GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-077

SHERRIE LAWSON,
Claimant–Respondent,

v.

BURKE CONSORTIUM INC., and
ERIE INSURANCE GROUP,
Employer/Insurer-Petitioners.

Appeal of a May 10, 2016 Compensation Order
by Administrative Law Judge Gennet Purcell
AHD No. 14-384A, OWC No. 713014

(Decided October 20, 2016)

Benjamin T. Boscolo for Claimant
Sarah M. Burton for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Compensation Order, Claimant's injury is described as follows:

> Claimant, whose date of birth is October 10, 1973, was hired by Employer in May of 2012 to work as an analyst for web-work development and change management. Prior to September 16, 2013, Claimant was in therapy with Mr. Donald Knight, a licensed clinical social worker to address some mid-life issues. She was also enrolled in a doctoral program at the University of Maryland for which her dissertation was scheduled to be completed by the end of 2014. In addition, Claimant taught a class at the University of the District of Columbia ["UDC"].

> To perform her work for Employer, Claimant was assigned to an office located on the second floor of Building 197 in the Navy Yard, where a shooting incident occurred on September 16, 2012. The shooting, which resulted in numerous fatalities, took place two floors above Claimant's workplace. She was in a meeting when she heard gunshots and the fire alarm went off. Claimant ran down the exit stairwell to a dead-ended alley, climbed atop a pile of construction materials to scale the wall, and escaped the shooting.

Lawson v. Burke Consortium, Inc., AHD No. 14-384, OWC No. 713014 (January 23, 2015).

The above quoted facts are not contested.

Claimant's psychiatrist, Dr. Aileen Kim, diagnosed Claimant with "anxiety/ post-traumatic stress disorder, major depression, hypervigilance, 'survivor's guilt' and frustration with her support system (or lack thereof)." *Lawson, supra.* Claimant relocated to North Carolina and obtained part time employment in management consulting.

Claimant was awarded temporary total disability benefits from July 1, 2014 to October 30, 2014, and temporary partial disability benefits from November 1, 2014 to the present and continuing in the January 23, 2015 order.

Claimant worked part time until January 2015. Claimant's North Carolina physician, Dr. Christopher Lord, withdrew her from work completely due to increasing symptoms. Claimant underwent therapy. On April 28, 2015, Dr. Lord continued to opine Claimant's absence from work was medically necessary.

On February 2, 2016, Claimant was again examined by Dr. Kim. Dr. Kim opined:

> While she is not at maximal medical improvement regarding symptoms stemming from and/or exacerbated by the Navy Yard shooting on September 16, 2013 she is at sufficient improvement to return to work gradually and partially, for example on a 20 hour a week basis.

Claimant's exhibit 7 at 211.

Employer sent Claimant for an independent medical evaluation ("IME") with Dr. Brian Schulman on February 8, 2016. Dr. Schulman took a history of Claimant's injury, treatment, and examined Claimant. Dr. Schulman opined Claimant was at maximum medical improvement and did not need further treatment due to her work related injury. Dr. Schulman further opined Claimant could return to work without restrictions.

A full evidentiary hearing occurred on February 17, 2016. Claimant sought a modification of the prior Compensation Order, specifically a modification of the ongoing award of temporary partial disability to temporary total disability from January 7, 2015 to the present and continuing. The sole issue to be adjudicated was the nature and extent of Claimant's disability. A Compensation Order

("CO") issued on May 10, 2016, granting Claimant's claim for relief, subject to a credit for temporary partial disability paid pursuant to the prior order.

Employer timely appealed. Employer argues first that the administrative law judge ("ALJ") erred in concluding Claimant had shown a change in condition occurred warranting a modification of the prior order and, second, that the ALJ erred in awarding Claimant temporary total disability benefits.

Claimant opposes the appeal, arguing the CO is supported by the substantial evidence and is in accordance with the law and should be affirmed.

ANALYSIS[1]

Employer first argues the ALJ erred in determining Claimant met her burden to show a reason to believe a change of condition occurred warranting a modification, pursuant to *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988) (*Snipes*). In so arguing, Employer takes issue with the ALJ's reliance on Dr. Lord's and Dr. Kim's opinion.

Employer argues the ALJ "failed to note that Dr. Lord does not indicate that Claimant's inability to work is related to her work injury." Employer's argument at 3. However, a review of the Joint Pre-hearing Statement and the recitation of issues to be addressed show the sole issue to be adjudicated was the nature and extent of Claimant's disability. Hearing transcript at 5-6. Medical causal relationship was not an issue in controversy. Thus the ALJ need not address the issue as it was not raised. Employer's argument is rejected.

Employer also points to Dr. Kim's restrictions, arguing they were the same as in 2014 and thus could not satisfy Claimant's burden of showing a reason to believe a change of condition had occurred. A review of the CO reveals the following discussion:

> Claimant testified that after the last formal hearing she was able to secure a part-time job, and that she attempted to perform this new position, albeit without much success, due to the adverse and ongoing debilitating symptoms of her panic attacks, anxiety and hypervigilance. HT at 27 - 29.
>
> Claimant also presented updated medical reports from her treating physician, Dr. Lord, and supporting medical reports from Drs. Engel and Kim. Dr. Lord, Claimant's treating physician asserted that, as of January 7, 2015," ... an immediate withdrawal from Claimant's contractual work obligations was medically necessary" CE 6 at 209. On April 28, 2015, Dr. Lord opined further that due to "multiple inter-related

[1] The scope of review by the CRB is generally 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the "Act") at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

> factors," Claimant's continued absence from work was medically necessary. CE 1 at 9.
>
> Claimant's testimony, and on its face, the supporting medical evidence, constitutes a sufficient showing under *Snipes, supra*, to consider her requested modification of the prior compensation order from partial to total disability. Having met her preliminary burden of proof under *Snipes, supra*, an evaluation of the evidentiary record as a whole is appropriate to determine whether a modification of CO 1 is warranted based on Claimant's claim.

CO at 6-7.

As the Claimant points out in argument, the ALJ relied upon not only on Dr. Kim's opinion, but also on Dr. Lord's opinion and on Claimant's testimony. Dr. Lord recommended Claimant remain off work and Claimant testified to her debilitating condition which prevented her from continuing her part time work. We disagree with Employer's argument that this is not sufficient evidence to support Claimant's burden in showing there is a reason to believe a change of condition occurred warranting a modification of the prior CO. The ALJ's conclusion is in accordance with *Snipes* and is affirmed.

Employer's second argument is that the ALJ erred in awarding the Claimant temporary total disability benefits.[2] Employer argues Dr. Lord's opinion is "facially deficient" and the ALJ's reliance on his opinion is in error. Claimant counters this argument, stating the ALJ properly accorded Dr. Lord the treating physician preference thus, the CO's conclusion Claimant is entitled to temporary total disability is supported by the substantial evidence in the record and in accordance with the law. We agree with Claimant.

The ALJ, in analyzing the competing medical opinions, noted:

> In assessing the weight of competing medical testimony in worker compensation cases, attending physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine the claimant solely for purposes of litigation." *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992). Because medical conclusions of treating physicians are given preference, any decision to credit another physician must be explained. See *Velasquez v. DOES*, 723 A.2d 401,405 (D.C. 1999).
>
> Indeed, the record contains written medical notes indicating that Dr. Lord and the other members of Claimant's North Carolina-based medical team were not consulted prior to Claimant's actual departure from her part-time job. Dr. Lord also does not attempt to explain any specific disability/impairment-based reasoning for his work restriction recommendation. This, while troubling, does not negate the support found in Dr. Lord's medical notes confirming Claimant's ongoing diagnosis, Claimant's intense on-going treatment and inability to continue working in her part-time role due to her subjective complaints of acute anxiety, inability to focus and complete her

[2] Employer, on page 4 of its brief, references an award of temporary total disability benefits from October 16, 2006 to the present and continuing. As this was not the claim for relief sought, we will assume this to be a typographical error.

work duties within the allotted timeframe and angst related to her work obligations. Despite terminating her work contract prior to discussing it with her medical team, Dr. Lord did later opine, and on more than one occasion, that the work restriction is necessary.

Conversely, Dr. Schulman opined that although Claimant was not at MMI with regard to the September 16, 2014, incident; Claimant did not have a mental or behavioral impairment that precluded her ability to resume gainful employment. He continued that Claimant experienced numerous family stressors but was stabilizing in spite of them, and with the assistance of her medications. Further, Dr. Schulman found that Claimant's medical removal from work as of April 28, 2015, was not related to her September 16, 2014, work incident.

There is not sufficient reason to depart from the preference for the opinion of the treating physician in this matter. Dr. Lord's opinion, as it pertains to the nature and extent of Claimant's impairment as of January 7, 2015, although cursory, is consistent with his treatment notes, and Claimant's history of treatment-focus and symptomology since her move to North Carolina. As such, Dr. Lord's opinions merit the treating physician preference. The opinion of Dr. Lord is found to be persuasive, and as such is relied upon and given weight.

Furthermore, Dr. Kim, in her unique position as Claimant's previous District of Columbia treating physician, upon completing her 2015 re-examination of Claimant, opined that based upon her re-examination, Claimant is still suffering from her preexisting history of anxiety, panic attacks and hypervigilance, is not at maximum medical improvement regarding her symptoms stemming and/or exacerbated by the September 16, 2014 shooting. Dr. Kim notes that Claimant is at sufficient improvement to return to work gradually and partially; on a twenty (20) hour per week basis. CE 6 at 211. However the total wage loss and unavailability of qualifying work from which Claimant currently suffers cannot be overlooked.

With regard to work availability, the contract under which Claimant was earning money was terminated in January of 2015. Since that time, Employer has not made any showing of the availability of any kind of employment, and there has not been any evidence submitted to show the availability of employment, commensurate with the physical restriction of not going back to the pre-injury employment, in the Navy Yard, in this case.

Further, Employer has openly asserted that it is not requesting a full return to work on Claimant's part; neither is Employer seeking to terminate Claimant's current level benefit payments. HT at 56, 60. Employer has stated it will maintain the temporary partial award granted in CO 1, the prior compensation order. As a result, the change in Claimant's condition, Employer's acknowledgement of her continuing impairment, and not having offered any employment, mandates the award of temporary total benefits until which time Claimant's wage loss is restored.

CO at 8-9.

The ALJ addressed Employer's concern with Dr. Lord's opinions sufficiently and still accorded Dr. Lord the treating physician preference and found Claimant to be temporarily and totally disabled. In arguing the ALJ was wrong by pointing this panel to other evidence, including the Employer's IME physician, what the Employer is asking this panel to do is to reweigh the evidence, a task we cannot do. As stated above, we are constrained to affirm 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 this panel might have reached a contrary conclusion.

CONCLUSION AND ORDER

The May 10, 2016 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.