

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-121

JEANETTE THOMAS,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Self-Insured Employer - Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 OCT 4 PM 4 09

Appeal from a Compensation Order of
Administrative Law Judge Gerald D. Roberson
AHD No. 10-092A, OWC No. 643201

Matthew J. Peffer, Esquire, for the Petitioner

Donna J. Henderson, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HEATHER C. LESLIE,² and HENRY W. MCCOY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

Jeanette Thomas sustained injuries to her neck, back, and ankle when she tripped and fell while employed by the Washington Metropolitan Area Transit Authority (WMATA) on October 3, 2007. In prior proceedings not relevant to this appeal, Ms. Thomas was awarded causally related medical care for injuries to her back. In a formal hearing before and Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) conducted September 14, 2011, Ms. Thomas sought

¹ Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Judge Leslie was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

an award of causally related medical care in the form of surgery to repair a partial tear of the right posterior tibial tendon, a part of her right ankle. Although the parties agreed that the tendon was in need of surgical repair, WMATA contested the medical causal relationship of the tear to the trip and fall at work of October 3, 2007.

In a Compensation Order issued September 30, 2011 (the CO), the ALJ denied the claim.

Ms. Thomas filed a timely Application for Review of the CO along with Claimant's Memorandum of Points and Authorities in Support of Application for Review (Ms. Thomas's Memorandum), to which WMATA filed an Opposition to Application for Review and Memorandum of Points and Authorities in Support of Opposition to Application for Review (WMATA's Memorandum).

We affirm the CO.

STANDARD OF REVIEW

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.*, (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.

DISCUSSION AND ANALYSIS

The parties stipulated that Ms. Thomas sustained a work related trip and fall on October 3, 2007. The dispute at the formal hearing and in this appeal is how extensive that injury was. WMATA maintains that, as far as Ms. Thomas's right ankle is concerned, the trip and fall resulted in nothing more than a sprain to the outside (anterior) of the ankle which has long resolved, and that her current right foot and ankle complaints are the result of an unrelated posterior tendinitis, which is on the inner aspect of the ankle. Ms. Thomas maintains that the interior ankle condition is causally related to the work injury.³

In the CO, the ALJ found that Ms. Thomas's evidence concerning the existence of the interior ankle injury coupled with her testimony that she had sustained no subsequent traumatic incidents since the work injury was sufficient evidence to invoke the statutory presumption that the interior ankle condition is medically causally related to the October 3, 2007 trip and fall.

WMATA does not contest this initial finding in this appeal, agreeing that once the presumption was invoked, the burden shifted to WMATA to adduce evidence sufficient to overcome the presumed medical causal relationship, and that upon doing so, the presumption fell from the case, and the ALJ

³ Although the trip and fall resulted in additional injuries and complaints to other parts of the body, the only injury in dispute at the formal hearing and the only injury in dispute in this appeal is the interior right ankle injury.

was required to weigh the evidence anew, without reference to any presumptions and with Ms. Thomas bearing the burden of proving such a causal relationship by a preponderance of the evidence. See generally, D.C. Code § 32-1521; *Ferreira v. DOES*, 667 A.2d 310 (D.C. 1995); *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995). WMATA maintains that that accurately describes how the ALJ handled this case in the CO.

The ALJ found, and Ms. Thomas does not dispute, that Ms. Thomas presented no medical opinion evidence on the question of medical causal relationship. WMATA presented the opinions of two independent medical evaluation (IME) physicians, Dr. Ian Weiner and Dr. Marc Danziger. Both physicians expressed the opinion that Ms. Thomas's posterior tibial tendon complaints are unrelated to the work injury, which based upon the medical records was shown to have been an anterior sprain, having no connection to the disputed posterior tendon injury, which both doctors explained is on the complete opposite side of the ankle. EE 14 (Dr. Danziger's deposition) at 36, 44-45; EE 12 (Dr. Weiner's deposition) at 12 – 14; 18. Both doctors stressed, and the ALJ noted, that the absence of complaints to the posterior tibial tendon area in the immediate aftermath of the injury militates against a finding that the current condition is related to the trip and fall. EE 12 at 18, EE 13 at 16 (both referenced at CO 11). Dr. Danziger also noted that when he examined Ms. Thomas on February 26, 2008 and again on January 6, 2009, Ms. Thomas had no abnormalities or pain in the region. EE 13 at 11 -13, (referenced in the CO at 11).

The ALJ found that the opinions of these doctors were not only sufficient to overcome the statutory presumption (CO, at 8) but also that upon weighing the evidence, of which the IMEs were the only medical opinion evidence addressing the issue, Ms. Thomas had failed to meet her burden of adducing a preponderance of the evidence in support of the existence of such a causal relationship, and that WMATA's evidence did in fact establish that the condition was not caused by the October 3, 2007 trip and fall (CO, at 11 – 12).

We note at the outset that Ms. Thomas does not challenge the ALJ's determination that she presented no medical opinion evidence on the issue. Nonetheless, she argues that (1) the evidence presented by WMATA was insufficient to overcome the presumption, and (2) even if it was sufficient for that purpose it was nonetheless, apparently as a matter of law, inferior in quantity or quality to the evidence of Ms. Thomas.

Ms. Thomas's arguments on appeal rest upon several misstatements of the law and/or illogical premises.

She asserts that "The CRB has noted for an IME to be considered unambiguous, the IME must affirmatively state that the work accident *could not have caused* the disability", citing but not quoting from *Romero v. V&V Construction*, CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011). Claimant's Memorandum, unnumbered page 6 (emphasis added).

It is not surprising that she does not quote *Romero*, since it nowhere stands for the proposition for which it is cited. First, contrary to Ms. Thomas's apparent understanding, the physician in *Romero* was a treating physician, not an IME physician. Second, the physician in *Romero* stated (or at least implied) that he never examined the body part in question. Third, the physician in *Romero* did not express a considered medical opinion on whether the injury at issue in that case was or was not, in

fact, causally related to the subject work incident at issue in that case. As the CRB stated in *Romero*:

In order to properly assess the ALJ's determination, it becomes necessary to evaluate the treating physician's letter to see if it meets the standard established by the D.C. Court of Appeals when seeking to rebut medical causation. That standard holds that an employer meets its burden to rebut the presumption when it proffers a qualified independent medical evaluator (IME) who, after examining the employee and reviewing his medical records, unambiguously opines that the work injury did not contribute to the disability. *Washington Post v. D.C. Dept. of Employment Services*, [and *Raymond Reynolds, Intervenor*] 852 A.2d 909 (D.C. 2004) [*Reynolds*].

Romero, supra, (bracketed material added).

We point out that, unlike Ms. Thomas in this appeal, the CRB in *Romero* accurately states that it is the expression of the opinion that the subject employment condition or incident *did not* cause the complained of condition, and not that it *could not* have done so that is the legal standard for adequacy in overcoming the presumption established by the DCCA in *Reynolds*. The CRB continued:

In his July 29, 2010 letter, Dr. Means prefaced his opinion by stating “[I] have not diagnosed Mr. Romero with any specific condition with regard to the left shoulder as he has not been formally evaluated for this yet”. As to a causal connection he went on to say:

It is possible that he could have developed some left shoulder symptoms from an avulsion traction⁴ type injury, but I do not think this is very likely, and Mr. Romero did not note any of these symptoms until 10/22/2009, at least to us [i.e., his treating physician's office and staff]. Therefore, I think the possibility that it is related to the 2/13/2009 injury is a very remote possibility.

If we apply the DCCA's standard, we first note that Dr. Means arguably has rendered an opinion without an express examination of the left shoulder and has stated that he has not diagnosed any specific condition to the left shoulder. We further note that by stating that there “is a very remote possibility” of a causal relationship between Petitioner's left shoulder symptoms and the work injury, Dr. Means has rendered an opinion that is anything but unambiguous. We are left to conclude using the test established by the DCCA, it was error for the ALJ to find that this evidence was comprehensive enough to rebut the presumption.

Romero, supra, (bracketed material added).

⁴ Our quotation comes from the LEXIS reported decision; it is likely that the correct reference would have been to “avulsion fracture type injury”.

We stress the significance of the analytical error and the potential folly that ensues by confusing Dr. Means's identity. The ALJ in *Romero* relied upon this passage as evidence upon which to rebut the presumption of causation. In *Romero*, if Dr. Means been an IME physician, the employer would have been required to elicit from him an opinion not on the *possibility* that the work conditions or incidents caused the complained of injury, but on the ultimate question of whether it did *in fact and in this case cause these conditions*. As it is, Dr. Means did not express an opinion that "the remote possibility" that he recognizes exists does not apply to this case. Indeed, he left it open, by prefacing that he hadn't ever actually formally examined the shoulder for any such purpose, and presumably had therefore not taken a shoulder-related history from Mr. Romero, performed x-rays or other studies upon the shoulder, or reviewed any pertinent medical records relating to the shoulder, any of which might have provided information making the possibility more or less remote.

To avoid having these types of cursory, off-the-cuff remarks form the basis of a rebuttal of the presumption that the DCCA requires that such opinion be (1) from a qualified medical doctor, (2) following an actual examination of the patient (3) and a review of the pertinent medical records and that it (4) unambiguously states (5) that there is no such causal relationship in the case at hand. That is the point of *Romero*. Dr. Means was not engaged to offer an opinion on this question in the context of resolving a legal dispute. Rather, he was asked what amounts to a hypothetical question to which he gave a hypothetical answer.

Ms. Thomas does not assert any lack of qualifications on the part of either IME physician, or argue that there is a failure to examine the patient or review pertinent records, or to express an unambiguous opinion that the posterior tendon conditions are unrelated to the trip and fall at work, nor could she, in light of the deposition transcripts cited and relied upon by the ALJ.

We note further that, while we do not accept Ms. Thomas's assertion that by explaining the mechanism by which the posterior tendon condition could occur, Dr. Weiner had "effectively conceded the possibility that the fall of October 2007 could have caused Ms. Thomas' posterior tibial tendonopathy"⁵, even had he so conceded, and done so explicitly as opposed to "effectively", such a concession would not necessarily render the opinion inadequate to overcome the presumption.

The last of the logical flaws that we will address is the argument that Dr. Danziger's opinion ought to be rejected as being irrelevant. In her Memorandum she writes:

Dr. Danziger's IME was conducted before Ms. Thomas began to suffer from the [sic] she complains of. Because she was asymptomatic when Dr. Danziger performed the IME, there would be no grounds for either Ms. Thomas or Dr. Danziger to mention it. Therefore, reliance on Dr. Danziger's IME as substantial evidence sufficient to break the causal nexus is inherently in error.

Claimant's Memorandum, unnumbered page 6. When considering this argument it is important to recall that Dr. Danziger did, in fact, examine the very ankle that is the subject of this litigation, and hence his opinion does not share the infirmity that was inherent in the opinion of Dr. Means in

⁵ Ms. Thomas's logical flaw here is that the opinion is also premised upon the lack of contemporaneous or nearly contemporaneous onset of posterior ankle pain.

Romero. The ankle was examined and did not exhibit any signs or symptoms consistent with posterior tibial tendonopathy. Far from being a reason to discount or discard Dr. Danziger's opinion that the work injury did not cause the condition, this lack of signs or symptoms at a point removed in time from the work injury is one of the premises for both Dr. Danziger's opinion and that of Dr. Weiner.

This is a somewhat stunning argument to make, coming as it does in the same case in which it was argued that "This is a traumatically induced condition that's been there from October 3, 2007" and that "It's clearly supported by the evidence that the October 3, 2007, accident had the potential to cause the problem that she has been experiencing ever since." Closing Argument of Matthew Peffer, HT 36 – 37. The absence of symptoms at a time when one would have expected them had they been caused by an earlier event is perhaps the most fundamentally obvious and compelling reason one can imagine for concluding that the earlier event didn't cause the later arising symptoms.

It is fallacious to argue that the absence of any signs or symptoms at a point in time "B" is irrelevant to whether that condition arose as a result of an incident occurring at an earlier point in time "A". The more logical conclusion is not that such an absence of symptoms be treated as irrelevant and be ignored, but rather that it be considered in the context of the record evidence as a whole and that a rational person could certainly deem it to be indicative of the fact that the condition did not arise out of the events occurring at point in time "A".

In summary, Ms. Thomas' arguments in this appeal are largely if not completely disagreements with the weight of the evidence and the inferences to be drawn from them, and she seeks that we make our own assessments and inferences and replace those of the ALJ with our own, or hers. This we are without the power to do.

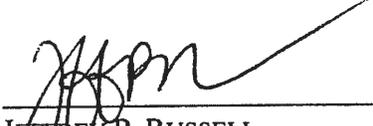
CONCLUSION

The findings of fact as found by the ALJ are supported by substantial evidence, and the conclusion that Ms. Thomas has failed to establish that he posterior tibial tendonopathy is causally related to the trip and fall is in accordance with the law.

ORDER

The Compensation Order of September 30, 3011 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

October 4, 2012
DATE