

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-111

SAMUEL WOODS
Claimant-Petitioner/Cross Respondent

v.

OMNI ELEVATOR and
COMPANION PROPERTY AND CASUALTY
Employer and Insurer-Respondent/Cross Petitioner.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAR 3 PM 1 28

Appeal from an August 29, 2014 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 14-212, OWC No. 711952

David M. Schloss for Claimant
Cheryl D. Hale for Employer

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, and LINDA F. JORY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant Samuel Woods was employed by Employer Omni Elevator as a mechanic. Claimant alleges that he sustained a cumulative trauma injury to his low back as a result of this employment. Employer denies the claim, asserting that Claimant's medical condition was not medically causally related to his employment, and that he had failed to provide adequate and timely notice of the injury to Employer. The causal relationship defense was premised upon the opinion and report of Dr. Louis Levitt, who performed an independent medical evaluation (IME) of Claimant, and concluded that his condition was not work related. The untimely notice defense was premised upon the presence in numerous medical records over a number of years in which

the medical providers noted that Claimant complained at times that various work activities, such as wearing a tool belt aggravated his low back pain.

Claimant sought an award of medical care and wage loss disability benefits at a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) on May 15, 2014. On August 29, 2014, the ALJ issued a Compensation Order in which she found that Claimant's low back condition is medically causally related to his employment with Employer, but that Claimant had failed to provide timely notice of the injury to Employer under D.C. Code § 32-1513 (a). The ALJ reasoned that the medical records demonstrated numerous instances in which Claimant advised his medical care providers that his low back condition was aggravated by work activities, and that Claimant knew or under the exercise of reasonable diligence should have known it was work-related, but that he failed to report the injury to Employer within 30 days of acquiring such knowledge, or having been in a position to have reasonably known of a workplace connection.

Claimant appealed the Compensation Order to the Compensation Review Board (CRB), asserting that the ALJ's decision is unsupported by substantial evidence, arguing in his "Memorandum of Points and Authorities in Support of Claimant's Application for Review" (Claimant's Brief) that (1) he had other conditions which may have led him to conclude his back problem was the result of non-work related causes, and (2) Employer's own IME doctor disputed the causal connection based in part upon the existence of such other conditions, rendering Claimant's lack of awareness reasonable, given that it is consistent with the opinion of Employer's IME.

Employer opposed the appeal, arguing in its "Memorandum of Points and Authorities in Support of Employer/Carrier's Opposition to Claimant's Application for Review" (Employer's Brief) that the ALJ's finding that the medical records from Claimant's years-long history of low back complaints and medical treatment contained sufficient references to Claimant's reporting a work-connection to his symptoms that a reasonable person could conclude that Claimant knew or should have known of a relationship between his job and his low back problems well before he advised Employer about them, and therefore the conclusion that his notice was untimely is supported by substantial evidence and must be affirmed.

Although Employer did not file a separate Cross-appeal, in its Brief it did contest the validity of the ALJ's finding of a medical causal relationship, that being that he did not reference having reviewed the medical records of the prior back treatments received in the years leading up to the claim. We deem this argument to constitute a Cross-appeal of the ALJ's finding on medical causal relationship.

Because the ALJ improperly found that Employer's causal relationship evidence was insufficient to overcome the statutory presumption of medical causal relationship, we vacate that finding, and remand for further consideration of the issue. Because the ALJ's finding that Claimant knew or in the exercise of reasonable diligence should have known of a work-connection between his injury and his employment more than 30 days prior to the stipulated date that said notice was given is supported by substantial evidence, the ALJ's conclusion that Claimant's notice of injury to Employer was untimely is affirmed.

ANALYSIS

Medical Causal Relationship

In Employer's Brief, it is contended that the ALJ's finding that Employer had failed to rebut the presumption of causal relationship is erroneous. Since that was the first issue addressed in the Compensation Order, we will address it first.

D.C. Code § 32-1521(1) provides claimants with a rebuttable presumption that the claim for workers' compensation benefits comes within the provisions of the Act. This presumption exists "to effectuate the humanitarian purposes" of the compensation statute, and evidences a strong legislative policy favoring awards in close or arguable cases. *Parodi v. DOES*, 560 A.2d 524 (D.C. 1989). *See also Spartin v. DOES*, 584 A.2d 564 (D.C. 1990).

The statutory presumption is invoked upon a showing by the claimant of an injury and a work place incident, condition or event that has the potential of causing the injury. *Parodi, supra*; *see also Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). This presumption extends not only to the occurrence of an accidental work place injury, but also to the medical causal relationship between an alleged disability and the accidental injury. *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

Once invoked, the presumption shifts to the employer the burden to produce evidence that is substantial, specific and comprehensive enough to sever the potential connection. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

The "specific and comprehensive" standard and the "substantial evidence" standard are fundamentally the same. Where an employer produces evidence that addresses the proposition for which the presumption has been invoked (thereby being relevant), and which, if true *could* lead a reasonable mind to reach a conclusion contrary to that to which the presumption leads (thereby being both specific and comprehensive, in that no reasonable mind could reach a conclusion based upon insufficiently specific evidence, or evidence that does not completely address the relevant question), the presumption falls from the case. Absent such evidence, the presumption will result in the claim being deemed to fall within the Act. On the other hand, where the employer does produce such evidence, the presumption falls from the case, and the evidence is to be assessed by reference to the preponderance of the evidence standard, with the burden of proof being on the claimant. *Ferreira, supra*; *Spartin, supra*.

Where the issue is medical causal relationship, the District of Columbia Court of Appeals (DCCA) has held that, where the record demonstrates that an IME physician has performed a personal examination of a claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the existence of a causal relationship between a claimed injury and a claimant's employment, there is substantial evidence in opposition to the presumption that is sufficient to overcome it. *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004). The court wrote:

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.

The mere statement of a physician's opinion in opposition to the presumption is not sufficient to overcome the presumption. Where such an opinion is unaccompanied by a discussion of the reasoning upon which it is based, and where such a contrary opinion has been reached in the absence of a review of at least most, if not all, of the relevant medical records, it does not constitute "substantial evidence". See *Washington Metropolitan Area Transit Authority v. DOES*, 827 A.2d 35 (D.C. 2003) (*Spencer*).

In concluding that Employer had failed to overcome the presumption in this case, the ALJ discussed the IME report of Dr. Levitt. The Compensation Order reads:

To rebut the presumption, Employer relied upon the IME report of Dr. Levitt, who opined Claimant's multilevel spondylosis to the lumbar spine is likely due to a recent nephrectomy. Dr. Levitt wrote "this long-standing disease has nothing to do with his laborious work and [sic] an elevator mechanic". On physical examination, Dr. Levitt's [sic] found Claimant demonstrated no findings consistent with lumbar disc syndrome or acute lumbar radiculopathy. The IME report is flawed as there is no indication from Dr. Levitt that he reviewed Claimant's extensive treatment records with Potomac Pain & Rehabilitation Associates covering a three year period or took treatment records into account when rendering his medical opinion.

It is found Employer has not adduced substantial medical evidence sufficient to rebut the presumption and sever the causal connection between Claimant's back condition and his employment duties. Absent any conflicting evidence, it is determined Claimant's strenuous employment duties have contributed to a worsening of his pre-existing condition.

Compensation Order, p. 5.

Employer asserts that this analysis is faulty, arguing that “it is clear from a review of Dr. Levitt’s report that he was well aware that the treatment had been going on for years prior to his examination”, suggesting that his failure to specifically discuss the treatment and therapy records from Potomac Pain & Rehabilitation Associates is insufficient reason to find the report lacking.

The IME report does suffer from not being very specific concerning what Dr. Levitt knew or had available to him by way of prior medical records, identifying specifically only two MRIs, one from January 2010 and another from August 2013, which showed “evidence of multilevel spondylosis in the lumbar spine”.

However, in the “History” portion, Dr. Levitt writes that “Mr. Woods points out there was never an inciting event ... [and] that he has been treated on and off for complaints of back pain by his primary care physician for at least a period of eight years [and who] recently recommended that he see a pain management physician who has provided the injection therapy.” He added that “he made it very clear that he has had chronic and recurrent back pain for a number of years that seemed to worsen in the last 2 – 3 years.” EE 1, IME report May 6, 2014.

Dr. Levitt also stated that “Complicating the complaints of lower back pain, he reports during the course of performing an MRI scan to the lumbar spine, which clearly demonstrated degenerative disc disease and [sic] the lower lumbar segments, they apparently detected some sort of mass on his kidney and he was confirmed to have some sort of carcinoma of the kidney. In 1/14 he underwent a nephrectomy. According to the patient, he has been recovering from that major surgery to remove his kidney.” EE 1 p. 1. Then, in the “Assessment” portion of the report, it is stated that “Whatever acute pathology identify [sic] by Dr. Bands when he evaluated the patient and recommended decompressive surgery does not appear to exist today.” EE 1, p. 2.

In concluding his discussion of his opinion on causation, Dr. Levitt wrote “At the risk of being redundant, there is nothing during my evaluation today and after review of the records that would provide any causal connection between his back pain that has been well established for years and any work activity as an elevator mechanic.” EE 1, p. 3.

The question presented by Employer’s cross-appeal, as we have deemed it, is whether Dr. Levitt’s report constitutes substantial evidence in opposition to the presumed relationship between Claimant’s low back injury and his employment. While *Reynolds* is quite helpful and establishes a bright line rule that under certain circumstances an IME *must* be found to be sufficient to overcome the presumption, the question of whether the evidence has overcome the presumption ultimately comes down to whether it constitutes “substantial evidence” severing the relationship. Put otherwise, the question is whether a reasonable person might accept the IME

report as supporting the finding that Claimant's back condition has not been caused or aggravated by his employment.

Although the ALJ is correct that there are few details concerning Claimant's pre-injury back treatment, it is clear that Dr. Levitt was aware of a general history of significant and long-standing back complaints. Although this report may not meet the *Spencer* level of specificity, we find that a reasonable person might accept the report as sufficient to sever the causal relationship, and the ALJ should therefore have weighed the evidence anew, without reference to the presumption, with Claimant bearing the burden of proof by a preponderance of the evidence.

Accordingly, we must remand the matter for further consideration of the issue, with the ALJ considering the record as a whole without reference to a presumption of medical causal relationship, and with Claimant bearing the burden of demonstrating the relationship by a preponderance of the evidence. While in the end the outcome may be the same, it is necessary that the ALJ consider the evidence under the proper burden of proof.

Timely Notice of Injury

Although the Compensation Order does not reference it in the Findings of Fact where the stipulations of the parties are identified, review of the hearing transcript (HT) confirms that the parties stipulated that the date of notice to Employer is December 17, 2013. See, HT 30 – 32. Thus, in order for notice to have been timely, this being a cumulative trauma injury, this date must be within 30 days of the date that Claimant knew, or in the exercise of reasonable diligence should have known, of the relationship between his employment and his work injury. The parties do not dispute that this is the legal issue before the ALJ.

In this case, Claimant argues that he did not make the connection in his mind between his employment and his job until Dr. Daniel Ignacio's medical evaluation of December 3, 2013. This assertion is made despite numerous references in treating records going as far back as December 17, 2011, in which Claimant's medical care providers at Potomac Pain & Rehabilitation, where he was receiving ongoing physical therapy for back pain, noted his reporting that "patient has increased back pain working nights at his new job". Compensation Order, p. 7. He bases this argument upon his own testimony to that effect, and his argument that his awareness of "symptoms" doesn't equate to awareness of cause.

The ALJ rejected that argument. We see no reason to substitute our judgment for that of the ALJ, whose factual findings are not only supported by substantial evidence, but are not contested as to the making of the statements by Claimant regarding the back pain and his job. It is worth noting that the notice statute doesn't require proof that a claimant actually does in fact make the connection between the employment and the injury in his or her own mind, but only requires the

conclusion based upon substantial evidence that in the exercise of reasonable diligence he or she should have made such a connection.

Although we may have reached a conclusion contrary to that of the ALJ on this issue, we cannot say that the ALJ's conclusion is arbitrary, capricious, or unsupported by substantial evidence cited by her in the Compensation Order. Claimant seeks to have us substitute our judgment for that of the ALJ, an exercise that we are not inclined or empowered to do.

CONCLUSION AND ORDER

The ALJ's finding that Claimant knew or in the exercise of reasonable diligence should have known of the relationship between the back injury and his employment is supported by substantial evidence and the conclusion that notice to Employer was untimely is in accordance with the law and is affirmed. The failure to find that Employer's evidence was insufficient to overcome a presumption of causal relationship is not supported by substantial evidence and is vacated. The matter is remanded for further consideration of that issue, with the ALJ weighing the evidence by a preponderance of the evidence standard, with Claimant bearing the burden of proof.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL

Administrative Appeals Judge

March 3, 2015

DATE