GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-146

JACQUELYN TILLMAN,
Claimant-Respondent,

v.

PEPCO and SPECIALTY CLAIMS SERVICES,
Self-Insured Employer and Third Party Administrator-Petitioner.

Appeal of an October 31, 2013 Compensation Order issued by
Administrative Law Leslie A. Meek
OHA No. 12- 492, OWC No. 689333

Shawn M. Nolen, for the Self-Insured Employer and Third Party Administrator-Petitioner
David M. Snyder for the Claimant-Respondent

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge,* JEFFREY P. RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND ORDER

The self-insured employer and third-party administrator have appealed the October 31, 2013 Compensation Order (CO) issued by an Administrative Law Judge (ALJ). In the CO, the ALJ held Jacquelyn Tillman (Claimant) was entitled to continuing temporary total work disability benefits beginning on July 17, 2012, Claimant did not voluntarily limit her income, and that her current cervical condition is medically causally related to a work injury. For the reasons stated, we AFFIRM.

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Pepco (Employer) as an account investigation representative, a position that primarily was sedentary and involved sitting at a desk, using a telephone and a computer. At the January 20, 2013 evidentiary hearing, the parties stipulated that Claimant sustained a work-related injury to her right wrist on May 27, 2007.

Claimant stopped working for Employer on November 6, 2008 and has not returned to any work. She has received medical treatment from Dr. H. S. Pabla, an orthopedic surgeon, a neurosurgeon Dr. Faheem Sandhu, and from a pain management specialist, Dr. Pauline Ignacio. Claimant also was examined for employer-requested Independent Medical Examinations (IME) by orthopedic surgeon Dr. Richard Barth on September 14, 2009 and by hand surgeon Dr. Neal Zimmerman on March 16, 2012.

The medical evidence showed the claimant treated with Dr. Pabla from December 2006 until January 4, 2008, for complaints to her wrists and hands. Dr. Pabla diagnosed work-related carpal tunnel syndrome. Claimant told Dr. Pabla she did not have any neck or shoulder pain and Dr. Pabla did not render any treatment to those areas during the time he treated Claimant.

Claimant came under the care of Dr. Sandhu on February 12, 2009, after she stopped working for Employer in November 2008, for pain in her right hand, wrist, arm, shoulder and neck. Dr. Sandhu's initial report from February 12, 2009, is the first mention of neck and shoulder pain in the medical evidence. Dr. Sandhu diagnosed cervical spondylosis, cervical stenosis and cervical radiculopathy. Dr. Sandhu performed an anterior cervical decompression and interbody arthrodesis on June 16, 2009 and a carpal tunnel release on November 24, 2009.

Dr. Ignacio treated Claimant from July 25, 2012 to December 7, 2012. Dr. Ignacio reviewed a functional capacity evaluation and reported on April 11, 2012 that claimant could work at a sedentary duty position.

On June 28, 2012, Employer offered Claimant a light duty position. Claimant did not accept the position and returned to Dr. Ignacio, who, in turn, referred Claimant back to Dr. Sandhu. Dr. Sandhu, after not seeing Claimant in more than one year, reported on October 29, 2012 that Claimant should not work.

Employer had surveillance by an investigator done on Claimant in October, 2012. The surveillance video showed the claimant running errands, driving long distances, shopping, and doing other activities of everyday life, activities that Claimant testified she could not do.

After Employer discontinued voluntary payments, Claimant filed her claim seeking ongoing temporary total disability benefits beginning July 17, 2012 and for authorization of medical treatment for her neck.

In a November 4, 2013 CO, the ALJ decided that Claimant's current neck condition was medically causally related to the May 2, 2007 work injury, that Claimant is entitled to temporary total work disability benefits from July 17, 2012 to the present and continuing, that Claimant is entitled to medical care for her neck and right wrist, that Claimant did not voluntarily limit her income and that Claimant did not prove Employer failed to timely controvert her claim.

Only Employer appealed with Claimant filing in opposition. On appeal, Employer argues that the findings of the CO are not supported by substantial evidence nor are they in accordance with the law. Specifically, Employer asserts the ALJ erred because Claimant failed to prove by a

preponderance of the evidence that she could not work and because Claimant voluntarily limited her income.

Employer further asserts the ALJ erred in finding that Claimant was entitled to the statutory presumption that her cervical condition is causally related to any work injury and that even if the presumption was properly invoked, the evidence does not preponderate in establishing the requisite causal connection.

ANALYSIS

The employer first argues that the ALJ erred in her findings that Claimant is unable to work and that Claimant did not voluntarily limit her income.

In the CO, the ALJ correctly noted that there is no presumption regarding the nature and extent of an injured worker's disability and that the law places the burden on the injured worker to prove nature and extent by a preponderance of the evidence.

The ALJ described the opinions of the claimant's treating doctors and the IME doctors with respect to the claimant's ability to work. The ALJ wrote:

> Claimant's evidence shows her treating physician who has treated her for a considerable amount of time, has determined she is unable to return to work. (CE 1 pp. 6, 24, 26). On November 12, 2012, Dr. Ignacio opined Claimant could not return to work, "until further notice." (CE 1, p.6). As of the date of hearing Dr. Ignacio's determination in this regard has remained unchanged.
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> On April 11, 2012, Dr. Ignacio released Claimant to return to work sedentary duty. (EE 2). On June 28, 2012, Employer sent to Claimant, a correspondence directing Claimant to report to work on July 27, 2012. (EE 1). However, Claimant testified she was not aware that Dr. Ignacio cleared her to return to work until she received Employer's June 28, 2012 correspondence. By August 27, 2012, Dr. Ignacio determined Claimant was unable to return to work since July 27, 2012. (CE 1).

CO at 6.

Thus, the ALJ correctly identified the competing medical opinions that discussed the nature and extent of Claimant's disability and, as is proper, gave the greatest evidentiary weight to the opinions of the treating physicians.

The employer does not argue that the ALJ misstated the opinions or that the ALJ could not give preference to the treating physicians. The employer, relying on *Darden v. DOES and Guest Services, Intervenor,* 911 A. 2d 410 (D.C. 2006), argues that the opinions of the treating physicians are legally insufficient because the treating doctors only stated the conclusion that Claimant could not work without explaining the bases for the opinions. We do not agree that *Darden* supports Employer's argument.

The *Darden* case did not involve the nature and extent of a claimant's disability. In *Darden,* the employer sought to suspend the claimant's temporary total disability benefits, alleging that the claimant refused vocational rehabilitation. The ALJ held that the claimant refused vocational rehabilitation services because she failed three times to meet with the vocational rehabilitation specialist even though the claimant testified "her doctor placed her on a total disability status." *Darden v. Guest Services,* OHA No. 01-430B, OWC No. 292465 (August 20, 2003).

In reaching his decision, the ALJ held the opinion of the treating doctor that he did not "see how she can go to work" was premised on the doctor's belief that the claimant did not have the skills to participate in light duty, not on his view of any limitations caused by work accident.

> [The doctor's] broader statements of her "total disability" are explained by his failing "to see how she can go to work" because, in his opinion, "(s he does not have the skills for any light employment". While the doctor's opinion as to Claimant's physical limitations (i.e., no strenuous work) are certainly entitled to great weight under longstanding agency policy according such weight to the medical opinions of treating physicians, whether Claimant "has the skills for any light employment" is not a medical opinion, and is therefore not to be accepted as if it were."

Id at 2.

On appeal, the CRB affirmed the ALJ's decision and endorsed the ALJ's analysis that in the context of this case, the treating doctor did not issue a medical opinion but instead issued an opinion with respect to claimant's ability to participate in vocational rehabilitation, a matter outside the doctor's expertise:

> As the ALJ asserted, this statement of Dr. Muawaad's is not a medical opinion and as such cannot be afforded any preference usually accorded a treating physician. Dr. Muawaad's opinion is an expert opinion outside the scope of Dr. Muawaad's medical expertise, one more appropriately considered by a vocational rehabilitation expert.

Darden v. Guest Services, CRB (Dir. Dkt) No. 03-115 (March 17, 2005) at 3.

The employer appealed to the District of Columbia Court of Appeals (DCCA). The Court, contrary to employer's argument, did not hold that a treating doctor's "blanket statement" that a claimant was unable to work was insufficient to establish the nature and extent of disability. Rather the DCCA affirmed the ALJ and the CRB that the treating doctor was not offering a medical statement for which there would be a preference, but was giving his view on the claimant's aptitude to participate in vocational rehabilitation, for which no such preference is required:

> The record supports the ALJ's conclusion that nothing in Dr. Muawwad's progress notes indicated that Darden's physical incapacity for work went beyond the

> limitations recognized in the July 28, 2002 compensation order, *i.e.*, the need to avoid work that is physically strenuous or that requires prolonged standing. In addition, the ALJ correctly recognized that a treating physician's opinion about whether a worker's compensation claimant has the skills for light employment is not a medical opinion and is not entitled to deference or to special weight. Accordingly, we hold that it was neither unreasonable nor contrary to law for the Board to uphold the August 20, 2003 Compensation Order suspending Darden's disability benefits for her unreasonable refusal to participate in vocational rehabilitation.

911 A.2d 410, at 410-411.[1]

Therefore, in the opinion below, the ALJ properly gave the treating doctors' opinions preferential evidentiary weight and the CO's determination that the claimant is totally disabled is supported by substantial evidence in the record and is in accordance with the law.

Employer's next assignment of error relates to the presumption of compensability. Case law has established that there are three sequential steps when analyzing a case with respect to the statutory presumption: the invocation step, the rebuttal step, and the weighing all evidence without the presumption step.

At the first step, an ALJ must determine whether the presumption is invoked. To invoke the presumption, the claimant's evidence must establish two elements: (1) that she sustained a work-related event and (2) that event had the potential of resulting in or contributing to her disability. *Georgetown University v. DOES and Bentt, M.D., Intervenor,* 830 A.2d 865 (D.C. 2003).

Once the presumption has been invoked, the burden shifts to the employer to rebut the presumption by producing evidence that is specific and comprehensive enough to sever the causal connection between the work injury and the alleged subsequent disability. *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

If the presumption is rebutted, the ALJ must weigh the evidence without the presumption to determine if the claimant proved, by a preponderance of the evidence that his or her disability was caused by a work-related injury. *Washington Hospital Center v. DOES and Callier, Intervenor,* 744 A. 2d 992 (D.C. 2000).

Employer challenges the ALJ's determination that Claimant's evidence triggered the statutory presumption of compensability. Employer concedes Claimant presented evidence of a disability but argues:

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[1] *Darden* also involved the claim that claimant voluntarily limited her income. The ALJ's determination that the claimant did not voluntarily limit her income will not be discussed because it did not turn on the claimant's medical condition. Rather, the ALJ in *Duncan* denied that part of the employer's claim because there was no evidence that any positions the claimant applied for resulted in a job offer and the one position claimant did not apply for was unsuitable because it was temporary, probationary, and unpaid.

> Since this claim is not based on based on a specific work injury, but rather on the premise of an occupational disease, such a non-event cannot satisfy the requirement of the presumption. The only remaining trigger is the showing of a work activity or exposure that could have caused the claimed condition, but the ALJ has failed to make such a finding. The Employer asserts such a finding is not even possible.

Employer's memorandum at 11.

We reject Employer's argument for two reasons. First, the employer stipulated to a work injury on May 2, 2007. (HT 17). Second, the ALJ did identify a presumption potential work activity and exposure by referencing Dr. Sandu's October 29, 2013 report that related the claimant's neck and arm pain to "the original work injury form [sic] 2007." CO at 4.

Lastly, the employer argues that even if the ALJ properly invoked the presumption, she erred at the final step of the presumption analysis, when she held Claimant, without the benefit of the presumption, proved the medical causal relationship of her cervical problems to the work injury. We disagree.

In making this argument, the Employer, in effect, is asking the CRB to reweigh the evidence. That Dr. Sandhu was not actively treating the claimant and had not treated her in over one year when he issued his opinion, that claimant went to him after she was told about Dr. Ignacio's (then) opinion that she could do light duty work, or because Claimant's testimony, in Employer's view, was not credible, do not, as a matter of law, disqualify Dr. Sandhu's opinion. Rather these were factors that the ALJ considered in determining the credibility of his opinion. The CRB does not reweigh the evidence with respect to credibility determinations based on admissible evidence. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2005).

CONCLUSION AND ORDER

The ALJ's determination that Claimant's left shoulder condition is medically causally related to her work-related injury, and that Claimant did not voluntarily limit her income are supported by substantial evidence in the record and are in accordance with the law and therefore is **AFFIRMED.**

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
Chief Administrative Appeals Judge

January 24, 2014
DATE