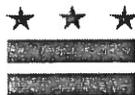


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 09-112

**SURRENDER GILL,
Claimant – Petitioner**

v.

**HOWARD UNIVERSITY HOSPITAL AND SEDGWICK CMS,
Employer/Carrier - Respondent**

Appeal from a Compensation Order of
Administrative Law Judge Heather C. Leslie
AHD No. 06-295A, OWC No. 637928

Raymond M. Hertz, Esquire for the Claimant-Petitioner
William Schladt, Esquire for the Employer and Carrier-Respondent

Before: LAWRENCE D. TARR, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND REMAND ORDER

OVERVIEW

This appeal challenges the June 18, 2009, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the Department of Employment Services (DOES). In the CO, the ALJ denied the claimant's request for continuing temporary total disability benefits beginning on October 24, 2007, finding that his current conditions are not causally related to his work injury.

BACKGROUND

The claimant, Surrender Gill, worked for the employer, Howard University Hospital, as a manager of credit and collections, a primarily sedentary job. There is no dispute that the claimant was injured at work on August 23, 2005 when he slipped and fell, and then fell again while attempting to get up. He sustained multiple injuries to his neck, right arm, right shoulder, low

back, legs, and right knee. The employer voluntarily paid the claimant temporary total disability benefits from August 24, 2005 through May 11, 2006.

There also is no dispute that the claimant was involved in an accident before the August 2005 work accident. In August 2004, the claimant was involved in a motor vehicle accident in which he injured his neck, back, left leg and left arm. After receiving emergency room treatment, the claimant came under the care of Dr. M. Blundon. Dr. Blundon treated the claimant for the motor vehicle accident until April 25, 2005, or about four months before the accident at work.

After the August 23, 2005, accident at work, the claimant went to the employer's emergency room and treated with Dr. J. Fechter on August 29, 2005. Dr. Fechter referred the claimant to Dr. S. Margulies in September 2005. Also in September 2005, the claimant discontinued treating with Dr. Fechter and began treating with Dr. Blundon.

On August 4, 2006, the claimant began treating at the Johns Hopkins University Hospital. Dr. K. Eckmann performed a neurological consultation on November 27, 2006. In addition, the employer had the claimant examined by Dr. J. Friedman, Dr. L. Levitt (twice), and Dr. R. Cohen.

On April 9, 2009, ALJ David L. Boddie conducted an evidentiary hearing to consider the claimant's claim for temporary total disability benefits from May 12, 2006 to the present and continuing. After the formal hearing, Judge Boddie was temporarily re-assigned to serve as an administrative appeals judge for the Compensation Review Board (CRB) and the case was transferred to ALJ Heather C. Leslie. Although given the opportunity, neither party objected to Judge Leslie deciding the case based on Judge Boddie's hearing record.

In the June 18, 2009, CO, the ALJ first held the claimant's evidence established he was entitled to the presumption of D.C. Code § 32-1521 (1), and that the employer presented sufficient evidence to rebut the presumption. Neither party challenges these findings.

The ALJ then analyzed the evidence without considering the presumption. Although treating physician, Dr. Blundon had opined that the claimant's conditions were causally related to the 2005 accident at work, the ALJ held the claimant had not met his burden of proof. The ALJ acknowledged the evidentiary preference given to a treating doctor's opinion but held Dr. Blundon's opinion was not entitled to this preference. The ALJ accepted the opinions of the employer's IME doctors, concluded the claimant's conditions were not causally related to the work accident, and denied the claim. The claimant timely appealed.

THE STANDARD OF REVIEW

The Compensation Review Board determines 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. Official Code §32-1501 *et seq.*, at §32-1522(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. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). The Compensation Review Board must 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.

DISCUSSION

On review, the claimant raises several arguments. The claimant argues that the ALJ abused her discretion by making a credibility finding against him because the ALJ did not conduct the evidentiary hearing. We find no merit to this assertion. Not only did the claimant fail to object to the case being decided by the ALJ who did not conduct the evidentiary hearing, a fair reading of the CO shows the ALJ's decision was based on her assessment of the medical evidence that was submitted by both parties, not on her assessment of the claimant's credibility.

The claimant also argues that the reason stated by the ALJ for rejecting the treating physician's opinion is not based on substantial evidence in the record. Specifically, the claimant takes issue with the following statement in the CO:

Dr. Blundon's reports raise many more questions than [sic] they answer. First, Dr. Blundon is silent as to his prior medical history, most notably the MVA of 2004 and his treatment of Claimant for injuries arising out of the accident...Dr. Blundon fails to mention the prior accident anywhere in his reports, a glaring omission to the undersigned.

Gill v. Howard University Hospital, AHD No. 06-295(A), OWC No. 637928 (June 18, 2009) at 9.

On review, the claimant correctly points out that claimant's exhibit 8, a medical report from Dr. Blundon, admitted into evidence at the formal hearing, states:

[Claimant] had had a previous injury on August 25, 2004, to his neck and back but he was not seen for approximately 4 months prior to the accident of August 23, 2005, and within a reasonable degree of medical certainty, all of his current disability and impairment is the direct result of the accident of August 23, 2005.

Clearly, Dr. Blundon's report did identify the claimant's previous accident. Therefore, the ALJ's contrary finding is not supported by substantial evidence. Although the ALJ's decision not to prefer Dr. Blundon's opinion also was based on other factors, in light of the ALJ's statements that Dr. Blundon's failed to mention the prior accident "anywhere" and this was a "glaring omission", we must conclude that this error was not harmless and that the ALJ's legal conclusion is not supported by substantial evidence.

The claimant also asserts that the ALJ improperly considered Employer's Exhibit 9. The ALJ who conducted the evidentiary hearing had sustained claimant's objection to this document and admitted it only for purposes of a potential appeal.¹

¹ Exhibit 9 is a copy of the claimant's performance evaluation. At the hearing, and in their memoranda, the parties stated exhibit 9 also contained a copy of a civil lawsuit filed against the claimant in the Superior Court that related to his job duties.

In the CO, the only specific mention of Exhibit 9 is at page 2, footnote 2 in which the ALJ stated

Claimant's objection as to the relevance of exhibit 9 was sustained. However, Exhibit 9 was allowed into evidence by Judge Boddie for purposes of appeal, if any, by the Employer. HT at 94.

The claimant, however, points to this sentence in footnote 6 a page 7 in which the ALJ wrote

While each documentary exhibit received in evidence is not specifically referenced in the discussion, all evidence of record was reviewed as part of the deliberation.

The claimant alleges that this sentence shows "ALJ Leslie erroneously reviewed this evidence and considered it as part of her deliberations which clearly created an unfair prejudice against the Claimant."

While this sentence is boilerplate language that appears in many COs, and it is possible the ALJ did not review Exhibit 9 but merely used a template that contained this sentence, on remand, the ALJ should not consider Exhibit 9.

Lastly, because this case is remanded, we shall comment on the CO's footnote 3, in which the ALJ used a web site to define a medical term. While an ALJ may take judicial notice of certain facts, the CRB recognized in *Simpkins v. Linens of the Week*, , CRB No. 08-178, AHD No. 08-079; OWC No. 640185 (August 6, 2009) that ALJ's should be aware of potential due process problems whenever they take judicial notice of evidence:

As the Court of Appeals made clear in *Renard v. D.C. Dept of Employment Services*, 673 A.2d 1274, 1276 (D.C. 1996), where such notice is of evidentiary matters outside the evidentiary record or administrative pleadings pertaining to the case, due process requires that the parties be afforded notice and the opportunity to contest the evidentiary matter.

Moreover, in this case the ALJ used a web site to take judicial noticed of the definition of a medical term. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Christopher v. Aguigui*, 841 A.2d 310, 311-12 n.2 (D.C. 2003) (quoting FED. R. EVID. 201(b)).

Here, the ALJ used a web site created by a layperson to define a technical medical term. The site is a source that reasonably can be questioned. Therefore, the ALJ improperly used this web site.

CONCLUSION

The June 18, 2009 Compensation Order s not supported by substantial evidence of record.

ORDER

The June 18, 2009, Compensation Order is **Vacated**. This case is **Remanded** for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D. Tarr
Administrative Appeals Judge

May 6, 2011
Date