COMPENSATION REVIEW BOARD

CRB No. 13-030

ADRIENNE JOHNSON,
Claimant–Petitioner,

v.

GEORGE WASHINGTON UNIVERSITY HOSPITAL and SEDGWICK CMS,
Employer/Carrier-Respondent

Appeal from a February 15, 2013 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 12-225A, OWC No. 683814

Matthew Peffer, Esquire, for the Petitioner
David M. Schoenfeld, Esquire, for the Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on February 15, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) denied Claimant's claim for temporary total disability benefits from August 8, 2011 to July 11, 2012, temporary partial disability benefits from July 12, 2012 to the present and continuing, and causally related medical expenses.[1]

In September 2010, Claimant sought medical treatment for complaints of spasms, chronic back pain and bone pain. An EMG revealed evidence of chronic right radiculopathy and an MRI

[1] *Johnson v. George Washington University Hospital,* AHD No. 12-225A, OWC No. 683814 (February 15, 2013).

in October 2010 indicated the source of Claimant's pain as the lower back and right leg. Claimant started working for Employer as a patient care technician in December 2010.

As a patient care technician, Claimant had responsibility for patient's activities of daily living including bathing, toileting, feeding, bedding changes, delivery of meals, and taking vital signs. On August 8, 2011, Claimant claimed she was in the process of taking the vital signs of a patient when she felt pain in her back and reported the injury to the charge nurse who told Claimant to write up an accident report. In the report, Claimant specifically stated the room and bed, 507 Bed A, where she working and the exact time, 3:35pm, the accident occurred.

After completing the accident report, Claimant was sent to employee health and then went home. Claimant followed-up with her primary care physician, Dr. Rita Pabla, on August 10, 2011. Claimant had a prior history of right leg spasms since 2000 for which she has been taking medication. At the time of the alleged work injury, Dr. Pabla had prescribed Claimant 1800 mg of Oxycodone per month and 1950 mg of acetaminophen per day, in addition to Baclofan, Naproxen and Lyrica.

Claimant also treated with orthopedic surgeon Dr. Michael Franchetti who diagnosed lumbar strain with right radiculopathy and related it to the August 8, 2011 work injury. In addition, Dr. Franchetti opined that the work injury exacerbated her preexisting condition. Dr. Franchetti had Claimant undergo a functional capacity evaluation (FCE) which determined she could work a job with a low physical demand level. As her position with Employer was of a high physical demand level, Dr. Franchetti deemed her unable to perform her pre-injury job and placed her in an off work status.

Employer had Claimant examined by two independent medical evaluators (IME). Dr. Robert Gordon determined she sustained a back strain while at work as did Dr. Louis Levitt. However, Dr. Levitt opined that Claimant had recovered from the work injury and could return to work without restrictions.

Due to the work restrictions imposed by Dr. Franchetti, Claimant obtained alternative employment as a dialysis technician in July 2012 and also as a part-time teacher's aide in September 2012.

Claimant filed a claim for disability benefits and a hearing was held on December 6, 2012 to determine whether she sustained an accidental injury on August 8, 2011 that arose out of and in the course of her employment and whether her disability was causally related to that injury. On February 15, 2013, a decision issued denying Claimant's request for benefits. Claimant filed the instant timely appeal, with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred in determining that Employer presented evidence sufficient to rebut the presumption and even if the presumption was rebutted, Claimant met her burden when the evidence is weighed without benefit of the presumption. Employer counters the CO 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 CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[2] *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.

The initial issue presented for resolution in this case was whether Claimant sustained an accidental injury to her low back that arose out of and in the course of her employment on August 8, 2011. The ALJ properly acknowledged that Claimant was entitled to a rebuttable presumption that she sustained an accidental injury that arose out of and in the course of her employment.[3] After reviewing the medical reports of Claimant's treating physicians, the ALJ determined that Claimant had presented sufficient evidence to invoke the presumption and neither party has contested this threshold determination.

With the presumption of compensability invoked, the ALJ proceeded to shift the burden to Employer to determine if Employer presented substantial evidence specific and comprehensive enough to sever the potential connection between the work injury and the job related event.[4] It is the ALJ's assessment of Employer's rebuttal evidence that Claimant makes her first assignment of error arguing that Employer did not present evidence that was specific and comprehensive enough to sever the presumption not only that the injury arose out of and in the course of employment but also that the current disability is medically causally related to that work injury. We disagree as to legal causation.

In reviewing the evidence Employer submitted to rebut the presumption of an accidental injury arising out of and in the course of employment, *i.e.*, legal causation, the ALJ determined

> Neither of the independent medical experts rendered an opinion that questioned whether claimant injured her back at work. While serving to rebut the causal relationship of any ongoing disability, the IME opinions

[2] "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).

[3] See *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

[4] In the CO, the ALJ incorrectly characterizes the shifting burden by stating "the burden shifts to employer to *disprove* the employment connection…" (Emphasis added.) There is no requirement for the Employer to "disprove" the connection between the injury and the employment. Rather, as already stated, "once the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." *Ferreira*, 531 A.2d 651, 655 (D.C. 1987); *Parodi v. DOES*, 560 A.2d 524, 526 (D.C. 1989); *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001).

> do not rebut the presumption that claimant suffered an injury to her back which arose out of and in the course of her employment.[5]

The ALJ noted that Employer was not limited to medical evidence to rebut the presumption; that it could be rebutted by the submission of substantial evidence "specific and comprehensive" enough to sever the potential connection between the disability and the work-related event. The ALJ proceeded to state:

> Employer submits the "Care Activity Reports" for all of the patients assigned to claimant on August 8, 2001. [Fn. omitted.] Review of the reports reveals that claimant took the vital signs of 4 of the 8 patients between 9:11 a.m. and 9:20 a.m. and all 8 patients between 12:18 pm and 12:37 p.m. However, claimant did not take any vital signs after 12:37 p.m. and in fact no vital signs were taken for any patients between 13:23 (1:23 pm) and 16:29 (4:29 p.m.) ER 22.
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> Employer asserts that the activity reports reveal that claimant was not in any room taking vitals at 3:35 pm, the time of the alleged injury. In an attempt to further discredit claimant's credibility, counsel for employer asked claimant on cross examination how many patients claimant had seen on the set of rounds before the injury occurred. Claimant testified that she did not recall. Counsel asked her if she testified at her deposition that she had seen seven patients sounded right. Claimant testified that it was a possibility. HT at 101, 102. Employer asserts that not only are there no vital signs recorded for the seven patients on or around 3:35 when claimant reported the injury occurred, there are no vital signs reported on the activity reports at the 3:00 time period (15:00) for any patient.
>
> Employer further asserts claimant has not been truthful about her pre-existing back problems and submits the neurology consultation report of Dr. Mohammad Y. Pathan who examined claimant on August 26, 2010. Dr. Pathan reported that claimant has chronic back pain and bone pain in his September 30, 2010 report. Employer also submits the MRI report for the lumbar spine MRI ordered by Dr. Pathan wherein the physician technician who interpreted the October 9, 2010 MRI noted the indication was lower back and right leg pain. Employer further submits the pharmacy purchase records of CVS and WEIS which establish that Dr. Pabla was prescribing and claimant was purchasing 180 (10-325) Oxycodone tablets monthly from November 12, 2010 prior to the alleged work injury. ER 11, 12. Although Dr. Pabla's records prior to August 2011 were not provided, in his November 29, 2011 report Dr. Pabla indicates he is prescribing Oxycodone for claimant's Lumbosacral neuritis. Thus it is reasonable that Dr. Pabla was prescribing claimant Oxycodone for treatment of her back injury prior to the work injury.[6]

[5] CO, p. 6.
[6] CO, p. 7.

With this chronicling of the Employer's evidence in rebuttal, the ALJ concluded:

> It is concluded after a thorough review of employer's rebuttal evidence that employer has in fact submitted [evidence] specific and comprehensive enough to sever the potential connection between claimant's back problems and her employment. *Ferreira I*, 531 A.2d at 655. Specifically, the undersigned finds employer's evidence that claimant was not performing the tasks she alleges when she alleges the injury occurred i.e., taking vital signs at 3:35 p.m. to be specific and comprehensive that while claimant may have reported a back injury on August 8, 2011 her back problems are pre-existing and not the result of anything she did at 3:35 pm at work.[7]

It was Claimant who stated that she sustained a specific injury while performing a specific work task at a specific time. While such specificity is not required when claiming an accidental work injury arising out of and in the course of employment[8], once it is so stated, it allows the rebuttal evidence to be equally specific. Employer submitted work activity reports that Claimant was required to fill out for each patient on a daily basis to show that at the time Claimant alleged she was injured, no vital signs for any patient were recorded and the ALJ appropriately so found. In addition, Employer submitted evidence of Claimant's pre-existing chronic back pain and the medications prescribed prior to the date of the alleged work injury. The ALJ found this evidence specific and comprehensive enough to rebut the presumption that the accidental injury occurred and we find no basis to disturb that ruling.

With the presumption rebutted, the burden shifted back to Claimant to prove by a preponderance of the evidence, without the aid of the presumption, that her disability was caused by a work-related accident.[9]

In reviewing the evidence Claimant proffered to support her claim, the ALJ specifically noted

> The record contains various descriptions of the mechanics of claimant's injury but Dr. Franchetti adds a new dimension to the mechanics in that he claims it was a "torquing" injury. This characterization is interesting in light of the various descriptions of how the injury actually occurred provided by claimant.[10]

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[7] CO, p. 7.

[8] See *McCamey v. DOES*, 947 A.2d 1191, 1198 (D.C. 2008) (citing *Ferreira, supra*, 531 A.2d at 656).

[9] *McCamey, supra*, 947 A.2d at 1199, fn. 6 (D.C. 2008) (citing *Washington Hospital Ctr. v. DOES*, 744 A.2d 992, 998 (D.C. 2000).

[10] CO, p. 8.

The ALJ then went through the various description with Claimant testifying at the hearing that in the process of taking a pulse measuring device off a patient "she felt a snap in right lower back and throbbing in her right leg" but on cross-examination could not recall the exact device she was removing; in an employee accident report, Claimant described "a sharp pain on right side of back"; on the DCWC Form 7, Claimant described a lumbar strain caused by removing a vitals machine in a tight space; in Claimant's claim application it was an injury to her back while removing equipment from a patient; and in a recorded statement Claimant stated she was taking a blood pressure cuff off a patient when she "felt a twitch like a something, a pain in my back."

Factoring in the various descriptions of how the accident occurred, along with what she deemed Dr. Franchetti's description to be an "exaggeration", Claimant's pain medication history, and Dr. Levitt's IME opinion that Claimant did not sustain an aggravation of her pre-existing back problem, the ALJ summarized the evidence and concluded

> Claimant was rather specific on August 8, 2011, when she completed the incident report while still at work, as to what time and what she was doing when the incident occurred. However, the specificity lessened in a short period of time. Claimant gave her recorded statement to the adjuster only 4 days after the alleged incident. Claimant advised Donita Jackson, that she had taken the patient's temperature and recorded that vital statistic; she had taken the pulse oximeter off and had that in her hand and was getting ready to take the blood pressure cuff off and then just felt a twitch, a pain in her back. ER 26 at 5. Claimant did not describe a twisting movement at all in her incident report, her notice of injury report, or in her recorded statement to the adjuster.
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> Claimant's allegation that she hurt her back at work while taking vital signs is not corroborated by any evidence of record other than her own testimony and her hearing testimony conflicts with the description she reported to the claims adjuster, the incident report she completed and her Notice of Injury (Form 7) and as well as her testimony under cross-examination. Claimant's statements made to her physicians, and her treating physician's description of the incident, when weighed against employer's evidence that claimant was not taking vital signs of any patients at 3:35 p.m. or anytime after 12:37 pm as none were recorded, do not equate to a preponderance of the evidence that she sustained an aggravation or a new injury to her back that arose out of an [sic] in the course of her employment.

The ALJ's analysis makes it clear that she does not place any credence in Claimant's testimony that she was taking vital signs at the time and place detailed by Claimant as the patient records that she was required to maintain contained no such detailed and corroborating information, in addition to the discrepancies in Claimant's own descriptions of the injury mechanism. While Claimant may have reported that she sustained a work injury, the evidence when weighed by the ALJ was found not to preponderate in her favor that an accidental injury occurred that arose out of and in the course of employment. As there is substantial evidence in

the record to support the ALJ's conclusion, we are not permitted to re-weigh the evidence to arrive at a contrary conclusion.[11]

CONCLUSION AND ORDER

The February 15, 2013 Compensation Order is supported by substantial evidence in the record and is in accordance with the law and therefore is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

December 5, 2013
DATE

[11] *Marriott, supra*.