GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-157

JAMIE MEREDITH,
Claimant–Petitioner,

v.

MARRIOTT RENAISSANCE and
MARRIOTT INTERNATIONAL, INC.,
Employer/Insurer-Respondents.

Appeal from a November 2, 2016[1] Compensation Order by
Administrative Law Judge Gregory P. Lambert
AHD No. 15-166, OWC No. 707496

(Decided March 13, 2017)

Melinda Maldonado for Claimant
Joel E. Ogden for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In 2013, Jamie Meredith ("Claimant") was employed as a Housekeeper for Marriott Renaissance ("Employer"). Claimant alleges she suffered injuries due to exposure to glue fumes, mycotoxins, and mold at her place of employment.

Due to these alleged injuries, Claimant sought medical care from a myriad of physicians, including physicians at Kaiser.

[1] A Compensation Order ("CO") was issued on October 13, 2016. The CO was reissued on November 2, 2016, via an ERRATA Order, due to concerns Claimant's Counsel was not properly served the CO on October 13, 2016.

Claimant also sought care from Dr. Alan Vinitsky. Dr. Vinitsky diagnosed Claimant with several conditions, including toxic encephalopathy and toxic effect of mycotoxin. Dr. Vinitsky opined these conditions were related to Claimant's work exposure to mold. Dr. Vinitsky kept Claimant out of work.

Claimant, at the request of Employer, underwent an independent medical evaluation ("IME") with Dr. Hung K. Cheung. Dr. Cheung reviewed medical records, took a history from the Claimant of her present condition, and performed a physical examination. Dr. Cheung opined that the alleged exposure while at work did not cause her health symptoms.

Claimant left the employ of Employer in August 2013 and has not worked since.

A full evidentiary hearing was held over three days, August 19, 2015, October 2, 2015, and October 23, 2015 before Administrative Law Judge ("ALJ") Donna Henderson. At the hearing, the Claimant's claim for relief was:

> Ms. Meredith requests temporary total disability benefits or, in the alternative, permanent total disability benefits from July 25, 2013 through the present and continuing. Aug. 19, 2015 HT at 116-18.
>
> Ms. Meredith also requests payment of already-incurred, causally-related medical bills (as reflected in her admitted evidentiary submissions) as well as future causally-related medical bills. Aug. 19, 2015 HT at 114-18.
>
> She also requests payments of her full average weekly wage based upon bad faith. Aug. 19, 2015 HT at 116-18.

CO at 6.

The issues identified in the CO to be adjudicated were the following:

- What is the applicable average weekly wage?
- Was there an injury, as defined by the Act?
- Did any such injury arise out of and in the course of employment?
- Is there a medical-causal relationship between Ms. Meredith's medical complaints and the alleged workplace exposure to mycotoxins or glue fumes?
- What is the nature and extent of the disability, if any?

CO at 6.

Subsequently, ALJ Henderson recused herself from the case. On May 11, 2016, ALJ Gregory Lambert issued an Order to Show Cause why the case could not be decided by him based on the existing record. "Both parties consented to the issuance of a compensation order based upon the current record." CO at 6.

On November 2, 2016, a CO issued which denied Claimant's claim for relief. The ALJ concluded:

> The treating physician preference does not apply to Dr. Vinitsky's opinion.
>
> After invoking the presumption that there was a medical-causal relationship between her complaints and the alleged exposure to glue fumes, which was rebutted with the unambiguous opinion of a qualified medical professional, Ms. Meredith was unable to prove by a preponderance of the evidence that there was a medical-causal relationship between any of her alleged complaints and the alleged workplace exposure to glue fumes.
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> After invoking the presumption of compensability that there was a medical-causal relationship between her complaints and the alleged exposure to mycotoxins, which was rebutted with the unambiguous opinion of a qualified medical professional, Ms. Meredith was unable to prove by a preponderance of the evidence that there was a medical-causal relationship between any of her alleged complaints and the alleged mold-related workplace exposure.
>
> No other medical-causal relationship theory was clearly described or could be reasonably inferred from arguments or admitted evidence presented by Ms. Meredith.
>
> This Order does not address any other contested issue in this case.

CO at 26.

The Claimant timely appealed with Employer opposing.

ANALYSIS[2]

Prior to addressing the arguments raised, we must address some contentions Claimant's counsel makes in her brief. Claimant's counsel alludes several times to the ALJs involved in the case, ALJ Henderson and ALJ Lambert, alleging their supposed political bias in favor of employers.

We first point out that Claimant's counsel consented to the reassignment of the case to ALJ Lambert. Second, Claimant's counsel fails to provide support for any attack against either ALJ when accusing them of political bias favoring employers, other than a general disagreement with the CO. Such an unfounded claim against ALJs does not advance Claimant's case and demeans the adjudicatory system within which injured workers seek relief for disability benefits. Claimant counsel's unfounded claims against both ALJ's will not be taken into consideration in the appeal at hand.

We ascertain from the brief[3] submitted that Claimant raises the following in appeal:

- The CO erred as a matter of law in concluding Employer failed to rebut the presumption of compensability.
- The CO erred as a matter of law by failing to accord Dr. Vinitsky the treating physician preference.
- The CO is not supported by the substantial evidence as the ALJ failed to address certain exhibits.
- The CO erred in concluding Employer had not spoliated evidence.

Claimant's first argument is "the Employer has failed resoundingly to rebut the Claimant's presumption" that Claimant's conditions are medically causally related to her employment. Claimant's brief at 6.[4] In so arguing, Claimant argues that her examination with Dr. Cheung was short, was biased, and wrong. In opposition, Employer argues that Dr. Cheung's opinion is

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[2] 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.

[3] Claimant's argument is often difficult to follow. Claimant makes many assertions not relevant to the CO or relevant to the Workers' Compensation Act in general, including alluding to toxic torts law, issues surrounding employment law in general, and attacks against other employees of Marriott International and the Claims Adjuster.

[4] Generally, there is a presumption, in the absence of evidence to the contrary, that the claim comes within the provisions of D.C. Code §32-1521(1) (2001) and is compensable. This statutory presumption exists "to effectuate the humanitarian purposes of the statute," and evidences "a strong legislative policy favoring awards in close or arguable cases." *Parodi v. DOES,* 560 A.2d 524, 525-26 (D.C. 1989); *Ferreira v. DOES,* 531 A.2d 651, 655 (D.C. 1987).

unambiguous and satisfies Employer's burden pursuant to *Washington Post v. DOES and Reynolds,* 852 A.2d 909, 910 (D.C. 2004) ("*Reynolds*").

As the District of Columbia Court of Appeals has held, an employer can rebut the presumption by proffering a "qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability." *Reynolds*, 852 A.2d at 910.

A review of the CO reveals the following:

> Marriott presented an unambiguous IME opinion from a well-qualified physician who examined Ms. Meredith and reviewed her records, which, as a matter of law, was specific and comprehensive enough to rebut the presumption. EE 1; *Washington Post v. District of Columbia Dep't of Employment Servs.*, 852 A.2d 909, 910-11 (D.C. 2004).

CO at 17.

We conclude the evidence supports the CO's conclusion. Dr. Cheung opined, after reviewing all of the medical records and after performing a physical examination, Claimant's conditions were not caused by the alleged workplace exposure to mold. In arguing Dr. Cheung's opinion is faulty, Claimant points this panel to the fact Claimant only visited Dr. Cheung once, that he is only a consultant, and that his opinion differs from other physicians. While this may be true, Claimant's argument would go to the weight of Dr. Cheung's opinion at the third step in the *Reynolds* analysis, when the evidence is weighed without benefit of the presumption.

When Employer is tasked with rebutting the presumption, the ALJ is tasked with only looking at Employer's evidence to determine whether Employer has introduced into evidence the opinion of a qualified independent medical expert, in this case Dr. Cheung, who has examined Claimant and reviewed the medical records and thereafter opines Claimant's conditions are not medically causally related to any mold exposure in the work place. We agree with Employer that Dr. Cheung's opinion is unambiguous and satisfies Employer's burden under *Reynolds.*

Having correctly determined the presumption of compensability has been rebutted, the ALJ then weighed all the evidence without benefit of the presumption, concluding Claimant "did not prove by a preponderance of the evidence that her alleged medical complaints are medically-causally related to any alleged workplace exposure." CO at 17. In so concluding, the ALJ found persuasive the medical opinion of Dr. Cheung and rejected the opinion of Dr. Vinitsky. The ALJ stated:

> Our cases recognize that the opinions of treating physicians are preferred over those obtained for purposes of litigation. *See generally Jackson v. District of Columbia Dep't of Employment Servs.*, 979 A.2d 43, 49 (D.C. 2009); *Golding-Alleyne v. District of Columbia Dep't of Employment Servs.*, 980 A.2d 1209 (D.C. 2009); *Lincoln Hockey LLC v. District of Columbia Dep't of Employment Servs.*, 831 A.2d 913, 919 (D.C. 2003). Dr. Vinitsky's opinion does not warrant the preference.
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> First, it is not warranted because he had very little contact with Ms. Meredith, who has an extensive medical history. Second, the preference does not apply because his opinion was clearly obtained for purposes of litigation: for example,

> only after Dr. Balzora refused to provide a favorable disability opinion was Ms. Meredith driven to Dr. Vinitsky by her lawyer. *See* EE 3; CE 8. And their last meeting occurred between the several hearings in this case. CE 8 at 68A-F.
>
> Documentary evidence also supports denying Dr. Vinitsky the preference. For example, an Employee's Notice of Accidental Injury or Occupational Disease represents that Dr. Patience B. Daniels is Ms. Meredith's treating physician, not Dr. Vinitsky. CE 1 at 6. Another document suggests a different treating physician: Dr. Torres. CE 8 at 49.
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> Finally, even had his opinion warranted the preference, ample reasons are provided below for its rejection.

CO at 14.

Thereafter, in a lengthy analysis we need not recite here, the ALJ recites why Dr. Vinitsky's opinion was rejected in favor of Dr. Cheung's opinion. See CO at 22-26.

Claimant, in argument, states that "per the OWC Act, a treating physician, and in this case, Dr. Alan Vinitsky is both a treating physician and an expert physician for the Claimant, trumps the Employer's witness, who merely saw the Claimant once, and ran no medical tests whatsoever per the Claimant's testimony." Claimant's brief at 7. However, in argument, Claimant does not argue the ALJ's conclusions quoted above are wrong, instead merely states Dr. Vinitsky is the treating physician.

After reviewing the evidence, we conclude that the ALJ's rejection of Dr. Vinitsky as the treating physician is supported by the substantial evidence in the record. We further conclude the ALJ's rejection of Dr. Vinitsky's opinion in favor of Dr. Cheung is supported by the substantial evidence in the record and in accordance with the law.

Next, Claimant argues the CO is not supported by the substantial evidence and is not in accordance with the law as the ALJ ignored evidence which would have supported Claimant's claim.

In addressing Claimant's argument, we are cognizant of many evidentiary rulings regarding exhibits submitted by Claimant, as outlined in the CO on pages 3-5. None of these rulings have been appealed. Thus, Claimant's argument that the ALJ failed to consider exhibit 4 is not persuasive as exhibit 4 was not admitted into evidence. Claimant also references exhibits 8-11 without citing to specific pages. We note only portions of exhibits 8, 10 and 11 were admitted, some of which were admitted but not for the purpose of proving a medical causal relationship.

We are also cognizant of the following in the ALJ's discussion under the heading, "Evidentiary Matters" on page 13 of the CO. In that discussion, the ALJ explains why "certain documents in evidence carry significant indicia of unreliability -- they have little to no probative value and are rejected." CO at 13. In argument, Claimant does not point to any errors the ALJ in his analysis, other than a broad disagreement. We affirm the ALJ's conclusions regarding the evidentiary weight given to the documents outlined in the paragraph.

Claimant argues that witnesses were proven to be untruthful, including Ms. Yvonne Rhodes and Ms. Phyllis Magruder, and that Claimant's video and samples proves mold was present. A review of the CO reveals however the ALJ did take into consideration the witness testimony and

Claimant's video evidence and samples in the findings of fact. Thus, contrary to many of Claimant's arguments, the ALJ did indeed take into consideration the witness testimony and admitted evidence presented by Claimant. We affirm.

We are satisfied the ALJ took into consideration all the exhibits and testimony submitted into evidence. As the ALJ explained:

> The entire record has been carefully reviewed. Although some exhibits might not be referenced or extensively discussed, they were all thoroughly considered and weighed during the course of deliberation. *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs.*, 983 A.2d 961, 964 (D.C. 2009) (ALJs "not obligated to inventory the evidence"). To the extent an argument is consistent with this Order, it is accepted. Inconsistent arguments are rejected.

CO at 13.

Finally, Claimant seems to allude to the argument that Employer had spoiled evidence which should lead to a negative inference. On this issue, the ALJ stated:

> Ms. Meredith's counsel appears to argue in favor of an adverse inference based upon a finding that Marriott spoliated evidence. *E.g.*, Aug. 19, 2015 HT at 15-16, 44, 66, 132 (spoliation references). The argument is unsupported by persuasive evidence. No adverse inferences are made.
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> If the argument reflects a tort claim, this forum does not have jurisdiction to adjudicate. *See generally Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998) ("[R]eckless spoliation of evidence is an independent and actionable tort."). Similarly, arguments in favor of punitive damages were not considered because this Agency cannot award them. CE 3 at 21 ("treble damages"). And arguments based on gross negligence were not considered for the same reason. Aug. 19, 2015 HT at 16:21-17:2.

CO at 14.

In argument, Claimant states that the "Employer failed to cooperate throughout this litigation process" and "Employer never produced an environmental test" in a timely fashion. However, Claimant does not point this panel to any evidence that Employer acted in bad faith or intentionally failed to preserve evidence.

Spoliation of evidence incorporates two sub-categories: the deliberate destruction of evidence and the simple failure to preserve evidence. Although a party's bad faith destruction of evidence relevant to proof of an issue gives rise to a strong inference that production of the evidence would have been unfavorable to the party responsible for its destruction, in a situation involving unintentional destruction or failure to preserve evidence, the fact-finder may, but is not required to, draw an adverse inference. *Battocchi v. Washington Hospital Center,* 581 A.2d 759, 765 (D.C. 1990). The ALJ, after taking into consideration Claimant's arguments and all the evidence presented, did not draw an adverse inference. We affirm this finding as being within the sound discretion of the ALJ.

As we stated above, this panel is tasked with 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,

Marriot, supra. We conclude such is the case before us. The CO under review made thorough and detailed findings of fact and conclusions of law that Claimant's conditions are not medically causally related to any work place exposure to mold. Said conclusions are supported by substantial evidence in the record and are in accordance with the law.

As we conclude the CO's conclusion regarding the lack of any medical causal relationship between Claimant's condition and work, all other remaining issues raised in Claimant's appeal, including the correct calculation of Claimant's average weekly wage and compensation rate, as well as the nature and extent of Claimant's injury, if any, are rendered moot.

So ordered.

CONCLUSION AND ORDER

The November 2, 2016 Compensation Order is supported by substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.