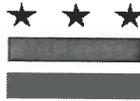


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-026

KELVIN JOHNSON,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF GENERAL SERVICES¹
Self-Insured Employer–Petitioner.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUL 21 AM 11 28

Appeal from a January 20, 2015 Compensation Order on Remand by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 05-021G, DCP No. 7610230006005-0001

(Decided July 21, 2015)

Matthew Peffer for Claimant
Andrea G. Comentale for Employer

Before LINDA F. JORY, MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 27, 2005, Kelvin Johnson, (Claimant) was lifting a metal door when he injured his left arm and left shoulder. A Compensation Order entered on July 12, 2006 which found that Claimant’s left shoulder and left arm problems were causally related to the work accident and temporary total disability benefits from April 27, 2005 to July 12, 2005 were awarded. *Kelvin Johnson v. District of Columbia Office of Property Management*, AHD PBL -05021, DCP NO. 006856 (July 12, 2006) (CO 1). On October 27, 2009, the Disability Compensation Program

¹ Employer pointed out in its Application for Review this matter was originally captioned as *Kelvin Johnson v. Office of Property Management*. Claimant’s employing agency is now known as Department of General Services. Employer mistakenly captioned its Application for Review filed on February 19, 2015 as *Kelvin Johnson v. Department of Corrections* because that is the (incorrect) caption noted in the January 20, 2015 Compensation Order on Remand.

(DCP) issued a Notice of Determination that Claimant was temporarily and totally disabled. Since the time of the formal hearing that was the subject of the July 12, 2006 CO1, Claimant received medical care and treatment from Dr. Christopher Magee and Dr. Zohair Alam. After a period of time, Dr. Alam recommended that Claimant undergo additional surgery on his left shoulder and opined that he was unable to perform his regular duties due to the injury. DCP did not authorize the surgery and Dr. Alam refused to treat Claimant.

In a Compensation Order issued on July 9, 2012, Claimant was found to be temporarily and totally disabled from December 6, 2011 to the present and continuing as a result of the injuries he sustained to his left shoulder and arm. *Kelvin Johnson v. District of Columbia Office of Property Management*, AHD PBL-05-021F, DCP No. 006856 (July 12, 2006) (CO 2). On April 18, 2013, Claimant was evaluated by Dr. David Johnson at Employer's request for the purpose of an Additional Medical Examination (AME), and he opined that Claimant's current complaints are unrelated to the work injury, that Claimant was no longer in need of medical care for that injury, which he opined had resolved. He opined further that any functional limits Claimant currently suffers from relate to "other causes".

DCP issued a Notice of Determination (NOD) terminating Petitioner's ongoing wage and medical benefits on May 5, 2013 based on Dr. Johnson's opinion. Prior to the formal hearing that took place before an administrative law judge (ALJ) on October 16, 2013, Claimant arranged for an AME by Dr. Jeffrey Phillips on September 17, 2013. A Compensation Order was issued on January 31, 2014, denying Petitioner's requests for restoration of his temporary total disability benefits, shoulder surgery and causally related medical benefits. *Kelvin Johnson v. District of Columbia Office of Property Management*, AHD PBL-05-021G, DCP No. 7610230006005-0001 (January 31, 2014) (CO 3). Petitioner timely filed an Application for Review challenging the CO3.

In a Decision and Remand Order, the CRB vacated the CO 3 as it determined it contained numerous material inconsistencies and inaccuracies on significant and critical issues. *Kelvin Johnson v. Dist. of Columbia Office of Property Management*, CRB No. 14-022, AHD No. PBL 05-021G, DCP 761023000620050001 (June 17, 2014)(DRO). The DRO further determined the ALJ made irreconcilable findings with respect to the conclusions of the medical experts and that the CO 3 was contradictory with respect to the issues to be decided. The matter was remanded to the ALJ to:

. . . issue a new CO that accurately identifies the issues to be decided, and which contains Findings of Fact that are identifiable as such and are supported by substantial and identified record evidence which contains Conclusions of Law that logically flow therefrom and which has an Order that conforms to those factual findings and legal conclusions and which clearly states what benefits have been awarded, if any. Accordingly, we must vacate the Compensation Order.

DRO at 4.

On January 20, 2015, the ALJ issued a Compensation on Remand (COR) which granted Claimant's request for reinstatement of temporary total medical disability from May 4, 2013

through the present and continuing; authorization for medical treatment including left shoulder surgery and payment for all related medical expenses.

Employer timely appealed.

ANALYSIS²

There have been numerous decisions involving this Claimant and the April 27, 2005 work related injury to claimant's left arm, from AHD, the CRB and the District of Columbia Court of Appeals. Only those relevant to the instant appeal have been identified for the purpose of this decision.

In support of its request for reversal of the COR, Employer asserts:

The ALJ's conclusion that 'Employer has failed to prove by a preponderance of evidence a change in Claimant [']s condition since the last Compensation Order in 2012 or the lack of a medical causal connection between Claimant's current conditions and the work injury' is not based on substantial evidence.

Employer further asserts that the ALJ's reliance on Dr. Jeffrey Phillip's 2008 and 2013 IME reports to support a medical causal connection between Claimant's current condition and the work injury is misplaced.

Claimant responds asserting:

Upon a weighing of the evidence, the COR determined that, although the Government had met its initial burden of production, the weight of the evidence supported a finding that Mr. Johnson required additional medical treatment, could not return to his pre-injury employment and was, therefore, entitled to ongoing wage loss benefits. These ultimate conclusions were based upon the COR's findings of facts and in accordance with the law, the COR properly followed the instructions by the CRB in the DRO and applied the law correctly to the facts.

Claimant's Brief at 6.

Employer cited to the following history provided by Dr. Johnson to support its assertion that the ALJ erred in concluding Employer had not met its burden of proof and that Claimant clearly had

² The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D. C. Code § 1-623.01(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. Code § 1-623.28(a) "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA) , is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. App. 2003)(*Marriott*). Consistent with this scope of review, the CRB and this panel are bound 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.

a significant history of persistent difficulty post the injury and surgery of 2002 prior to April 27, 2005:

Past history is remarkable in that the patient had undergone surgery by Dr. William Dorn for the left shoulder in November 2002 for AC joint problems, either due to arthritis or an AC separation. The patient was then involved in a motor vehicle accident in May 2003 when he once again had left shoulder pain and x-rays at that time revealed an AC separation (May 29, 2003). The patient's symptoms continued through 2004 for which he took Motrin. On September 24, 2004, he had recurrence of symptoms in his shoulder from another injury when he was lifting toilets and was seen by the doctors at Kaiser Permanente on September 24, 2004 because of significant pain in the shoulder.

On February 16, 2005, the patient was noted to have 'chronic and severe shoulder pain for which medication and physical therapy was prescribed. On February 25, 2005, again the patient was noted to have severe shoulder pain on the left shoulder for which he wanted a Toradol injection. This was just a month and a half prior to the work injury on April 27, 2005 for which he is being seen today.

Employer's Brief at 4, citing to Employer's Exhibit 2 at 3. .

Employer refers to Claimant's AME report of Dr. Jeffrey Phillips dated September, 23, 2008 wherein Dr. Phillips stated "The only thing that could change my opinion as to the causation of the individual's permanent problem would be documentation of persistent difficulty post the injury and surgery of 2002 prior to 4-27-05". Employer asserts that had Dr. Phillips had the information that Dr. Johnson describes in his report, and quoted in Employer's Brief, Dr. Phillips would have changed his opinion on causation.

Dr. Philips' evaluations were obtained in 2008 and again in September 2013 by Claimant-Respondent solely for the purpose of litigation. In 2008, Dr. Phillips opined that Claimant-Respondent 'did sustain a strain to the rotator cuff of the left shoulder and impingement syndrome caused by the accident of 4-27-05 . . .' See *Claimant's Exhibit 1 at p. 4*.

A review of the 2012 Compensation Order Employer is attempting to modify reveals the ALJ has previously addressed employer's attempt to relate claimant's problems to his pre-injury conditions, citing to the 2006 Compensation Order:

I hereby incorporate the following from the discussion in the June 2006 Compensation Order:

Regarding the pre-existing injury to the clavicle, the record indicates the time it was sustained was three years before the instant injury . . .

The pre-existing conditions as evidenced by previous visits to Kaiser Permanente for shoulder pain and the motorcycle accident may or may not be related to claimant's current injury claim. It is not necessary to ascertain if this is or is not the case as it is well established that a disability resulting from the aggravation of a pre-existing condition is compensable under the Act' *See Washington Hosp. Center v. District of Columbia Department of Employment Services*, 744 A.2d 97 (DC. 2000)

The discussion regarding Claimant's pre-injury condition has been adjudicated previously, and the decision has become the law of this case.

CO 1 at 6.

Further review of the 2006 CO 1 reveals findings of fact were made involving Claimant's pre-injury motor cycle accident, his broken clavicle, and his treatment with Kaiser Permanent from his multiple injuries to his left shoulder between 2002 and 2005.

This Panel finds that the only statement that could establish a change in claimant's condition which may warrant the termination of Claimant's benefits is the statement quoted by the ALJ from Dr. Johnson's report:

I do not believe that he requires any restrictions related to his left shoulder from the April 27, 2005 injury and any restrictions he might warrant (if any) would be due to other causes. (EE 2).

COR at 5. We further find the ALJ did not commit error in his analysis or conclusion:

Dr. Johnson did not explain what the "other causes" are that Claimant is receiving treatment for his shoulder and how those causes impact Claimant's ability to return to work. Therefore, I credited the report of Dr. Phillips over all the other medical reports of record. I also reject the Dr. Alam's report because of its inconsistency with his earlier reports and his recent finding of adhesive capsulitis.

It is determined that Claimant's symptoms and complaints are consistent with the diagnosis of adhesive capsulitis in that he has a recent worsening of his condition years after the trauma that caused the injury and persistent pain. It is logical that the work injury which is most recent would have caused Claimant's current left shoulder symptoms. Therefore Employer has failed to provide adequate [justification] for [its] termination of [Claimant's] disability benefits.

Id.

The CRB does not reweigh evidence so long as there is substantial evidence in the record to support the ALJ's finding³. Although we may have reached a conclusion contrary to that of the ALJ on this issue, we cannot substitute our judgment for that of the ALJ. *Marriott, supra* 834 A.2d at 885. We conclude that the ALJ's Conclusions of Law are supported by substantial evidence in the record.

CONCLUSION AND ORDER

The January 20, 2015 Compensation Order on Remand is supported by substantial evidence and is in accordance with the law and is hereby AFFIRMED.

So Ordered.

³ The ALJ failed to specifically identify that *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, 8-9 (November 12, 2014) places the burden on Employer at the third step. We find this omission is not reversible error in this case. Placing the legal burden at the third step is necessary when the evidence presented by each side is equal. However, the ALJ did not find the evidence presented by each side was equal and we find his analysis of the evidence may fairly be read as finding Employer did not meet its burden.