

GOVERNMENT OF THE DISTRICT OF COLUMBIA

**Department of Employment Services
Labor Standards Bureau**

**Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD**



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CRB (Dir.Dkt.) No. 03-117

GENEVIEVE MARCHAND,

Claimant – Petitioner,

v.

PARK HYATT WASHINGTON AND GALLAGHER BASSETT SERVICES,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva Brown
OHA No. 03-232; OWC No. 535108

William A. Butler, Esquire, for the Petitioner

Michael D. Dobbs, Esquire, for the Respondent

Before: E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, FLOYD LEWIS and
SHARMAN J. MONROE, *Acting Administrative Appeals Judges*.

FLOYD LEWIS, *Acting Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code §32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 21, 2003, the Administrative Law Judge (ALJ) denied Claimant-Petitioner's claim for authorization for acupuncture treatment based on the determination of no medical causal relationship between the complained of neck condition and the work injury. Claimant-Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Claimant-Petitioner asserts that the Administrative Law Judge erred in concluding that Employer-Respondent presented sufficient evidence to rebut the presumption of compensability afforded Claimant-Petitioner's neck injury under the D.C. Workers' Compensation Act, and in further concluding that Claimant-Petitioner's neck injury was not the result of her work injury.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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 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. Official Code §32-1501 *et seq.*, at §32-1522(d)(2)(A). "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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this Review Panel are constrained 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.

Turning to the case under review herein, Claimant-Petitioner asserts that the Administrative Law Judge's decision should be reversed because Employer-Respondent did not produce enough evidence to rebut the Act's presumption of compensability. Even if there was sufficient evidence to rebut the presumption, Claimant-Petitioner contends that the Administrative Law Judge erred by concluding that her injury had resolved and in rejecting her request for reimbursement for acupuncture treatment. Employer-Respondent counters that it sufficiently overcame the presumption and after weighing the evidence, the Administrative Law Judge properly concluded that Claimant-Petitioner's injury had resolved and that Employer-Respondent was not responsible for Claimant-Petitioner's acupuncture treatment.

An employee's claim is presumed to come within the provisions of the Act. D.C. Official Code § 32-1521(1) (2001). Upon presentation of credible evidence of an injury and a work-

related event or activity that has the potential of resulting in or contributing to the injury, a claimant invokes the protection of the presumption. *Ferriera v. District of Columbia Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The focus then shifts to the employer to produce evidence specific and comprehensive enough to sever the presumed connection between the employment-related event and the injury. Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). In addition, the scope of the application for the presumption has been expanded to include the causal relationship between the current disabling condition and the injury. *Whittaker v. District of Columbia Department of Employment Services*, 668 A.2d 844, 846-847 (D.C. 1995).

In successfully invoking the Act's presumption, Claimant presented the December 4, 1998 report of her treating physician, Dr. Marc Danziger, which states Claimant suffers from muscular strain to her neck, as the result of her work injury. Thus, our focus shifts to whether Employer successfully rebutted the presumption. In *Washington Post v. District of Columbia Department of Employment Services*, 852 A.2d 909 (D.C. 2004), the District of Columbia Court of Appeals described the evidence that is needed to rebut the presumption:

We hold that an 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.

852 A.2d at 910.

Employer presented the independent medical examination of Dr. Robert Gordon who concluded, upon physical examination, that there was no objective explanation for Claimant's subjective complaints. He emphasized that her examination was devoid of any objective findings. Moreover, Dr. Gordon stated that acupuncture was not necessary, as Claimant's work injury had resolved. Employer's Exh. No. 1. On the issue of rebutting the presumption, there is thus substantial evidence of record to support the Administrative Law Judge's finding that Employer presented sufficient evidence to overcome the presumption. Thus, the final question is whether substantial evidence of record supports the Administrative Law Judge's conclusion that, upon weighing the conflicting medical evidence on causation in the absence of any presumption, Claimant failed to prove, by a preponderance of the evidence, that her neck condition was the result of a work-related injury.

In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. District of Columbia Department of Employment Services*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350, 1353 (D.C. 1992). Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers' compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the

testimony of the treating physician. *Canlas v. District of Columbia Department of Employment Services*, 723 A.2d 1210, 1211-12 (D.C. 1995).

In the instant matter, the Administrative Law Judge clearly gave persuasive reasons why the opinion of Claimant's treating physician was rejected in favor of the conclusions of Dr. Gordon. As discussed earlier, the Administrative Law Judge stressed that Dr. Gordon opined that there was no objective explanation for Claimant's subjective complaints, as her physical examination did not reveal any objective findings to support the claim that her neck condition was related to the work incident. In deciding to rely on Dr. Gordon over Dr. Danziger, the Administrative Law Judge considered the fact that Claimant had not missed any time from work in years, had not sought treatment from Dr. Danziger for over a year, from December 14, 1999 to January 22, 2001, and was not taking any prescription medication related to her injury. Also, the Administrative Law Judge specifically noted that Dr. Danziger was of the medical opinion that Claimant's ongoing symptoms were due to cervical degenerative disc disease and did not include an assertion that her degenerative condition was exacerbated by her work injury.

Based upon the foregoing, there is no reason to disturb the Administrative Law Judge's holding that the weight of the medical evidence favored Employer and that Claimant failed to prove that her neck condition was medically causally related to her work injury.

CONCLUSION

The Compensation Order of August 21, 2003 which denied Claimant-Petitioner's request that Employer-Respondent be held responsible for her acupuncture treatment, is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of August 21, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Acting Administrative Appeals Judge

April 15, 2005
DATE