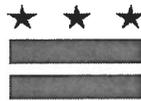


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-175

**DANISHIA WHATLEY,
Claimant–Petitioner,**

v.

**SPECIALTY HOSPITAL OF WASHINGTON and PMA INSURANCE,
DEANWOOD REHABILITATION CENTER and CHARTIS CLAIMS, INC.,
Employers/Carriers–Respondents.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 APR 14 PM 9 24

On Appeal of a September 30, 2015 Compensation Order on Remand
by Administrative Law Judge Gregory P. Lambert
AHD No. 14-057, OWC Nos. 699915 and 706629

(Decided April 14, 2016)

Krista N. DeSmyter for Claimant
Joel E. Ogden for Employer Specialty Hospital of Washington
Douglas A. Datt for Employer Deanwood Rehabilitation Center ¹

Before JEFFREY P. RUSSELL and HEATHER C. LESLIE, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Danishia Whatley (Claimant) injured her leg in a non-work related kickboxing accident in November 2011. An MRI taken following that injury revealed what the radiologist interpreted as a possible torn ACL in her left knee. Her knee was put in an immobilizer for approximately a month, and she missed some time from work from her then-employer, which was neither of the employers in this case.

¹ Mr. Datt replaced Jane Gerbes as counsel for Deanwood Rehabilitation Center by letter submitted September 16, 2015.

Claimant became employed as a Certified Nursing Assistant (CNA) by Specialty Hospital of Washington (Specialty) in 2012. Her average weekly wage was \$517.18.

A few months after obtaining that job, on January 5, 2013, Claimant slipped on water in a patient's room and fell on her back. She treated the following day and again on January 8, 2013 at Bowie Health Center. The records from these treatments make reference to "severe pain in her back" as well as pain in her right knee, and a history of chronic knee problems including "her knee giving out". She was referred to a Certified Nurse Practitioner for follow-up care, and eventually came under the care of Dr. Leonid Selya, a spine specialist. Dr. Selya and his colleagues at Capital Orthopedics provided medical treatment. Although a left knee examination was performed during the course of her care, no treatment was rendered concerning the knee, and no restrictions on activity were ever imposed relating to the knee while Claimant was under Dr. Selya's care.

Claimant was seen and evaluated by Dr. Kevin Hanley on April 8, 2013, at the request of Specialty, for the purpose of an independent medical evaluation (IME), and he authored an IME report. In it, he observed that Claimant was found to have full range of motion and no swelling or effusion in the either knee. He opined Claimant had sustained a minor contusion to her left knee, that she should restrict her activities to 20 pounds of lifting, and refrain from bending, pushing or pulling. He further opined that Claimant's strength and reconditioning would be improved by a 3 week course of physical therapy. His report also suggests that an MRI would be required to determine if the knee condition represented anything more than a simple contusion and strain injury. However, he made no reference to the prior non-work-related kickboxing injury or to the MRI that was taken in conjunction with that injury.

In a knee examination performed on January 31, 2013, Dr. Selya found a normal range of motion, and there are no additional references to Dr. Selya examining or treating the knee before release of Claimant from his further care on May 9, 2013.

Dr. Hanley authored an addendum to his IME report on May 24, 2013 without reviewing any additional medical records or further examining Claimant. In it he restated his view that if Claimant undergoes the recommended physical therapy her knee condition would resolve. Again, there was no reference to any prior knee injury sustained while kickboxing.

Claimant failed to show up for work on June 5, 6 and 7, 2013, and was terminated from employment.

Claimant started working as a CNA at Deanwood Rehabilitation Center (Deanwood) on June 10, 2013, earning an average weekly wage of \$440.00.

Two weeks later, while working at Deanwood on June 25, 2013, Claimant again slipped and fell on water, landing on her left knee. Claimant sought care for this injury at Concentra, where her injury was diagnosed as a contusion. She was advised to attend physical therapy but did not regularly attend due to child care issues. She was released to return work in a light duty capacity. After initially not returning to work, Claimant did, to a position in the laundry. Although the job

required a lot of standing, when she complained that standing caused problems with her knee, she was permitted to sit for breaks.

On July 22, 2013, the physician's assistant (PA) overseeing her care at Concentra concluded that Claimant's work-related contusion had resolved and that Claimant was no longer restricted in her activities due to the contusion. At that time, Claimant advised the PA that she was scheduled to see an orthopedist concerning surgery for the kickboxing injury, and the PA advised her to follow up on that.

Also during that month, Claimant began working for a new employer, Unique Residential Care (Unique), as a CNA. Although standing while performing her job gave her knee pain, sitting breaks were allowed for the job. This position paid \$10.50 per hour. Claimant left the job as a result of a death in the family, and although she was advised by Unique that she could return to the position, she chose not to do so.

During that month, on July 29, 2013, Claimant injured her low back in a non-work-related automobile accident, and obtained medical care from Dr. Selya at Bowie Health Center.

The following month, Claimant saw Dr. Stephen Webber, a member of the same practice group as Dr. Selya. Although she advised Dr. Webber that she had a suspected ligament tear in her left knee from the kickboxing incident, she also stated that she had slipped and fallen at work falling on her left knee, leading Dr. Webber to write "so this is a workers' compensation injury". CE 5. At that time he advised her to obtain rehabilitative therapy, for which approval would be awaited from the compensation carrier.

Thereafter Claimant obtained new employment as a cashier at Restaurant Depot. She held that job for approximately two months, but after an incident between herself and her supervisor, she was sent home and advised to wait for a call concerning when she could return to work. No call came.

On January 13, 2014, Dr. Hanley performed a second examination of Claimant, and was made aware at that time that Claimant had sustained the injury while employed at Deanwood on June 25, 2013. He authored a new IME report in which he wrote:

In talking with Ms. Whatley today and going over the medical records with her, she readily admits that it was the [Deanwood] injury of June 25, 2013 that has led to the current level of symptomatology in the knee she is having today. She agrees that she was not having significant knee problems at that [sic] time of that accident. Therefore one would have to assume that the [Specialty] incident of January 5, 2013 temporarily aggravated her preexisting condition [the torn ACL from kickboxing] that dates back to 2011 and that the temporary aggravation had resolved by the time she had the new accident on June 25, 2013. It would appear based on the examination today which exposes an effusion within the knee, that that incident which again has aggravated her underlying problem, has not yet resolved.

Claimant sought awards of additional medical treatment for her left knee and temporary total disability benefits from June 25, 2013 and ongoing and causally related medical care for her left knee at a formal hearing before Administrative Law Judge (ALJ) David L. Boddie on January 23, 2014.

While awaiting ALJ Boddie's decision, in the spring of 2014, Claimant began working as a communications assistant at Anne Arundel Medical Center (AAMC), in a full time sedentary job paying \$11.00 per hour. She left that position to focus on her studies.

During this time, Claimant also worked at Southern Maryland Hospital as an emergency registrar. This full time position, which paid \$14.00 per hour, required standing and walking, but also permitted sitting at times. Claimant left that job for the same reason that she left the AAMC job, to further her professional education.

In November and December 2014, Claimant entered and completed an externship at Concentra Urgent Care, performing venipuncture, pulmonary function tests, audiograms, EKGs, and other medical technical tasks. By the end of December 2014, Claimant completed the program and obtained the certificate.

Judge Boddie left the employ of the Department of Employment Services (DOES) without issuing a Compensation Order. The matter was re-assigned to ALJ Gregory P. Lambert. Claimant sought a new hearing rather than have Judge Lambert decide the case based solely upon the record created at the January 23, 2014 formal hearing. Therefore, a second formal hearing was held January 22, 2015 before Judge Lambert. At that time the claim for relief was amended to include temporary total disability from June 25, 2013 through July 4, 2013, and from July 19, 2013 to the present and continuing

On March 27, 2015, Judge Lambert (hereinafter, the ALJ) issued a Compensation Order (CO) denying the claims based upon his finding that there is no causal relationship between Claimant's ongoing knee complaints and either of the work injuries at issue in this case, and finding that Claimant was capable of returning to work at several jobs that she "was able to perform" which "demonstrated she suffered no wage loss" during the period claimed. The ALJ also determined that Deanwood is responsible for medical care related to Claimant's left knee contusion, but not for medical expenses related to the degenerative condition and ACL tear in the left knee. Compensation Order at 11.

Claimant filed an Application for Review (AFR) and a memorandum of points and authorities in support thereof (Claimant's Brief) seeking reversal of the CO and entry of an award of the claimed benefits. Claimant argued that the CO is unsupported by substantial evidence, and that the ALJ misapplied the law.

Both Specialty and Deanwood filed oppositions to the AFR and memoranda of points and authorities in support thereof (Specialty's Brief and Deanwood's Brief, respectively), arguing that the facts as found in the CO are supported by substantial evidence and are in accordance with law, and asked that the CO be affirmed.

On September 10, 2015, the Compensation Review Board (CRB) issued a Decision and Order affirming the CO.

On September 15, 2015, Claimant filed a Motion for Reconsideration, arguing that it was evident that the CRB did not have before it the full record when it considered the appeal, because in addressing Claimant's arguments regarding causal relationship based upon a medical report from Dr. Hanley, the Decision and Order stated that certain of Claimant's description of Dr. Hanley's reports was demonstrably inaccurate.

Claimant's Motion for Reconsideration correctly argued that the record the CRB reviewed when the initial Decision and Order issued did not include consideration of the IME report from Dr. Hanley dated January 13, 2014 which, while not being included in Claimant's hearing exhibits, was included and indexed as Specialty's Exhibit 1 in its second submission of exhibits for the second formal hearing in this case.

Therefore, in a Decision and Remand Order on Reconsideration (DROR) issued September 24, 2015, the Motion for Reconsideration was granted, the portion of the CO concerning the causal relationship between Claimant's left knee and the Deanwood accident affirmed in Decision and Order of September 10, 2015 was vacated, and the matter was remanded to AHD with the following relevant language:

We have concluded that, in this case, it was error for the ALJ to fail to address the IME report of Dr. Hanley. Although the report was not offered by Claimant as an exhibit, it was referred to and relied upon by Claimant in closing argument, the ALJ made a factual finding that Dr. Hanley performed an IME that day, and it is the only opinion from a physician in the record who (1) addresses the question of causal relationship of the current knee condition to either injury and (2) had knowledge of and considered the effects and events surrounding both work injuries at issue and the pre-existing kickboxing injury.

The ALJ in this case specifically included Dr. Webber's ignorance of the second injury as a reason for rejecting his opinion. While we acknowledge that an ALJ is not required to inventory the evidence considered and describe each and every document or bit of testimony that was or was not accepted, we also must remember that a party is entitled to have each of its articulated and evidentially supported arguments considered. While Claimant didn't discuss this particular argument at length at the formal hearing, it is supported by evidence, and that evidence appears to be the only opinion in this record on this question expressed by a doctor with knowledge of both injuries. Accordingly, we must remand the matter for further consideration, with instructions that the ALJ address Dr. Hanley's opinion.

DROR at 8.

The DROR then concluded:

CONCLUSION AND ORDER

The denial of any claim for temporary total disability benefits against Specialty is supported by substantial evidence and is affirmed. The failure to consider the contents of the medical reports of Dr. Hanley concerning possible aggravation of Claimant's pre-existing left knee condition was error. The matter is remanded for further consideration of Claimant's claim that the left knee condition was aggravated by the Deanwood accident, and if so, for a determination as to whether Claimant is entitled to temporary partial disability for the periods described above and the amount of such entitlement, if any, and given that there was no issue concerning the reasonableness and necessity of medical care, to grant the request therefor if causal relationship is found to be established.

DROR at 11.

On September 30, 2015, the ALJ issued a Compensation Order on Remand (COR) again determining that the Deanwood incident did not cause Claimant's alleged left knee condition, and denied her claim for benefits associated with that claimed injury.

Claimant filed an Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief), appealing the COR to the CRB.

In Claimant's brief she asserts "any previous arguments of error and arguments made in her prior memorandum filed in this matter before the CRB" are raised again by reference. Claimant also raised new arguments not previously raised and/or expanded upon those previously raised and rejected arguments, as well as arguing that the ALJ's rejection of Dr. Hanley's January 13, 2014 report and opinion was unsupported by substantial evidence and should be reversed.

Employer Specialty filed a Response to Claimant's Application for Review (Specialty's Response) and Deanwood filed an Employer Deanwood Rehabilitation Center and Insurer PMA Insurance Group's Opposition to Opposition to Claimant's Application for Review and a memorandum of points and authorities in support thereof (Deanwood's Brief).

Because the rejection of Dr. Hanley's IME opinion is supported by substantial evidence, we affirm the COR.

ANALYSIS

Preliminarily we note that to the extent that Claimant raises new arguments other than that the ALJ failed to adequately consider Dr. Hanley's January 13, 2014 IME report, or adds additional bases for any other argument concerning the validity of the original Compensation Order, whether previously raised or not, such additional or new arguments will not be considered and shall be deemed to have been waived by the failure to raise said arguments or bases in the original Application for Review.

Further, we reincorporate our original determinations concerning all arguments and issues as contained in our original Decision and Order, with the exception of those explicitly set forth in the DROR as being vacated for the reasons set forth in that order, but including those set forth above in the Background section of this Decision and Order, which are as reflected in the DROR.

Turning to the substance of this appeal, we set forth the language used by the ALJ to address the CRB mandate:

Dr. Hanley's report was reviewed and cited in the Compensation Order.

Although Ms. Whatley told Dr. Webber that her knee problems were aggravated by the January 13 accident, she later attributed her complaints to the June 2013 accident when speaking to Dr. Hanley in 2014. CE 6; SE 1 at 2. She also experienced pain in her left knee when she started at Deanwood. BHT at 40 ("Yes. I still experienced the pain, the pain in the left knee was still, it varied on days"). Prior to June 2013, standing too long triggered symptoms in her left knee. BHT at 41. These statements are inconsistent and I reject her characterizations of when her symptoms began because they are unreliable.

CO at 8. Upon remand, the report has been revisited and considered again. Ms. Whatley's unreliable statements in the report are rejected for the reasons noted above as well as elsewhere in the original Compensation Order. Because Dr. Hanley relies upon Ms. Whatley's unreliable statements, his comments about causation and aggravation are unreliable and rejected. SE 1 at 2; DROR at 2.

The original Compensation Order's analysis is adopted. CO at 7 – 9. Based on my credibility findings and the comprehensive review that I undertook before issuing the Compensation Order, as well as my re-review of the record following the CRB's remand, I find no reason to disturb my findings of fact or conclusions of law. This renewed conclusion explicitly includes consideration of Dr. Hanley's IME. SE 1.

COR at 2.

Claimant's primary arguments against this finding and conclusion are that the ALJ failed to accord her the presumption that her condition is causally related to the Deanwood slip and fall, and the ALJ's reasons for rejecting Dr. Hanley's views are insufficient.

As to the first argument, it appears to us to be rendered specious by her companion argument titled "2. THE COMPENSATION ORDER ON REMAND ERRED AS A MATTER OF LAW IN DETERMINING THAT DEANWOOD HAD REBUTTED THE PRESUMPTION OF COMPENSABILITY OF THE AGGRAVATION OF MS. WHATLEY'S KNEE CONDITION AS A RESULT OF THE DEANWOOD INJURY." Claimant's Brief at 6.

It defies logic to complain that the ALJ had failed to accord the benefit of the presumption, then argue that the evidence the ALJ relied upon to overcome the presumption is inadequate for that purpose.

Regarding the second argument, while Claimant offers reasons why one might disagree with the ALJ's ultimate assessment of Dr. Hanley's opinion, the reasons given by the ALJ are certainly sufficient to rationally conclude as he did. That is, an unreliable medical history from a non-credible patient, relied upon by a non-treating IME physician, and inconsistent or contradictory medical histories given to other physicians by a person deemed non-credible generally by the fact finder, is sufficient justification to reject that opinion.

CONCLUSION AND ORDER

The ALJ's rejection of Dr. Hanley's opinion that there is a causal relationship by aggravation of a pre-existing left knee infirmity and the Deanwood injury is supported by substantial evidence. The conclusion that there is no such causal relationship based upon the previously affirmed or un-appealed findings of the ALJ is in accordance with the law. Accordingly the Compensation Order on Remand is affirmed.

So ordered.