

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-159

JEFFREY BOWSER,
Claimant-Petitioner,

v.

CLARK CONSTRUCTION GROUP, LLC and
SEDGEWICK CMS, INC.
Self-Insured Employer and Third-Party Administrator-Respondent.

Appeal from a November 23, 2016 Compensation Order on Remand
by Administrative Law Lilian Shepherd
AHD No. 11-046B, OWC No. 669729

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 MAR 23 PM 1 10

(Decided March 23, 2017)

Justin M. Beall for Claimant
Sarah M. Burton for Employer

Before GENNET PURCELL, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This is an appeal from a Compensation Order on Remand ("COR") issued on November 23, 2016. The following background is taken from a prior Decision and Order issued by the Compensation Review Board:

Mr. Jeffrey Bowser was a pile driver for Clark Construction ("Clark") when he injured his head, neck, left shoulder, and left arm on April 28, 2010; the boat Mr. Bowser was working on in the tidal basin lurched, and he hit the back seat. In a Compensation Order dated June 24, 2011 an administrative law judge ("ALJ") granted Mr. Bowser temporary total disability benefits from February 3, 2011 to the date of the formal hearing and continuing as well as medical treatment; the Compensation Review Board ("CRB") affirmed this Compensation Order.

On January 18, 2013, the parties attended a second formal hearing; Clark sought to modify the June 2011 Compensation Order and to terminate medical treatment including psychiatric care and temporary total disability benefits. Mr. Bowser requested ongoing medical treatment, authorization for psychiatric treatment, and change of his vocational rehabilitation counselor. In a December 13, 2013 Compensation Order, another ALJ ruled Mr. Bowser's head, neck, and back injuries had resolved. This ALJ concluded Clark presented evidence to substantiate terminating Mr. Bowser's medical benefits and wage loss benefits.

Bowser v. Clark Construction Group, CRB No. 14-004 (August 14, 2014) (footnotes omitted).

Claimant appealed a December 13, 2013 Compensation Order ("CO") to the CRB. Upon review, the CO was affirmed. Claimant appealed the CRB's Decision and Order ("D&O") to the District of Columbia Court of Appeals ("DCCA"). Upon review, the DCCA affirmed the CRB's decision with respect to terminating Claimant's temporary total disability ("TTD") benefits and reversed and remanded for a new decision concerning the Administrative Law Judge's ("ALJ") denial of Claimant's claim for medical benefits for treatment of his carpal tunnel condition and entitlement to benefits related to his psychological conditions. The matter was remanded to the CRB for clarification on these specific issues. *Bowser v. DOES and Clark Construction, LLC*, 129 A.3d 253 (D.C. 2015). Accordingly, the CRB remanded the matter to AHD for further proceedings consistent with the DCCA's December 31, 2015 opinion. *Bowser v. Clark Construction, LLC*, CRB No. 14-004 (R) March 31, 2016.

On April 14, 2016, Claimant requested a second formal hearing to present his claim for benefits. Prior to the formal hearing the parties resolved the issue concerning Claimant's entitlement to benefits related to his carpal tunnel condition.

Following the second formal hearing, a Compensation Order on Remand ("COR") issued in which the ALJ concluded Claimant's psychiatric condition was not medically causally related to the April 28, 2010 work injury and therefore Claimant's claim for disability benefits related to his psychological condition was denied. *Bowser v. Clark Construction Group, LLC*, AHD 11-046B (November 23, 2016).

Claimant timely appealed the COR to the CRB by filing Claimant's Application for Review ("Claimant's Brief"). In his appeal Claimant asserts that the ALJ erred in concluding that Employer's evidence was sufficiently comprehensive to sever the presumption of compensability, and erred in her analysis rejecting the treating physician preference, and as such, the COR is not based on substantial evidence in the record and must be reversed. Claimant's Brief at 8.

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review ("Employer's Brief"). In its opposition, Employer asserts the COR's conclusions are supported by substantial evidence in the record, is in accordance with prevailing law and should be affirmed. Employer's Brief at 1.

ANALYSIS

Claimant asserts the ALJ erred in concluding that Employer presented sufficient evidence to rebut the statutory presumption of compensability related to the medical causal relationship of Claimant's psychological condition to the April 28, 2010 work injury.

Specifically, Claimant argues:

Employer attempts to rebut the presumption of a medical-causal relationship by pointing to an October 1, 2012 report by Dr. Brian Schulman, M.D. (EE 1). However, Dr. Schulman's report is insufficiently comprehensive to sever the connection between Mr. Bowser's psychological injury and the April 28, 2010 injury. At the outset it, [sic] it is important to note that Dr. Schulman's report does in fact indicate that Mr. Bowser suffers from psychological deficits. According to Dr. Schulman's report, Mr. Bowser's score on the St. Louis University Mental Status (SLUMS) Examination places him in the "mentally impaired range." (EE 1 at 22). Moreover, the Hamilton Psychiatric Rating Scales for Depression and Anxiety were elevated. (EE 1 at 22). Most importantly, the Brief Psychiatric Rating Scale, which Dr. Schulman explains "is a general measure of psychopathology," reflected high scores in measures of "hostility, anxiety, emotional withdrawal, and tension." (EE 1 at 22).

In his 25-page report, Dr. Schulman devotes exactly four sentences to explaining why he believes Mr. Bowser does not suffer from PTSD. (EE 1 at 24). Dr. Schulman states that "Mr. Bowser does not describe any ongoing flashbacks of the subject incident." (EE 1 at 24). However, the record is clear that Mr. Bowser constantly replays the event in his mind, and that he dwells on his co-workers laughing at his injury, and has nightmares of the morning on the boat. (CE 2 at 24, 26; HT 26: "I mean, it still hurts me to this day, you know. My own union brothers sitting there laughing at somebody getting hurt.").

Moreover, while concluding that "there is no objective basis, based on the incident itself or [Mr. Bowser's] residual symptoms, to diagnose [PTSD]" (EE 1 at 24), Dr. Schulman conveniently overlooks clear record evidence of Mr. Bowser's homicidal and suicidal ideation, which is even confirmed in Mr. Jackson's vocational rehabilitation reports. (HT 22; CE 1; CE 2 at 25, 45, 58-59; CE 3 at 68, 81). Dr. Schulman is a hired gun.

Claimant's Brief at 10-11.

In response, citing to Dr. Schulman's opinion, Employer argues:

As evidenced by his twenty-four (24) page report, Dr. Schulman took a thorough history from the claimant, conducted a comprehensive physical examination of claimant and reviewed all pertinent medical records. Based upon the history, review of pertinent medical records and his physical examination of the claimant, Dr. Schulman opined that "there is no objective evidence that he (the Claimant)

sustained a psychiatric, neuropsychiatric, or central nervous system injury consequent to the subject event.” Employer’s Exhibits (“EE”) 1, p. 24. Dr. Schulman further opined:

Mr. Bowser does not meet criteria for Posttraumatic Stress Disorder (PTSD). His sole complaint referent to the actual incident is that he has nightmares of ‘drowning,’ although on the date of loss, he was never in the water. Further, he expresses no fear of returning to work as a pile driver; he is not hypervigilant, fearful, or avoidant of water; and he does not describe any ongoing flashbacks to the subject incident. In that regard, there is no objective basis, based either on the incident itself or his residual symptoms, to diagnose a posttraumatic mental disorder. EE 1, p. 24.

In the present case, the Employer presented substantial evidence sufficient to rebut the presumption of causation. Dr. Schulman’s opinions are rendered by a board certified psychiatrist, which are firm and unambiguous and supported by detailed reasons and are “specific and comprehensive enough” to rebut the presumption of causation. *Ferreira*, 531 A.2d at 655.

Employer’s Brief at 8.

We agree with Employer’s assessment. In his medical opinion, although Dr. Schulman does not deny that Claimant suffers from some level of psychological condition and that testing indeed revealed a level of psychological impairment, Dr. Schulman is clear in his review that Claimant does not suffer from PTSD and more relevantly, that there is no objective evidence that Claimant sustained a “psychiatric, neuropsychiatric, or central nervous system injury” as a result of the April 28, 2010 event.

Section 32-1521 (1) of the D.C. Code provides claimants with a rebuttable presumption that the claim for workers compensation benefits comes within the provisions of the Act. *Parodi v. DOES*, 560 A.2d 524 (D.C. 1989). *See also Spartin v. DOES*, 584 A.2d 564 (D.C. 1990). Once the statutory presumption is established, the burden shifts to the employer to produce evidence that is substantial, specific and comprehensive enough to sever the potential connection. “Substantial evidence” is such relevant evidence as a reasonable mine might accept as adequate to support a conclusion”. *Stewart v. DOES*, 6060 A.2d 1350 (D.C. App. 1992).

We determine that the ALJ’s conclusion that Employer successfully rebutted Claimant’s presumption of compensability was based on substantial, specific, and comprehensive evidence in the record in accordance with *Stewart, supra*. We also agree that Dr. Schulman’s IME meets the standard set forth by the DCCA in *Washington Post v. DOES and Raymond Reynolds*, 852 A.2d 909 (D.C. 2004)(*Reynolds*). That is, it is undisputed that Dr. Schulman is a qualified medical expert who examined Claimant, reviewed Claimant’s relevant medical records, and rendered an unambiguous opinion that the work injury did not contribute to the alleged psychological injury.

Claimant next argues that the ALJ did not accord his treating physician the required deference when weighing his claim for disability benefits. Claimant asserts that the ALJ's reason for discrediting treating physician Dr. Edwards' opinion *i.e.* that she relied on the subjective representations from Claimant in rendering her diagnosis; that she failed to provide any intensive psychiatric treatment to Claimant although she opined Claimant would benefit from intensive psychiatric and psychotherapeutic treatment; that she last treated Claimant in 2012; and, that her opinion suffers from a lack of basis for her "no work" restriction, are without legal basis.

It is well established in the District of Columbia, that there is a preference for the testimony of treating physicians over doctors retained for litigation purposes in workers' compensation cases. Even with this preference however, where there are persuasive reasons to do so the ALJ may choose to reject a treating physician's opinion and credit the testimony of a non-treating physician over a treating physician. *See Stewart, supra* at 1353, *see also Short v. DOES*, 723 A.2d 845 (D.C. 1978). Persuasive reasons to discredit an opinion from a treating physician include sketchiness, vagueness, and imprecision in the medical reports of that physician. *Erick v. WMATA*, H&AS No. 92-63, OWC No. 181489 (October 28, 1993).

Our review of the COR reveals little in the way of objective medical evidence supporting Claimant's assertion that the treating physician's opinion was improperly discredited. The reasons Dr. Edwards' opinion was discredited as discussed by the ALJ were:

1. Dr. Edwards opined that Claimant would benefit from intensive psychiatric and psychotherapeutic treatment, but provided no indication that she ever provided him with such a referral or that Claimant sought the intensive treatment.
2. Dr. Edwards opined that Claimant was not able to work and should not be encouraged to work until he is medically and psychiatrically cleared, but did not provide a medical basis as to why, other than his description of a volatile relationship with his vocational rehabilitation counsellor.
3. Dr. Edwards, in a June 2016 medical opinion, despite a 4 year long period between medical reports failed to provide a basis as to how Claimant's mental condition remained unchanged when he ceased working with the alleged catalyst to his declining mental condition, Mr. Jackson in 2012.
4. In rendering her June 2016 medical opinion, Dr. Edwards did not perform a new Mood Score test or obtain an Anxiety Scale rating on Claimant's behalf.
5. Dr. Edwards' opinion did not reference that Claimant had been hospitalized for psychiatric care or decompensated (as she opined would occur if Claimant remained untreated in a 2012 medical report).
6. Dr. Edwards, a psychologist, overruled Claimant's treating neurologist Dr. Vandana Sharma's physical release of Claimant to light duty work with a 20 pound lifting restrictions without the medical basis for the restriction.

Claimant further argues that the ALJ both mischaracterized and ignored significant evidence in the record. Claimant argues that by singling out that Dr. Edwards had not treated Claimant since 2012, the ALJ overlooked the fact that Dr. Schulman, Employer's IME doctor, has not treated Claimant either.

These arguments are unpersuasive. Each evidentiary factor Claimant asserts the ALJ ignored was discussed and otherwise considered in the COR. Accordingly any allegation of mischaracterization of the evidence is ostensibly a request for this panel to reweigh that evidence in Claimant's favor, a task we cannot undertake.

The ALJ properly articulated her bases for rejecting the treating physician opinion and noted that although Dr. Edwards recommended intensive psychiatric and psychotherapeutic treatment, she never provided Claimant with a referral to seek such treatment nor provided such treatment herself. Claimant argues that he did seek such treatment on one occasion, however the ALJ determined the record does not support his argument. Claimant's three-day admission to George Washington Hospital on June 26, 2012, was the result of a direct threat Claimant made to his counselor. Moreover, Dr. Edwards did not evaluate Claimant during his stay at GWU, did not provide any further review or consultation regarding his stay at GWU, nor specify a medical opinion regarding his stay at GWU; neither did Claimant seek or receive any ongoing intensive psychiatric and psychotherapeutic treatment after his GWU stay. Claimant's argument on this issue is rejected.

We determine that the ALJ stated specific and legitimate reasons for rejecting Claimant's treating physician's opinion and for crediting the testimony of Dr. Schulman. Those reasons are supported by substantial evidence in the record. The COR is affirmed.

CONCLUSION AND ORDER

The Compensation Order on Remand is AFFIRMED.

So ordered.