

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 09-134

DANA C. HALLMON,

Claimant-Petitioner/Cross-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insurer Employer-Respondent/Cross-Petitioner.

Appeal from a Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 09-028, OWC No. 644460

Michael J. Kitzman, Esquire, for the Petitioner/Cross-Respondent
Donna J. Henderson, Esquire, for the Respondent/Cross-Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and LAWRENCE D. TARR, *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 §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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Overview

These appeals follow the issuance on July 31, 2009 of a Compensation Order (CO) addressing claims in connection with two consolidated workers' compensation claims, one for an injury claim dated November 29, 2006 and designated Office of Workers' Compensation (OWC) claim number 635146, and the other for an injury dated April 30, 2007 and designated OWC number 644460.

Claimant, who is both Petitioner and Cross-Respondent (referred to hereinafter as Claimant), presented a unified claim for temporary total disability (TTD) benefits from and after August 15, 2007, alleging that her disability was caused by one or both of the claimed injuries. Employer, which is both Respondent and Cross-Petitioner (hereinafter Employer), denies that Claimant sustained a work related injury on April 30, 2007, denies that Claimant gave adequate and timely notice of the alleged April 30, 2007 injury, denies that Claimant is temporarily totally disabled as claimed, and denies that any disability from which Claimant actually suffers is medically causally related to either the stipulated work injury of November 29, 2006, or the disputed work injury of April 30, 2007.

In the CO under review, the Administrative Law Judge (ALJ) determined that Claimant's proof, despite being sufficient to invoke the presumption of compensability, ultimately failed to support the rebutted claim of having sustained a work injury on April 30, 2007. The ALJ did find that any disability from which Claimant suffers is causally related to the November 29, 2006 injury. However, the claim for TTD benefits was ultimately denied because the ALJ determined that Claimant failed to demonstrate the nature and extent of her alleged disability by a preponderance of the credible evidence. Claimant timely appealed.

Claimant argues that the ALJ's determination that she failed to demonstrate that she sustained an accidental injury on April 30, 2007 is unsupported by substantial evidence and is not in accordance with the law. Claimant also argues that the denial of her claim for disability benefits based upon a failure to produce sufficient evidence to carry her burden is likewise not in accordance with the law because she did produce adequate evidence to support the claim.

Employer filed an opposition to Claimant's appeal arguing that failing to demonstrate an April 30, 2007 compensable work injury and failing to prove the nature and extent of her disability in connection with the November 29, 2006 work injury are supported by substantial evidence and thus in accordance with the law. Included in the opposition is Employer's cross appeal of the determination that Employer's independent medical evaluation (IME) evidence failed to rebut the presumption that Claimant's current disability, if any, is medically causally related to the stipulated work injury of November 29, 2006.

Claimant filed an opposition to the cross appeal arguing that the ALJ properly determined that Employer's IME was insufficiently specific and comprehensive to overcome the medical causal relationship presumption.¹

¹ On September 30, 2009, Claimant filed "Claimant's Motion to File Opposition to Cross-Application Out of Time". As Employer's cross-application had been filed on September 15, 2009, 7 DCMR § 258.13 required Claimant to file any response within five (5) calendar days; in this case by September 20, 2009. In the motion, Claimant claims the reason for untimely filing was due to "error and inadvertence" in mistakenly calendaring when the opposition was due and that she would incur prejudice if the filing was not accepted and that no prejudice would inure to Employer. As failing to file timely due to mistakenly calendaring when a filing is due is not considered

ANALYSIS

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. Workers' Compensation Act of 1979, as amended, § 32-1501 *et seq.*, 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. D.C. Dept. of Employment Services*, 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 if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

There are three separate issues to be addressed in this appeal.

First, in the CO, the ALJ determined that, although Claimant presented sufficient evidence to invoke the presumption of compensability in connection with the April 30, 2007 claim, Employer had rebutted that presumption. The ALJ then weighed the evidence in the absence of the presumption and held "I find Claimant's total lack of contemporaneous corroborating evidence of a work related occurrence or injury fails to support her claim of a compensable injury under the Act", and that "In weighing the evidence presented, I find that Claimant has failed to show by a preponderance of the evidence that the injury she sustained occurred while she was at work or that it occurred as a result of her work duties." CO at 7. The ALJ went on to state that "with the issue of causal relationship to the April 30, 2007 work incident dropped from this matter the issue of notice and medical causal relationship with regards to this incident is moot." *Id.*

Claimant argues that her testimony of the events occurring on April 30, 2007 especially with reference to the poorly functioning bus brakes that formed the basis of her injury claim was corroborated and confirmed by Employer's witness, Donna Moore. Claimant contends further that Ms. Moore's testimony that she had "no recollection" of Claimant alleging that she was injured at that time is the only evidence proffered by Employer in contravention of the claim of such an injury having been sustained on that date; and further argues that this evidence is not "substantial evidence" in opposition to the claimed event having occurred.

Employer disagrees and argues that the ALJ's determination in this regard is supported by substantial evidence. Employer argues that not only does Claimant inaccurately portray Ms. Moore's testimony by characterizing her denial that Claimant advised her of any injury as testimony that she merely had no recollection of, but also that other evidence supports the ALJ's conclusion. Employer points to the fact that Claimant was "out sick" on May 4, 2007, which is

good cause and as the regulations do not contemplate or require a showing of prejudice that would ensue to either party, the motion is denied and Claimant's "Memorandum of Points and Authorities in Opposition to Employer's Cross-Application for Review" filed out of time on September 30, 2009 is not accepted and will not be considered in the instant appeal.

the date that one of her treating physicians listed as being the date she injured herself; to the IME report of Dr. Mark Rosenthal in which he asserts that nothing “occurred while driving a bus in May of 2007” would cause a patient to experience the complaints that Claimant describe; and that the ALJ found Claimant’s testimony to be lacking in credibility.

In reviewing the CO, it appears the ALJ has conflated the question of accidental injury with causal relationship. While issues of “legal causation”² are often sometimes implicated in “accidental injury” disputes, there does not appear to be any such scenario here. The entirety of the evidence cited by the ALJ in determining that Employer rebutted the presumption of compensability consists of medical documents and the fact that they don’t refer to April 30th. Rather, the ALJ notes, one medical record, from Dr. John Byrne dated May 24th, refers to the work injury as having occurred May 4th, and the other (a medical note attached to a Return to Duty Evaluation form dated May 14th) makes no reference to “April 30”. The ALJ also notes that the medical note attached to that form doesn’t include any reference to a work related injury.

Based upon this evidence, we take issue with the ALJ’s conclusion that “a reasonable mind” would be allowed to accept the proposition that Employer had rebutted Claimant’s testimony to the effect that on April 30th she was operating a bus with poorly functioning brakes, which caused her to have to repeatedly apply great amounts of pressure, until it reached the point where she needed to call her superiors and a replacement bus brought to the scene; that while depressing the brake she felt a distinct “popping” in her back followed by the onset of low back pain; that she reported the pain to the depot desk clerk (an Employer representative at the bus yard); and that she worked the remainder of the week but by May 4th her pain was so bad that she left work and sought treatment from Dr. Dotson and Dr. Byrne.³

This is the evidence that the ALJ relied upon to invoke the presumption. A single medical report, authored three weeks later containing a wrong date for the initial injury does not, on this record, constitute evidence sufficiently specific and comprehensive to overcome the presumption. This is particularly true where the erroneous date is the date that Claimant and Employer agree is the last date she worked, and was less than a week after the claimed date of injury. There is no question that the brake failure scenario occurred. There is no doubt that by May 24th Claimant was complaining of low back pain to Dr. Byrne, and that she attributed that pain to the excess pressure she had to apply to the failed brakes. At this juncture (that is, at this point in the ALJ’s analysis), the only rebuttal evidence considered was the one minor and easily explicable error in Dr. Byrne’s report.

While the ALJ’s analysis might be excused as harmless error, in that she went on to review a wider array of the record evidence, and ultimately determined that a “lack of corroborating contemporaneous reporting” led her to conclude that Claimant had not sustained “a

² There are, for example, cases where causation is framed as a dispute over “arising out of and occurring in the course of the employment”, where “but for” causation analysis is required. *See, e.g., Kolson v. DOES*, 699 A.2d 357 (D.C. 1997). And, there are legal causation issues where it is argued that a secondary injurious event such as falling down a set of stairs forms the basis for claims not medically caused by the initial work injury, but which may nonetheless be compensable as being legally causally related to a work related injury.

³ The ALJ wrote that Claimant sought treatment from Dr. Dotson; while in her testimony, Claimant testified she sought treatment from Dr. Byrne. HT 36.

compensable injury under the Act". However, the ALJ also determined that Claimant failed to show that "the injury she sustained occurred at work or that it occurred as a result of her work duties". These are at least facially inconsistent. We must remand for the ALJ to further consider the evidence, properly apply the presumption and rebuttal analysis, and if the presumption is rebutted, to re-weigh the evidence on the issue in its entirety as a whole and make specific and consistent findings of fact and conclusions of law concerning whether Claimant sustained a work related injury on April 30, 2007.

Regarding the second issue on appeal, the ALJ proceeded to consider the claim in connection with the stipulated work injury of November 29, 2006. The ALJ first determined that, because of the stipulation, Claimant was entitled to the benefit of the presumption that any current disability is causally related to that injury and is therefore presumed to be compensable.⁴ The ALJ then considered the contents of Employer's two IMEs, as well as the medical reports of Dr. Hampton Jackson (repeatedly referred to in the CO as Dr. Hampton). Dr. Jackson treated Claimant for a non-work related injury sustained while attending a circus performance, which had kept her out of work for over three and a half years preceding October 2006. Based on this evidence, the ALJ concluded Employer had failed to adequately rebut the presumed causal relationship between the November 26, 2006 work injury and the current disability.

Employer, in its cross appeal, seeks reversal of this determination, arguing that its IME reports and the deposition testimony of Drs. Rosenthal and Johnson are sufficient under *Reynolds*⁵, to overcome the presumption, and that, despite the ALJ's ultimate conclusion that Claimant had failed to demonstrate entitlement to the claimed TTD, the matter must be remanded for reconsideration and entry of an order issued after consideration of the evidence under a preponderance of the evidence standard.

The District of Columbia Court of Appeals (DCCA) has held that where the record demonstrates that an IME physician has performed a personal examination of a claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion that the work injury did not contribute to the disability, this is sufficient to rebut the presumption.⁶

It is clear from reading the reports of Dr. Johnson alone, at EE 1 (an initial report and an addendum authored after reviewing records not made available to him at the time of his initial report), that Employer has overcome the presumption that Claimant's alleged current disability is causally related to the work injury of November 29, 2006. The doctor describes a personal examination of Claimant in detail, recites accurately and fully (when considering both documents) the pertinent medical records, and renders the opinion that Claimant had sustained:

neck and back strain from the injury of November 29, 2006
superimposed on a preexisting degenerative disk disease of the lumbar

⁴ *Whittaker v. DOES*, 531 A.2d 844 (D.C. 1995).

⁵ *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004)(*Reynolds*).

⁶ *Id.*

spine, with resolution of symptoms from the November 29, 2006 injury by March 22, 2007 and with re-aggravation of symptoms in May 2007 unrelated to the injury of November 29, 2006. [...] I believe that the patient's current symptoms are causally related to the activities that occurred in May 2007 and *not due to the injury that was sustained on November 29, 2006*. [...] I believe that...her current symptoms are related to *degenerative disc disease aggravated by the activities occurring in May 2007 and not related at all to the temporary aggravation she sustained on November 29, 2006*.

EE 1, Report of December 3, 2007 (emphasis added).

As Dr. Johnson's report meets the test enunciated by the DCCA in *Reynolds*, we must remand this matter in order to permit the ALJ to consider the evidence anew. We are not unaware of the fact that this same evidence assumes an injury occurred on or about "the week of May 4, 2007", which is, of course, a reference to the claimed injury of April 30, 2007. We note however, that Dr. Johnson's opinion *vis a vis* the resolution of the aggravation (referring clearly to the aggravation of the preexisting degenerative disc disease) brought about in November 29, 2006 was temporary and had resolved by March 22, 2007. Thus, the ALJ's finding, if made on remand, that Claimant did not sustain a compensable work injury on April 30, 2007 does not necessarily conflict with a finding that the November 29, 2006 injury had resolved and is unrelated to any current claimed disability.

Finally, the third issue to be addressed on appeal is the ALJ's resolution of the nature and extent of Claimant's disability. Noting that it was Claimant's burden to make this showing by a preponderance of the evidence⁷, the ALJ reviewed the evidence concerning the relative lack of severity of the November 29, 2006 bus accident, the incredible nature of Claimant's testimony, the fact that her expert medical evidence was premised in large part upon her incredible and inconsistent version of the events, her purposeful omission from her medical histories of the three and a half years she was off work due to the sequelae of the non-work related injury, and the intentional omission of discussion and consideration of that history by the doctor who treated her for that injury, and concluded that Claimant had failed to produce "credible evidence of her continued total disability", and denied the claim. The ALJ explicitly declaimed reliance upon the IME opinions, citing their being fraught with inaccuracies and error, brought about by Claimant's providing them and other physicians upon whose reports they relied with misinformation.

Claimant appeals this denial arguing that the medical evidence is sufficient to support her claim for TTD, and that, being "uncontradicted", her evidence is by definition "substantial evidence", citing *Wallace v. District Unemployment Compensation Board*, 294 A.2d 177 (1972); *Graddick v. Configuration, Inc.*, Dir. Dkt. No. 00-24, OHA No. 00-19, OWC No. 505701 (November 28, 2000); and *Taylor v. Sears, Roebuck & Co.*, Dir. Dkt. No. 96-96, OHA No. 93-285, OWC No. 236937 (February 23, 1997). Claimant further argues that the ALJ relied "largely" upon "questions" regarding the prior non-work related injury, which in Claimant's view improperly ignored the aggravation principle.

⁷ *Dunston v. DOES*, 509 A.2d 109 (1986).

Employer supports the ALJ's decision, asserting that the decision was fundamentally a matter of determining credibility and that in this case the negative view of the credibility of Claimant and her treating physicians is justified and explained adequately. Employer also argues that its IMEs supply additional support for the ALJ's decision.

The cases cited by Claimant do not stand for the proposition that "uncontested evidence is substantial evidence" in all cases and at all times, nor of a claimant's burden to produce "substantial evidence" of the level of disability. Rather, it is a claimant's burden to present a preponderance of the credible evidence to support the claimed level of disability. Failure to produce credible evidence on an issue where one has the burden of proof is tantamount to failing to produce a preponderance of the evidence.

Evaluation of the evidence, including evaluation of a witness's credibility and assessment of how a lack of credibility by a claimant impinges upon the credibility of medical opinion based upon the information provided by a non-credible claimant, are almost exclusively within the province of the ALJ, and will not be disturbed by us unless they are clearly wrong. Simply put, the ALJ determined that Claimant's entire TTD claim was premised upon her own non-credible testimony, and medical opinion that was either suspect itself (i.e., intentionally misleading in the case of Dr. Bymes' opinions), or fatally flawed due to Claimant's misrepresentations or omissions concerning her significant, highly relevant and apparently quite severe prior back injury sustained in the circus incident (as is the case with Dr. Joshua Ammerman, Dr. Myers, and Drs. Phillips and Green).

While we do not necessarily agree with the assessment and analysis of the ALJ regarding the validity of Claimant's medically expressed disability opinions, we can not say that they are clear error. Further, there is no doubt that Claimant's medical evidence does, in fact, suffer from the infirmities that the ALJ assigned to it. We therefore affirm them at this time.

CONCLUSION

The evidence cited by the ALJ was insufficient to overcome the presumption of compensability in connection with the injury claimed to have been sustained on April 30, 2007, and the conclusions drawn by the ALJ concerning that injury are inconsistent, conflicting and appear to concern at least in part the issue of medical causal relationship, a separate issue distinct from whether Claimant sustained a work related injury on that date. The finding that Claimant did not sustain an accidental work injury on April 30, 2007 is reversed.

The finding of the ALJ that Employer failed to produce adequate evidence to overcome the presumption that Claimant's current disability, if any, is causally related to the work injury of November 29, 2006, is not in accordance with the law, and is reversed.

The finding of the ALJ that Claimant failed to adduce sufficient evidence to support entitlement to the claimed temporary total disability award is affirmed.

ORDER

The findings that Claimant did not sustain an accidental work injury on April 30, 2007, and that Claimant's disability, if any, is causally related to the work injury of November 29, 2006, are reversed, and the finding that Claimant failed to adduce sufficient evidence to meet her burden of establishing entitlement to the claimed temporary total disability is affirmed. This matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

October 12, 2011

DATE