

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-012

**REGINA VELASQUEZ¹,
Claimant-Petitioner,**

v.

**BAKER DC, LLC
and ARCH INSURANCE COMPANY,
Employer/Carrier-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAY 13 PM 12 11

Appeal from an December 31, 2014 Compensation Order
by Administrative Law Judge Donna J. Henderson
AHD No. 13-031, OWC No. 694213

B. Marian Chou for Claimant
Anthony J. Zaccagnini and Julie D. Murray for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, and MELISSA LIN JONES *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked as an unskilled laborer for employer. On June 21, 2012, Claimant was struck by a beam which was being lowered by construction workers. Employer's Safety Manager took Claimant to Dr. Louis Levitt the next day. Dr. Levitt diagnosed Claimant as suffering from a contusion to the left shoulder girdle and prescribed Advil. Claimant returned to work on Monday June 25, 2012 with light duty restrictions. On July 15, 2012, Claimant presented Employer with a disability slip from Holy Cross Hospital which stated Claimant should be off work from July 12, 2012 through July 14, 2012. While at Holy Cross Hospital Claimant had a CT scan of her head which was normal. Claimant sought treatment from Dr. John Keeling on July 23, 2012 who diagnosed left neck strain and advised Claimant to return to full duty. Dr. Keeling advised Claimant to return if she had an increase in symptoms. Claimant returned to

¹ We note that throughout the course of the adjudication process, Claimant's name has been Regina Velasquez and Regina Velasquez Aragon. While the Compensation Order before us lists Claimant's name as Regina Velasquez Aragon, Claimant's Application for Review identifies Claimant as Regina Velazquez.

work and did not return to Dr. Keeling or any physician for further treatment. Claimant was laid off by Employer on August 13, 2012 along with three other employees. Claimant sought a permanent partial impairment rating due to “muscular headaches” from Dr. Arthur Kurlanzik on March 11, 2013

At the request of Employer, Claimant was examined by Dr. Kenneth Eckmann, neurologist. Claimant sought treatment from Dr. Joan Luo on April 30, 2014 and complained of headaches and left shoulder pain. Dr. Luo referred Claimant for an MRI of the brain which Claimant had on June 10, 2014. The MRI was negative as were an EMG and nerve conduction studies performed on June 13, 2014.

A full evidentiary hearing occurred on June 24, 2014. The claimant sought an award of temporary total disability benefits from July 12, 2012 through July 15, 2012 and July 24 2012 and authorization for medical treatment. As the administrative law judge (ALJ) who conducted the formal hearing had resigned, an Order to Show Cause, issued advising the parties to show cause why the matter could not be decided based on the existing record by another ALJ. Claimant consented to have the matter decided by a new ALJ based on the existing record. Employer did not file a response. A Compensation Order (CO) issued on December 31, 2014. The ALJ ordered Employer make payment of Claimant’s medical treatment with Dr. Levitt, Holy Cross Hospital and Dr. Keeling and the diagnostic studies ordered by them. Employer was further ordered to make payment of temporary total disability for the period of relief claimed. Claimant’s claim for medical expenses incurred as a result of the two independent medical examinations (IME) Claimant had with Drs. Kurlanzik and Dr. Luo was denied.

Claimant timely appealed, requesting that the CO be reviewed and reversed. Employer opposed Claimant’s appeal, asserting the ALJ applied the law correctly and relied on substantial evidence in reaching her conclusions.

ISSUES ON APPEAL

1. Is the ALJ’s determination that Employer rebutted the presumption supported by substantial evidence?
2. Did the ALJ improperly reject the IME opinion of Dr. Eckmann?
3. Did the ALJ erroneously withhold probative and material evidence?
4. Is the ALJ’s determination that Claimant is not entitled to retaliatory discharge relief supported by substantial evidence?
5. Did the ALJ erroneously decide whether Claimant had a permanent injury?

ANALYSIS²

Claimant incorrectly asserts Employer must meet its evidentiary burden by a preponderance of evidence in order to rebut the presumption. Although not identified by the ALJ in her analysis, when an IME opinion is proffered to rebut the presumption, it is well established that employer's evidence is sufficient to rebut the presumption when the IME opinion is rendered by a qualified independent medical expert who, having examined the employee and reviewed the medical records, renders an unambiguous opinion that the work injury no longer contributes to the disability. *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004).

The ALJ stated:

Despite its stipulations, Employer contends that the injury was a contusion of her left shoulder and that any current symptoms in her neck and head are not causally related to being hit by a beam on June 21, 2012. Employer's own evidence establishes that there was an injury and for which anti-inflammatory medicine (Advil), heat and a home stretching program were prescribed. EE 5, p.1. Employer submitted no evidence that the symptoms before January 8, 2013 the date on which Dr. Robert Gordon examined Claimant, were not causally related to the injury.

The Employer successfully rebutted the presumption for the period after January 8, 2013 by Employer's IME Dr. Gordon's report on January 8, 2013. After January 8, 2013, Claimant's complaints regarding her left shoulder, neck and head had resolved. Dr. Gordon reported that his "thorough neurological examination shows no residuals from any head injury that may have occurred," noting that Claimant's brain scan was also normal. CE 2, p.5. Dr. Gordon's exam is consistent with the "tenderness" in the cervical spine and paraspinals which Dr. Keeling found less than a month after the injury. EE 3.

CO at 5.

In support of the assertion that the ALJ erroneously assessed Dr. Gordon's report, Claimant asserts that Dr. Gordon is an orthopedic surgeon and not a neurologist; therefore Dr. Gordon does not have the expertise to conduct a "thorough neurological examination". Claimant's Brief at 8. Claimant further asserts:

² The scope of review by the Compensation Review Board (CRB) and this Review Panel (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. D.C. Code § 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 Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003). 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.

From his own report, Dr. Gordon admitted that the Claimant still had complaint of headaches when she visited him. He rejected the Claimant's complaint without any justification and then, conveniently concluded that the Claimant has fully recovered from her head injuries and reached maximum medical improvement. Dr. Gordon's own statements are not logical and contradict to (sic) themselves.

Id.

Dr. Gordon summarized his opinion in the January 8, 2013 report:

In summary, this patient sustained some soft tissue injuries on June 21, 2012. She still had some headache complaints, but her examination was devoid of any objective findings. Assuming the accuracy of the history given to me by the patient some contusions of the head, neck and shoulder did occur on June 21 2012. On an objective musculoskeletal basis, she has recovered from these injuries. She was seen at a local hospital emergency room and had two consultations subsequent to that injury, which I believe were appropriate. However, there is nothing to indicate that any further treatment was indicated or necessary as related to this injury. On an objective musculoskeletal basis, she has reached maximum medical improvement. There are no restrictions on this patient's physical capacity as related to any soft tissue injuries that may have occurred on 6/21/12.

EE2 at 2.

We decline to discuss whether Dr. Gordon is qualified to conduct a neurological examination as it is beyond our scope of review. We conclude, instead, that pursuant to *Reynolds*, Dr. Gordon's opinion is an opinion rendered by a qualified independent medical expert who, having examined the claimant and reviewed the medical records, and rendered an unambiguous opinion that the work injury no longer contributes to Claimant's symptoms. The ALJ determined that Employer's evidence was sufficient to rebut the presumption of compensability as of the date of Dr. Gordon's examination but that medical treatment prior to January 8, 2013 were causally related, i.e., from Drs. Levitt and Keeling. We find no error with this approach. We further conclude the ALJ's conclusion that Employer had rebutted the presumption as of January 8, 2013 that claimant's condition was causally related to the work injury is supported by substantial evidence and in accordance with the law.

The ALJ properly reviewed the record as a whole and determined that Claimant did not meet her burden of proving by a preponderance of evidence that her alleged ongoing symptoms remain causally related to the June 21, 2012 injury. We find no error committed by the ALJ in her analysis.

With regard to Claimant's assertion that the ALJ improperly rejected the Dr. Eckmann's IME report, we note the ALJ explained "[t]he opinions of Dr. Eckmann and Dr. Luo are rejected because Claimant's description of her symptoms to Dr. Eckmann and Luo differed significantly

from her earlier reports.” CO at 5. Having reviewed the earlier reports of Drs. Levitt and Keeling, where Claimant made no mention of headaches or loss of vision, we must agree with the ALJ’s assessment and the evidence in our view does not compel a contrary conclusion.

We now turn to Claimant’s assertion that the ALJ who initially heard this matter withheld probative and material evidence. As Employer explains, the evidence excluded consisted of three discovery deposition transcripts of employees interviewed by Claimant’s attorney with regard to how the accident transpired. The prior ALJ, explained that the depositions would not be admitted: “[b]ut there’s no contested fact that she was hit on the head with a large object at a construction site which caused her to have an injury to her head and neck and she received medical treatment” HT at 17. As the CRB has stated, it is generally recognized that an ALJ has broad discretion in conducting the formal hearing, including the admission and exclusion of evidence; with the proviso that the discretion exercised must be administered fairly and not in an arbitrary or capricious fashion. *See Goodwin v. Starbucks Coffee Co.*, CRB No. 08-215, AHD No. 08-163, OWC No. 643564 (December 11, 2008); *Speight v. George Washington University Hospital*, CRB No. 12-142, AHD No. 12-233, (January 2013). Moreover, a review of the administrative file reveals that in response to the Order to Show Cause issued by the ALJ, Claimant, through her counsel, filed the following response:

Claimant, Regina Velasquez Aragon, after consultation with her attorney, by and through her attorney, B. Marian Chou, agrees to have a new ALJ to decide the [case] on the parties’ exhibits, the transcript, the Proposed Findings of Fact and Conclusion of Law instead of rehearing of the case all over again.

If Claimant felt the excluded deposition transcripts unfairly prejudiced her case, she was given the opportunity to have the matter reheard and present testimony of the employees which she declined to do.

In support of Claimant’s assertion that the ALJ’s findings of facts and analysis on retaliatory termination are not supported by substantial evidence, Claimant asserts the “ALJ did not discuss any of Claimant’s testimonies (sic) in the hearing regarding the Employer’s practice of discrimination against Claimant after she was injured.” Claimant’s Brief at 15. Specifically Claimant asserts:

Claimant testified that there were three female cleaning employees in the project. After the project ended in August 2012, the other two female employees were transfer [sic] to other project and continued to work and she was terminated. The other two female employees did not file worker’s compensation claim but Claimant did. HT 90-92. Claimant’s testimonies [sic] are sufficient to establish the Employer’s animus and to prove the Employer’s pattern and practice to discriminate the (sic) injured employees by failing to offer light duty work, refusing the employee to return to work after doctor’s visit and terminating Claimant while transferrin other two female employees to other project. *See St. Clair v. DOES*, 658 A.2d 1040 (D.C. App. 1995).

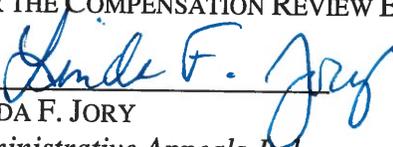
The ALJ set forth the correct standard utilized in determining if a termination of employment is retaliatory for filing a workers' compensation claim, citing the Court of Appeals decision in *Children's Defense Fund v. DOES*, 726, A.2d 1242, 1247-1248 (D.C. 1999). We find the ALJ's determination that Claimant failed to make her *prima facie* case for retaliatory discharge because she presented no evidence of *animus* on the part of employer to be supported by substantial evidence. The ALJ found that not only did Claimant admit the firing was coincidental, there was no evidence that Employer knew that Claimant was seeking additional medical treatment. The ALJ concluded correctly that "There was no reason for Employer to terminate her employment in retaliation for the worker's compensation claim because Employer did not know that she was claiming additional benefits" CO at 8. Further the ALJ added that if Claimant had met her initial burden Employer demonstrated a legitimate business reason for laying her off. We agree with the ALJ's conclusion that Employer established a legitimate non-discriminatory business reason for Claimant's discharge with the testimony of Employer's safety manager that the project Claimant was working on for Employer was nearing completion and all employees were subject to being laid off as it was completed. CO at 9.

Finally with regard to Claimant's assertion the ALJ erroneously rendered a decision of Claimant's permanent disability, we note that the claim for relief was for 5 days temporary total disability only. Claimant did not make a claim for any permanent disability. Nevertheless, we conclude the ALJ did not make any findings of fact or conclusions of law with regard to the permanent nature of claimant's injury.

CONCLUSION AND ORDER

The Conclusions of Law contained in the December 21, 2014 Compensation Order are supported by substantial evidence and are in accordance with the law and the Compensation Order is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:


LINDA F. JORY

Administrative Appeals Judge

May 13, 2015

DATE