

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-088

DANA C. HALLMON
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent

Appeal from an June 21, 2013 Compensation Order on Remand by
Administrative Law Judge Karen R. Calmeise
AHD No. 09-028, OWC No. 644460

Michael J. Kitzman, Esquire, for the Claimant/Petitioner
Donna J. Henderson, Esquire, for the Self-Insured Employer/Respondent-Cross Petitioner

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

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on June 21, 2013 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). The Administrative Law Judge (ALJ) denied Claimant’s request for temporary total disability (TTD) benefits from August 15, 2007 to the present and continuing.¹

¹ *Hallmon v. WMATA*, AHD No. 09-028, OWC No. 644460 (June 21, 2013).

Claimant worked for Employer as bus operator. In 2002, Claimant suffered a non-work related back injury that disqualified her from operating a bus for four years. In October, 2006, Claimant was reinstated as a bus operator and returned to full duty. On November 26, 2006, the bus Claimant was operating was sideswiped by another bus resulting in injuries to her low back and right arm; Claimant was off work for four months. On April 30, 2007, Claimant reported that she sustained a work-related injury to her back caused by having to depress the brakes repeatedly and with extra pressure in order to get it to stop which necessitated the bus being taken out of service.

Claimant filed a claim for disability benefits consolidating both claims and alleging that her current disability was caused by one or both of the claimed injuries. In a July 31, 2009 Compensation Order (CO), the administrative law judge (ALJ) denied the claim for relief after determining that Claimant did not sustain an accidental work injury on April 30, 2007 and while the claimed disability was causally related to the work injury of November 29, 2006, Claimant failed to show entitlement to disability benefits by a preponderance of the evidence.² Claimant appealed to the Compensation Review Board (CRB) with Employer filing in opposition and also filing a cross appeal.

In an October 12, 2011 Decision and Remand Order (DRO), the CRB determined that:

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.³

On June 21, 2013, the COR that is the subject of this appeal issued. After further review of the record evidence, the ALJ concluded that while Claimant sustained an accidental work injury on April 30, 2007 and gave Employer timely notice of that injury, Claimant's current disability was not medically causally related to either the work injury of 2006 or 2007 and thus

² *Hallmon v. WMATA*, AHD No. 09-028, OWC No. 644460 (July 31, 2009).

³ *Hallmon v. WMATA*, CRB No. 09-134, AHD No. 09-028, OWC No. 644460 (October 12, 2011).

denied the claim for relief. Claimant filed the instant appeal with Employer again filing in opposition and a cross appeal.⁴

On appeal, Claimant asserts that the COR should be reversed because the ALJ erred in determining that the presumption of compensability was not invoked, that the ALJ substituted her own medical judgment, and the ALJ erred in not awarding wage loss benefits. In opposition, Employer argues that as Claimant's lack of credibility prevents an ultimate finding of medical causal relationship any error found in the ALJ's determination that the presumption was not invoked should be deemed harmless. Employer argues that the COR is supported by substantial evidence and should be affirmed.

ANALYSIS

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order (CO) are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁵ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In the October 12, 2011 DRO, the CRB determined that the ALJ had conflated the question of Claimant having sustained an April 30, 2007 accidental injury, with the issue of medical causal relationship. On remand, the ALJ was instructed to further consider the evidence and properly apply the presumption and rebuttal analysis to make a separate determination as to whether Claimant sustained a work related injury on April 30, 2007.

In the COR under review, the ALJ made a separate determination that Claimant suffered an accidental work injury on April 30, 2007 and that timely notice was given. Neither of those determinations is being challenged.

In addressing the issue of medical causal relationship, the ALJ framed the issue as "medical causal relationship to the 2006 or the 2007 injury" and acknowledged that the presumption of compensability applies not only to the work-related injury but also extends to the medical causal relationship between any alleged disabling condition and the work injury.⁶ The ALJ commenced her analysis by stating:

⁴ Although Employer titled its opposition as "WMATA's Opposition to Application for Review and Cross-Application for Review of the Compensation Order on Remand", Employer raises no separate new argument for review. With no new argument raised, we only consider its arguments in opposition to the errors raised by Claimant.

⁵ "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. DOES*, 834 A.2d 882 (D.C. 2003).

⁶ See *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

Claimant relies upon her own testimony as well as the medical records of several physicians to invoke the presumption of compensability. Generally, a claimant's testimony and presentation of medical evidence are enough to invoke the presumption that a medical condition and the accidental work injury are related. However, in this case, I find the Claimant has not produced credible evidence that the 2006 or 2007 work incidents are medically causally related to her claimed injury.⁷

Having initially found Claimant to be an incredible witness, the ALJ proceeded with a discussion of the deficiencies in Claimant's medical evidence. The ALJ discounted the reliability of the treating physicians' diagnoses of Claimant's current condition insofar as they were predicated on a combination of Claimant providing misinformation and/or omitting information as to her medical history, specifically as related to the severity of her 2002 non-work related back injury. After noting these deficiencies, the ALJ concluded, as to both work injuries, that "Claimant has presented insufficient evidence to invoke the presumption of compensability [of a medical causal relationship]."

As the first assignment of error, Claimant argues the ALJ erred in determining that the presumption was not invoked. Specifically, Claimant argues that she presented evidence, both in testimony and exhibits admitted, of two work related events resulting in injury to her back and that these events had the potential to cause the injuries in question and presumably, although not stated, the disabling condition that prevented her from returning to work. We find merit in this argument.

As noted above, the ALJ in the COR under review determined that Claimant suffered an accidental work-related injury on April 30, 2007. As for the November 29, 2006 work incident, we reflect back on the July 31, 2009 CO where the ALJ stated:

The parties have stipulated that Claimant sustained an injury which arose out of and in the course of Claimant's employment on December 12, 2006 [sic].

* * *

Claimant has already demonstrated a work related event and a subsequent disability as is evidenced by Employer's stipulation that Claimant sustained an injury in the form of a low back and neck strain as a result of the bus accident on November 29, 2006. The presumption of compensability is, therefore, invoked pursuant to the Act, D.C. code [sic], 1981, as amended §32-1521(1). *See Ferreira, supra* at 656. Thus, the burden shifts to employer to disprove that the Court further held in *Davis-Dodson v. District of Columbia Department of Employment Services*, 697 A2d [sic] 1214 (D.C. App. 1997) citing Whittaker, *supra*, the undersigned is required to "view the causal relation between a present disability and a job-related injury through the lens, as it were, of the statutory presumption

⁷ COR, p. 7.

unless the employer has rebutted the presumption by evidence specific and comprehensive enough to sever the potential connection between the two” (Citation omitted).⁸

In the COR, there is no reference to a stipulation to the November 29, 2006 work injury or the Employer specifically stipulating to the type of injury sustained. Concomitantly, the ALJ now finds that the presumption as to medical causal relationship with regard to that injury was not invoked, whereas before with the stipulation acknowledged it was. While the CRB returned the CO to the ALJ to permit consideration of the “evidence anew”, it was not intended that stipulated and material facts would be omitted.

Insofar as the presumption was deemed invoked as to a causal relationship between the November 29, 2006 work injury and the claimed current disability, the issue was returned because the CRB determined that Employer’s independent medical evaluation (IME) by Dr. Johnson was sufficient to rebut the presumption as it met the test enunciated by the DCCA in *Reynolds*.⁹ As the record evidence has not changed, the determination that the presumption has been rebutted becomes the law of the case¹⁰ and on remand the ALJ need only weigh the evidence for this accident.

With regard to the ALJ’s now uncontested finding that Claimant sustained a 2007 work related injury, we also address the determination that the presumption has not been invoked. The ALJ makes much of the fact that the treating physicians’ opinions are devoid of any reference to the 2002 non-worked injury where Claimant injured her back. The ALJ stressed the reports of Dr. Hampton characterizing this as a “permanent injury” and the fact that Claimant remained off work for almost 4 years.

At the same time, there is substantial evidence that Claimant returned to full duty work in October 2006 without restrictions. Employer’s IME physician, Dr. Johnson, expressed the opinion that Claimant’s neck and back strain injury from November 29, 2006 had resolved by March 2007 and suffered a “re-aggravation of symptoms in May 2007 unrelated to the injury of November 29, 2006.” (EE 1). Dr. Johnson further stated “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.” (EE 1).

While it was pertinent for the ALJ to highlight the impact the deficiencies in Claimant’s medical history as related to her treating physicians and their resulting diagnoses, it is also requires an analysis of the impact of those medical opinions that essentially found that preexisting conditions had resolved. Claimant has asserted that her current disability is medically causally related to either the 2006 or 2007 work injury. The medical evidence treats the injuries separately, with the earlier incident possibly having resolved by the time second injury. The ALJ

⁸ July 31, 2009 CO, pp. 7-8.

⁹ *Washington Post v. DOES and Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004).

¹⁰ *Torres v. Westin Hotels Washington, D.C.*, CRB No. 09-072, AHD No. 05-088B, OWC No. 590860 (May 3, 2010), citing *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980).

needs to apply the presumption of compensability separately as to each in order to reach a proper resolution in this matter. We return this matter to the ALJ in order to do so.

Claimant next argues the ALJ committed error by improperly substituting her own medical judgment for that of the treating physicians. We find no basis for this claim. In reviewing the medical opinions of the treating physicians, the ALJ found them to be less than persuasive on the issue of medical causation because they did not show that the physicians reviewed Claimant's medical records from the 2002 slip and fall. This is permitted and does not constitute error.

Finally, Claimant asserts the ALJ committed error by not awarding wage loss benefits. Claimant argues (1) that her present condition renders her unable to perform her pre-injury employment; (2) that she has not reached maximum medical improvement; and, (3) that Employer has not offered her suitable alternative employment consistent with her restrictions. We agree only as it pertains to the April 30, 2007 work injury and its relation to the currently claimed disability.

We previously affirmed the ALJ's determination that Claimant had not met her burden by a preponderance of the evidence that she was entitled to temporary total disability benefits. This affirmance was predicated on the ALJ finding the Claimant incredible and the inherent deficiencies in the opinions of the treating physicians. While we do not disavow that determination, we recognize the ALJ's decision could change as she explains her assessment of the evidence anew in resolving the contested issues with regard to the April 30, 2007 injury and any resulting disability. Upon proper application of the presumption analysis, the ALJ shall accordingly proceed with a discussion of the nature and extent of Claimant's disability attributable to the April 30, 2007 injury, if any.

CONCLUSION AND ORDER

The conclusion that Claimant presented insufficient evidence to invoke the presumption of a medical causal relationship between either the November 29, 2006 or April 30, 2007 work related injuries and the current disability is not supported by substantial evidence in the record and is not in accordance with the law. Accordingly, the June 21, 2013 Compensation Order on Remand is REVERSED and REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

October 18, 2013
DATE