

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-058

**ISAAC EBENEZER,
Claimant - Petitioner**

v.

**U.S. SECURITY ASSOCIATES
and ZURICH AMERICAN INSURANCE COMPANY
Employer/Carrier - Respondents**

Appeal from a Compensation Order of
Administrative Law Judge Gerald Roberson
OHA No. 10-485, OWC No. 666531

Benjamin T. Boscolo, Esquire, for the Claimant
Mark W. Bertram, Esquire, for the Employer

Before HEATHER C. LESLIE, HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Review Board.

DECISION AND ORDER

INTRODUCTION

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the April 17, 2013, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for temporary total disability benefits from November 2, 2009 through the present and continuing, authorization for medical care, causally related medical bills and interest.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The Claimant worked as a Security Officer for the Employer. Before November 2, 2009, the Claimant sought treatment for back pain related to pre-existing tuberculosis. On November 2, 2009, the Claimant slipped and fell while at work. The Claimant sought medical treatment for a cut on his head. Subsequently, the Claimant followed up with Dr. David Perim on November 14, 2009 for treatment to his back. The Claimant underwent surgery to his back to address a possible tumor and fracture at T6 and T7. The Claimant was disabled from his regular job as a result of his back condition and surgery. The Employer denied that the back condition was causally related to the November 2, 2009 slip and fall.

A full evidentiary hearing was held on April 4, 2011. The medical reports of Dr. Perim as well as his deposition were presented by both parties in their cases in chief. In a Compensation Order dated April 14, 2011, the ALJ denied the requested benefits, finding that the Claimant's back condition was not medically causally related to the work injury.¹ The CRB affirmed.²

The DCCA vacated the CRB's decision and order affirming the Compensation Order.³ The DCCA found that the ALJ's conclusions that 1) the Claimant did not have a significant fall; 2) the Claimant had experienced increasing pain prior to the fall; 3) the infiltrative process had begun prior to the fall; and 4) Dr. Perim performed the kyphoplasty⁴ because he suspected the Claimant had a tumor or infection were all supported by the substantial evidence in the record.

However, the DCCA held that with respect to the Claimant's compression fracture, the Employer had failed to rebut the presumption of compensability. Thus, the DCCA found and concluded that the compression fracture was causally related to the work injury. The DCCA further held:

Due to the narrow scope of the ALJ's conclusion, the other issues contested by the parties should be considered on remand, including: the extent to which the compression fracture caused petitioner to suffer a disability within the meaning of D.C. Code § 32-1501 (8) (2001); whether the disability caused by the compression fracture entitled petitioner to temporary total disability benefits from November 2, 2009, to the present and continuing (or, potentially, during the period between the fall and petitioner's corpectomy); and authorization for medical care related to the compression fracture. Even in light of the presumption that the fall did cause the compression fracture, the duration that the compression fracture caused physical incapacity that resulted in the loss of wages is an issue of material fact, which must be addressed on remand.

¹ *Ebenezer v. U.S. Security Associates*, AHD No. 10-485, OWC No. 666531 (April 14, 2011).

² *Ebenezer v. U.S. Security Associates*, CRB No. 11-048, AHD No. 10-485 (September 8, 2011).

³ *Ebenezer v. DOES*, No. 11-AA-1261 (December 11, 2012).

⁴ As noted by the DCCA, the Claimant at the Formal Hearing stipulated that the second surgery, the corpectomy, was not causally related to his work injury.

On February 19, 2013, the CRB issued a Decision and Remand Order to the Office of Hearings and Adjudications for further findings of fact and conclusions of law relating to the Claimant's compression fracture, as instructed by the DCCA.⁵

On April 17, 2013, a Compensation Order on Remand (COR) was issued.⁶ The ALJ again denied the Claimant's claim for relief, concluding the Claimant did not establish entitlement to disability or medical benefits as a result of the compression fracture.

The Claimant timely appealed. The Claimant argues the ALJ erred in finding the Claimant's disability was not related to the work accident, and that the conclusion that the Claimant is not disabled as a result of the work accident is not supported by the substantial evidence in the record and not in accordance with the law. The Claimant did not appeal the denial of authorization for medical treatment. As such, that issue will not be discussed further by the CRB.

The Employer opposed the application for review, arguing the COR was supported by the substantial evidence in the record and in accord with the law.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

DISCUSSION AND ANALYSIS

We begin our discussion by noting, as stated above, the DCCA has found that the compression fracture is related to the work injury. As the Claimant correctly points out, this is the law of the case. Thus, on remand the ALJ was to determine whether or not the compression fracture caused his disability. The ALJ found the Claimant to have failed to prove, by a preponderance of the evidence, that his compression fracture caused his disability.

The Claimant's first argument is the ALJ failed to follow the DCCA's mandate that the compression fracture was related to the work injury and attempted to "redetermine, in favor of the Employer, the issue of whether or not Mr. Ebenezer's disability is casually related to the work accident of November 2, 2009" and that the ALJ "refused to view the entire medical record" specifically pointing to any lack of commentary on pages 9 and 10 of Dr. Perim's deposition. Claimant's argument, unnumbered at 11.

⁵ *Ebenezer v. U.S. Security Associates*, CRB No. 11-048, AHD No. 10-485 (February 19, 2013).

⁶ *Ebenezer v. U.S. Security Associates*, AHD No. 10-485, OWC No. 666531 (April 17, 2013).

A review of the COR reveals that the ALJ began his analysis by outlining the law surrounding the issue of nature and extent, specifically that the Claimant has the burden of proving his disability by a preponderance of the evidence or stated another way, that his wage loss is because of his compression fracture.⁷ Following this recitation of the applicable law, the ALJ engaged in a burden shifting type of analysis, revisiting the issue of medical causation, for instance noting the Claimant is arguing the compression fracture was caused by his work accident. The Claimant need not argue this point as the DCCA found the compression fracture was caused by the accident. However, ultimately, as discussed below, the ALJ does address whether the compression fracture caused the Claimant any disability, thus rendering any initial confusion harmless.

Specifically, the ALJ states,

Dr. Perim does not specifically address whether the reduction at T7 rendered Claimant disabled. In fact, Dr. Perim testified absent the tumor or infection he would not have performed the surgery on November 15, 2009. EE 2, Depo at 19-20. Given these comments, Claimant has not offered sufficient evidence to establish that the compression at T7 and the subsequent reduction at T7 rendered him disabled from work. The record does not contain an opinion from a physician that Claimant sustained a disability as a result of the T7 compression fracture and surgery. To the extent Dr. Perim did not address whether the T7 compression fracture and surgery rendered Claimant disabled after the surgery on November 15, 2009, Claimant has not met his burden to establish entitlement to temporary total disability benefits.

COR at 5.

A review of the evidence supports the ALJ's conclusion. While the compression fracture has been found to be caused by the Claimant's work injury, the ALJ lists several reasons why the Claimant failed in proving, by a preponderance of the evidence, the disability suffered after the injury was caused by the compression fracture. The ALJ notes that the treating physician would not have performed the surgery on November 15, 2009 absent the tumor or infection, two conditions not caused by the work accident. Moreover, the DCCA noted, as we do here, that the Claimant stipulated to the second surgery as not being related to the work injury but due rather to the Claimant's tuberculosis.

The Claimant does take issue with the ALJ not mentioning in the COR Dr. Perim's deposition testimony on pages 9 and 10.⁸ We note that on page 10, Dr. Perim states that due to a "fairly extensive thoracic fusion" the Claimant would be a light duty candidate. The record is unclear what surgery, the kyphoplasty of November 15, 2009 or the corpectomy of December 2009 the

⁷ The Claimant erroneously states that his burden is to prove by "substantial credible evidence that they are entitled to the requested level of benefits." Claimant's argument unnumbered at 12. As stated above, the Claimant must prove his entitlement to disability benefits by a preponderance of the evidence, a higher standard.

⁸ As we have stated many times before, an ALJ need not present an inventory of all the evidence that was considered in making the necessary factual findings. See, *Toure v. Fairmont Hotels and Resorts*, CRB No. 13-059, AHD No. 11-167B, OWC No. 679676 (June 26, 2013); *Kyle v. Safeway Stores, Inc.*, CRB No. 12-117, AHD No. 12-116, OWC No. 685101 (October 9, 2012); *Green v. Palomar Hotel*, CRB No. 11-065, AHD No. 10-582, OWC Nos. 673571 and 673273 (November 10, 2011).

doctor is referring to as the extensive thoracic fusion. As the DCCA notes, the surgery on November 15, 2009, a kyphoplasty, was minimally invasive. Regarding the corpectomy, Dr. Perim noted this surgery involved “stabilization, meaning he had screws and rods.” EE 2, Depo at 8.

The ALJ found the evidence presented by Claimant to be insufficient to carry his burden, a finding we affirm based upon the uncertainty in the record we just outlined. As the District of Columbia Court of Appeals has so succinctly stated, “in some cases, rather, the weakness of the proponent's proof... may be enough to defeat a claim.” *Golding-Alleyne v. District of Columbia Dep’t of Employment Servs*, No. 07-AA-1281, CRB 07-168, (D.C. 2009). Such is the case here.

The ALJ weighed the evidence and found the Claimant to have failed in proving his case by a preponderance of the evidence. What the Claimant is asking us to do is to reweigh the evidence in his favor on appeal, a task we cannot do. As there is substantial evidence in the record to support the ALJ’s conclusion, we affirm the COR.

ORDER

The April 17, 2013 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. The Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

July 30, 2013
DATE