GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-163

LACI ELLIOTT,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent.

Appeal from a November 21, 2016 Compensation Order by
Administrative Law Judge Lilian Shepherd
AHD No. 16-228, OWC No. 735706

(Decided April 6, 2017)

Justin M. Beall for Claimant
Mark Dho for Employer

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Laci Elliot ("Claimant") was a bus driver for the Washington Metropolitan Area Transit Authority ("Employer") for approximately 28 years. As described by the Administrative Law Judge ("ALJ") in the Compensation Order ("CO"),

> On August 4, 2015, after completing her work day, Claimant was notified that her cousin passed away. Claimant called her supervisor, Frank Machado and told him she had a death in the family. Claimant asked Mr. Machado for two days off to help plan the funeral. Claimant told Mr. Machado that the funeral would not be for two weeks and she would bring him proof of death in two weeks.

On August 6, 2015, Claimant called Mr. Machado to let him know that she would return the following day but that she was unsuccessful with the funeral arrangements and she will have the proof of death in two weeks. Claimant and Mr. Machado went back and forth about the proof of death in two weeks and Mr. Machado told her to come in and see him the next day.

On August 7, 2015, Claimant reported to work and worked her early run. During her break, Claimant sat in the garage and waited for Mr. Machado. Mr. Machado came in the side door and he looked at her and quickly turned away. Mr. Machado met with a group of bus operators and started having conversations with them. Claimant waited for him to finish speaking with the other operators and as he was walking away she called to him again. Mr. Machado looked at Claimant and went into the superintendent's office.

Claimant spoke with her shop steward, Lawrence Cole, and explained the situation to him. She asked Mr. Cole to check into the situation, to ensure that she was not given an absent without leave ("AWOL") on her record, and let her know by the time she completed her run. Claimant asked Mr. Cole to either text her or leave her a voice mail message.

Claimant was concerned that the AWOL would assess 8 points on her employment record (employer uses a point systems for disciplinary actions). In August of 2015, Claimant had 16 points on her record. An AWOL would have added 8 points to her record and would have been grounds for an automatic termination.

After speaking with Mr. Cole, Claimant went to her vehicle to drive to the other location to relieve another bus operator. As Claimant was driving, she developed a lump in her throat, her eyes started welling up with tears, and she thought she needed to go to the hospital. Claimant was also breathing heavily; she was hyperventilating and could not catch her breath. She called central and was barely able to speak. She told central that they needed to send someone else to relieve the other bus operator because she was going to the hospital.

CO at 2-3.

Claimant has not worked since August 8, 2015.

Claimant was diagnosed with generalized anxiety disorder and grief reaction. Claimant subsequently was examined by Dr. Dayna Smith. After noting symptoms of depression and anxiety, Dr. Smith opined Claimant could not work and recommended self-care and stress management techniques.

Claimant continued to seek help and counseling with several providers, including Dr. Sylvia Porter and Dr. Angela Marshall. Claimant also began to allege constant headaches because of the events of August 7, 2015.

On February 11, 2016, Employer sent Claimant for an independent medical evaluation ("IME") with Dr. Damanhuri Alkaitis for a neurological evaluation. Dr. Alkaitis took a history of Claimant's injury and treatment, reviewed medical records, and performed a physical examination. Dr. Alkaitis opined Claimant's headaches were unrelated to her employment with WMATA. Dr. Alkaitis reiterated this opinion in a letter dated May 24, 2016.

On March 5, 2016, Claimant was sent to Dr. Brian Schulman for an IME. Dr. Schulman reviewed medical records and took a history from Claimant. Thereafter, Dr. Schulman opined Claimant did not suffer from any "mental or behavioral injury or develop a psychiatric disorder" due to the events of August 7, 2015.

A full evidentiary hearing occurred on October 13, 2016. Claimant sought an award of temporary total disability benefits from August 8, 2015 to present and continuing as well as causally related medical benefits related to the claimed work injury. The issues presented for adjudication were:

1. Did Claimant sustain a psychological injury arising out of and in the course of her employment on August 7, 2015?

2. Is Claimant's psychological injury for which she sought medical treatment causally related to her work injury on August 7, 2015?

3. What is the nature and extent of Claimant's disability?

CO at 2.

A CO issued on November 21, 2016 denying Claimant's claim for relief, concluding:

> Based upon a review of the record evidence in its entirety, it is hereby concluded Claimant did sustain an injury that arose out and in the course of her employment on August 7, 2015. However, Claimant's disability is not medically causally related to the work place incident on August 7, 2015. Having determined that there is no medical causal relation between Claimant's psychiatric disability and the work place incident of August 7, 2015, the issue of nature and extent is moot.

CO at 12.

Claimant timely appealed. Claimant argues "the ALJ erred: (1) in concluding that Employer had come forward with sufficient evidence to rebut the statutory presumption of a medical causal relationship operating in Claimant's favor; and (2) in the alternative, erred in failing to give proper deference to the medical opinion of Claimant's treating providers for purposes of determining whether Claimant demonstrated medical causation by a preponderance of the evidence." Claimant's brief at 11-12.

Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with prevailing law. Employer did not appeal the finding that an accidental injury occurred on August 7, 2015 that arose out and in the course of her employment.

ANALYSIS[1]

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) and is compensable. The ALJ concluded that Claimant had invoked the presumption of compensability. This finding has not been appealed.

With the presumption invoked, the burden then shifts to Employer to bring forth substantial evidence showing that a disability is not medically causally related to the work injury. The District of Columbia Court of Appeals ("DCCA") has held that Employer has met its burden to rebut the presumption of causation when it has proffered 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. *Washington Post v. DOES and Reynolds,* 852 A.2d 909 (D.C. 2004) (*Reynolds*).

This bring us to Claimant's first argument, that the ALJ erred in concluding Employer had rebutted the presumption of compensability through the IME opinions of Drs. Alkaitis and Schulman. As the ALJ discussed:

> Dr. Alkaitis examined Claimant and opined that Claimant's current headaches are non-specific. He opined that there are some elements that suggest the headaches may be potentially migrainous but they are most likely overlaid with anxiety. He opined that from a neurological standpoint, the Claimant has nonspecific headaches and an anxiety disorder which have not been adequately treated. Dr. Alkaitis opined that Claimant's diagnosis and need for treatment is not related to her employment. He further opined that the headaches are not caused by other people's actions, no physical trauma and no external mechanical cause.
>
> Dr. Schulman performed a psychiatric examination of Claimant and opined that Claimant's expansive affect, verbosity and her reported excessive emotional reactivity are suggestive of a possible Cyclothymic Mood Disorder which is a vacillating illness of life that was not caused by the occupational incident of August 7, 2015. Dr. Schulman further opined that Claimant did not sustain a

[1] The scope of review by the Compensation Review Board ("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.

> mental or behavioral injury or developed a psychiatric disorder consequent to either date of loss.
>
> Dr. Alkaitis reviewed Dr. Schulman's psychiatric IME of Claimant and Dr. Alkaitis opined that his opinion regarding the Claimant's ability to work in a full duty capacity had not changed. He reiterated his opinion that the Claimant's headaches are not related to her employment, the headaches were not caused by other people's actions. Claimant did not experience any physical trauma and there was no external mechanical cause for her headaches. Dr. Alkaitis maintained his opinion that the need for treatment of her headaches is not related to her employment. Dr. Alkaitis opined that there is no neurological disability and no neurological impairment regarding the August 7, 2015 work incident. Employer's evidence is sufficient to sever the connection and rebuts the presumption.

CO at 9-10. Footnotes omitted.

Regarding the opinion of Dr. Alkaitis, Claimant argues that the opinion is neither firm nor unambiguous, and is actually an inconsistent and unreliable opinion. While conceding Dr. Alkaitis opines Claimant's headaches are not work related, Claimant argues his opinion is nonetheless inconsistent and unreliable because he opines he is unsure of the cause of her headaches. We disagree.

As the ALJ pointed out above, Dr. Alkaitis opined on February 11, 2016 that Claimant suffered from non-specific headaches which were not related to her employment with WMATA. Dr. Alkaitis reiterated this opinion on May 26, 2016, explaining they were not related to her employment as her headaches were not caused by other people's actions, trauma or any other external mechanism. These opinions were rendered after a review of the medical records and an examination of Claimant. We cannot agree with Claimant's characterization of Dr. Alkaitis's opinion as not satisfying Employer's burden to rebut the presumption of compensability, as his opinion, that Claimant's current medical condition is unrelated to the work injury, is an unambiguous opinion which satisfies the *Reynolds* standard.

Claimant argues that Dr. Schulman's report is "insufficiently comprehensive to sever the connection between Ms. Elliott's physical and psychological injuries and the August 7, 2015 injury." Claimant's brief at 16. Again, we disagree.

A review of the evidence supports the ALJ's reliance on the report of Dr. Schulman, in part, to rebut the presumption of compensability. Similar to Dr. Alkaitis, Dr. Schulman took a history of the injury, Claimant's treatment, and performed a mental status evaluation. Dr. Schulman opined definitely that "Ms. Elliot did not sustain a mental or behavioral injury or develop a psychiatric disorder" due to her injury of August 7, 2015. Such an unambiguous opinion is enough to satisfy the *Reynolds* standard.

Claimant's second argument is that the ALJ erred in not according the treating physician preference to Dr. Porter or Dr. Marshall and instead finding the opinion of the IME physicians more persuasive. It is well settled in the District of Columbia, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *see also, Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). However, even with this preference, the trier of fact may choose to credit the testimony of a non-treating physician over a treating physician. *Short, supra.* And where there are persuasive reasons to do

so, a treating physician's opinions may be rejected. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

In the case before us, the ALJ stated:

> Claimant's medical records indicate on several occasions that she is suffering from migraine headaches. However, Claimant's treating physicians do not attribute Claimant's headaches to the work related event on August 7, 2015. Claimant's treating physicians noted Claimant's symptoms but they did not find a medical causal relation between her migraine headaches and a work related event. Claimant's treating physicians have opined that she's paranoid and very anxious. Dr. Harris opined that Claimant has worsening anxiety versus post-traumatic stress disorder with severe rumination triggered when discussing work or return to work. Dr. Marshall opined that Claimant may be paranoid and very anxious and that stress is causing her anxiety and symptoms and lack of sleep.
>
> Claimant came under the care of her counselor, Dr. Porter. Dr. Porter does not provide any opinions regarding Claimant's diagnosis. Dr. Porter's notes were a reflection of what the Claimant told her regarding the symptoms she was experiencing. Dr. Porter's notes also contain the methods for how some of the counseling sessions occurred and also contained coping skills that Dr. Porter provided to Claimant. Nowhere in Dr. Porter's notes is an opinion providing a diagnosis or a correlation between Claimant's symptoms and the work place event. It should also be noted that Dr. Porter's notes from her sessions with Claimant on May 3, May 10, May 17 and May 24, 2016, are the exact same notes as June 7, June 14, June 21, and June 28, 2016, verbatim. This is reflective of the fact that Dr. Porter is a counselor who listens but does not provide a diagnosis and does not make a correlation between a work place injury and medical causal relationship. Claimant's treating physicians and counselor find that Claimant is stressed or anxious when discussing work, family and finances but they offer no correlation to the August 7, 2015 work incident. In addition, Claimant's physical examinations do not support her subjective complaints regarding the migraine headaches. Claimant's MRI of her brain was normal.

CO at 11.

In arguing the above analysis is wrong, Claimant argues that contrary to the ALJ's assertion that Dr. Porter failed to opine Claimant's condition is medically causally related to the work injury, Employer's Treating Physician Form included within Claimant's exhibit 5 is such proof. This is not a medical report, but a form Dr. Porter filled out for Employer. While we do acknowledge that the box of that form is checked next to the question "is this injury work related," a review of the medical record does not reveal any firm language explaining why or how Claimant's condition is medically causally related. Indeed, the remainder of Exhibit 5 consists of Dr. Porter's medical notes summarizing her sessions with Claimant, and what Claimant' relayed in that particular session, and do not offer a medical diagnosis or causation opinion.

Similarly, Claimant points this panel to exhibit 3 when arguing Dr. Marshall opines Claimant's migraines and blurred vision are because of work. However, a review of the medical record shows that Dr. Marshall was only summarizing what Claimant relayed to him. Dr. Marshall's assessment does not mention whether the conditions were medically causally related to work.

Although the ALJ does refer to the treating physician preference, in this case it appears that the ALJ's ultimate determination was premised upon the finding that neither doctor expressed an opinion on causation, as explained above. In essence, there was no opinion to reject. While the CO could have been more clearly drawn, the evidence supports the ALJ's interpretation of the lack of a clear expression of medical opinion relating to causation from the treating physicians.

Finally, Claimant argues that as the medical reports are based on Claimant's reports of her symptoms, and the ALJ found Claimant to be credible, then the reports of her treating physician's must be credible as well. In a footnote, Claimant expounds on this argument, stating:

> Often times, when ALJs find claimants to lack credibility, they will, in order to justify denial of a claim, impute the credibility determination to the treating physicians, and find that the treating physicians' opinions lack credibility because they are rooted in non-credible information (i.e. first-hand reports from the claimant). Certainly, the inverse must be true – if a claimant is found to be credible, then the opinions of treating physicians' which are based on the first-hand reports of that claimant must be deemed to be credible, as well. That is precisely the situation here.

Claimant's brief at 20, n.5.

We decline to follow this very broad rationale. In the case before us, the fact that the ALJ found the Claimant credible, still is negated by the fact that Claimant's treating physicians, namely Dr. Marshall or Dr. Porter, did not render an opinion on whether Claimant's headache and need for counseling were medically causally related to the work accident.

The ALJ concluded:

> The IMEs of Drs. Alkaitis and Schulman provide a thorough psychiatric and neurophysiological explanation regarding the likely cause of Claimant's condition; therefore, they are accorded greater weight. The undersigned is persuaded that Drs. Alkaitis and Schulman's medical opinions are more comprehensive and explains their reasons for their medical conclusion which outweighs the medical opinions of Claimant's doctors at Comprehensive Women's Health and Dr. Porter which are both silent on the causation of Claimant's current condition.

CO at 12.

We can find no error in the above analysis.

CONCLUSION AND ORDER

The November 21, 2016 Compensation Order is supported by substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.