

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-140

LUZ M. DANIELSEN-SCHNEIDER,

Claimant–Petitioner,

v.

SODEXHO, INC. AND GALLAGHER BASSETT SERVICES,

Employer and Carrier-Respondents.

Appeal from a Compensation Order by
The Honorable Gerald D. Roberson
AHD No. 12-215, OWC No. 677148

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 SEP 18 AM 11 17

Michael Kitzman, Esquire for the Petitioner
Barry Bernstein, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ HENRY MCCOY, and MELISSA LIN JONES *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the July 30, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for disability benefits, payment of causally related medical expenses, and interest. We AFFIRM.

¹Judge Heather C. Leslie is appointed by the Director of DOES as an interim Compensation Review Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a server captain for the Employer. The Claimant also had a second job as a bartender with another employer. On December 11, 2010, the Claimant injured her right hand when attempting to catch a box filled with bottles. The Claimant allegedly hurt her right hand and right thumb. The Claimant sought medical treatment on December 13, 2010 with the physicians at Kaiser Permanente. While noting a prior diagnosis of carpal tunnel syndrome, no mention was made of any new injury. The Claimant continued to receive treatment and underwent a right carpal tunnel release on March 2, 2011. The Claimant missed time from work at both jobs while undergoing treatment and recovering from surgery.

On November 8, 2011, the Claimant underwent an independent medical evaluation (IME) with Dr. Michael Franchetti. Dr. Franchetti took a history of the Claimant's injury and performed a physical examination. Dr. Franchetti diagnosed the Claimant with occupationally-related right carpal tunnel syndrome and opined the Claimant suffered from a 34% right upper extremity impairment due to the injury of December 11, 2010.

The Employer sent the Claimant to Dr. Robert Gordon for an IME on January 17, 2012. Dr. Gordon also took a history of the injury and performed a physical examination. Dr. Gordon opined the right carpal tunnel diagnosis was not related to the work injury, but instead to the Claimant's pre-existing condition. Dr. Gordon further opined that the Claimant could work without restrictions.

A Formal Hearing was held on July 11, 2012. At the Formal Hearing the Claimant requested an award of temporary total disability from December 18, 2010 to February 4, 2011 and from March 2, 2011 to March 15, 2011, temporary partial disability from February 5, 2011 to March 1, 2011 and from March 16, 2011 to November 8, 2011, and permanent partial disability of 34% for the right upper extremity, causally related medical expenses and interest. The Employer raised the issues of medical causation of the Claimant's right carpal tunnel syndrome and the nature and extent of the Claimant's disability, if any.

A CO was issued on July 30, 2012. First, the ALJ found the right thumb injury arose out of and in the course of the Claimant's employment.² Secondly, the ALJ found that the Claimant had failed to prove that her right carpal tunnel syndrome was medically causally related to her work injury. The CO denied the Claimant's request for disability benefits in its entirety.

The Claimant timely appealed. On appeal, the Claimant argues that the CO is not supported by the substantial evidence in the record. The Claimant argues that the ALJ was in error in disregarding the opinion of Dr. Franchetti and the physicians at Kaiser Permanente.

The Employer argues that the CO is supported by the substantial evidence in the record and should be affirmed.

² This finding was not appealed by the Employer.

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 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* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (the "Act") at §32-1521.01(d) (2) (A) and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

It is well settled that the Claimant, in order to invoke the presumption of compensability that her injury comes within the act, must show some evidence of work related event, activity or requirement which has the potential of resulting in or contributing to the death or disability. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). Here, the ALJ found the Claimant had satisfied this threshold requirement through her testimony and documentary evidence that the right thumb injury was casually related to her work injury, a finding that the Employer did not appeal. The ALJ also found that the Employer had rebutted the presumption of compensability through Dr. Gordon's opinion.³ The Claimant does not appeal this finding.

The ALJ then correctly notes that as the statutory presumption had been rebutted, the evidence is then weighed without benefit of the presumption and found the Claimant had failed to prove her condition was medically causally related to the work injury. The Claimant argues this is in error as the opinion of Dr. Franchetti that the work injury aggravated her pre-existing condition is consistent with the testimony of the Claimant and the symptoms reported to the physicians at Kaiser Permanente. The Claimant further argues that the opinion of Dr. Gordon should be discredited as he did not know how "severe the injury was" and his opinion does not constitute substantial evidence. We disagree.

First, the ALJ correctly notes that neither Dr. Gordon or Dr. Franchetti are treating physicians, thus the statutory preference does not apply to either opinion.⁴ CO at 7. Further, a review of the Compensation Order reveals that when addressing the various medical opinions presented, the ALJ stated,

³It is well settled that the Act's presumption of compensability operates only "in the absence of evidence to the contrary." In *Ferreira*, the District of Columbia Court of Appeals (DCCA) held, that "[o]nce the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." *Ferreira, supra*, at 655; *Parodi v DOES*, 560 A.2d 524, 526 (D.C. 1989); *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001). Where the Employer has presented evidence "specific and comprehensive" on the question of causality, the presumption falls from the matter and the conflicting evidence is weighed without reference thereto.³ *Ferreira, supra*.

⁴ In the District of Columbia, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *see also, Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

The treating physicians from Kaiser Permanente have not offered an opinion concerning medical causation, and the records from Kaiser do not demonstrate the physicians were aware Claimant sustained an injury on December 11, 2010. On December 13, 2010, Claimant sought medical treatment from Kaiser for bilateral hand numbness and tingling with weakness. CE 2, p. 3. Claimant did not mention the work incident of December 11, 2010, and the physician did not offer any findings in connection with the events of December 11, 2010. The physician merely noted previous clinical findings of carpal tunnel syndrome, and recommended a MRI of the cervical spine again. CE 2, p. 3. Claimant underwent the MRI of the cervical spine on December 29, 2010, which was normal. CE 2, p. 47. A subsequent nerve conduction study revealed the presence of bilateral carpal tunnel syndrome. CE 4, p. 54.

Dr. Shirali provided follow-up treatment on January 4, 2011. The medical history described Claimant as a right-handed supervisor for banquets/Sodexo, seeking consultation for bilateral hand numbness. The physician indicated this started 3-4 years ago, was intermittent and then got worse December 2010. Dr. Shirali does not attribute Claimant's worsening to any work events, and he does not appear to be aware of the mechanism of the injury associated with the work incident of December 11, 2010. Dr. Shirali diagnosed bilateral carpal tunnel syndrome, and Claimant elected to have surgery. CE 2, p. 17. Dr. Shirali performed a right carpal tunnel release on March 2, 2011. CE 2, p. 27 and CE 3. Claimant had post-operative follow-up treatment on March 9, 2011, which indicated the numbness was better, but Claimant had continued soreness. CE 2, p. 34. Claimant received a medical release to return to work on March 15, 2011. Her treating physicians never offered an opinion regarding the medical causation of her right carpal tunnel syndrome and release to the work incident of December 11, 2010.

While Dr. Franchetti medically related the right carpal tunnel syndrome condition to Claimant's employment, his assessment lacks sufficient medical rationale to resolve the issue. Dr. Franchetti does not even provide a description of the work incident in question to establish a foundation for his assessment. He offered no medical history with respect to the mechanism of the injury. CE 1, p.1. Dr. Franchetti documented preexistent findings of carpal tunnel syndrome, and he merely noted her condition "worsened in December 2010." CE 1, p. 1. Dr. Franchetti does not explain what caused Claimant's condition to worsen in December 2010, and he does not specifically mention any employment factors. As such, his report does not offer sufficient medical history and findings to medically causally relate Claimant's condition to the work incident of December 11, 2010.

CO at 7-8.

After summarizing the above, the ALJ gave several reasons why he found the opinion of Dr. Gordon more persuasive. We find no error in the above analysis and affirm the finding that the

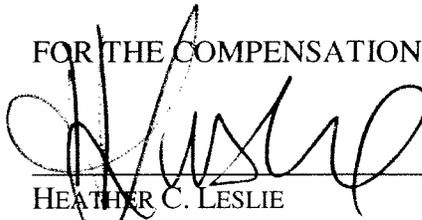
Claimant's right carpal tunnel syndrome and corresponding need for surgery is not medically causally related to the work injury.

What the Claimant is in essence asking us to do is to re-weigh the evidence in favor of the Claimant, finding the opinion of Dr. Franchetti more persuasive over that of Dr. Gordon. This we cannot do. The CO's finding that the Claimant had failed to prove her right carpal tunnel syndrome was medically causally related to the injury of December 11, 2010 is supported by the substantial evidence in the record.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the July 30, 2012 Compensation Order is supported by substantial evidence in the record. It is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

September 18, 2012

DATE