

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-190

**ALEXIS HUTCHINSON,
Claimant–Petitioner,**

v.

**MASSIMO DUTTI and
ACE FIRE UNDERWRITERS INS. CO.,
Employer/Insurer – Respondents.**

Appeal from an October 30, 2015 Compensation Order on Remand by
Administrative Law Judge Amelia G. Govan
AHD No. 14-276, OWC No. 708499

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAY 4 PM 12 45

(Decided May 4, 2016)

David Snyder for Claimant¹
Tony D. Villeral for Employer

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

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The procedural history pertinent to the current appeal is described by the Compensation Review Board (CRB) in a prior Decision and Remand Order:

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

¹ Michael J. Kitzman represented Claimant in prior proceedings.

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 lymphedema. 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 lymphoscintigraphy 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.

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.

Hutchinson v. Massimo Dutti, CRB No. 14-147 (March 25, 2015) (DRO) at 1-3, (Footnotes omitted.)

After considering the parties' arguments, the CRB affirmed the ALJ's conclusion that Claimant had established by a preponderance of the evidence that Claimant's initial problems with her feet were causally related to her employment. However, the CRB held:

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-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.

DRO at 5-6.

On October 30, 2015, a Compensation Order on Remand (COR) was issued. In that COR, the ALJ denied Claimant's claim for relief.

Claimant timely appealed. Claimant argues the original award of disability benefits in the November 1, 2014 was supported by the substantial evidence and in accordance with the law, however, the COR is not. Claimant argues:

The CRB impermissibly disturbed...findings of fact in the DRO and must correct this abuse of discretion and accept the findings of fact on appeal this time.

Claimant's argument at 6.

Employer argues that the COR is supported by the substantial evidence and in accordance with the law as Claimant failed in her burden to prove by a preponderance of the evidence that she has a work related disability.

ANALYSIS²

Claimant argues that the initial award of temporary total disability benefits was supported by the substantial evidence in the record and in accordance with the law and that the CRB, in remanding the case, "impermissibly disturbed...findings of act in the DRO." Claimant's argument at 6. Claimant contends *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149, (May 9, 2012) (*Fuentes*) and *Bopp v. Clark Concrete Contractors*, CRB No. 13-040 (May 30, 2013) (*Bopp*) support Claimant's argument that the prior CO was supported by the substantial evidence in the record and in accordance with the law.

As we have recently stated in *Haire v. Ft. Myer Construction Corp.*, CRB No. 15-161, 3-4 (March 3, 2016) (*Haire*):

We are mindful of our decision in *Fuentes v. Willard Intercontinental Hotel*, CRB No. 11-149, (May 9, 2012) which stated,

²The scope of review by the CRB is generally limited to making a determination 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

There is no requirement under the Act or in the case law that mandates that a medical condition be the subject of a written medical restriction before it can be the basis for a wage loss-based award of benefits. Such written restrictions may make adjudication of disputed claims easier, and the lack of such a restriction certainly can, in some instances, be a legitimate basis for denying a claim. However where, as here, the ALJ finds as facts that the work injury is causing a claimant to be unable to work to the same degree that was being worked prior to the injury, and that the claimant is earning less post-injury because of that inability, the claimant is entitled to a partial disability award based upon that ongoing wage loss, until such time as the claimant becomes eligible for an award under the schedule.

In *Fuentes*, the claimant, after undergoing surgery, was unable to perform his duties at a second job due to his work-related injury. The ALJ had found the claimant to be a credible witness in describing the effect of his injury on his ability to work his second job, but denied the claimant temporary partial disability as the claimant's treating physician released him back to work without restrictions, thus leaving the ALJ no choice but to deny the claim as no "medical justification" had been presented. *Fuentes*, supra at 3. The CRB vacated the denial of benefits and remanded the case to the ALJ with instructions to award the claimant the temporary partial disability sought.

Thus, in limited circumstances the ALJ may award disability benefits absent medical documentation. We do not agree with Employer that "medical testimony of any kind would be obviated" if a claimant's testimony would be deemed to be sufficient. Employer's argument at 7.

As stated in *Fuentes*, the lack of any medical documentation could be the basis for a denial, while the submission of medical documentation or restrictions certainly make adjudicating such claims an easier task for the ALJ. Indeed, most cases that come before us fall under these two scenarios. However, when the ALJ finds a claimant credible and finds persuasive his or her testimony describing the effect of the injury on the ability to work, the lack of medical restrictions or clear medical documentation is not necessarily a bar to an award of disability. We caution however, the ALJ must give sufficient reasons to do so.

Haire, supra at 3-4.

In the COR, the ALJ quoted the above cases in support of the proposition that Claimant's testimony, as well as a documented inability to perform job duties, supported the CO's award of temporary total disability. After referencing *Fuentes* and *Bopp*, along with *Granado v. Manganaro Corp.*, CRB No. 10-076 (August 30, 2011), the ALJ stated:

...the Board's evaluation of the evidence does not support a determination that claimant is unable to return to her usual employment.

COR at 8.

It is clear from the COR that the ALJ felt constrained by the DRO. The DRO, however, was not intended to restrict the ALJ to only one outcome, but rather was intended to remand the matter for further analysis. The DRO concluded, in light of the IME opinion, that Claimant's testimony was insufficient to support a finding of disability and also indicated that the CRB could not determine what evidence supported some of the findings made by the ALJ. The CRB concluded:

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.

DRO at 6.

On remand, the ALJ noted the following:

In the November 14, 2014 CO, the undersigned relied upon the credible testimony of Claimant to support the conclusion that because she could not walk, it was not possible for her to perform her usual job duties. Her testimony was supported by the reports of her treating physician. When Dr. Liberman examined her in December of 2013 and January of 2014, he reported:

...She was working up until April 14, 2013. She was constantly on her feet at work She has constant burning and aching in her feet. She also gets severe, brief shooting pains in both feet. The pain became so severe she couldn't work anymore. Her symptoms are little better when she is off her feet. But overall, the pain never improved after she stopped working....Unfortunately this problem in her feet is not improving...CX 1, p.13, p.4.

At her last visit with Dr. Liberman, he reported that there was no improvement in her symptoms. CX 1, p. 2, 3. Claimant's uncontradicted testimony indicated her duties with Employer required her to be on her feet, standing, walking and climbing stairs, throughout her work day.

It is further noted that Dr. Liberman, in his June 20, 2014 deposition, describes Claimant's foot pain as a "disabling problem." CX 3, p. 48-49.

COR at 7-8.

We now rectify any confusion our DRO caused. Based upon the further analysis the ALJ undertook, quoted above, Claimant has proven, by a preponderance of the evidence, along with her testimony that she remain temporarily and totally disabled as a result of her work related injury.

CONCLUSION AND ORDER

The Compensation Order on Remand is VACATED. Upon REMAND, the ALJ is to enter an award granting Claimant's claim for relief.

So ordered.