

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-020

PHIL M. VASKO,

Claimant–Petitioner,

v.

MONUMENTAL SPORTS and Zurich American Insurance Company,

Employer and Insurer-Petitioner.

Appeal from a Compensation Order by
The Honorable Leslie A. Meek
AHD No. 11-121A, OWC No. 675924

Michael J. Kitzman, Esquire for the Petitioner
Mark Bertram, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges*.

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

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the January 24, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for causally related medical expenses. We AFFIRM.

¹Judge 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).

FACTS OF RECORD

The Claimant was employed as a stage hand/concert rigger for the Employer. On November 18, 2010 the Claimant stood up and felt a pop in both his knees. The Claimant followed up with Dr. Christopher Annunziata, with whom he had been treating for left knee problems prior to November 18, 2010.

After performing an MRI, Dr. Annunziata diagnosed the Claimant with arthritis of both knees. Dr. Annunziata suggested a total left knee replacement which the Claimant underwent. The Claimant alleged that his bilateral knee condition, including the left knee replacement, was causally related to the injury of November 18, 2010. The Employer sent the Claimant for an Independent Medical Evaluation (IME) with Dr. Stuart Gordon.

A Formal Hearing was held on November 22, 2011. The issues raised were 1) whether or not the Claimant suffered an accidental injury on November 18, 2010; 2) whether or not the Claimant's current medical condition was causally related to the work accident of November 18, 2010, and; 3) whether or not the Claimant was entitled to related medical expenses for his right knee. HT at 7. On January 24, 2012, a CO was issued which denied the Claimant's claim for relief. The ALJ found that the Claimant had failed to prove, by a preponderance of the evidence, that the Claimant's medical condition was causally related to the work injury of November 18, 2010.

The Claimant timely appealed. The Claimant argues that the CO improperly credited the opinion of the Employer's physician, failed to apply the treating physician preference, and failed to address alternate theories of compensability. The Employer argues that the CO is supported by the substantial evidence in the record and should be affirmed.

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 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* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Claimant's first argument is that the CO's reliance on Dr. Gordon's opinion was in error as Dr. Gordon does not address the possibility that the Claimant's injury was aggravated by the work injury and, in fact, under the "impression" section of his report indicates there is no evidence of an injury on November 18, 2010. Thus, the Claimant argues the ALJ's reliance upon Dr. Gordon's opinion is in error and cannot constitute substantial evidence. We disagree.

A review of the CO reveals that ALJ noted that Dr. Gordon opined that the “Claimant’s right knee condition is related to underlying degenerative disease” and that this opinion is enough to rebut the presumption of compensability. We find no error in this. After having found the presumption of compensability rebutted, the ALJ correctly noted the Claimant’s burden of proving, by a preponderance of the evidence, that his right knee condition is causally related to the work accident. The Claimant failed in this burden.

The Claimant incorrectly argues that because Dr. Gordon did not specifically address his contention that his right knee condition was aggravated by the November 18, 2010 work injury, the CO is not supported by the substantial evidence in the record. We reject the Claimant’s selective reading of the record. Dr. Gordon does opine that the Claimant’s right knee condition is degenerative in nature and not attributable to anything that occurred on November 18, 2010. We also reject the proposition put forth by the Claimant that if the Employer’s IME physician does not specifically address his case theory, then a finding in favor of the Claimant is “mandated.” What the Claimant is essentially arguing is that it was the Employer’s burden, through the IME physician, to disprove his case theory. This is simply not the case. It is the Claimant’s burden to prove medical causation by a preponderance of the evidence, if the presumption of compensability has been rebutted. The ALJ’s conclusion that the Claimant failed this burden is supported by the substantial evidence in the record.

The Claimant next argues that the ALJ failed to cite any record based evidence to reject the opinion of the Claimant’s treating physician, Dr. Annunziata and that as such, the CO is not in accordance with the law and must be reversed. We disagree.

A review of the CO, reveals that the ALJ took into consideration the medical reports and deposition testimony of Dr. Annunziata. Specifically,

Dr. Annunziata is an orthopaedist specializing in knee and shoulder surgery. (CE 3, p.22). Dr. Annunziata treated Claimant for the instant injury and has treated Claimant for another orthopaedic condition to Claimant's left knee that Claimant has had since 2001. (CE 3, p. 23). For the November 18, 2010 work injury, Claimant began treating with Dr. Annunziata on December 3, 2010. (CE 3, p.23). The doctor ordered Claimant to undergo an MRI of his right knee on December 21, 2010. (TR p. 21; CE 3, p. 24). The MRI showed degenerative changes within the medical meniscus as well as similar changes on the cartilage pad on the outside part of the knee; a small joint diffusion; and tricompartmental osteoarthritic further changing chondromalacia which are worse by the patella. (CE 3, pp. 24-25).

In a January 11, 2011 form prepared by Claimant's counsel, Dr. Annunziata provided responses to inquiries made by Claimant's counsel. Claimant's counsel advised his inquiries pertained to an incident that occurred on 11/18/2010. (CE 1, p.10).

Claimant's counsel states, "It is my understanding that you are treating my client for an injury to the left and right knees. . . What is your diagnosis?" Dr.

Annunziata responded, "Knee osteoarthritis and significant effusion". Dr. Annunziata failed to provide any information to attribute this diagnosis to Claimant's right knee.

The second question on said form asks, "Is the condition you have diagnosed caused, contributed to or aggravated, even in part, by the above-referenced incident?" Dr. Annunziata checks a space provided, to indicate the affirmative and then states, "Knee osteoarthritis and aggravation by prolonged standing/walking." Again, Dr. Annunziata fails to offer any statement to attribute this circumstance to Claimant's right knee.

In his October 4, 2011 deposition testimony, Dr. Annunziata states he considered Claimant's line of work, the tasks Claimant is required to perform, along with the physical demands of Claimant's position and determined Claimant's job, "certainly could exacerbate problems in his right knee." (CE 3, pp26-27). Dr. Annunziata further testified that Claimant's right knee condition could also be attributed to causes such as getting older. (CE 3, p. 13). Dr. Annunziata recommended Claimant undergo an arthroscopic intervention. (CE 3, p. 27).

CO at 3-4.

The ALJ, after reciting the treating physician preference², then rejected the opinion of Dr. Annunziata as he "did not affirmatively state that the current condition of Claimant's right knee was caused by a work incident of November 18, 2010." CO at 5. We find no error in the above analysis and conclusion. While there may be substantial evidence to support a contrary conclusion, we cannot re-weigh the evidence in the Claimant's favor as he is asking us to do.

Finally, the Claimant argues that the CO failed to address his alternate theory of compensability, that his work activities could have resulted in an aggravation of his pre-existing condition, quoting *Murray v. DOES*, 795 A.2d 980 (DC 2001). While the final paragraph in the Discussion section of the Compensation Order delineates a November 18, 2010 accident, that conclusion is in response to the specific issues raised at the formal hearing; however, the ALJ in the remainder of the Compensation Order also addresses Claimant's alternate theory and analyzes the evidence in that regard. As stated above, the ALJ took into consideration Dr. Annunziata's opinion that the Claimant's job *could* exacerbate problems in his right knee," as well as his statement that other factors *could* have contributed to his right knee condition. Any perceived error regarding the issue of an aggravation of a pre-existing condition or even a cumulative exacerbation of the underlying condition is harmless error.

It was the Claimant's burden, to prove by a preponderance of the evidence that his right knee condition was caused by the injury. A burden the ALJ concluded that he had not met. We affirm.

² In the District of Columbia, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. See *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998); see also, *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the January 24, 2012 Compensation Order on Remand is supported by substantial evidence in the record. It is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

April 3, 2012
DATE