

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD

2016 AUG 4 AM 10 05

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-1166

ABREHAM ZEMEDAGEGEHU, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

FEDERAL EXPRESS CORPORATION, *et al.*, INTERVENORS.

On Petition for Review of an Order of the
District of Columbia Department of Employment Services
Compensation Review Board
(CRB 15-091)

(Submitted July 15, 2016)

Decided July 29, 2016)

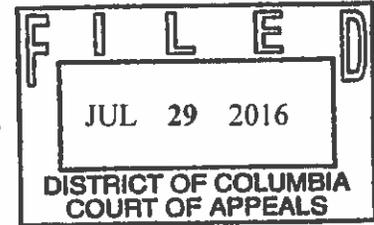
Before MCLEESE, *Associate Judge*, and NEWMAN and BELSON, *Senior Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Abreham Zemedagegehu challenges the denial of his worker's compensation claim. We affirm.

I.

In an administrative hearing in February 2015, Mr. Zemedagegehu testified as follows. Mr. Zemedagegehu worked as a box handler at the Federal Express ("FedEx") warehouse on New York Avenue from 2006 to 2010. In October 2008, Mr. Zemedagegehu was lifting a box weighing approximately seventy-five pounds when he felt a "pop" in the lower part of his spine and his left hip. Mr. Zemedagegehu informed his colleagues of the incident, and his supervisor told him to fill out a report. Because Mr. Zemedagegehu communicated through American Sign Language and his English was limited, he filled out forms with the help of an interpreter. Mr. Zemedagegehu later filled out a questionnaire on the computer



without the assistance of an interpreter, although he did not understand some of the English words.

Following the incident, Mr. Zemedagegehu sought treatment at a doctor's office on New York Avenue, where he received medication and was told to rest. He also sought care at the George Washington University ("GWU") Hospital emergency room, and he received a letter saying he could not work for two weeks. Mr. Zemedagegehu gave the letter to his supervisor. Although he requested lighter work, Mr. Zemedagegehu continued the same work at FedEx for two more years until 2010, when he ultimately had to quit his job because of the pain. Mr. Zemedagegehu testified that his back pain started in 2008. He denied having sought medical treatment for back pain in 2006 and reporting at that time a prior history of back pain.

Mr. Zemedagegehu did not present any medical records reflecting treatment for back pain from the time of the incident in 2008 until October of 2011. Mr. Zemedagegehu did produce medical reports indicating that he sought treatment from Dr. Bonita Coe at GWU Hospital for back, head, and abdominal pain in October 2011. He returned to Dr. Coe for treatment numerous times through April 2014. Mr. Zemedagegehu also introduced medical reports from 2014 from the Spine and Pain Center of GWU Hospital, where he was diagnosed with mild lumbar disc degeneration.

Before the ALJ, FedEx maintained that Mr. Zemedagegehu did not sustain an accidental injury during the course of his employment or, in the alternative, that his back pain was not causally related to the incident in October 2008. In support of this argument, FedEx introduced emergency-room records from July 2006 and March 2007 indicating that Mr. Zemedagegehu sought treatment for back pain at GWU Hospital before 2008, contrary to his testimony. FedEx also introduced evidence that Mr. Zemedagegehu did not file a Notice of Injury form with the Office of Workers' Compensation until November 2012. FedEx submitted an Independent Medical Evaluation ("IME") from Dr. Louis E. Levitt, who examined Mr. Zemedagegehu in August 2013 at the request of FedEx. Dr. Levitt opined that Mr. Zemedagegehu had likely sustained a muscular back strain when lifting the box but would have reached full medical improvement in the three months following his injury. After concluding that Mr. Zemedagegehu's examination was completely normal, Dr. Levitt further opined that Mr. Zemedagegehu had the capacity to work on a full-time basis.

The ALJ denied Mr. Zemedagegehu's claim for relief. The ALJ expressly discredited large portions of Mr. Zemedagegehu's testimony, including his account of the October 2008 incident, the progression and severity of his pain, and the injury's impact on his physical capabilities. In making these credibility findings, the ALJ found "no contemporaneous documentary evidence, credible testimony, or medical report [] to substantiate [Mr. Zemedagegehu's] story." The ALJ noted, "[A]ny reference to the alleged October 2008 work injury, in the record medical reports, is based only on [Mr. Zemedagegehu's] unvalidated statements to the medical providers." The ALJ found no causal link between Mr. Zemedagegehu's injury, his subsequent medical treatment, and his wage loss. The Compensation Review Board ("CRB") affirmed.

II.

"In a worker's compensation case, we review the decision of the [CRB], not that of the ALJ. In doing so, however, we cannot ignore the compensation order which is the subject of the Board's review." *Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Emp't Servs.*, 926 A.2d 140, 147 (D.C. 2007). We will not disturb a CRB decision that "flows rationally from [] facts . . . supported by substantial evidence on the record." *Upchurch v. District of Columbia Dep't of Emp't Servs.*, 783 A.2d 623, 626-27 (D.C. 2001). The CRB may not review the evidence on appeal de novo, and if substantial evidence exists to support the ALJ's findings, the CRB must affirm even if contrary evidence exists. *Hensley v. District of Columbia Dep't of Emp't Servs.*, 49 A.3d 1195, 1199 (D.C. 2012). When the CRB has conducted a proper inquiry, "this court will affirm the agency's ruling unless it is arbitrary, capricious, or otherwise an abuse of discretion and not in accordance with the law." *McCamey v. District of Columbia Dep't of Emp't Servs.*, 947 A.3d 1191, 1196 (D.C. 2008) (en banc).

Mr. Zemedagegehu's sole argument before this court is that the ALJ erroneously denied him the statutory presumption of compensability. D.C. Code § 32-1521 (2012 Repl.); see *Ferreira v. District of Columbia Dep't of Emp't Servs.*, 531 A.2d 651, 655 (D.C. 1987) (holding that claimant is entitled to presumption of compensability when claimant makes "initial demonstration" of "a death or disability and a work-related event, activity, or requirement that has the potential of resulting in or contributing to the death or disability") (emphasis deleted). Specifically, Mr. Zemedagegehu contends that it was impermissible for the ALJ to consider credibility when determining whether Mr. Zemedagegehu had made a sufficient initial demonstration to be entitled to the presumption of compensability.

We need not decide that issue. Rather, we affirm the CRB's alternative conclusion that even if Mr. Zemedagegehu was entitled to the presumption, remand for further proceedings would be futile because the ALJ's credibility finding was fatal to Mr. Zemedagegehu's claim. In this court, Mr. Zemedagegehu does not address the CRB's alternative ruling. Mr. Zemedagegehu therefore arguably waived his claim of error. *Cf. United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 391 U.S. App. D.C. 165, 184-85, 608 F.3d 871, 890-91 (2010) (“[I]n situations in which there is one or more alternative holdings on an issue, failure to address one of the holdings results in a waiver of any claim of error with respect to the court’s decision on that issue[.]”) (ellipses and internal quotation marks omitted). In any event, we agree that remand would be futile.

Even if one assumes that the ALJ erred in making an initial credibility determination when deciding whether Mr. Zemedagegehu was entitled to a presumption of compensability, FedEx indisputably rebutted the presumption. To rebut the presumption, an employer need only introduce “substantial evidence . . . specific and comprehensive enough that a reasonable mind might accept it as adequate to contradict the presumed causal connection between the event at work and the employee’s subsequent disability.” *Washington Post v. District of Columbia Dep’t of Emp’t Servs.*, 852 A.2d 909, 911 (D.C. 2004) (citation, footnote, alteration, and internal quotation marks omitted). FedEx presented substantial evidence to challenge the causal connection between Mr. Zemedagegehu’s injury and a work-related event. The IME alone, which found no evidence of an existing injury and concluded that any symptoms from the alleged accident would have resolved themselves within three months of the accident, sufficed to rebut the presumption. *See, e.g., Safeway Stores, Inc. v. District of Columbia Dep’t of Emp’t Servs.*, 806 A.2d 1214, 1220-21 (D.C. 2002) (holding that medical report clearly stating physician’s opinion that claimant’s injury was not work-related constituted substantial evidence to rebut presumption of compensability).

When the employer adequately rebuts the presumption of compensability, the claimant has the burden of demonstrating by a preponderance of the evidence that his or her disability was caused by a work-related injury. *See Upchurch*, 783 A.2d at 628. Given that all of Mr. Zemedagegehu’s evidence supporting the existence of a connection between his injury and his employment rested on the credibility of Mr. Zemedagegehu’s testimony and statements, the ALJ’s adverse credibility finding was fatal to Mr. Zemedagegehu’s claim. Mr. Zemedagegehu does not challenge the ALJ’s credibility finding in this court, and we see no reason

to look behind that finding. Because the outcome of proceedings on remand is a foregone conclusion, we affirm. *See, e.g., Northhampton Media Assocs. v. Federal Commc'ns Comm'n*, 291 U. S. App. D.C. 297, 300, 941 F.2d 1214, 1217 (1991) (“remand is unnecessary where agency on remand would inevitably arrive at the same result”) (internal quotation marks omitted).

The decision of the CRB is therefore

Affirmed.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

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