GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-136

JAMAL K. EVANS,

Claimant–Respondent,

v.

CHILDREN'S NATIONAL MEDICAL CENTER

and

AVIZENT RISK CO.,

Employer/Insurer – Petitioners.

Appeal from a Compensation Order by
The Honorable Anand K. Verma
AHD 11-194, OWC No. 678657

Benjamin T. Boscolo, Esquire for the Claimant
Jeffrey W. Ochsman, Esquire for the Employer

Before HEATHER C. LESLIE,[1] MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the Employer – Petitioner (Employer) for review of a October 31, 2011, Compensation Order (CO), issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section[2] of the District of Columbia's Department of Employment Services (DOES).

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

[2] Formerly known as the Administrative Hearings Division.

In that CO, the ALJ granted in part the claimant's request for temporary total disability benefits, causally related medical bills, and authorization for medical treatment. We reverse and remand.

BACKGROUND FACTS OF RECORD

The Claimant was a Special Police Officer for the Employer. Prior to the work accident, the Claimant, for medical reasons unrelated to his employment, was placed in a light duty position with restrictions of no lifting above 15 pounds. The Employer was able to accommodate this restriction. On February 12, 2011, the Claimant hurt his back while restraining an unruly patient.

The Claimant sought medical care at the emergency room and followed up with his primary care physician. The Claimant ultimately came under the care and treatment of Dr. Jeffrey Phillips, per the advice of his counsel. Dr. Phillips recommended the Claimant remain off work until released to light duty on June 30, 2011 which the Employer was able to accommodate on July 6, 2011.

A Formal Hearing was held on September 8, 2011. The Claimant sought an award granting him temporary total disability benefits from February 3, 2011 to February 23, 2011 and February 25, 2011 to July 5, 2011 subject to a credit for wages earned during the claimed period, authorization for medical treatment and causally related medical expenses. The issues raised were whether or not the Claimant's disability was causally related to the work injury of February 12, 2011 and the nature and extent of the Claimant's alleged disability, if any. The Employer also raised the defense of whether the Claimant's claim is barred pursuant to D.C. Code §32-1521(4) because he willfully intended to injure himself. A CO was issued wherein the ALJ granted the Claimant temporary total disability benefits from February 17, 2011 to July 5, 2011 subject to a credit for wages earned, reasonable and necessary medical treatment related to the work injury, and payment of causally related medical bills already incurred as a result of the injury.

The Employer timely appealed with the Claimant opposing.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d)(2)(A) of Act.

Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra.*

ANALYSIS

On review, the Employer first argues that the ALJ erred as a matter of law in not finding that the Claimant willfully intended to injure himself. The Employer argues that the "Claimant's injury was due solely to his decision to ignore his physician's instructions by electing to intervene in an action where it was likely that he would sustain injury, and is thus not compensable." Employer's Argument at 4. The Employer relies upon D.C. Code §32-1521(4) which states,

> In any proceeding for the enforcement of a claim of compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:
>
> > (4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

A review of the CO reveals that the ALJ took the Employer's argument into consideration and stated,

> Employer argues claimant willfully injected himself into the fray and, therefore, any resulting injury he suffered therein should be deemed non-compensable. Even though, at the time of work incident, claimant worked in light duty position, he was the only police officer available who was required to respond to the emergency situation after receiving a call on his walkie-talkie. (HT 73-74). Claimant's testimony on cross examination further illuminated that his supervisor, Sergeant Willis was unavailable to respond to the distress call. Hence, regardless of employer's contention of claimant's voluntary assumption of the potential risk of harm, claimant as a special police officer always remained under a preexisting duty to promptly respond to the emergencies arising during his tour of duty within the hospital and, accordingly, any delay in debating the merits of the emergency call would have proven deleterious.

Evans v. Children's National Center, AHD No. 11-194, OWC 678657 (October 31, 2011) at 4.

We agree that responding to an emergency call while on light duty restrictions does not, by itself, show a willful intent to injure oneself. We do not agree that the actions of the Claimant "can only be viewed as a deliberate intent to place himself in a position wherein he would be injured." Employer's Argument at 6. We find no error in the ALJ's conclusion. In essence, the Employer is asking us to re-weigh the evidence in the Employer's favor which we cannot do.

The Employer's next argument is that any award for temporary total disability should only be from February 17, 2011 to February 23, 2011 and from March 23, 2011 to June 29, 2011. The Employer argues that the ALJ failed to take into consideration the "totality of the medical evidence presented at the Formal Hearing." Employer's Argument at 9.

When addressing the issue of nature and extent, the ALJ noted,

> In the instant claim, claimant seeks temporary total wage loss from February 3, 2011 to February 23, 2011 and from February 25, 2011 to July 5, 2011. In support of that claim, claimant relies on the disability reports from the physicians who treated him during the period of purported incapacity. The record evidence supports claimant's inability to return to work from February 17, 2011 through March 2, 2011 (CE 4, pp 21-22). Then, on March 23, 2011, Dr. Salter placed him off-work for inability to return to work until April 23, 2011, to be continued again until May 4, 2011 and May 25, 2011 (CE 1, pp. 9, 11, 13).Thereafter, Dr. Salter released him to return to light duty employment on June 30, 2011 with restrictions of lifting of 20 lbs., frequent sitting with stretching breaks, stair climbing, bending/stooping and pushing/pulling. (CE 1, p.4). On July 5, 2011, employer offered a modified duty job to claimant commensurate with his physical restrictions. (EE 10).
>
> Because employer made a suitable modified duty job available to claimant commencing on July 6, 2011, employer has clearly rebutted claimant's claim of total disability to perform his usual employment after July 5, 2011.

Evans, supra at 5.

A review of the evidence does not show that between March 3, 2011 and March 22, 2011 any physician opined that the Claimant could not work. On March 1, 2011, Dr. Phillips opined that the Claimant could return to work as scheduled. It is not until March 23, 2011, that Dr. Salter, a colleague of Dr. Phillips, then takes him out of work. The ALJ did not address this specific time period. Therefore, we remand the CO to reconsider the nature and extent of the Claimant's disability between March 3, 2011 and March 22, 2011. If the ALJ deems the Claimant to be temporarily and totally disabled during this time period, the ALJ must identify the evidence in the record to support this claim.

As for the rest of the time period claimed, a review of the evidence supports the ALJ's conclusion that the Claimant was temporarily and totally disabled from February 17, 2011 to March 2, 2011 and from March 23, 2011 through July 5, 2011. What the Employer requests us to do is to re-weigh the evidence, a task we cannot do.

Finally, the Employer argues that the treating physicians were provided with an incomplete history and as such, the ALJ erred in extending the treating physician preference to the physicians at Philips and Green. Specifically, the Employer contends that as the treating physicians were not informed of the Claimant's alleged back pain in 2009, his hypertension, nor of the Claimant's pre-injury light duty job position, their opinions are "imprecise, inadequate, and faulty." Employer's Argument at 11.

We disagree with the employer's argument. While the absence of a complete medical history could in some circumstance negate the treating physician preference, here the omissions in the treating physician's records are insignificant and insubstantial and do not rise to the level of negating the evidentiary preference given to treating physicians. See, *Brown v DOES*, 700 A.2d 787, 793 (D.C. 1997)

The ALJ considered not only the medical evidence, but also the testimony of the Claimant as a whole and implicitly found in this case such absence in the medical records not to be of any significance. We find no error in this.

CONCLUSION AND ORDER

The October 31, 2011 Compensation Order is REVERSED, in part, and REMANDED for further findings of fact on the issue of the nature and extent of the Claimant's disability between March 3, 2011 and March 22, 2011.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

February 29, 2012
DATE