

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-107

SERGIO PINEDA,
Claimant–Petitioner,

v.

CASE FOUNDATION CO., D/B/A KELLER FOUNDATION, LLC and
TRAVELERS INDEMNITY CO.,
Employer/Insurer-Respondent.

Appeal from a July 13, 2016 Compensation Order by
Administrative Law Judge Lilian Shepherd
AHD No. 16-159, OWC No. 733283

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 DEC 13 PM 2 10

(Decided December 13, 2016)

Kasey K. Murray for Claimant
Gregory Eichelman for Employer¹

Before LINDA F. JORY, HEATHER C. LESLIE, and GENNET PURCELL *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Sergio Pineda (“Claimant”) worked as a laborer for Keller Foundation (“Employer”). His job involved working on iron, lifting heavy metal pipes and other tasks involving concrete. Claimant’s work related accident occurred on July 27, 2015, when he slipped and fell against concrete on both knees and hands. He felt a lot of pain in his right arm and his shoulder. His right arm was swollen, turned purple and was very painful. He notified the superintendent after he fell. Employer gave Claimant ice for his arm. On July 30, 2015, he sought medical treatment at Kaiser Permanente and was examined by Lawrence Waters, PA. He told the medical personnel that his knees and his hands were injured from the fall. Waters noted Claimant sustained a right elbow injury and the assessment was a right triceps tendon tear.

¹ Tyler O. Prout appeared on behalf of Employer at the formal hearing.

On August 7, 2015, Claimant was treated by Murali Balakrishnan, M.D. Dr. Balakrishnan performed surgery on Claimant's ruptured triceps on his right elbow. On August 24, 2015, the medical records noted that Claimant's post-surgical follow up showed he had a range of motion of 50 degrees flexion to almost 90 degrees, distal neurological and vascular function is intact. He was fitted with a sling and was to avoid lifting anything heavier than a coffee cup with his right upper extremity and to focus on mobilization exercises.

Prior to the work related accident, Claimant suffered from low back pain; he felt pain that would radiate all the way down to his feet and he has received medications and injections.

On August 27, 2015, Dr. Balakrishnan reviewed the x-rays of Claimant's left elbow and left hand and he opined that the bruise to the left elbow and hand is soft tissue in nature. He advised Claimant that it is possible he bruised the joint and soft tissue when he fell onto both hands and he reassured Claimant that he may mobilize and use the left upper extremity as comfortable.

On November 6, 2015, Dr. Murali Balakrishnan released Claimant to work with the restriction of no lifting over 20 lbs. for four weeks, and after four weeks, Claimant could resume regular work duties.

Employer told Claimant he could return to work and collect tickets from the trucks that come into the construction site. He reported for the light duty job sometime in November, though he does not recall the date. When Claimant reported, he spoke with the superintendent in the area, the superintendent made a phone call to his boss and after the phone call, Claimant was sent home. Two days later he returned to the light duty job and he spoke with the superintendent. The superintendent called the boss again and Claimant went home and did not return to the job.

On November 17, 2015, Claimant was examined by Dr. Ellen Finkelman. She compared Claimant's 2010 and September 2015 MRIs of the lumbosacral spine which showed progression in spinal stenosis and disc degeneration which was deemed significant. Dr. Finkelman opined that Claimant had significant progression in disc disease before and after the accident it was aggravated by his fall on the job and has resulted in chronic pain. She noted that Claimant was unable to lift more than 10-20 lbs. continuously.

On November 24, 2015, Claimant was examined by Ian Gordon, MD. Claimant's complaints to Dr. Gordon was severe back pain radiating to his left leg, giving him an inability to sit or stand for any period of time. Claimant related it to a July 27, 2015 work injury. Claimant told Dr. Gordon that he did have some problems with his back prior to the accident but was able to do his work. Dr. Gordon's examination of Claimant revealed he walked with a slightly stooped gait, he was antalgic and had no neurologic deficit. He placed him on a course of prednisone and Claimant was scheduled for an epidural shot. Dr. Gordon diagnosed Claimant with lumbar disc herniation, spinal stenosis and a work related injury.

On February 25, 2016, Dr. Gordon examined Claimant and noted that he has a multi-level degenerative disease with disc herniation at L3-L4, L4-L5 and a small one at L5-S1, most of his leg symptoms are likely from his L4-L5 level. He noted Claimant has multiple problems now

including neck complaints, arm symptoms, not all of which were explained by a C5-C6 disc herniation and multi-level degenerative disease. He referred Claimant for physical therapy for his neck.

On June 6, 2016 Dhruv Patedar, M.D., an orthopedic, neurological spine surgeon, performed an independent medical examination (“IME”) at Employer’s request, which noted Claimant’s pre-existing lumbar and cervical issues, the lack of objective evidence of acute injury related to the work-accident, and opined there is no casual relationship between the July 27 work accident and Claimant’s current spinal condition.

A dispute arose as to whether current treatment for Claimant’s neck and back and alleged disability were causally related to the work injury that occurred on July 27, 2015. A formal hearing was held before an administrative law judge (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”). A Compensation Order (“CO”) issued on July 13, 2016 which denied Claimant’s claim for relief of temporary total disability from November 17, 2015 to the present and continuing and authorization for medical treatment to the neck and back including pain management, lumbar spine injection and physical therapy.

Claimant filed Claimant’s Application for Review and Memorandum of Points and Authorities in support of his Application for Review (“Claimant’s Brief”) asserting the CO is not supported by substantial evidence and not in accordance with the law. Employer filed Memorandum of Points and Authorities in Support of Employer and Insurer’s Opposition to Claimant’s Application for Review (“Employer’s Brief”) arguing that the CO should be affirmed.

ISSUE ON APPEAL

Is the July 13, 2016 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (“the Act”) and as contained in the governing regulations is limited to making a determination whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions flow rationally from those facts and are otherwise 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 (DCCA), 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) (*Marriott*). Consistent with this scope of review, the CRB is 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

With respect to the ALJ's determination that Claimant's current conditions are not causally related to the work injury of July 27, 2015, Claimant asserts:

The ALJ then analyzed whether Employer had rebutted the presumption. In doing so, she reviewed the IME of Dr. Pateder. She noted that Dr. Pateder "opined that [Mr. Pineda] has a pre-existing cervical . . . degeneration which [has] been [an] active problem since 2007." (CO 7.) She ultimately concluded that this IME was sufficient to sever the connections and rebut the presumptions of compensability (CO 7.) She then determined that after review of the medical evidence, Mr. Pineda did not establish by a preponderance of the evidence "a medical causal relationship between a disability involving his neck and the work related injury." (CO 8) She believed that the IME and included opinions of Dr. Pateder provided "a more thorough explanation regarding the likely cause of Claimant's condition." (CO 11.) As a result, she afforded greater weight to the IME report of Dr. Pateder in which he erroneously concluded that Mr. Pineda had a pre-existing cervical condition dating back to at least 2007. (CO 10-11.)

* * *

Dr. Pateder's IME conclusions are based on an [sic] misstatement of Claimant's medical history as recorded by Dr. Pateder. There simply is no evidence of a pre-existing cervical spine disability anywhere in the medical record. (See CEs 1-15, EEs 1-23.) There is nothing to indicate he had even a complaint, much less a diagnosis, regarding his neck before the July 27, 2015 accident. At his deposition, he explicitly denied experiencing any symptoms involving his neck prior to the accident. (Pineda Dep. At 336:9.) As such, it was improper for the ALJ to conclude Employer had rebutted the presumption as to the neck.

A similar circumstance involving an IME was considered by the Court of Appeals in *Jackson v. District of Columbia Dept. of Employment Services*, 979 A.2d 43 (D.C. 2009). There the court found that an IME report that was based upon errors-in-fact regarding a claimant's prior medical history was insufficient to rebut the presumption of compensation. As the IME in that case failed to consider relevant medical evidence, the court concluded that the IME was not specific and comprehensive enough to sever the causal connection between the claimant's disability and her work-related accident.

Here, because Dr. Pateder failed to consider the accurate medical history, namely that there was no medical evidence of a pre-existing cervical spine or neck condition, and instead erroneously concluded the opposite, his IME cannot be sufficiently specific and comprehensive enough to sever the causal connection between Mr. Pineda's fall and his neck condition, and is not credible. Thus, Employer has not brought forth the requisite substantial evidence needed to meet its burden. As such, the ALJ's conclusion that Mr. Pineda's neck disability did not arise out of and in the course of his employment is not supported by substantial evidence in the record.

Claimant's Brief, un-numbered at 8-10.

In opposition, Employer asserts:

The Claimant's allegation that Dr. Pateder's reported [sic] stated the Claimant had pre-existing cervical problems since 2007 is a mischaracterization of his report. The Claimant alleges that Dr. Pateder's IME was based on a mistake of fact concerning the receiving treatment for any pre-existing neck condition. The Claimant's Application cites a portion of the Judge Shepherd's Order discussing pre-existing conditions, to make it appear as if Dr. Pateder is referring to the Claimant having treatment for his neck in 2007. However, to reach this result, the Claimant excludes the reference to the pre-existing lumbar degeneration. Dr. Pateder's reference to treatment starting in 2007 is a reference to the Claimant's pre-existing lumbar spine treatment, not the neck. Dr. Pateder's IME clearly refers to medical reports from 2007 that address the Claimant's pre-existing lumbar problems. As is clear in the IME, Dr. Pateder addressed both the neck and back so it is reasonable for him to address these prior treatment records for the back. The Claimant's exclusion of the reference to the back distorts Dr. Pateder's findings to support their position.

Other than the Claimant's attempt to twist Dr. Pateder's words, there is nothing in Dr. Pateder's report where he specifically states the Claimant had received prior treatment for his neck. For the neck, Dr. Pateder focused on the degenerative findings in the Claimant's cervical spine MRI, which also showed no acute injury. Dr. Pateder noted the several months' gap where the Claimant did not report any neck symptoms along with the numerous issues in the Claimant's physical examination which indicated the Claimant was exaggerating his symptoms.

Dr. Pateder's factual findings and detailed report provided substantial evidence to sever the presumption. Similar to the IME report at issue in *The Washington Post* case, [Reynolds, *infra*] Dr. Pateder was a qualified expert who reviewed the pertinent medical reports and physically examined the Claimant. Based on his medical expertise and observation of the Claimant, he determined that the Claimant's neck complaints were not causally related to the accident. Dr. Pateder's report is distinguished from the findings in *Jackson*, [*supra*] where the IME doctor based his conclusions on factually inaccurate information, Judge Shepherd clearly put in her Order why she chose to give greater deference to Dr. Pateder's report in accordance with the law. There is no evidence of Dr. Pateder relying on any inaccurate information in reaching his conclusion about the neck.

Employer's Brief unnumbered at 13 – 15.

After a thorough review of Dr. Pateder's IME report, we agree with Employer's characterization of it. We specifically agree with the following:

1. Dr. Pateder's reference to treatment starting in 2007 is a reference to the Claimant's pre-existing lumbar spine treatment, not the neck.
2. Dr. Pateder's IME clearly refers to medical reports from 2007 that address the Claimant's pre-existing lumbar problems.
3. There is nothing in Dr. Pateder's report where he specifically states the Claimant had received prior treatment for his neck.
4. For the neck, Dr. Pateder focused on the degenerative findings in the Claimant's cervical spine MRI, which also showed no acute injury.
5. Dr. Pateder noted the several months' gap where the Claimant did not report any neck symptoms along with the numerous issues in the Claimant's physical examination which indicated the Claimant was exaggerating his symptoms.

We agree that Dr. Pateder's IME meets the standard set forth by the DCCA decision in *Washington Post v. DOES and Raymond Reynolds*, 852 A.2d 909 (D.C. 2004)(*Reynolds*)². That is, it is undisputed that Dr. Pateder is a qualified medical expert who examined Claimant, reviewed Claimant's relevant medical records, and rendered an unambiguous opinion that the work injury did not contribute to the disability. We further agree with Employer that in addition to the medical evidence, the ALJ made it clear that she found Claimant's testimony was not credible, which we note Claimant did not challenge on appeal.

Thus, we reject Claimant's assertion that the ALJ's conclusion that Claimant's neck and shoulder injuries are not causally related to the July 27, 2015 work-related accident is not in accordance with the law and that Claimant should therefore be awarded the requested temporary total disability benefits. We conclude the ALJ's determination that Employer met its burden of severing the existing relationship between Claimant's alleged disability and the work-related accident is supported by substantial evidence and is in accordance with the law.

The ALJ further found that as there were no medical records to establish that Claimant injured his chest, right knee, left arm, left shoulder, or neck, Claimant has not established by a preponderance of the evidence a medical causal relationship between these body parts and the work injury of July 27, 2015. Claimant does not challenge the ALJ's weighing of the existing medical evidence to reach her final conclusion that Claimant has not met his burden of establishing by a preponderance of evidence that his back problems are causally related. Inasmuch as we are precluded from re-weighing the evidence, the ALJ's ultimate conclusion that Claimant's injury to his chest, left arm and hand, right knee, left shoulder, neck and back are not medically causally related to the work incident on July 27, 2015 is AFFIRMED.

² The law is clear that to rebut the presumption the employer must proffer the opinion of 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. *Reynolds, supra*.

CONCLUSION AND ORDER

The July 13, 2016 Compensation Order which denied Claimant's claim for relief is supported by substantial evidence and in accordance with the law and is accordingly AFFIRMED.

So ordered.