CRB No. 12-035

BILIKISU DAWODU,
Claimant–Respondent,

v.

HOWARD UNIVERSITY HOSPITAL and SEDGWICK CMS,
Employer/Carrier-Petitioner.

Appeal from an Order by
The Honorable Leslie A. Meek
AHD No. 11-327, OWC No. 665917

William Schladt, Esquire for the Petitioner
Christina DeSmyter, Esquire for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,[1] and HENRY W. MCCOY *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board; HENRY W. MCCOY, concurring.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR 250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

Ms. Bilikisu Dawodu worked for Howard University Hospital as a registered nurse. On November 28, 2009, a patient's spouse assaulted Ms. Dawodu at work.

[1] Judge Russell has been appointed by the Director of the DOES as a Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

Within two days of the assault, Ms. Dawodu began treating with Dr. Eric Dawson for cervical and lumbar injuries. Dr. Dawson consistently has certified Ms. Dawodu as unable to return to her pre-injury work as a result of her work-related injuries.

On February 3, 2011, Dr. David Johnson evaluated Ms. Dawodu on Howard University Hospital's behalf. Dr. Johnson could not find any objective findings to support Ms. Dawodu's subjective complaints.

On March 4, 2011, Howard University Hospital terminated voluntary payments of temporary total disability benefits, and Ms. Dawodu requested a formal hearing. In a Compensation Order dated February 1, 2012, an administrative law judge ("ALJ") granted Ms. Dawodu temporary total disability benefits from March 5, 2011 to the date of the formal hearing and continuing as well as causally-related medical expenses.

On appeal, Howard University Hospital takes issue with the weight the ALJ afforded the opinions of Ms. Dawodu's treating physician. Howard University Hospital prefers the opinions of Dr. Johnson.

Ms. Dawodu opposes the appeal on the grounds that Howard University Hospital impermissibly requests a re-weighing of the evidence when substantial evidence in the record supports the findings of fact and the conclusions are in accordance with the law. Ms. Dawodu also asserts the opinion of Dr. David Johnson is not sufficient to rebut the presumption of compensability. Consequently, Ms. Dawodu requests we affirm the February 1, 2012 Compensation Order.

ISSUE ON APPEAL

1. Is the February 1, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS[2]

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability ("Presumption").[3] In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[4] "[O]nce an employee offers evidence

[2] 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. Section 32-1521.01(d)(2)(A), D.C. Workers' Compensation Act, as amended, D.C. Code §§ 32-1501 *et seq*. ("Act"). 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 contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[3] Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

[4] *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987).

demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."[5] There is no dispute the ALJ appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was Howard University Hospital's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[6] Only upon a successful showing by Howard University Hospital would the burden return to Ms. Dawodu to prove by a preponderance of the evidence, without the benefit of the Presumption, her ongoing injuries arose out of and in the course of employment.[7]

To rebut the Presumption, the ALJ relied upon Dr. Johnson's opinion that Ms. Dawodu's subjective complaints were the result of symptom magnification, not objective findings of an injury caused by her work-related accident. Dr. Johnson's opinion constitutes sufficient evidence to rebut the Presumption.[8]

In reaching the conclusion that Ms. Dawodu is entitled to wage loss and medical benefits, the ALJ relied upon Dr. Dawson's opinions regarding causation and work capacity. Howard University Hospital prefers the opinions of its independent medical examination physician to those of Ms. Dawodu's treating physician, but in private sector workers' compensation cases in the District of Columbia, there is a preference for the opinions of a treating physician.[9] Moreover, in order to effectuate the purpose of that preference, as noted in the Compensation Order, an ALJ is not required to give any reason for rejecting the opinions of the independent medical examination physician.[10]

Ultimately, an argument that "the Administrative Law Judge did not properly weigh the evidence presented"[11] rarely will succeed because so long as a Compensation Order 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 contrary conclusion, the CRB is constrained to affirm the Compensation Order.[12]

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[5] *Washington Hospital Center v. DOES,* 744 A.2d 992, 996 (D.C. 2000).

[6] *Waugh v. DOES,* 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

[7] See *Washington Hospital Center v. DOES,* 821 A.2d 898 (D.C. 2003).

[8] Pursuant to the *Reynolds* standard, *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004), Dr. Johnson's opinion is sufficient to rebut the Presumption because he performed a personal examination of Ms. Dawodu, reviewed the relevant medical records, and stated an unambiguous opinion contrary to the causal relationship presumption.

[9] *Kralick v. DOES,* 842 A.2d 705, 712 (D.C. 2004).

[10] *Washington Hospital Center v. DOES,* 821 A.2d 898 (2003) ("Only with respect to treating physicians have we even held that the examiner must give reasons for rejecting medical testimony, *see Canlas v. District of Columbia Dep't of Employment Servs.,* 723 A.2d 1210, 1211-12 (D.C. 1999).")

[11] Memorandum of Law in Support of Employer's Petition for Review, p.1.

[12] *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

CONCLUSION AND ORDER

The February 1, 2012 Compensation Order is supported by substantial evidence and is in accordance with the law. The Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

June 28, 2012
DATE

HENRY W. MCCOY, concurring:

The Claimant was working for Employer as a nurse when she was attacked by the husband of a patient who slammed her into a wall. While the CO has a specifically delineated section entitled "Findings of Fact", it contains no facts as to the injuries sustained by Claimant, her duties as a nurse, her symptoms/complaints and the impact on her ability to perform her job, or what is her current condition. One is left to ferret out these facts, to the extent they are even made, from the ALJ's discussion.

In the discussion, the ALJ cites the various diagnostic tests that Claimant has undergone from her treating physician, Dr. Dawson, and concludes with the statement

> Throughout his treatment of Claimant, Dr. Dawson noted continued nerve impingement with aggravation of underlying condition and diagnosed Claimant with lumbar discopathy and neural radiculopathy.[13]

This amounts to nothing more than a recitation of what the treating physician observed and diagnosed. It is left for the ALJ to take this observation and medical opinion and make a separate finding of fact as to Claimant's disabling condition, if any. This has not been done, but apparently is accepted as such by the majority. I come away from this decision still wondering exactly what injuries Claimant sustained in the accident and what are her current complaints and condition that prevent her from returning to her pre-injury duties, whatever they may be.

I next take issue with the ALJ's determination of the nature and extent of Claimant's disability. Although we know Claimant is a nurse, no findings are made as to the duties she performs in that capacity. This deficiency however does not prevent the ALJ from making the ultimate conclusion that "Claimant suffered a temporary total disability and remains disabled as a result of the November 28, 2009 physical altercation."[14] Furthermore, when the ALJ summarily states that

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[13] *Dawodu v. Howard University Hospital*, AHD No. 11-327, OWC No. 665917, p. 3 (February 1, 2012).

[14] *Id.* at 2.

Claimant suffered "a temporary and total disability and remains disabled", one is left to question disabled from doing what? With no findings as to Claimant's duties, what is the rationale for the stated conclusion?

As to Claimant's disability, the CO contains the following assessment:

> Dr. Dawson deemed Claimant disabled from returning to her regular duties. Dr. Dawson deemed Claimant disabled from returning to her regular duties from March 5, 2011 to the present and continuing.[15]

First, the treating physician is making a disability determination, something which is within the sole purview of the ALJ, but that responsibility appears to have been surrendered here. The majority finds no fault in the ALJ surrendering her decisional authority by merely accepting the treating physician's disability determination without any independent analysis and determination that Claimant is temporarily and totally disabled. Disability is a legal determination, not a medical one. The D.C. Court of Appeals has held that a treating physician's opinion as to whether a claimant is disabled from performing his or her work duties constitutes a non-medical opinion that is entitled to neither the deference nor to the special weight that is accorded a treating physician's opinion.[16]

The other problem with allowing the ALJ to accept Dr. Dawson's disability determination is his assessment that Claimant is disabled from returning to her regular duties. Again, it begs the question how one can be disabled from returning "to her regular duties" when those duties are unknown, as no findings have been made as to Claimant's duties as a nurse.

It is for these reasons that I cannot fully endorse affirming the February 1, 2012 Compensation Order.

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HENRY W. MCCOY
Administrative Appeals Judge

[15] *Id*.

[16] *Darden v. DOES*, 911 A.2d 410, 416 (D.C. 2006).