

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-136

DONNA GRAHAM,
Claimant–Petitioner,
v.

PEPCO,
Self-Insured Employer–Respondent.

Appeal from a July 20, 2012 Compensation Order on Remand of
Administrative Law Judge Amelia G. Govan
AHD No. 10-539, OWC No. 672370

David J. Kapson, Esquire, for the Petitioner
Shawn M. Nolen, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

Donna Graham was employed by Pepco as a “Senior Planner/Scheduler”, a position in which she was required to type, answer telephone calls and perform other clerical work. She worked for Pepco in this or other similar capacities for over 26 years. She suffers from a non-work related cervical condition which had required surgical intervention by Dr. Paul Griffith, from which surgery she recovered and returned to work without difficulty.

Around March 2010, Ms. Graham sought medical care from Dr. James D. Abbott for neck pain, and radiating numbness and tingling into both hands. She reported these same complaints to Dr. Griffith. When she was seen again by Dr. Griffith on June 10, 2010, he diagnosed her condition as bilateral carpal tunnel syndrome (BCTS), and prescribed wrist splints and medication.

Ms. Graham filed a claim for medical care and treatment for her BCTS, which was denied by Pepco, which maintained that the BCTS was unrelated to her employment.

The claim was presented for resolution at a formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on February 17, 2011, following which a

Compensation Order (CO) was issued on November 10, 2011. In the CO, the ALJ granted the claim.

Pepco appealed the CO to the Compensation Review Board (CRB). In a Decision and Remand Order (DRO) issued May 16, 2012, the CRB vacated the award and remanded for further consideration. The basis of the CRB's decision was that, while testimony of Ms. Graham and the opinion of her treating physician, Dr. Abbott, were sufficient to invoke the presumption that her BCTS was causally related to her employment, upon reweighing the evidence, the ALJ accepted Dr. Abbott's opinion as being more persuasive than the independent medical evaluation (IME) opinion of Dr. Richard Barth, to the effect that the BCTS was unrelated to Ms. Graham's employment without explaining why it was more persuasive. Quoting from the DRO:

The ALJ, when discussing whether or not the Claimant had invoked the presumption relied upon not only the Claimant's testimony but also the July 2010 opinion of Dr. Abbott. A review of the July 2010 opinion of Dr. Abbott shows reveals [sic] the following opinion,

I advised her to consult with an attorney as I can neither support nor deny her condition as definitely work related. It certainly is within the realm of possibility to a reasonable degree of medical certainty that this is a related to [sic] repetitive motion injury. However, I cannot state unequivocally that this is the cause for this problem.

As the Employer concedes, the threshold to invoke the presumption of compensability is a low "hurdle" to overcome. [...] As the ALJ noted, all the Claimant must show is the existence of work related activities which had the potential to cause or contribute to the Claimant's condition. Although the opinion of Dr. Abbott is not "unequivocal," as the ALJ acknowledges, it was enough, along with Claimant's testimony to invoke the presumption. Stated another way, Dr. Abbott's opinion in conjunction with the Claimant's testimony showed the existence of work activities which had the *potential* to cause or contribute to her current condition. We find no error in this.

[...]

A review of the CO reveals that when addressing whether or not the Claimant proved by a preponderance of the evidence her entitlement to the medical benefits claimed, the ALJ stated,

In that Dr. Barth's opinion successfully rebuts the presumption regarding Claimant's *current* condition, the burden reverts to Claimant to prove, by the preponderance of the evidence, her entitlement to the medical benefits claimed. *McNeal [v. DOES]*, 743 A.2d 722 (D.C. 2000)]. I found Dr. Abbott's opinion, when considered in conjunction with Graham's testimony and the May 2010 EMG/NCS study interpretation, to be more persuasive than that of Dr. Barth.

CO at 5 – 6.

Then, the CRB continued in the DRO:

The opinions of Dr. Abbott are equivocal. A review of the evidence shows that Dr. Abbott stated there was a possible causal connection but that he also checked “no” when asked if Claimant’s condition was due to her employment. Claimant’s Exhibit 1 at 12. The ALJ did not explain why, in light of these inconsistencies, she awarded the claim.

While it is not within our authority to re-weigh the evidence, we are summarizing the evidence in the case at bar to point out why we must remand the case back to the ALJ for further discussion regarding the medical evidence and how, in light of the treating physician’s equivocal opinion, the Claimant sustained her burden.

[...]

Accordingly, the Award is VACATED, and the case is REMANDED for further consideration consistent with this Decision and Remand Order.

DRO, page 4.

On July 20, 2012, the ALJ issued a Compensation Order on Remand (COR), in which it was determined that Ms. Graham had not established that her BCTS was causally related to her employment, and denied the claim.

Ms. Graham filed a timely appeal of the COR with the CRB, asserting that the reasons for the denial of the claim are not supported by substantial evidence. Pepco filed a timely opposition, arguing that the ALJ’s determination was based upon substantial evidence and should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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*, D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code § 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 and this review panel must affirm 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 where this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

In the COR, the ALJ re-incorporated her initial factual findings, and then expounded upon her analysis of the case. As before, the ALJ determined that Ms. Graham's testimony and Dr. Abbott's statement that her work had the potential to cause the BCTS was sufficient to invoke the presumption, and that the IME of Dr. Barth was sufficient overcome that presumption. She then proceeded to consider the evidence anew, writing as follows:

[...] Employer argues that Claimant did not provide sufficient evidence to prove that her condition is medically causally related to her employment. Employer contends that Claimant only submitted her lay opinion, and that this testimony alone, *coupled with* Dr. Barth's opinion does not satisfy her burden.

COR, page 4 (italics added). Given that Dr. Barth is the IME physician, it is quite apparent what the that the ALJ meant in the italicized "coupled with" was something more akin to "as compared to" or "weighed against". The ALJ thereupon described Dr. Barth's opinion in a footnote to that paragraph, which reads as follows:

Dr. Richard Barth performed an IME on Claimant and opined that with a reasonable degree of medical certainty, Claimant's current symptoms are not causally related to her employment in that carpal tunnel is multifactorial in origin and Claimant's current condition would have developed whether she worked for Employer or not. EE 1 pg.2.

COR, page 4, footnote 1. The COR thereupon continues:

On review of the evidence, it is found that Claimant's testimony in regards to whether her injury arose out of and in the course of her employment is not corroborated by any medical testimony. Likewise, Claimant's assertion that her work and her injury are medically causally related is not supported by any medical evidence on record. Dr. Abbott stated that it could not be ruled out that Claimant's condition was related to her employment, indicated on his Attending Physician's Statement of October 20, 2010 that Claimant's injury was not a result of her work duties. Claimant has not provided sufficient evidence to prove that her condition and her work duties are medically causally related.

COR, page 4.

In this appeal, Ms. Graham's contention is that "there is substantial evidence in the record that demonstrates that she is entitled to the above referenced claim for relief", but we must point out that that is not the issue that we are called upon to resolve. Rather, we are called upon to determine whether the ALJ's denial is supported by substantial evidence.

The bulk of Ms. Graham's appellate submission consists of a recitation of procedural and background facts, and a discussion concerning invocation of the presumption of compensability and its rebuttal. None of these matters are in dispute. There is no question that the testimony of Dr.

Abbott, to the effect that Ms. Graham's employment was a potential cause of her BCTS, and her testimony that her BCTS symptoms arose after many years of repetitive work for Pepco, was sufficient to invoke the presumption of compensability, and similarly it is uncontested that Pepco's IME opinion from Dr. Barth was sufficient to overcome that presumption, thereby placing the burden of proof by a preponderance of the evidence on Ms. Graham.

Ms. Graham also discusses the treating physician preference, and argues that application of that preference mandates that she prevail on this record. What this argument misses is that the point of the ALJ is that nowhere in this record does Dr. Abbott state that in his opinion Ms. Graham's work caused or contributed to her BCTS, and that the only medical opinion in this record directly addressing the issue is the contrary opinion of Dr. Barth. On these points, the ALJ's determinations that there is no medical opinion in this record attributing Ms. Graham's condition to her employment, and that the only direct medical opinion in this record is that it did not, are supported by substantial evidence.

CONCLUSION AND ORDER

The ALJ's conclusion that Ms. Graham had failed in her burden of demonstrating the existence of such a causal relationship by a preponderance of the evidence is supported by substantial evidence, rendering the denial of the claim for relief in accordance with the law. The Compensation Order on Remand is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

May 14, 2013
DATE