GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB (Dir.Dkt.) No. 05-248

ANDRE P. HARTGROVE,

Claimant – Respondent

v.

ARAMARK CORPORATION AND SPECIALTY RISK SERVICES, INC.,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 04-476, OWC No. 590360

Curtis B. Hane, Esq., for the Petitioner

Benjamin T. Boscolo, Esq., for the Respondent

Before SHARMAN J. MONROE, LINDA F. JORY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on June 27, 2005, the Administrative Law Judge (ALJ), after finding that the Claimant-Respondent (Respondent) sustained an injury that arose out of and in the course of his employment, awarded temporary total disability benefits with interest, and causally related medical expenses. The Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the ALJ granted the Respondent's Motion to Re-open the Record and that the Compensation Order is not supported by substantial evidence. The Respondent did not file an opposition.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, 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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner alleges that the ALJ erred in granting the Respondent's Motion to Re-open the Record to admit the January 3, 2005 report of Dr. Kevin McGrail, the treating physician, because the Respondent, in filing the Motion, did not provide any rationale or basis for submitting the report. Accordingly, the Petitioner argues that since the ALJ relied, in part, on that report in reaching his decision, the decision must be reversed. Employer Brief at pp. 7-10. With respect to the merits of this matter, the Petitioner argues that it presented sufficient evidence, via the medical opinion of Dr. Anthony Caputy, the independent medical examiner, and the deposition testimony of the Dr. McGrail, to rebut the presumption of compensability and that the medical reports of Dr. McGrail do not support the presence of a continuing disability.

As to the Motion to Re-open the Record, the Panel takes administrative notice of the contents of the official file maintained by AHD.[2] The official file contains a letter dated April 13, 2005 from the Petitioner's counsel asking that the letter be treated "as a Motion to Reopen the Record for Admission of an updated medical report from Dr. Keith M. McGrail dated January 3, 2005." The Panel agrees that the Respondent did not provide any rationale or basis for submitting the report. In granting the Motion, the Panel agrees that the ALJ did not specifically state that the January 3, 2005 one page report was material and not available at the time of the formal hearing. The ALJ, however, cited to cases setting forth the applicable test for the admission of post-hearing evidence. Moreover, in considering the one-page January 3, 2005 report opining a continuing disability against the numerous reports from Dr. McGrail, including his deposition, also opining a continuing disability, which were admitted during the hearing, the Panel determines that the ALJ's failure to specifically set out the post-hearing admission test and its application was a harmless error.[3]

As to the merits of the appeal, the Panel rejects the Petitioner's argument that its evidence rebutted the presumption of compensability, but on a different basis than that cited by the ALJ. In considering whether the Petitioner met its burden of producing sufficient evidence to overcome the presumption that the Respondent's condition is causally related to the work injury, the ALJ wrote:

> Employer had claimant independently medically evaluated again on June 24, 2004 by Dr. Caputy who noted in his IME that "it is likely that his complaints are shunt related and not related to the events of August 2, 2003." In noting his findings, however, Dr. Caputy did not offer any rational bases therefor, or a comprehensive explanation how he arrived at those findings. Dr. Caputy's conclusion, that he had no objective findings that would prohibit claimant from returning to work initially in a light duty, part time capacity, is not reliable as unsupported by any objective medical evidence, e.g., diagnostic tests. Thus, Dr. Caputy's opinion, predicated on his one-time examination, lacking any reliability cannot constitute specific and comprehensive evidence in rebuttal of the statutory presumption. It has been held that the presumption of compensability cannot be overcome merely "by some isolated evidence." *Whittaker v. District of Columbia Department of Employment Services*, 668 A.2d 844, 846 (D.C. 1995)(quoting *Wheatley v. Adler*, 132 U.S. App. D.C.184, 407 F. 2d 314 (1968)(en banc)). Thus, the entirety of employer's evidence fails to meet the standard under the Act required for rebuttal of the statutory presumption. Hence, absent any rebuttal evidence, claimant's injury is deemed to have arisen out of and in the course of her employment.

Compensation Order at p. 5.

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[2] The Petitioner also attached copies of the Respondent's Motion to Re-Open the Record and of its Opposition thereto to its Application for Review.

[3] The ALJ is reminded to set out the post-hearing admission test for evidence and its application in every case in order to create a complete record which can withstand procedural challenges. The CRB is not empowered to make assumptions on the ALJ's behalf. Failure to set out the test may result in a remand.

The D.C. Court of Appeals recently addressed the nature of the evidence that is required to be produced in order to overcome the presumption in *The Washington Post v. D.C. Department of Employment Services*, 852 A.2d 909 (D.C. 2004) (hereinafter, *Reynolds*). Therein, the court determined that the unambiguous and detailed opinion of a qualified expert on the question of causation, including aggravation, said opinion being based upon a personal examination of the injured worker and a review of the relevant medical records is "specific and comprehensive enough" to rebut the presumption. *Reynolds* at 914. Hence, where a physician's opinion is unaccompanied by a discussion of the reasoning upon which it is based, and where such an opinion has been reached in the absence of a review of at least most, if not all, of the relevant medical records, it does not constitute "substantial evidence".

While there is no indication that Dr. Caputy, the independent medical examiner, failed to review any relevant medical records, the opinion expressed by Dr. Caputy is ambiguous, from a legal perspective, in that it ascribes the complained of condition as having resulted from the shunt, and not from "the events of August 2, 2003". The ambiguity lies in the fact that it is not clear whether the doctor acknowledges that the head injury may have been aggravated by the August 2, 2003 head trauma. Thus, the ALJ was not in error in finding this report insufficient to overcome the presumption.

CONCLUSION

The Compensation Order of June 27, 2005 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of June 27, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE
Administrative Appeals Judge

September 29, 2005
DATE