

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-077

MICHAEL A. BOONE, SR.,

Claimant-Respondent,

v.

PEPCO,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order by
Administrative Law Judge Belva D. Newsome
AHD No. 05-191B, OWC No. 540653

Michael J. Kitzman, Esquire, for the Respondent
Shawn M. Nolen, Esquire, for the Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges.*

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

DECISION AND ORDER

JURISDICTION

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

¹ Judge Russell has been appointed by the Director of the DOES as an interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

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Overview

Claimant-Respondent (Respondent) was working for Employer-Petitioner (Petitioner) as a heavy equipment operator on May 25, 1999 when he injured his lower back while attempting to pick up a twelve-foot long chain sling weighing between 30 to 40 pounds. Respondent received ongoing care from Dr. Adolph Johnson until 2010 whereupon he was referred to Dr. Fraser Henderson, a board certified neurosurgeon.

Dr. Henderson treated Respondent with nerve a block injection to the L-5 nerve root which provided temporary relief from the pain. Due to the success of this injection and further diagnosis, Dr. Henderson recommended surgery in the form of a bilateral L4/5 medial fasciectomy and decompression.

At the Formal Hearing, where Respondent sought authorization for the recommended surgery, Petitioner argued that Respondent's current symptoms were not medically causally related to the May 25, 1999 work injury and the recommended surgery was neither reasonable nor necessary. The presiding Administrative Law Judge (ALJ) basically determined after the presumption was rebutted, that Respondent had shown by a preponderance of the evidence that his current symptoms were causally related to the work injury, and that the proposed surgery was reasonable and necessary, and therefore granted the claim for relief. *Boone v. PEPCO*, AHD No. 05-191B, OWC No. 540653 (July 14, 2011) (CO). Petitioner filed a timely appeal, with Respondent filing an opposition.

On appeal, Petitioner asserts that the ALJ's conclusions of a medical causal relationship and the reasonableness and necessity of the proposed surgery are not supported by substantial evidence in the record. Respondent argues to the contrary and that the CO should be affirmed.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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, § 32-1501 *et seq.*, at § 32-1521.01 (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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard 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 if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, Petitioner initially argues that the ALJ's determination that Respondent's "current medical condition is causally related to his work of May 25, 1999 is not supported by evidence in the record, and the ALJ has failed to cite any evidence supporting her decision."² We find no merit in this argument.

² *Memorandum of Points and Authorities of Self-Insured Employer Pepco in Support of Application for Review*, p. 6.

Pursuant to § 32-1521(1) of the Act, a claimant is entitled to a presumption of compensability.³ In order to benefit from the presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.⁴ This presumption has also been extended with regard to the aggravation of a work-related injury⁵ and to the medical causal relationship between an alleged disability and the work-related injury.⁶

The ALJ deemed the Respondent's credible testimony, in addition to the medical reports from Drs. Johnson and Henderson, sufficient to invoke the presumption that his lower back condition was causally related to the work injury that occurred on May 25, 1999.⁷ Petitioner makes no argument that the ALJ improperly determined that the presumption had been invoked.

Once the presumption of a medical causal relationship has been invoked, the burden shifted to Petitioner to come forward with substantial evidence that the disabling condition is not causally related to the work injury.⁸ Here, the ALJ found the February 2, 2011 independent medical evaluation (IME) report from Dr. John Cohen sufficient to rebut the presumption and thereby sever the causal relationship between Respondent's condition and the work injury.

As the presumption has been rebutted, the evidence must be weighed without reference to the presumption and the burden of production shifted back to Petitioner to show by a preponderance of the evidence that his current disabling condition is causally related to the May 1999 work injury.⁹ It is at this juncture in the analysis that Petitioner argues the ALJ erred, asserting that Respondent has not met his burden.

In weighing the medical evidence, it would appear, although it is not specifically stated, that the ALJ accorded Respondent's evidence the treating physician preference.¹⁰ The ALJ identified the notations within the medical records of Drs. Johnson and Henderson that she

³ Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

⁴ *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987).

⁵ *Waugh v. DOES*, 786 A.2d 595 (D.C. 2001).

⁶ *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

⁷ In the CO on page 3, the ALJ misstated the nature of the injury in stating "[E]mployer challenges whether Claimant's upper right extremity injuries are medically causally related to his May 25, 1999 work injury." We take this to be an inadvertent typographical error insofar as the "lower back" is referenced elsewhere in CO as the injured body part.

⁸ *Waugh, supra*.

⁹ *Id.*

¹⁰ *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004).

ultimately found sufficiently persuasive to warrant the conclusion that "Claimant's lower back pain is medically causally related to his work-related injury of May 25, 1999." CO at 4. Although not required to do so, the ALJ also explained why she rejected the report of Dr. Cohen and favored those of the treating physicians.¹¹

The ALJ rejected Dr. Cohen because he found:

"...Claimant had not exhausted conservative treatment for his lower back pain and did not state what further aggressive treatment Claimant should undergo....Dr. Cohen states that Claimant's back pain was not directly caused by Claimant's work-related injury. The legal requirement is medically causally related and not direct result. The medical records concerning Claimant's back pain due to lifting do not demonstrate lifting equivalent to a thirty to forty pound chain swing." CO at 4.

For the ALJ to discount Dr. Cohen's opinion because he found Respondent had not exhausted conservative treatment while also not stating what aggressive treatment Respondent should have undertaken overlooks the salient fact that this finding has nothing to do with causal relationship. Citing the doctor's statement of the failure of prior medical treatment coupled with a similar failure to state prospective treatment ordinarily would have constituted reversible error, if cited as the only reasons for rejecting the IME's opinion.

However, the ALJ proceeded to fault Dr. Cohen for opining that Respondent's back pain was not directly caused by the work-related injury. As the ALJ correctly noted, the legal standard of causation for workers' compensation purposes under the Act includes contribution to a condition, not merely direct causation.¹² In addition, in referencing the medical records concerning Respondent's low back pain due to lifting, the ALJ basically reasons that the other subsequent lifting events to which Petitioner points to as alternative causes of the current condition, i.e., lifting trash or a computer, are not sufficiently as traumatic as lifting a 30 to 40 pound swing chain so as to break the causal connection between the work incident and the current low back condition. These reasons for rejecting the IME and the medical records regarding the intervening lifting events are supported by substantial evidence in the record.

Petitioner's arguments on appeal that Respondent did not meet his burden amount to disagreements with the interpretation and weight to be given the evidence considered by the ALJ. While it is possible to have reached a different conclusion based upon this same record, we are nonetheless constrained to affirm the decision of the ALJ where it is based upon substantial evidence. In this case, there is substantial evidence to support the facts as found by the ALJ, and the conclusion that Respondent's current low back pain is medically causally related to the May 1999 work injury flows rationally from those facts and will not be disturbed.

¹¹ See *Oliver v. George Washington University*, CRB No. 09-001, AHD No. 95-376E, OWC No. 282571 (November 17, 2008).

¹² *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004).

Petitioner next asserts that the ALJ erred in finding that the proposed surgery is reasonable and necessary. Petitioner argues that the ALJ's rationale for accepting the treating physician's opinion over that of the utilization review report is not persuasive.

It has become increasingly settled in this jurisdiction that on the question of reasonableness and necessity of medical treatment:

“...the UR is not “dispositive”, but rather, under the DCCA opinion in *Siblely Memorial Hospital, supra*, and our subsequent decision in *Haregewoin, supra*, it stands on equal “preferential” footing with an opinion of a treating physician. The question of reasonableness and necessity is properly before the ALJ for consideration; she is free to consider the medical evidence as a whole on the question, and is not bound by the outcome of the UR report. The issue should be decided based upon the ALJ's weighing of the competing medical evidence and she is free to accept either the opinion of treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.”¹³

In addition, it is incumbent upon the ALJ to explain why one opinion is chosen over the other.¹⁴

In addressing the reasonableness and necessity of the proposed back surgery, the ALJ correctly stated that the February 2, 2011 UR report was “accorded equal weight to the opinion of Dr. Henderson.” The ALJ went on to reason

It is found that the Utilization Review report is deficient, as it recommends additional conservative treatment that Claimant has already undergone. The undersigned is not persuaded by the opinion in the Utilization Review report, and therefore it is rejected.

Given the length of Claimant's conservative treatment without longlasting (sic) relief as reported by the Claimant, it is reasonable that he undergo the prescribed surgery to his lower back. It is determined that Claimant has met his burden that the medical treatment recommended by Dr. Henderson is reasonable and necessary.

CO at 5.

Petitioner asserts the ALJ committed error because the stated reason for rejecting the UR report, i.e., because it recommends conservative treatment already undertaken, is not persuasive. Petitioner argues that the UR doctor's recommendation of conservative treatment is based upon a finding of there being no medical evidence to support surgical intervention and the treating physician provided no rebuttal to the UR report.

¹³ *Green v. Washington Hospital Center*, CRB No. 08-208, AHD No. 07-130, OWC No. 628552 (June 17, 2009).

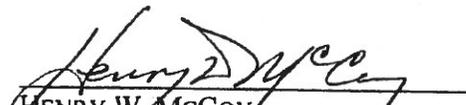
¹⁴ *Haregewoin v. Leows Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008).

The ALJ in weighing the competing medical reports on the issue of the reasonableness and necessity of the proposed back surgery has determined that the treating physician's recommendation is more persuasive as it comes at the end of an extensive period of conservative treatment that has afforded Respondent little or no relief. The first limited surgical intervention, the L5 nerve root injection, provided immediate, although short-term, relief. The ALJ's rejection of the UR report, which recommends further conservative treatment which has already proven to be unsuccessful in the treatment of Respondent's ongoing back pain, is supported by substantial evidence in the record and will not be disturbed.

CONCLUSION AND ORDER

As the Compensation Order of July 14, 2011 is supported by substantial evidence in the record and is in accordance with the law, it is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

October 21, 2011

DATE