

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-130

**BERNADETTE ORTEGA,
Claimant-Respondent/Cross-Petitioner,**

v.

**CLARK CONSTRUCTION GROUP, LLC and
ZURICH NORTH AMERICA,
Employer/Insurer-Petitioners/Cross-Respondent.**

Appeal from an October 24, 2014 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 14-283, OWC No. 701816

DEPT. OF EMPLOYMENT
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Matthew J. Peffer for the Claimant
Sarah Burton for the Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, HEATHER C. LESLIE AND
MELISSA LIN JONES, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts of Claimant's accident are not in dispute and have been accurately stated by the
Administrative Law Judge ("ALJ"):

Claimant, a 59 year-old woman, worked for Employer as a laborer off and on
between 1997 and 2013. Her job duties consisted of flagging, sweeping, packing,
and whatever tasks the foreman required her to do that day. She sometimes
worked Saturdays and Sundays, and on some days, 14 to 16 hours. In 1999,
Claimant fractured her right foot; however, in February 2013, she had returned to
full duty. (HT pp. 22-25)

On February 15, 2013, Claimant was assigned to count pieces of construction
material and throw them into a big box. She was throwing metal scaffolding

frames, weighing from 20-50 pounds, in to the box when one of the pieces bounced, and fell on her right foot. The frame came in contact with Claimant's foot just above the steel toe in her boot. She reported her injury to the foreman, and continued to work. Her foot was sore while she was working, and the pain became worse when she went home and took her shoes off. Over the weekend, the area on the top of her foot turned dark. When she returned to work on Monday, February 18, 2013, the foreman referred her to the Medcor clinic which was three blocks away.

Compensation Order ("CO") at 1.

Claimant returned to work on February 19, 2013 and continued working but testified she was unable to perform all her work and had problems with her right foot. On March 4, 2013, Employer sent her to its corporate health clinic where she was diagnosed with a foot contusion and given a post-op shoe and a pain patch. X-rays taken on March 5, 2013 were read as normal.

Claimant worked for Employer until March 22, 2013 when she apparently was the only employee laid off and not rehired.¹ Claimant next sought medical treatment about four months later when she went to Unity Healthcare, a Medicaid facility, on July 11, 2013. Dr. April Chin, a podiatrist, examined Claimant. Dr. Chin diagnosed an upper foot inflammation and ordered x-rays of Claimant's injured right foot. These x-rays also were read as normal.

Claimant's next medical treatment was on October 21, 2013, when she was seen again at the Medcor clinic (now called MedicsUSA) because her foot was swollen. Claimant was advised on October 21, 2013 and November 12, 2013, that she only could do light duty sedentary work. X-rays were taken at MedicsUSA as was an MRI. The November 21, 2013 MRI was read by Dr. Ian M. Lande as showing:

abnormal morphology of the head of the second metatarsal bone with degenerative changes and capsular thickening of the joint. This is suspicious for underlying avascular necrosis or Freiberg's disease.

Dr. Mary Concepcion, the MedicsUSA doctor, wrote on November 26, 2013 that the MRI and x-ray showed avascular necrosis of the second metatarsal head and "This affected area corresponds directly to where the metal object fell on her foot 9 months ago." Dr. Concepcion removed Claimant from all work and referred her to an orthopedic specialist.

Claimant came under the care of orthopedic surgeon Dr. Joel D. Fechter on December 4, 2013. Dr. Fechter noted that the imaging studies revealed "evidence of avascular necrosis of the second metatarsal head." On December 19, 2013 Dr. Fechter reported that he viewed the March 2013 x-rays and they did not show any evidence of cystic change or avascular necrosis. Dr. Fechter referred Claimant to Dr. Daniel D. Lahr for consultation.

¹ Claimant did not allege that her discharge was retaliatory in violation of D.C. Code § 32-1542.

On January 21, 2014, Dr. Mark B. Danziger, an orthopedic surgeon, examined Claimant at Employer's request. Dr. Danziger assessed Claimant as having a Freiburg's infraction or avascular necrosis of the second metatarsal bone. Dr. Danziger reported:

What I have a tough time finding is any correlation with the injury that occurred on 2/15/13, especially since there was such a significant lag time and dearth of treatment. She essentially presented with a foot contusion to an urgent care center three days after injury. She was then treated with medication and some therapy and seemed to respond nicely. By the time she went back for her last visit with Kaiser on 3/31/13, she was noted to have mild symptoms and normal x-rays and was able to continue working full duty work as she had all along with only minimal symptomology. The fact that she was able to continue without treatment over the next seven months speaks to the lack of a causal relationship between her current symptomology and the work related injury. If she truly had a traumatic event that would lead to Freiburg's infarction, which is not thought to be the major source of the phenomenon anyway, one would expect symptomology to be more persistent and more progressive rather than presenting to an urgent care center seven months later with new onset of right foot pain. It is my conclusion that there is no causal relationship between the work related injury that occurred on 2/15/13 and her current symptomology. I do believe the diagnosis is correct; however, I believe it is unrelated.

Following Dr. Fechter's referral, Dr. Lahr examined Claimant on February 28, 2014 and assessed "Right second metatarsal head avascular necrosis."

Dr. Lahr reviewed the March 2013 x-rays and reported:

She has brought with her the original initial radiographs dated 3/4/13, which show no evidence of avascular necrosis. Given the fact that the initial radiographs showed no avascular necrosis and she has significant injury to that area and she developed avascular necrosis, within a reasonable degree of medical certainty I believe that her current problem is due to the work-related injury.

In an undated letter to Claimant's counsel, apparently written in May 2014, Dr. Fechter said:

The patient's diagnosis is right foot avascular necrosis second metatarsal head and contusion. Objective signs of injury have included evidence of avascular necrosis on radiographs and MRI scan of the foot. The symptoms the patient is experiencing are consistent with the diagnosis and objective findings. I do believe that the work injury of 2-15-13 did produce the symptomatic condition from which the patient is currently suffering.

Claimant's claim for benefits proceeded to a formal hearing. In the Compensation Order ("CO"),

the ALJ identified three issues for determination:

- the medical causal relationship between Claimant's current disability and the February 15, 2013 injury at work,
- the nature and extent of Claimant's disability, and
- the reasonableness and necessity of continuing medical care.²

The ALJ's Conclusion of Law was:

Claimant's right foot injury is medically causally related to the injury that arose out and in the course of her employment on February 15, 2013. Claimant is not entitled to temporary total disability benefits. The medical treatment that Claimant seeks is reasonable and necessary.

CO at 9.

Employer filed its appeal of the CO on November 21, 2014 and Claimant filed her appeal on November 24, 2014. Employer appealed the ALJ's holdings that Claimant's ongoing complaints are medically causally related to the work injury and the awarding of continued medical care. Claimant has appealed the ALJ's decision that she is not entitled to any temporary total disability benefits.

We shall discuss the applications for review in the order they were filed at the CRB.

EMPLOYER'S APPLICATION FOR REVIEW

Employer first argues that the ALJ erred in finding that there is a medical causal relationship between the work accident and Claimant's right foot condition. Employer asserts the ALJ should not have given preference to the opinions of Claimant's treating physicians because Dr. Fechter and Dr. Lahr failed to explain the seven month lapse between the normal x-rays in March and July 2013 and the diagnosis of avascular necrosis in October 2013 and because those doctors failed to consider that Claimant worked full duty after being diagnosed with a minor foot contusion in February and March 2013.

In her opposition to Employer's appeal, Claimant argues that the ALJ's conclusion that her avascular necrosis is medically causally related is supported by substantial evidence in the record and that appeal should be denied because Employer is asking the CRB to impermissibly reweigh the evidence.

² As will be more fully explained later in this decision and remand order, this issue related to whether claimant's avascular necrosis was medically causally related to the work injury.

The CO correctly stated the proper analysis for deciding whether there is a medical causal relationship between Claimant's work injury and her condition; that there is a presumption of compensability if Claimant makes an initial demonstration of the relationship, that Employer can rebut the presumption by introducing substantial evidence that severs the potential connection, and if rebutted, Claimant has the legal burden of proving, by a preponderance of the evidence, that her disability was caused by a work-related injury.

The CO, relying on Claimant's credible testimony and the opinions of Dr. Fechter and Dr. Lahr, held that Claimant invoked the presumption. Employer does not challenge this finding.

The CO then assessed Dr. Danziger's IME opinion, to see if it rebutted the presumption. It is here where the CO is internally inconsistent.

On page 6 of the CO, the ALJ first found that Employer's evidence did not rebut the presumption:

In order to rebut the presumption, the employer must offer substantial evidence that the injury did not arise out of and in the course of Claimant's employment.
Employer's evidence fails to sever this connection.

However, in the next full paragraph the ALJ held Dr. Danziger's opinion was sufficient to rebut the presumption:

Claimant testified that, over time her foot became more painful and more constant. The dearth of treatment for Claimant occurred because she was not informed by Employer at the time of the injury regarding workers' compensation; therefore, she sought treatment when and where she could go on her own. There is no fixed time between experiencing the first symptoms and the worsening of the pain. **Dr. Danziger's opinion meets the criteria for rebuttal**, but is outweighed by other evidence, including *WebMD*.

But, in the next paragraph the ALJ reverts to finding the presumption was not rebutted:

Thus, both Dr. Fechter and Dr. Lahr opined that Claimant's injury was medically causally related to the work-related accident on February 15, 2013. **Employer has not rebutted the presumption.** Claimant's current right foot pain is causally related to the injury that arose out of and in the course of her employment.

In her opposition, Claimant argues the ALJ found the presumption was not rebutted and that the ALJ also undertook the third step of the presumption analysis and determined that the evidence preponderated in her favor:

It appears that, despite statements that the IME does not rebut the presumption, the CO undertook an analysis of the facts as if it did. Thus, upon a weighing of

the evidence, the CO properly found that the opinions of the treating physicians outweighed those of the Employer's IME physician.

Claimant's Opposition at 4.

Because of the apparent inconsistent and incomplete language in the CO, we cannot, as a matter of law, find that the ALJ held Employer failed to rebut the presumption, unnecessarily weighed the evidence, and held Claimant met her burden in proving medical causal relationship by a preponderance of the evidence. We must remand this case for the ALJ to clarify the decision and, if necessary, make additional findings for a proper presumption analysis.

Employer further argues that the ALJ committed reversible error by relying on information from the web site *WebMD* without giving the parties notice and opportunity to present rebuttal evidence. Claimant agrees that the *WebMD* information should not have been made a part of the record. However, Claimant asserts that this was a harmless error because the CO does not indicate the ALJ solely relied on the *WebMD* information and that the web site information was not dispositive.

In the CO, the ALJ held that information she researched from *WebMD* proved Employer did not sever the medical causal connection between Claimant's condition and the work injury. After noting Dr. Danziger's IME opinion was based in part on the seven-month delay in symptoms, the ALJ used *WebMD* information to impeach Dr. Danziger's opinion:

In order to rebut the presumption, the employer must offer substantial evidence that the injury did not arise out of and in the course of Claimant's employment. Employer's evidence fails to sever this connection.

"Most cases of vascular necrosis are the result of an underlying health problem or injury. In its early stages, A VN typically causes no symptoms; however, as the disease progresses it becomes painful. At first, you may experience pain when you put pressure on the affected bone. Then, pain may become more constant. If the disease progresses and the bone and surrounding joint collapse, you may experience severe pain that interferes with your ability to use your joint. The time between the first symptoms and collapse of the bone may range from several months to more than a year."
WebMD. [Footnote added to main text].

While an ALJ may take judicial notice of certain facts, the CRB recognized in *Simpkins v. Linens of the Week*, CRB No. 08-178, AHD No. 08-079; OWC No. 640185 (August 6, 2009) that ALJ's should be aware of potential due process problems whenever they take judicial notice of evidence:

As the Court of Appeals made clear in *Renard v. D. C. Dept of Employment Services*, 673 A.2d 1274, 1276 (D.C. 1996), where

such notice is of evidentiary matters outside the evidentiary record or administrative pleadings pertaining to the case, due process requires that the parties be afforded notice and the opportunity to contest the evidentiary matter.

Gill v. Howard University Hospital, CRB No. 09-112, AHD No. 06-295A, (May 6, 2011).

In this case, the ALJ used information she found on a web site to apparently impeach Dr. Danziger's medical opinion.³ Employer was not given an opportunity to impeach the *WebMD* information nor was Claimant given the chance to bolster the *WebMD* information. If on remand the ALJ wishes to utilize information from *WebMD*, she must afford the parties the opportunity to review the information and offer evidence to refute or support that information.⁴

Employer's other assignment of error concerns the third contested issue. The ALJ identified this third contested issue as "Is continuing medical care for Claimant reasonable and necessary?" -- a characterization that would invoke Utilization Review. However, it is clear from the ALJ's analysis of this issue and the memoranda filed by the parties that this dispute was not about whether the treatment modalities were reasonable and necessary, but instead related to whether the requested medical treatment is for a condition that was medically causally related to the work injury.

Resolution of this issue depends on the ALJ's determination on remand whether Employer rebutted the presumption and, if so, whether Claimant met her burden in proving her avascular necrosis is medically causally related to the work injury. If so, then the medical care would be Employer's responsibility.

CLAIMANT'S APPLICATION FOR REVIEW

In her Application for Review, Claimant appeals the ALJ's decision denying her claim for continuing temporary total disability benefits. In opposition, Employer argues Claimant is not entitled to temporary total disability benefits from October 21, 2013 to the present and continuing because her ongoing medical complaints are not medically causally related to the accidental injury. Employer's Memorandum in Opposition at 4- 5.

³ We say "apparently" because as we indicated earlier the CO is not clear as to whether the ALJ held Employer rebutted the presumption.

⁴ We should further note that in the paragraph following the *WebMD* information, the ALJ stated "Dr. Danziger's opinion meets the criteria for rebuttal, but is outweighed by other evidence, including *WebMD*." It is unclear whether the ALJ's reference to "other evidence" is referring only to the evidence identified in the preceding four sentences or "other evidence" stated in other parts of the CO. On remand, should the ALJ use a similar analysis, the CO should state with specificity what that "other evidence" is.

With respect to Claimant's review request, it is not contested that Claimant was released to full time, full duty work when laid off and not recalled in May 2013 and that she was limited to light duty work in October 2013.

The ALJ held Claimant did not prove entitlement to temporary total benefits because Claimant's wage loss was not due to the injury but to the layoff:

Pursuant to D.C. Code § 32-1508 (2) and *Logan*, supra, in order to establish entitlement to temporary total disability compensation benefits, the claimant must prove that as the result of a compensable work related injury he or she has been unable to return to work or earn income in his or her usual or any other occupation which has caused him or her to suffer a total loss of wages. Claimant was injured on February 15, 2013. She continued to work full-time for Employer from February 15, 2013 until she was laid off on May 22, 2013. Claimant did not lose wages due to her injury; rather, Employer laid her off. Hence, she is not entitled to temporary total disability benefits.

CO at 7.

Claimant accepts the ALJ's finding that she was not entitled to temporary total disability benefits when she was laid off after being released to full duty but argues that she is entitled to benefits after the lay off when she was medically restricted to light duty:

Although the Employer terminated Ms. Ortega from work, that does not absolve the Employer of its duty to either pay temporary total benefits or attempt, to find vocational rehabilitation, some work that Ms. Ortega could perform within her restrictions. Ms. Ortega was not entitled to temporary total disability benefits until October of 2013 when a physician limited her ability to work. At that point in time, the burden shifted to the Employer, and the Employer has established no evidence to support a finding that Ms. Ortega is not entitled to temporary total benefits following the issuance of either total or partial work restrictions.

Claimant's Memorandum at 10. (Citations omitted).

The CO only discussed the effect of the May 2013 layoff on the claim for temporary total benefits but did not discuss the effect of the October 2013 light duty release and whether the evidence established that Claimant's disability after October, economically, was caused by the work injury. As the DCCA stated, "where rebuttal evidence is presented, the claimant ultimately has the burden to show by a preponderance of the evidence that his or her disability, in an economic sense, was caused by the work injury." *Upchurch v. DOES*, 783 A.2d 623, 627-628 (D.C. 2001). See also *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) and *Robinson v. DOES*, 824 A.2d 962 (D.C. 2003).

CONCLUSION AND ORDER

This case will be remanded to the ALJ for a determination whether Employer rebutted the presumption and if so, whether Claimant met her burden of proving by a preponderance of the evidence that her right foot condition is medically causally related to the work injury. The ALJ also shall determine whether Claimant is entitled to disability benefits beginning October 21, 2013 and whether treatment for Claimant's avascular necrosis is Employer's responsibility.

The October 24, 2014 Compensation Order is VACATED and this case REMANDED for further findings of facts and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR

Chief Administrative Appeals Judge

May 19, 2015

DATE