COMPENSATION REVIEW BOARD

CRB No. 11-112

JOSE C. ROMERO,
Claimant–Respondent,

v.

V&V CONSTRUCTION, INC. and OHIO CASUALTY INSURANCE CO.,
Employer-Petitioner.

Appeal from a Compensation Order on Remand by
The Honorable Anand K. Verma
AHD No. 10-267, OWC No. 657345

Christopher R. Costabile, Esquire for the Petitioner
Michael J. Kitzman, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and HEATHER C. LESLIE,[1] A*dministrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR 250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. Jose Romero injured himself at work on February 13, 2009; he severed part of his left thumb while operating a drill. Mr. Romero underwent surgery by Dr. Kenneth R. Means and received initial follow-up treatment from the orthopedic practice of Phillips and Green who, in turn, referred Mr. Romero back to Dr. Means for continued follow-up treatment.

[1] Judge Leslie has been appointed by the Director of the Department of Employment Services as a temporary CRB member pursuant to Administrative Policy Issuance No. 11-04 (October 5, 2011).

While Mr. Romero's chief complaints were pain and stiffness in his left thumb and the sites of his skin grafts, he eventually voiced complaints of left shoulder pain. Mr. Romero filed a claim seeking authorization for medical treatment for his left shoulder complaints, claiming they were medically causally related to his work accident.

In an August 31, 2010 Compensation Order, an administrative law judge ("ALJ") denied Mr. Romero's claim for relief. Mr. Romero appealed arguing he had not been afforded the presumption of compensability.

On appeal, the CRB determined the ALJ had committed error by evaluating the cumulative evidence to conclude that Mr. Romero's left shoulder complaints were not medically causally related to his work injury before according Mr. Romero the presumption of compensability. The CRB further reasoned

> the Compensation Order shows that the parties stipulated that on February 13, 2009, the Petitioner sustained an injury which arose out of and in the course of his employment. CO at p. 2. Thus, the presumption of compensability attached in this case. As the court held in *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2d 844 (D.C. 1995), the presumption, once attached to establish a causal connection between the disability and the work-related event, activity, or requirement, also extends to the question of the medical causal relationship between the current disability and the work-related injury. Accordingly, in order to rebut the presumption of medical causal relationship, an employer must present evidence specific and comprehensive enough to sever the potential connection between the disability and work-related injury. *See Whittaker, supra* at 845-846.
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> With the presumption attached, it became necessary for Respondent to present evidence in rebuttal to sever the potential connection between the left shoulder complaints and the work-related injury. On remand, the ALJ is instructed to apply the traditional presumption of compensability analysis to the facts of this case and determine whether that presumption has been rebutted. If not, the ALJ shall award the relief requested. If the presumption is found to be rebutted, the ALJ shall determine whether on shifting the burden back, Petitioner has proven his case by a preponderance of the evidence and rule accordingly.[2]

The August 31, 2010 Compensation Order was vacated and remanded.

On remand, the ALJ, again, denied the claim for relief. The ALJ reasoned that although the presumption of compensability had attached, it had attached only as to the left thumb injury. As such, the ALJ determined the presumption of compensability had not been invoked as to the left shoulder complaints; therefore, the burden did not shift to the employer to rebut the presumption of compensability. The ALJ then proceeded to argue in the alternative that even assuming the presumption of compensability had been invoked, there was evidence in the record that clearly rebutted that presumption.

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[2] *Romero v. V & V Construction, Inc.*, CRB No. 10-169, AHD No. 10-267, OWC No. 657345 (February 10, 2011), p. 3.

Another appeal ensued, and the CRB ruled that Dr. Means' July 29, 2010 letter was not sufficient to rebut the presumption of compensability:

> In his July 29, 2010 letter, Dr. Means prefaced his opinion by stating "[I] have not diagnosed Mr. Romero with any specific condition with regard to the left shoulder as he has not been formally evaluated for this as of yet." As to a causal connection he went on to say:
>
> > It is possible that he could have developed some left shoulder symptoms from an avulsion traction type injury, but I do not think this is very likely, and Mr. Romero did not note any of these symptoms until 10/22/2009, at least to us. Therefore, I think the possibility that it is related to the 02/13/2009 injury is a very remote possibility.
>
> If we apply the [D.C. Court of Appeals'] standard, we first note that Dr. Means arguably has rendered an opinion without an express examination of the left shoulder and he has stated that he has not diagnosed any specific condition of the left shoulder. We further note that by stating there "is a very remote possibility" of a causal relationship between Petitioner's left shoulder symptoms and the work injury, Dr Means has rendered an opinion that is anything but unambiguous. We are left to conclude using the test established by the [Court], it was error for the ALJ to find that this evidence was comprehensive enough to rebut the presumption.[3]

In the end, the CRB determined Mr. Romero successfully had invoked the presumption of compensability, and V&V Construction, Inc. ("V&V") had failed to rebut that presumption. As a result, Mr. Romero's shoulder injury is compensable and the matter was remanded for the issuance of a Compensation Order awarding authorization for medical treatment for Mr. Romero's left arm and shoulder.

On September 29, 2011, a second Compensation Order on Remand issued. This time, the ALJ granted Mr. Romero's claim for relief:

> Hence, consistent with the Court's rationale, the statutory presumption, once invoked to the left thumb injury of February 13, 2009, also extends to the subsequently developed left shoulder symptoms. Accordingly, in order to rebut the invoked presumption of compensability to the left shoulder infirmity, employer now must present specific and comprehensive evidence from its IME physician. In the instant case, however, employer did not submit any evidence in rebuttal. Thus, the invoked presumption insofar as the left shoulder symptomatology stands unrebutted.[4]

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[3] *Romero v. V&V Construction, Inc.*, CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011), pp. 4-5.

[4] *Romero v. V&V Construction, Inc.*, AHD No. 10-267, OWC No. 657345 (September 29, 2011), p. 4.

Now, in this appeal, V&V asserts the parties' stipulation to an accidental, thumb injury on February 13, 2009 is not sufficient to invoke the presumption of compensability as to Mr. Romero's left shoulder injury. V&V also asserts that requiring an opinion from an independent medical examination physician to rebut the presumption of compensability was error.

Mr. Romero requests we affirm the September 29, 2011 Compensation Order on Remand. Given the *Whittaker* extension of the presumption of compensability to new symptoms occurring after the initial accident, Mr. Romero contends V&V's evidence was insufficient to rebut the presumption of compensability.

ISSUES ON APPEAL

1. Does substantial evidence in the record support that the ALJ properly considered the directives in the September 9, 2011 Decision and Remand Order?

2. Is the September 29, 2011 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

ANALYSIS[5]

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability ("Presumption").[6] 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.[7] "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."[8] Furthermore, after a claimant successfully establishes a causal relationship between a disability and a work-related accident, the Presumption continues to apply when he files for additional benefits due to new symptoms allegedly stemming from the work-related injury.[9]

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[5] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is 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 International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[6] 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."

[7] *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987).

[8] *Washington Hospital Center v. DOES,* 744 A.2d 992, 996 (D.C. 2000).

[9] *Short v. DOES,* 723 A.2d 845, 850 (D.C. 1998), citing *Whittaker v. DOES,* 668 A.2d 844, 846-847 (D.C. 1995).

Mr. Romero claims his left shoulder pain developed as a result of his on-the-job accident; in support of his position, he submitted a statement from Dr. Means that a causal relationship between Mr. Romero's left shoulder injury and his on-the-job accident is possible. As the CRB ruled previously, Dr. Means' opinion is sufficient to invoke the Presumption, and although the ALJ previously had reasoned that the parties' stipulation to a workplace, thumb injury did not qualify to invoke the Presumption in regards to a shoulder injury, *Whittaker* makes it clear that the stipulation is sufficient to do just that because the stipulation establishes a work-related event, activity, or requirement which has the potential to cause or to contribute to Mr. Romero's shoulder injury.

Thus, it was V&V's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event,"[10] and turning to V&V's argument that a requirement that an opinion from an independent medical examination physician is necessary to rebut the Presumption has been written into the Act, neither the CRB nor the D.C. Court of Appeals has required an opinion from independent medical examination physician in order to rebut the Presumption.[11] Although obtaining an opinion from an independent medical examination physician is a common approach to rebutting the Presumption, it is not the only method.

In the September 9, 2011 Decision and Remand Order, the CRB applied the test for evaluating opinions intended to rebut the Presumption to Dr. Means' opinion and determined that Dr. Means' opinion is insufficient for that purpose. That is not to say that an opinion from an independent medical examination physician is necessary in all cases, but in this case, Dr. Means' opinion was rendered without examination of Mr. Romero's shoulder and was "anything but unambiguous" on the issue of causation.

CONCLUSION AND ORDER

The September 29, 2011 Compensation Order on Remand is supported by substantial evidence and is in accordance with the law. The Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

June 11, 2012
DATE

[10] *Waugh v. DOES,* 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

[11] See *Washington Post v. DOES,* 852 A.2d 909 (D.C. 2004).