

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-147

ALEXIS HUTCHINSON,
Claimant-Respondent,

v.

MASSIMO DUTTI and
ACE FIRE UNDERWRITERS INS. CO.,
Employer/Insurer-Petitioner.

Appeal from a November 14, 2014 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 14-276, OWC No. 708499

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Michael J. Kitzman for Claimant
Tony D. Villeral for Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer's retail clothing store as a "women's style advisor", assisting customers with the selection and purchases of upscale clothing. Claimant was required to wear uniform "Oxford" style shoes. Claimant started experiencing soreness in her feet. Claimant soaked her feet in the evenings but her symptoms worsened as time passed. On April 14, 2013, Claimant's symptoms worsened to the extent that she had to leave after one hour. Claimant sought treatment from her primary care physician, Dr. Aviva Zyskind.

Claimant had a neurological consultation with Dr. Michael Batipps on August 26, 2013. Claimant advised Dr. Batipps that at age 1 she underwent corrective foot surgery and walked relatively normally without deficits in walking or running. Claimant also advised Dr. Batipps

that at age 16 swelling in her right foot increased and she was told she had lymphedema¹. At age 22 her left foot began to swell and she again was told she had lymphedema. Claimant reported that on April 14, 2013 she experienced sharp pains, paresthesia and intermittent swelling after “an especially busy day at work”.

Claimant’s primary care provider referred Claimant to Dr. Eric Wisotsky, for a lymphedema evaluation on August 26, 2013. A lymphoscintigraphy² was ordered to confirm Claimant has lymphedema. The lymphoscintigraphy was performed on October 11, 2013 which revealed a lymphatic obstruction in Claimant’s right leg. Claimant came under the care of Dr. Joseph Liberman, a neurologist and associate of Dr. Batipps on December 11, 2013. She complained of pain in her hands and feet. Dr. Liberman initially was of the opinion that claimant may have tarsal tunnel syndrome and he ordered an EMG nerve conduction study. EMG’s performed of Claimant’s feet and hands were negative. Dr. Liberman acknowledged that there was no indication of nerve damage in her feet but suspected Claimant had tendon or ligament damage due to prolonged standing and advised Claimant to see an orthopedic physician. Dr. Liberman also ordered blood work to rule out other disorders contributing to Claimant’s symptoms. Claimant saw Dr. Francis McGulgan, an orthopedic surgeon who specializes in foot and ankle surgery, on February 10, 2014. Dr. McGulgan found no evidence of any pathology and recommended Claimant see a rheumatologist. Dr. Liberman reported Claimant’s blood work was negative. Dr. Wisotsky diagnosed Claimant with fibromyalgia on February 10, 2014. On April 16, 2014, Dr. Liberman recommended Claimant see a rheumatologist to determine if the problem with her feet and legs is triggering a fibromyalgia-like syndrome.

A full evidentiary hearing occurred on September 4, 2014. Claimant sought an award of temporary total disability benefits from April 14, 2013 through the present and continuing, as well as authorization for medical treatment and payment of all causally related medical expenses. An administrative law judge (ALJ) issued a Compensation Order (CO) on November 1, 2014. The ALJ concluded Claimant has been temporarily and total disabled by bilateral lower extremity symptoms related to her employment since April 14, 2013 and granted Claimant’s claim for relief.

Employer timely appealed. Employer asserted Claimant did not prove by a preponderance of the evidence that her symptoms are the result of a work related activity or event. Specifically, Employer challenges the ALJ’s conclusion that Claimant suffered any injury to her lower extremities as Employer asserts that Claimant has fibromyalgia which the ALJ found not related to her employment. Employer further asserts that the ALJ erred in finding no reason to reject the opinion of Dr. Liberman and the ALJ’s rejection of Dr. Resnak’s opinion was an abuse of discretion.

¹ Lymphedema is a chronic unilateral or bilateral edema of the extremities due to accumulation of interstitial fluid as a result of stasis of lymph which is secondary to obstruction of lymph vessels or disorders of the lymph nodes. Dorland’s Illustrated Medical Dictionary 1036 (29th Edition 2000).

² A lymphoscintigraphy is a scintigraphic detection of metastatic tumor in radioactively labeled lymph nodes. Dorland’s Illustrated Medical Dictionary 1040 (29th Edition 2000).

Claimant has responded asserting that the treating physician, Dr. Liberman provided a well-reasoned opinion based on all of the testing and diagnostic tests performed.

STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) and this Review Panel (Panel) as established by the Act and as contained in the governing regulations 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. D.C. Code § 32-1521.01(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. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this Panel are bound to 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.

ISSUE ON APPEAL

Is the November 14, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS

The ALJ correctly determined Claimant was entitled to the benefit of the presumption that the complained of condition of her feet is causally related to her employment. The Panel further concludes the ALJ found that Employer had rebutted the presumption and reviewed the record evidence as a whole, without reference to the presumption, but taking into account the preference that is accorded to the opinions of treating physicians in this jurisdiction under *Short v. DOES*, 723 A.2d 845 (D.C. 1998), as well as, *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992), and determined Claimant has established by a preponderance of the evidence, that Claimant’s condition is causally related to the stipulated work injury. We find no error committed by the ALJ in her analysis.

With regard to Dr. Liberman, Employer asserted:

...The Claimant relied on the opinion of Dr. Lieberman [sic] who explained he is not an expert in the Claimant’s pre-existing symptomatic lymphedema. The Claimant’s symptomatic lymphedema affects her legs causing them to swell. Not only is there regular swelling, there was lymphatic obstruction found in the right leg on October 11, 2013. This unrelated obstruction is the only objective evidence of any abnormality in the Claimant’s lower extremities. Dr. [Lieberman] found no objective evidence of any actual injury. Dr. [Lieberman] testified he is not an expert in fibromyalgia. His entire assessment of this case is based on guessing. He felt in a small percentage of people fibromyalgia could be related to

an injury even though most cases are not related to an injury. However, when asked what percentage he explained it's never anything he's come across in his reading. Lastly, Dr. [Liberman disables the Claimant despite the fact the Claimant is not receiving any treatment for the alleged work place injury. The Claimant is only treating for her unrelated fibromyalgia. For these reasons, Dr. [Liberman's] opinion should have been rejected.

Employer's Memorandum at unnumbered 11.

The ALJ concluded:

The reports of Drs. Batipps and Liberman support the existence of a medical causal connection between Claimant's lower extremity symptoms and her April 2013 employment activities. They based this opinion upon examinations and treatment of Claimant, upon review of objective test results and upon consideration of the mechanism of injury.

CO at 6.

In support of her rejection of Employer's IME opinion from Dr. Richard Restak, the ALJ concluded that Dr. Restak did not "satisfactorily explain his conclusion that Claimant's lower extremity symptoms were non-existent or that the mechanism of Claimant's 2013 work activity had no effect on her current lower extremity condition". *Id.*

Dr. Restak stated:

I am confident that there is no neurologic explanation for her symptoms and I feel that the issue of alleged injury on April 14, 2013 is improbable. The vast of symptoms she has are not causally related or related at all to the alleged incident on April 14, 2013. She has a long history of being able to stand for extended periods of time on her feet and in fact even worked as a barber and hairstylist putting in 12 hour days. . . . Her problem is primarily neuropsychiatric and I think she needs to be placed on psychotropic medication. Unfortunately she stated in the April 7, 2014 visit to Dr. Eric Wisotzky, that she is "spiritually opposed to taking medication.

ER 1 at 4.

Dr. Restak's reference that Claimant's "vast" symptoms are not causally related suggests that some of her symptoms are related. Moreover, his diagnosis of a neuropsychiatric injury calls into question whether her pain at work caused or aggravated this condition. Thus, we must agree with the ALJ that Dr. Restak did not satisfactorily explain his conclusion and affirm the ALJ's

finding that Claimant established by a preponderance of the evidence that Claimant's initial problems with her feet are causally related to her employment³.

With regard to the nature and extent of Claimant's disability, the ALJ correctly states "It is well settled that in determining an injured employee's entitlement to the requested level of benefits, the claimant must present credible, supporting evidence," citing *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). Subsequently, the District of Columbia Court of Appeals has held that the burden of proof in nature and extent issues is by a preponderance of evidence. *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009). This Panel notes the ALJ did state the correct burden in her "Conclusion."

This Panel does not agree with Employer's assertion that the record conclusively establishes that claimant has fibromyalgia⁴. We do however agree with Employer that Claimant has not established by a preponderance of evidence that she is unable to work due to the work related problems. Although Claimant asserts that she was released only to light duty work, this Panel cannot identify any physician's opinion to support a determination that Claimant was either released to light duty work or that she is unable to return to her pre-injury duties since April 14, 2013 and continues to be unable to work. While the ALJ stated "None of Claimant's treating physicians has released her [to] return to her usual work duties" this Review Panel concludes there is no medical evidence in the record to support these conclusory statements made by the ALJ:

Claimant has shown a disability, i.e., that her bilateral lower extremity symptoms resulted in her being medically restricted from performing her usual work duties for Employer herein. Claimant's treating physician has provided an opinion to validate the disabling effect of Claimant's work-related impairment and that Claimant is entitled to medical benefits for her causally related right knee symptoms.

CO at 7. The record before the ALJ contains the IME opinion of Dr. Restak who stated:

There should be no job restrictions placed on her because there were no findings that would indicate impairment of the feet or hands or other body parts she has complained of.

EE 1 at 5. Dr. Liberman, who the ALJ has identified as the treating physician, was never asked at his deposition and his reports do not discuss Claimant's ability to work. In light of the IME opinion in the record, this Panel concludes Claimant's testimony alone is not sufficient to meet her burden of establishing by a preponderance of evidence that she is unable to return to her pre-

³Although we may have reached a conclusion contrary to that of the ALJ on this issue, we cannot substitute our judgment for that of the ALJ. *Marriott*, 834 A.2d at 885

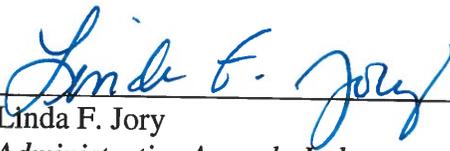
⁴Dr. Wisotzky, who treated claimant on three occasions, diagnosed claimant with fibromyalgia on February 20, 2014. Dr. Liberman reported at his last examination of claimant on April 16, 2014 that he recommended Claimant have a rheumatology consultation to see if the problem with her feet and legs is triggering a fibromyalgia-like syndrome. Dr. Liberman testified at his deposition he did not think claimant had fibromyalgia but he did not know of a test to diagnose fibromyalgia.

injuries duties. As the ALJ's conclusion, that based upon a preponderance of the evidence, Claimant has been temporarily and totally disabled is not supported by substantial evidence the determination of the nature and extent of claimant's disability is vacated and remanded to Administrative Hearings Division for further consideration of this issue.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's bilateral foot problems are causally related to her employment is supported by substantial evidence and is affirmed. The ALJ's conclusion that Claimant has been temporarily and totally disabled since April 14, 2013 and continuing is vacated. The matter is remanded for further consideration of that issue with Claimant bearing the burden of establishing by a preponderance of the evidence standard.

FOR THE COMPENSATION REVIEW BOARD:



Linda F. Jory
Administrative Appeals Judge

March 25, 2015
DATE