconsistent or conflicting evidence, the presumption should be invoked, and the effect of the inconsistent evidence comprising the complex and nuanced credibility analysis is to considered at the evidentiary-weighing third step.

We conclude the ALJ's determination that claimant did not provide credible testimony is not supported by substantial evidence in the record. We cannot affirm her determination that Claimant has failed to invoke the presumption as we conclude there is sufficient evidence in this record to invoke the presumption.

CONCLUSION AND ORDER

The determination that Claimant did not invoke the presumption is reversed as it is not supported by substantial evidence and not in accordance with the law. The matter is remanded to AHD for

findings of fact and conclusions of law as to whether Employer has rebutted the invoked presumption and if not, consideration of the remaining issues of the nature and extent of Claimant's disability and the medical necessity of Claimant's medical treatment.

So ordered.