GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-115

NATIVIDAD MONTIEL,
Claimant–Respondent/Cross-Petitioner,

v.

WASHINGTON HOSPITAL CENTER and
GALLAGHER BASSETT SERVICE,
Employer/Third Party Administrator-Petitioner/Cross-Respondent.

Appeal from a July 27, 2016 Compensation Order
by Administrative Law Judge Gerald D. Roberson
AHD No. 16-224, OWC No. 712254

(Decided January 24, 2017)

Ashlee K. Smith for Employer
Krista N. DeSmyter for Claimant

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This is an appeal by Washington Hospital Center ("Employer") of a Compensation Order issued July 27, 2016 ("CO") by and Administrative Law Judge ("ALJ") following a formal hearing in the Administrative Hearings Division of the Office of Hearings and Adjudication within the District of Columbia Department of Employment Services.

The following procedural and case-related facts are as found and referred to in the CO. There are many other medical visits, particularly to Dr. Wilkerson Ninala, which are documented in the evidentiary record but which are not referenced in the CO or here. We limit our recitation to these facts because they represent the basis of the ALJ's findings and conclusions, and neither party complains in this appeal that anything specific in the record that is not referenced in the CO was not considered or should be considered by the Compensation Review Board ("CRB").

Natividad Montiel ("Claimant") was employed as a surgical technician by Employer. She was injured when she slipped and fell in an operating room on December 19, 2013, striking her head and knees on the floor.

As a result of this injury Claimant suffered headaches, dizziness, neck pain, back pain and arm pain. The day following the fall she underwent CT scans of her head and neck which were read as normal. She also underwent an MRI of the brain, which was also normal.

She came under the care of Dr. Eric Jeffries, a neurologist, in January 2014. Although Claimant continued to report bouts of headaches, Dr. Jeffries neurological examination was normal. He diagnosed her headaches as cervicogenic, and prescribed anti-inflammatory medicine and a muscle relaxer.

Claimant also sought care from her internist, Dr. Wilkinson Ninala, on March 31, 2014. Dr. Ninala diagnosed post-concussion syndrome.

She was seen again by Dr. Jeffries May 8, 2014, complaining of tingling and "pulling" of her head. The neurological examination was again normal. Dr. Jeffries felt that Claimant suffered from cervical stenosis, headaches, and post-concussive symptoms, for which he prescribed Cymbalta.

Employer had Claimant seen on June 11, 2014 by Dr. Robert Smith, an orthopedic surgeon, for the purpose of an independent medical evaluation (IME). Claimant continued to complain to Dr. Smith of neck pain and back pain occasionally radiating into her right arm, as well as headaches and dizziness. By the time of this examination, Claimant had returned to her usual occupation. Dr. Smith reported that Claimant's knee contusions had resolved completely, that her neurological examination was normal, and that her condition warranted six weeks of post-injury physical therapy and a home exercise program.

Claimant was seen again by Dr. Jeffries on September 8, 2014, complaining of headaches and fatigue. Dr. Jeffries indicated at that time that he believed Claimant should limit her work schedule, which included long shifts and regular overtime, to 8 hours a day and 40 hours per week.

On November 11, 2014, Dr. Jeffries referred Claimant for pain management. Claimant also returned to Dr. Ninala and his co-practitioner, Dr. Satish Angra, who also suggested pain management and continued care under Dr. Jeffries.

On March 16, 2015, Claimant was seen at Employer's request by Dr. A. Jerry Friedman, a neurologist, for an IME. Claimant complained of pain over her entire body, constant headaches, bilateral neck and shoulder pain, and weakness and tingling in her arms and hands. Dr. Friedman opined Claimant suffered from head trauma, myofascial pain, headaches and neck pain.

Claimant was seen again by Dr. Jeffries on March 19, 2015, and she advised him that one of her medications, nortriptyline, alleviated her headaches, and Dr. Jeffries continued her on that medication.

Claimant was referred to Dr. Amin Amini, a brain and spine specialist, who saw her on July 14, 2015. She complained to Dr. Amini of headaches, neck, chest, back and bilateral arm and shoulder pain, bilateral leg pain with difficulty walking, all of which interfered with her activities of daily living. She reported intolerance to cold, nausea, memory loss, blurred vision and muscle spasm. His physical examination demonstrated hyperreflexia, limited range of neck motion, with normal muscle tone and bulk. He performed a psychological assessment which was reported as normal.

It was Dr. Amini's view that Claimant exaggerated some of her symptoms, which were unexplainable by reference to her normal MRI, and opined that she was not a surgical candidate and that he had nothing to offer her by way of treatment from a neurological perspective.

Claimant continued to see Dr. Jeffries, as well as other specialists, including Dr. Ghazal for pain management, and Dr. Paul DeMarco for a rheumatology evaluation. Dr. DeMarco diagnosed myofascial pain but not fibromyalgia attributed to "her work", and recommended physical therapy and medication focusing on muscle relaxation.

Claimant was seen by Dr. Ninala on December 1, 2015, at which time he reviewed her progress and wrote a "Disability Certificate" limiting Claimant to a 10 pound lifting restriction and limiting Claimant's work schedule to eight hours per day and 40 hours per week.[1]

In February 2016, Claimant saw Dr. Ninala and he noted that she was crying during the visit, as she has at several other times while in his office. He referred her to a psychologist.

Claimant again saw Dr. Jeffries on March 3, 2016, and complained of diffuse body pain, chronic headaches, a burning sensation in her armpits, and generalized muscle pain including neck pain associated with the headaches.

On June 24, 2016, Claimant was evaluated by Dr. Donald Hope, a neurologist and psychiatrist, for an IME at Employer's request. Claimant reported complaints concerning her armpits, as well as blurred vision, cognitive problems, and a feeling of being "overwhelmed" by her condition.

Dr. Hope's assessment was that Claimant's problems were non-physiologic and markedly exaggerated, being notable for "marked give-way weakness" throughout the examination. His impression was (1) pre-existent mild cervical disc disease with a mild cervical bulge unrelated to

[1] Prior to the imposition of the December 1, 2015 weight restriction, Claimant had continued to work as a surgical technician, limiting her hours to no more than eight per day and 40 per week. The limits on hours were imposed earlier, probably by either Dr. Jeffries or Dr. Ninala, but the CO does not state when or by whom the hour limitations were imposed. Nonetheless, they were accommodated by Employer, which resulted in Employer voluntarily paying temporary partial disability benefits based upon the wage differential. As noted below in footnote 3, Employer was unable to continue to accommodate Claimant once the weight restriction was imposed, and it was at that point that Claimant was placed in the greeter position.

the work injury which was asymptomatic, (2) cervical myofascial pain which was "self-limited"[2] without permanent injury, disability or sequalae, (3) self-limited cervicogenic headache without permanent injury, disability or sequalae, (4) persistent multitude of complaints unsubstantiated by objective findings, unrelated to the work incident without permanent injury, disability or sequalae, (5) symptom exaggeration and pain behaviors, and (6) minimal evidence for a brief, self-limited post-concussive syndrome without permanent injury, disability or sequalae. It was Dr. Hope's opinion that the work-related post-concussive syndrome resolved about three months after the work injury.

Claimant was terminated from employment because Employer maintained that she was crying on the job, behavior incompatible with her duties as a greeter.[3]

She sought an award of temporary total disability from November 29, 2015 through January 24, 2016 and February 10, 2016 to date and continuing at the formal hearing conducted on July 6, 2016, as well as payment of expenses for psychological care. Following the hearing the CO was issued on July 27, 2016.

In the CO, Claimant was awarded temporary total disability benefits from November 29, 2015 through January 24, 2016, and from February 10, 2016 through the date of the hearing and continuing. Claimant's claim for payment of medical expenses relating to a referral for psychological evaluation was denied.

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[2] Meaning "limited by its own peculiarities, and not by outside influence; said of a disease that runs a definite limited course." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1620 (29th ed. 2000).

[3] The CO does not give specific dates for the periods when Claimant worked as a surgical technician or when she switched to the greeter position. The dates of payments recited below are taken from an Order entered August 16, 2016, post-hearing and following issuance of the CO by the ALJ. The Order was issued following the filing by the parties of a Joint Motion to Modify Compensation Order, in order to "correct the average weekly wage, [and to] inclu[de] additional dates of voluntary payments and the award."

The Order states that Claimant was paid temporary total disability benefits for the following periods:

> December 20, 2013 through January 13, 2014
> January 18, 2014 through January 27, 2014
> Various other unspecified dates from January 17, 2015 through April 27, 2015.

The Order states that Claimant was paid temporary partial disability benefits for the following periods:

> July 23, 2014 through October 23, 2015
> October 25, 2015 through November 28, 2015
> January 24, 2016 through February 10, 2016
> February 11, 2016 through July 13, 2016

The Order amends the award to read:

> Employer shall pay temporary total disability benefits from November 29, 2015 to January 24, 2016 and February 10, 2016 to the present and continuing with interest, based on an average weekly wage of $1,409.71

On August 26, 2016, Employer filed Employer/Insurer's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief") seeking reversal of the award of temporary total disability benefits.

On September 6, 2016, Claimant filed Claimant's Opposition to the Employer's Application for Review and Cross-Application for Review ("Claimant's Brief"), seeking affirmance of the award of temporary total disability benefits and reversal of the denial of payment for psychological care.

On September 16, 2016, Employer filed Petitioner's Opposition to Respondent's Cross-Petition for Judicial Review, seeking affirmance of the denial of the request for provision of psychological care.

ANALYSIS

We note preliminarily that the CO is lacking in specificity in many areas that would make a full understanding of the facts of this case much easier. *See. e.g.* note 3, *supra.* However, none of the missing (or in some cases, ambiguous) findings in the CO form the basis of either party's legal positions in this appeal.

The only portion of the CO's award with which Employer takes exception in this appeal is the award for ongoing temporary total disability beginning February 10, 2016. The loss of wages underpinning this award stem from (1) Claimant being unable to perform her pre-injury job as a surgical technician due to her continuing physical limitations related to lifting weights over ten pounds, and to work more than eight hours per day or forty hours per week, and (2) Claimant's being terminated from a modified "greeter" position due to her being unable to control her emotions and refrain from crying while on duty.

Employer does not argue in this appeal that Claimant is physically capable of returning to her pre-injury position. Further, Employer has apparently abandoned any reliance upon a "voluntary limitation of income" theory in connection with its defense of this claim, as such defenses are normally couched. [4] We can find no reference to voluntary limitation in Employer's Brief, and while the primary case cited in the brief by Employer upon which it relies dealt tangentially with voluntary limitation of income, the behavior in that case was, generally speaking, the claimant's *intentional* failure to follow workplace rules about attendance and notifying the employer in advance of or after incurring an absence from work. Nothing in the cited case related to a presumably unintentional behavioral problem, such as the inability to control one's emotions and thereby crying. *See generally Robinson v. DOES and Flippo Construction Company, et al.,* 824 A.2d 962 (D.C. 2003), cited in Employer's Brief at unnumbered pages 10, 11.

[4] By this we mean that when an employer raises the issue of voluntary limitation of income it is in the context of an injured worker failing or refusing to accept either a position modified by the employer to conform to a claimant's work injury-related physical limitations, or to accept a different job that is available and within a claimant's vocational capacity. No such argument is raised by Employer in this appeal.

There is no suggestion raised in this case that Claimant's crying while on duty was an intentional behavior that she could control. Rather, although the ALJ accepted the only psychiatric medical opinion in the record relating to Claimant's mental state, to the effect that Claimant had not sustained a psychological or emotional injury as a result of the work injury, there does not appear to be any question that, for whatever reason, Claimant experiences uncontrollable emotional reactions which lead to her becoming what Employer deems to be unacceptably tearful and sometimes to cry.

As Employer itself points out, "under D.C. law, if a claimant is provided restrictions by their treating physician, the employer is required to provide a modified duty position that the claimant can *mentally* and physically perform. *See Morrison v. DOES*, 834 A.2d 890, 896 ([D.C.] 2003)." Employer's Brief at unnumbered page 11, n. 14 (emphasis added).

Morrison involved the question of whether the "suitability" of a modified position could take into account factors other than those attributable to the work injury. The court cited *Joyner v. DOES*, 502 A.2d 1027, 1031, n. 4 (D.C. 1986) for the proposition that

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically *and mentally* do following his [or her] injury, that is, what type of jobs is he [or she] capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he [or she] could realistically and likely secure?

(Emphasis added).

The court concluded *Morrison* with this instruction:

> Accordingly, for the foregoing reasons, we conclude that the agency's decision that Ms. Morrison rejected a job offer commensurate with her physical abilities is based on substantial record evidence, but we remand the case to the agency for a determination of whether Ms. Morrison was entitled to refuse the job offer at St. Anne's because it was not "suitable employment," *even though it was commensurate with her physical abilities*, since she would be forced to give up her position at the Jackson Medical Group.

Id. at 898 (emphasis added).

Although on remand to the CRB ultimately rejected the claimant's claim that the job was unsuitable, the CRB wrote:

> As the Hearing Examiner correctly emphasized, an employer is not required to find suitable employment for its injured employee with a salary that matches the

> employer's pre-injury wages. *However, it must be stressed that the employer would be obligated to make up the difference between the pre and post-injury wages in the form of temporary partial disability benefits.*
>
> Thus, in the instant matter, the Hearing Examiner properly rejected Petitioner's contention that the position at St. Anne's was unsuitable employment because she would have to quit her part-time employment at Jackson to work full-time at St. Anne's. The calculation of Petitioner's actual wage loss after her injury included her wages at Jackson, in addition to the wages she would have earned at St. Anne's, had she not voluntarily limited her income.
>
> As such, the Hearing Examiner's conclusion that Petitioner voluntarily limited her income by failing to accept suitable employment offered to her by St. Anne's is supported by substantial evidence and is in accordance with the law. This Panel must reject Petitioner's argument that she entitled to refuse the job offer by St. Anne's because it was not "suitable employment," even though it was commensurate with her abilities, since she would be forced to give up her position at Jackson. *See Robinson v. D.C. Water & Sewer Authority*, CRB No. 04-49, OHA No. 03-231A (June 22, 2006); *Henry v. WMATA*, Dir. Dkt. No. 90-78, H&AS No. 89-586 (December 29, 1994) (rejection of a claimant's argument that she was entitled to refuse a suitable job offer because if she accepted the position, it would have conflicted with her personal academic commitments).

Morrison v. Greater Southeast Community Hospital, CRB No. 98-046 (September 14, 2006) at 5, 6 (emphasis added).

It was the employer's obligation to make up any wage differential that rendered Ms. Morrison obligated to accept the new position identified by employer or have her ongoing benefits reduced commensurately. However, it is equally noteworthy that neither the court nor the CRB determined that factors other than a claimant's physical capacity could not be considered when a determination of suitability is concerned, and by citing and quoting *Joyner*, the court explicitly reiterated that what "can the claimant physically and *mentally* do following his [or her] injury" is a legitimate question in conducting this inquiry.

It is immaterial to this case that Claimant's emotional difficulties precluded her from satisfactorily performing the greeter position. Whatever its genesis, Ms. Montiel's predisposition to emotional responses to dealing with the public are part of who she is, and the ALJ was not obligated to find that Employer's terminating her because she was not able to satisfactorily perform the job is no different than their terminating Claimant from a modified position as, say, an accounting assistant, because she lacks the skills to perform that position.

Accordingly we reject Employer's argument that Claimant's termination from the greeter position severed the connection between the work injury and Claimant's wage loss, for the

reason that her termination from that position was the result of the position not being suitable alternative employment under *Joyner*.

This result is further supported, as Claimant notes in her Brief, by the ALJ making a specific finding that Claimant credibly testified that the greeter position included pushing a cart laden with periodicals, causing her to experience pain from the work accident, and that pain was a reason she cried on duty. Claimant's Brief, Argument 2 at 9 – 10.

Review of the CO confirms such a finding was made by the ALJ (CO at 13), and resort to the record confirms that Claimant so testified. (HT 44-46). Thus, there are multiple grounds upon which to affirm the ALJ's decision.

Turning to Claimant's Cross-Appeal, she argues in her Brief that the ALJ's reliance upon the opinion of Dr. Hope to the effect that her work-injury has not resulted in a psychiatric or psychological injury should not be affirmed because the ALJ rejected Dr. Hope's conclusions with respect to causal relationship of Claimant's alleged headaches as being insufficiently explained, and that they are as fully explained as Dr. Hope's opinions concerning the psychiatric claim. Claimant's Brief at 14.

We disagree.

In considering this issue, the ALJ first accorded Claimant the benefit of the presumption that her claimed psychological injury is causally related to the work injury. He did this because "Dr. Ninala stated he referred her to a psychologist because he testified that he was 'trying to find it there's anything that can help her' and that he referred her to a psychologist because 'she had not gotten any better', and stated that the referral [was] possibly related to the accident." CO at 14, referring to CE 16 at 29.

While the ALJ based the decision to accord Claimant the benefit of the presumption in part upon Dr. Ninala's testimony, it is apparent that Dr. Ninala's statement was made in the context of his being perplexed at her complaints of pain that had no apparent cause within his area of expertise, internal medicine. *See* CE 16 at 13-14, 16, 18-19, 22-23, 26, 29.

After according Claimant the benefit of the presumption, the ALJ then relied upon the opinion of Dr. Hope, a psychiatrist and neurologist, to the effect that the work injury did not cause any condition requiring psychological treatment, to rebut the presumption. The ALJ then weighed the evidence and, while acknowledging the treating physician preference, he accepted the opinion of the psychiatrist, as a specialist, over that of the internist, to conclude that there were no psychological issues that were causally related to the work injury. The following is the ALJ's discussion of this process:

> In this case, the record does not contain sufficient evidence to causally relate Claimant's psychological consultation to the December 19, 2013 work injury. At

> the hearing, Claimant maintained Dr. Ninala, who is an internal medicine physician and is not board certified, made the referral due to her tearfulness at work. HT p. 16 and CE 16, Depo at 27 -28. During his deposition, Dr. Ninala stated he could not recall the February 2016 incident of crying at work. Dr. Ninala testified "I don't know if she was crying in February 2016." CE 16, Depo at 29. Dr. Ninala testified he referred her to a psychologist because he is "trying to find if there's anything that can help her." CE 16, Depo at 29. Dr. Ninala testified he referred her to a psychologist because she had not gotten any better, stating the referral is possibly related to the accident. CE 16, Depo at 30. Conversely, Dr. Hope, who is board certified in neurology and psychiatry, stated Claimant had a normal mental status with normal orientation to person, place and time. EE 8, p. 29. Dr. Hope noted Dr. Jeffries' [sic] did not recommend neuropsychological testing for Claimant's cervicogenic headaches. EE 8, p.42. Dr. Hope reported Claimant had no ongoing condition related to the subject incident. EE 8, p. 42. Dr. Hope remarked Claimant does not require any additional treatment. Dr. Hope expressly stated "Dr. Ninala's referral for psychotherapy is not reasonable, necessary or causally related to the subject incident of 12/19.13." EE 8, p.43. At this time the record does not contain medical rationale from a qualified physician to causally relate the need for a psychological consultation to the work incident of December 19, 2013 or employment factors. Dr. Hope's opinion constitutes the weight of medical authority as the only physician, specializing in psychiatry, to render an opinion regarding Claimant's mental status. As such, Claimant has not causally related the request for psychiatric treatment to the work incident of December 19, 2013.

CO at 15, 16.

This is an instance where the medical opinion in favor of a causal connection finding was considered against a contrary medical opinion. The favorable opinion was not expressed in very strong terms, being described as a "possibility", and was made by a non-board certified internist, while the contrary opinion was unequivocal and rendered by a board certified psychiatrist and neurologist.

While we may have reached a different conclusion, it is not our job to substitute our judgment for that of the ALJ. Rather, where the ALJ's acceptance of a medical opinion is supported by substantial evidence and its variance from that of a treating physician is reasonable and explained, the ALJ's decision prevails and must be affirmed. *See Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). That is the case in this matter, and we affirm.

CONCLUSION AND ORDER

The findings that Claimant's physical limitations prevent her from performing the duties of the pre-injury job are supported by substantial evidence, are not challenged on this appeal, and are AFFIRMED. The determination that Claimant's termination from her modified position as a greeter neither severed the causal relationship between Claimant's diminished wage loss and the work injury nor constituted a voluntary limitation by Claimant of her income is supported by substantial evidence and is AFFIRMED. The determination that Claimant's work injury has not resulted in a psychological injury is supported by substantial evidence and is AFFIRMED.

So ordered.