

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-088

**BERNADETTE ORTEGA,
Claimant-Respondent,**

v.

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

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 NOV 8 AM 11 25

Appeal from a June 13, 2016 Compensation Order on Remand
by Administrative Law Judge Nata K. Brown
AHD No. 14-283, OWC No. 701816

(Decided November 8, 2016)

Matthew J. Peffer for the Claimant
Sarah Burton for the 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 ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Order, the Compensation Review Board (“CRB”) outlined Claimant’s injury, treatment, and the procedural history of Claimant’s claim as such:

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. 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.

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.

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.

Ortega v. Clark Construction, CRB No. 14-130 (May 19, 2015) ("DRO"). (Footnotes omitted.)

After addressing the parties' arguments, the CRB determined the ALJ committed error in the presumption analysis, finding inconsistent and incomplete language in the order as well as questionable reliance on a website for a medical definition. The CRB also found the ALJ erred when denying disability benefits by not discussing Claimant's light duty release. The CRB remanded the case, concluding:

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.

DRO at 9.

A Compensation On Remand ("COR") issued on June 13, 2016 which granted Claimant's claim for relief. The ALJ concluded:

Claimant's right foot injury is medically causally related to the injury that arose out of and in the course of her employment on February 15, 2013. Claimant is entitled to temporary total disability benefits. The medical treatment that Claimant seeks is reasonable and necessary.

COR at 10.

Employer appealed. Employer argues:

- Claimant's ongoing complaints are not medically causally related to the work injury.
- The ALJ erred in awarding the Claimant total disability benefits from October 21, 2013 to the present and continuing.

Claimant opposes the appeal, arguing the COR is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Employer first argues that contrary to the ALJ's conclusion, Claimant's ongoing complaints are not medically causally related to the work injury. In so arguing, Employer challenges the opinions of the treating physicians, Dr. Fechter and Dr. Lahr, and points this panel to the opinion of Employer's IME physician, Dr. Danziger.

¹ The scope of review by the CRB is generally 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, ("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.

It is well settled that there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *See Short v. DOES*, 723 A.2d 845 (D.C. 1998); *see also, Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). In analyzing the opinions of Dr. Fechter and Dr. Lahr, the treating physicians, the ALJ noted:

Claimant's treating physician, Dr. Fechter, examined Claimant on nine occasions from December 4, 2013 through May 12, 2014. In each report, Dr. Fechter opined that that Claimant sustained an injury to her foot at work on February 15, 2013, and, because of injury, she has persistent difficulties to her right foot. Further, Dr. Lahr, who examined Claimant on five occasions from February 28, 2014 through May 30, 2014, opined on March 13, 2014 that, given the fact that the initial radiographs showed no avascular necrosis and she has significant injury to that area and developed a vascular necrosis, within a reasonable degree of medical certainty, he believed that her current problem is due to the work related injury.

Dr. Fechter and Dr. Lahr opined that Claimant's injury was medically causally related to the work-related accident on February 15, 2013. Each of the treating physicians had examined Claimant several times, and saw the progression of her injury. Dr. Danziger, in contrast, had only one examination with Claimant. Thus, the opinions of Dr. Fechter and Dr. Lahr, who treated her for several months, are credited. Claimant's right foot pain is causally related to the injury that arose out of and in the course of her employment.

COR at 6-7.

While the treating physician preference was not specifically referenced in the COR, it is clear the ALJ afforded Dr. Fechter and Dr. Lahr the treating physician preference. In arguing that the ALJ's rejection of Dr. Danziger's opinion, based on only evaluating the Claimant once is in error, what the Employer fails to consider is that in *Washington Hospital Center v. DOES and Paul A. Thielke*, 821 A.2d 898, 904 (D.C. 2003), the District of Columbia Court of Appeals held that it is only with respect to treating physicians that reasons for rejecting a physician's opinion must be explained. The ALJ need not explain why an IME opinion is rejected, although here one was given. We find no error in the ALJ's analysis or in affording Dr. Fechter and Dr. Lahr the treating physician preference. Employer's argument is rejected.

Employer's second argument is that the ALJ erred in concluding that Employer had failed to rebut Claimant's *prima facie* case that she is temporarily and totally disabled.

A review of the COR reveals the ALJ correctly noted that when nature and extent is at issue, the burden shifting analysis outlined in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) is utilized. Specifically, once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. *Logan, supra* at 240, citing *Crum v. General Adjustment Bureau*, 238 U.S. App D.C. 80, 738 F.2d 474 (1984).

Employer does not appeal the ALJ's finding that Claimant had demonstrated an inability to return to her usual job, but appeals the conclusion that Employer had not rebutted Claimant's *prima facie* case that she is temporarily and totally disabled. On this, the ALJ stated:

Employer submits an IME, dated January 21, 2014, wherein Dr. Scheer opined that Claimant has a Freiburg's infraction or a vascular necrosis of the right foot second metatarsal; however, he concluded that there is no causal relationship between the work-related injury that occurred on February 15, 2013 and her current symptomatology. Dr. Scheer further stated in the IME that if Claimant truly had a traumatic event that would lead to Freiburg's infraction, which is not thought to be the major source of the phenomenon anyway, one would expect symptomatology to be more persistent and more progressive rather than presenting to an urgent care seven months later with new onset right foot pain. (EE 1, p.3)

Further, Dr. Sheer stated that he believed the diagnosis is correct; however, he believed the pain in her foot it [sic] was unrelated to the work-place injury. Further, he opined that, from a work-related point of view, Claimant requires no additional medical care or any therapy with regard to the work related injury that occurred on February 15, 2013. He also opined that Claimant's time off work is related to being laid off and has nothing to do with the previous foot injury--she should and could have returned to full duty work as she did in an appropriate time frame. Dr. Sheer opined that Claimant was at maximum medical improvement and can work full duty without restrictions.

In this instance, Employer's medical evidence does not rebut Claimant's *prima facie* case that she is temporary totally disabled and cannot perform her pre-injury duties as a laborer. Claimant was disabled from performing her job in February 2013. There was lapse in the medical care that she needed because she did not know how to file a workers' compensation claim until October of 2013. Claimant was finally sent to an orthopedic surgeon in December 2013, and she did not see a foot specialist until February 2014. In the medical report proffered by Employer, Dr. Sheer opined that Claimant's current symptomatology was caused by a new onset right foot pain; however, there is no mention in the medical records showing how or when a new injury to Claimant's right foot occurred.

COR at 8-9.²

We agree with Employer that the ALJ's conclusion that Employer had failed in its burden under the second prong in *Logan* is in error. Dr. Danziger's opinion clearly states that as it relates to her work injury, Claimant could return to her former occupation, full duty. Employer's exhibit 1 at 3. However, we find any error harmless as the ALJ continued her analysis and in essence addressed the third prong of *Logan*, analyzing whether the Claimant refuted Employer's evidence, thereby sustaining a finding of total disability. The ALJ continued the analysis stating:

² In the COR, the ALJ erroneously calls the IME physician Dr. Sheer, when in fact it is Dr. Danziger.

Dr. Concepcion opined that Claimant would be able to resume light duty, which was sitting work only, and Dr. Fechter stated that Claimant should limit activities. Employer has not offered sedentary work or provided any medical evidence that she can currently work her pre-injury job. The record shows that Employer has denied Claimant's continued treatment and temporary total disability benefits, based on findings that Claimant can return to full duty work; however, it is well settled that "an aggravation of a preexisting condition may constitute a compensable accidental injury under the Act." *Ferreira [v. DOES, 531 A.2d 651]*, *supra*, at 660 (D.C. 1987) quoting *Wheatley*, 132 U.S. App. D.C. at 182, 407 F.2d at 312). Neither Employer's evidence, nor any other evidence in the record, rebuts Dr. Concepcion's opinion that Claimant can only work light-duty. Employer's argument that Claimant could return to her pre-injury employment is not supported by the record.

Claimant could continue on in a light duty capacity but for the matter of Employer's subsequent unwillingness to accommodate her disability. Pursuant to *Logan, supra*, Claimant has met her burden to show that she is unable to return to her pre-injury duties and the burden of presenting medical evidence for rebuttal or showing work for which Claimant is qualified and which is available to him, falls to the Employer. Claimant's credible testimony, inability to serve in her pre-injury capacity, and unavailability of a light duty role, has resulted in a significant wage loss and effectively establishes her temporary total disability.

The preponderance of the evidence shows that Claimant is temporarily totally disabled.

COR at 9.³ (Footnotes omitted.)

Thus, the ALJ was aware that Dr. Danziger did release Claimant to full duty as it relates to her work related injury. The ALJ concluded that Claimant's credible testimony and the opinions of her treating physicians, coupled with Employer's inability to show the availability of a light duty job, satisfied Claimant's burden, that of a preponderance of the evidence, that she is totally disabled. We affirm this finding. In relying solely on the opinion of Dr. Danziger and pointing this panel to his report, what the Employer is asking this panel to undertake is reweighing the evidence, a task we cannot do.

Finally, we must note that in our prior DRO, we stated:

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

³ We do acknowledge that the ALJ curiously inserts language about an aggravation of a pre-existing condition. While such an erroneous statement can lead to a remand, the ALJ does not expound upon this statement, nor allude to such a case theory anywhere else. Indeed, no physician has opined such and neither party argued this theory. We will thus treat such a statement as an administrative error, and not germane to the ALJ's analysis.

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.

DRO at 7.

Regardless, the ALJ in the COR continued to perpetuate this error by listing reasonableness and necessity as an issue, analyzing the issue, and then concluding the medical treatment Claimant seeks was reasonable and necessary. Employer did not appeal this finding. However, we feel it prudent to point out our prior DRO determined that the issue was in all actuality whether the treatment requested was for a medical condition that was medically causally related to the work injury.

CONCLUSION AND ORDER

The June 13, 2016 Compensation Order on Remand supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

So ordered.