

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-082

**DANA BUCKNER,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer.**

Appeal of a May 25, 2016 Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 15-506, OWC No. 705045

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 OCT 27 PM 12 58

(Issued October 27, 2016)

Krista N. DeSmyter for Claimant
Mark H. Dho for Employer

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed as a station manager by Employer on May 19, 2013. On that day, Claimant slipped and fell off of a chair and injured her left hand, left shoulder, and both knees.

Claimant began treatment with Dr. Mark A. Cohen and his associates. Claimant was diagnosed with cervical and lumbar radiculopathies, left shoulder sprain, and aggravation of pre-existing arthritis of both knees. Claimant's exhibit 2 at 29. Dr. Cohen took Claimant out of work. Claimant underwent conservative treatment which included medication and physical therapy.

On April 10, 2014, Dr. Michael Franchetti, an associate of Dr. Cohen, recommended an MRI as Claimant's condition was not improving. After reviewing the results of the requested MRI, Dr. Franchetti opined Claimant suffered from a "severe exacerbation of lumbosacral strain with clinical

bilateral lumbar radiculitis due to the May 19, 2013 injuries.” Claimant’s exhibit 2 at 22. Dr. Franchetti recommended a regimen of medication, continued to keep Claimant off of work, and further recommended a functional capacity evaluation (“FCE”) to determine if Claimant could perform her duties as a station manager.

Claimant underwent the recommended FCE which revealed her capable of working at a sedentary physical demand level on a full time basis.

Claimant returned to work full duty, full time on July 15, 2013. Claimant ceased working again on August 2, 2013 due to her diabetic condition.

Employer sent Claimant to several independent medical evaluations (“IME”). The first occurred on June 25, 2013 with Dr. David Dorin. Dr. Dorin took a history of Claimant’s injury and medical treatment, and performed a physical examination. Dr. Dorin opined any injuries Claimant suffered had healed and she could return to work, full time, without restrictions.

Dr. Dorin again performed an IME on August 28, 2014. Dr. Dorin reviewed medical records and performed a physical examination. Dr. Dorin opined any injury suffered at work had healed long ago, and that Claimant could return to work with no limitations. Dr. Dorin indicated Claimant needed no further treatment related to her work injury.

Claimant was also seen by Dr. Louis Levitt for an IME on June 15, 2015. Dr. Levitt took a history of Claimant’s injury and medical treatment, and performed a physical examination. Dr. Levitt opined Claimant was at maximum medical improvement from any residuals of her work injury by July of 2013. Dr. Levitt opined Claimant could return to work full duty without restrictions and that her current condition and complaints were not related to her work injury.

A full evidentiary hearing occurred on January 13, 2016. Claimant sought an award of temporary total disability from June 5, 2015 to the present and continuing, payment of causally related medical expenses, authorization for continuing medical treatment, and interest on accrued benefits. The issues to be adjudicated were whether Claimant’s lumbosacral strain and clinical bilateral lumbar radiculitis are medically causally related to the work injury, the nature and extent of Claimant’s disability, and whether Employer was entitled to credit for long term disability benefits paid to Claimant. A Compensation Order (“CO”) issued on May 25, 2016, denying Claimant’s claim for relief, concluding Claimant failed to prove, by a preponderance of the evidence, that her lumbosacral strain and clinical bilateral lumbar radiculitis were related to her work accident.

Claimant timely appealed. Claimant argues first the administrative law judge (“ALJ”) erred in concluding Employer had rebutted the presumption of compensability, arguing the IME opinions were founded on “superficial statements of opposition to causation.” Claimant’s argument, at unnumbered 10. Second, Claimant argues that the ALJ “implicitly” determined that Claimant’s weight was the cause of her current condition, and that as such, “evaluated this claim in a manner inconsistent with the humanitarian purposes of the Act, and the legal framework for case evaluations.” Claimant’s argument, at unnumbered 11. Specifically, Claimant argues the rejection of Dr. Franchetti’s opinion, as the treating physician, was in error.

Employer opposes the appeal, arguing the CO is supported by the substantial evidence and is in accordance with the law and should be affirmed.

ANALYSIS¹

Claimant first argues the ALJ erred in finding the presumption of compensability had been rebutted by the Employer. Claimant argues the opinions of the IME physicians, Dr. Dorin and Dr. Levitt, were not specific and comprehensive enough to rebut the presumption and were “superficial.” Thus, Claimant asserts, pursuant to *Baker v. Aramark*, CRB No. 10-094 (January 23, 2012) (*Baker*), these opinions were not enough to rebut the presumption. We disagree.

In *Baker*, the CRB expressed concern that the IME reports relied upon in that case to rebut the presumption did not review all the medical records of the treating physician. Specifically, the CRB found the failure of the IME physician to address the treating physician’s diagnosis, a repetitive stress injury, to be fatal to the Employer’s ability to rebut the presumption.

Such is not the case before us. The ALJ noted:

In order to rebut the presumption, Employer relies on the opinions of both Drs. Dorin and Levitt. In his report of August 28, 2014, Dr. Dorin, after examining Claimant and reviewing her medical records, unambiguously opined that Claimant's current symptoms are not medically casually related to her May 19, 2013 work accident. Dr. Dorin stated: "The alleged symptoms of pain in the lower back at the present time have no correlation to the mechanics of the incident at work on May 19, 2013, and cannot be explained to be related to that particular incident since the patient has been off work since September 21, 2013. EE 2 at 13. Dr. Levitt, in his report of June 22, 2015, opined: "In my office today, I can identify no specific residuals linked to the injury of May 19, 2013." EE 1 at 2.

Therefore, based on the unambiguous opinions of Drs. Dorin and Levitt, I find employer has rebutted the statutory presumption. Accordingly, the evidence is now weighed without benefit of the presumption, and with claimant having the requirement of showing by a preponderance of the evidence, that her back and bilateral radiculitis conditions are causally related to the work injury of May 19, 2013.

CO at 7 (citations omitted)..

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.

A review of the IME reports supports the ALJ's analysis. Both IME physicians took a history of the injury, reviewed medical reports and objective testing, and rendered unambiguous opinions that the Claimant's current complaints were unrelated to her work injury. We affirm the ALJ's conclusion that these opinions were specific and comprehensive enough to rebut the presumption of compensability. *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004), *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

Claimant next argues the ALJ's rejection of Claimant's testimony and the treating physician's opinion is in error as it "implicitly" requires Claimant demonstrate her weight was not the primary cause of her injury.

In rejecting the opinion of Dr. Franchetti, the ALJ stated:

However, Dr. Franchetti does not: (1) provide any explanation or rationale for his opinion that Claimant's "chronic lumbosacral strain and clinical bilateral lumbar radiculitis" are the result of her May 19, 2013 accident; (2) discuss the 9 (nine) month gap in Claimant's medical treatment between July 9, 2013 and April 4, 2014; (3) discuss Claimant's diabetes, which required Employer to remove her from full duty work on August 2, 2013; (4) discuss in any of his medical records (there are also no references in the medical records of Drs. Liu, McGovern, and Cohen) the role Claimant's weight may have played, or continues to play, in her ongoing back and bilateral leg problems, other than the reference in his July 28, 2015 report that Claimant was scheduled for gastric bypass surgery in November 2015. CE 1, CE 2, HT 43, 44, EE 1 at 2, EE 2 at 12.

Dr. Franchetti, in his September 1, 2015 letter, does discuss Claimant's "objective signs" which he describes as tenderness, spasm, moderate range of motion and abnormal straight leg raising tests on both sides. However, I give these findings no weight in view of Claimant's less than credible testimony and Dr. Dorin's findings. In his August 28, 2014 report, Dr. Dorin found that Claimant related tenderness "with simple touching of the spine", had limited range of motion of the lumbar spine due to her obesity, and found that the straight leg raising tests produced no radicular symptoms.

Dr. Franchetti also opined: "The accident on which this claim is based is the cause of the conditions/diagnoses listed above. When Ms. Buckner slipped and fell on May 19, 2013, she sustained an acute lumbar spinal injury due to the mechanical trauma sustained to her lumbar spine." However, in view of the above discussion, and in view of the lack of objective findings as found by both Drs. Levitt and Dorin, the Claimant's return to full duty work a little over two months after the accident, and in view of Dr. Franchetti's lack of an explanation of how claimant's current conditions are related to her May 19, 2013 accident, I reject Dr. Franchetti's medical causality opinions. CE 1, EE at 12.

CO at 8.

In attacking the ALJ's reasoning, Claimant argues that Dr. Franchetti's rationale is clear from his records, relaying what Claimant told him and that she had not suffered any further accidents. However, it is clear from the above, the ALJ was concerned about the lack of any objective findings as well as the gap in treatment.

The ALJ also expressed concerns over Dr. Franchetti's lack of discussion regarding her return to work full duty, before a different health condition took her out of work. Claimant posits this goes against the rule that an aggravation of a prior medical condition is a new injury.² We are uncertain whether Claimant is arguing her injury aggravated her diabetes or her obesity, however, a review of the medical records does not support this argument and Claimant did not make this argument at the formal hearing.

We disagree with Claimant that the ALJ "implicitly" required Claimant to demonstrate her weight was not the cause of her current medical condition. As Employer states, "contrary to claimant's allegation, there is no reference or finding of fact made by the ALJ which finds this point of view was the basis of a final legal conclusion." Employer's argument at 9.

The ALJ gave several reasons why he was rejecting the opinion of the treating physician, Dr. Franchetti. These reasons are supported by substantial evidence in the record and in accordance with the law.

Claimant also argues the CO is in error as it fails to explain why Claimant was found to be less than credible. On this point the ALJ found:

At present, Claimant, who I did not find a credible witness because I found her to exaggerate her current symptoms and limitations, experiences "...real bad pains in my back and my legs...." Claimant can only walk two to three minutes at a time and can stand for only five minutes at a time. Dr. Franchetti told Claimant she could return to light duty work but she has been unable to do so because Employer has not accommodated her light duty restrictions. HT 33-35.

CO at 5.

The ALJ found Claimant's responses to be exaggerated, pointing to specific responses to questions. It is well settled that the credibility findings of an ALJ are entitled to great weight when properly supported. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985). While we would have preferred more examples to support the ALJ's explanation of why Claimant was not credible, we determine any such error to be harmless. In any event, the ALJ's rejection of Dr. Franchetti's opinion in favor of the medical opinions of Drs. Dorin and Levitt are fatal to Claimant's case, regardless of any flaws in the ALJ's credibility determination.

After weighing the evidence, the ALJ noted:

² It is well settled in this jurisdiction that an aggravation of a pre-existing condition by work related conditions constitutes a compensable injury under the Act. See *King v. DOES*, 742 A.2d 460 (D.C. 1999), and *Harris v. DOES*, 660 A.2d 404 (D.C. 1995).

Thus, both IME physicians agree, based upon three separate examinations of Claimant over the course of two years, that: (1) Claimant sustained a strain to her low back on May 19, 2013; (2) there are no objective findings; (3) Claimant can return to her pre-injury work as a Station Manager; (4) no further casually related medical treatment is needed as a result of the May 19, 2013 work accident; (5) Claimant had reached maximum medical improvement by the end of July 2013; (6) Claimant stopped working in August/September of 2013 because of her diabetes; and, (7) there are no residuals from Claimant's work accident of May 19, 2013. EE1, EE2.

Therefore, based on the reasons stated hereinabove, I find persuasive, and give more weight to, the well-substantiated and well-documented opinions of Dr. Dorin and Dr. Levitt that Claimant's chronic lumbosacral strain and bilateral radiculitis conditions are not medically causally related to her May 19, 2013 work accident. Accordingly, I find that Claimant has failed to prove, by a preponderance of the evidence, that her chronic lumbar strain and clinical bilateral lumbar radiculitis conditions are medically causally related to her May 19, 2013 work accident.

CO at 9.

After having rejected the opinion of Dr. Franchetti, the ALJ found persuasive the opinions of Drs. Dorin and Levitt. The ALJ denied the claim, concluding Claimant failed to carry her burden, by a preponderance of the evidence, in proving her entitlement to disability benefits. We affirm the CO as supported by substantial evidence and in accordance with the law. In argument, what the Claimant is asking this panel to do is to reweigh the evidence and find in her favor, a task we cannot do. As stated above, we are constrained to 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. *Marriott, supra*.

CONCLUSION AND ORDER

The May 25, 2016 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

So ordered.