

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-079

**JOHN J. MARSHALL,
Claimant–Petitioner,**

v.

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

Appeal from a April 10, 2015 Compensation Order
by Administrative Law Judge Joan E. Knight
AHD No. 12-326A, OWC No. 686356

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 SEP 24 PM 2 48

(Decided September 24, 2015)

Benjamin T. Boscolo for Claimant
Cheryl D. Hale for Employer

Before, LINDA F. JORY, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant has significant pre-existing right knee and bi-lateral hip problems. In 1996, Claimant fractured his left hip that required surgical placement of a screw. In April 2003, a table collapsed under Claimant causing him to fall and injure his right hip. In May 2004, Claimant had a right medial meniscus tear corrected by an arthroscopy and undergoes periodic epidural block injections for residual symptoms. In February 2005, Claimant sought medical attention for pain in his right hip shooting down his leg and he was diagnosed with right hip osteoarthritis. In January 2006, Claimant was diagnosed with bilateral hip osteoarthritis. In July 2006, Claimant underwent a right knee arthroscopy. On October 26, 2007, Claimant sought medical care from Dr. Gregory Ford of Kaiser Permanente for complaints of right knee pain. During his physical examination, Claimant complained of some pain with internal–external rotation of the right hip. Pelvic x-rays reviewed by Dr. Ford revealed significant degenerative changes in both hips. Claimant returned to the physicians at Kaiser for hip pain on July 8, 2008 and August 27, 2008,

January 2011, and September 8, 2011. On December 6, 2010, Claimant sought treatment from Dr. Bahman Sadr of the Veteran's Medical Center for right hip irritability. Claimant underwent a total right hip replacement at the Veteran's Administration Hospital on January 13, 2012.

On November 28, 2011, Claimant completed a Notice of Accidental Injury form providing a date of injury of October 26, 2007. On December 2, 2011, counsel for Claimant filed both a claim application and notice of accidental injury (Forms 7 and 7A) for right hip and right knee injuries he sustained on October 26, 2007.

A full evidentiary hearing occurred on June 26, 2014. Claimant sought an award of temporary total disability benefits from January 13, 2012 through May 8, 2012, as well as payment for causally related medical treatment.

An administrative law judge (ALJ) issued a Compensation Order (CO) on April 10, 2015. The ALJ concluded Claimant did not meet his burden of demonstrating that he sustained an accidental injury that arose out of and in the course of his employment.

Claimant timely appealed. Claimant asserts the ALJ erroneously found Employer rebutted the presumption of compensability, therefore the CO should be reversed.

Employer contends that the CO should be affirmed as it is supported by substantial evidence.

ISSUE ON APPEAL

Is the April 10, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

Claimant correctly asserts "An IME report relied upon by an Employer is sufficient to break the presumption if the IME [physician] physically examined the Claimant, reviewed the Claimant's medical records, and rendered a firm and unambiguous medical opinion in support of the contention that the work accident did not cause the Claimant's current disability" citing *Washington Post v. DOES and Reynolds, intervenor*, 852 A.2d 909, 914 (D.C. 2004) (*Reynolds*). Claimant's Brief at 7.

¹ The Compensation Review Board's (CRB) scope of review, established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is 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. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB is bound to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Although the ALJ did not specifically rely on *Reynolds*, Claimant does not assert that the ALJ erred in not citing *Reynolds* in her rebuttal analysis. Instead Claimant contends:

Substantial evidence does not support two findings reached by the Compensation Order that served to deny Mr. Marshall's claim for benefits; that Dr. Scheer's medical opinion rebutted Mr. Marshall's theory of disability, and that [Claimant's] testimony was not credible.

Claimant's Brief at 5. With regard to Dr. Scheer, Claimant asserts that:

... Dr. Scheer's opinion is neither specific nor comprehensive enough to break the presumption because the opinion does not discuss the specific work activity that Mr. Marshall stated caused him pain pressing the pedals on the bus. Dr. Scheer's opinion assumes Mr. Marshall is sitting and not moving his hips, when the evidence in the record assumes a mechanism of injury based upon Mr. Marshall moving his hips while pressing the gas and brake pedals. The Employer failed to present evidence that the actions of pressing the gas and brake pedals of the bush [sic], based on Mr. Marshall's physiology and the space within the bus, did not cause Mr. Marshall's hip degeneration. *See Whittaker*, 668 A.2d at 847. Thus because Dr. Scheer's opinion did not actually address what Mr. Marshall has stated was the injuring activity that led to the disability, Dr. Scheer's opinion is neither specific nor comprehensive enough to break the presumption of causation. *See Reynolds*, 852 A.2d at 914.

Claimant's Brief at 7.

While we agree that in the course of weighing the evidence, the ALJ referred to Dr. Scheer's description of Claimant's job duties as "sitting for a long period of time and driving over rough streets", we do not agree that to rebut the presumption, Employer is tasked with presenting evidence to contradict Claimant's theory of how the accident occurred that was proffered at the formal hearing; that the mechanism of his injury is based upon moving his hips while pressing the gas and brake pedals.

Nevertheless, a review of Dr. Scheer's deposition testimony as well as his three reports does not reveal that Dr. Scheer was informed by Claimant that his problems stemmed from his pressing on the gas and brake pedals. Dr. Scheer's failure to discuss this theory does not support Claimant's assertion that the ALJ erred in finding Dr. Sheer's reports have met Employer's burden to rebut the presumption.

In determining that Employer presented sufficient rebuttal evidence, the ALJ stated:

To rebut the presumption, Employer presented the IME opinion of Dr. Scheer who performed two IME's of Claimant on behalf of Employer. In his January 27, 2014 report, Dr. Scheer opined Claimant's advanced right hip osteoarthritis and any disability condition pertaining to Claimant's right [hip] was not caused by or aggravated by his work activities operating a bus. Based upon this evidence,

Employer has sufficiently rebutted the presumption invoked, by presenting evidence specific and comprehensive enough to sever the said connection between Claimant's right hip and any job-related event. The burden reverts to Claimant to prove by a preponderance of the evidence, that he sustained a work injury arising out of and in the course of his employment. The evidence is weighed without the benefit of the statutory presumption. *Ferreira, supra*.

CO at 6.

While this panel agrees that the CO might have been more persuasive by relying on *Reynolds* and quoting the standard that is enunciated in that case, we find that as long as the standard that is applied in the CO is the proper one, it is not reversible error to fail to cite a particular case.

As noted by the ALJ, Dr. Scheer examined Claimant on two occasions. The first examination took place on July 23, 2012. We note that in his report of the 2012 IME, Dr. Scheer's outline of Claimant's medical record consumed a full page and included treatment Claimant received for both his right hip and left hip from the VA Hospital and the Kaiser physicians. In his subsequent IME report for the examination of February 26, 2014, Dr. Scheer indicated that he reviewed his report from the July 23, 2012 and subsequent medical records. Dr. Scheer concluded:

The records are clear that he has a long history of right hip pain, receiving steroid injections to the right hip in 2005 with recurrence of the right hip pain in January 2006. There was no mention of any right hip complaints until July 2008 and no mention of any work-related injury in any of the records. It is again my opinion that no treatment or diagnostic studies are causally related to any work-related injury on 10/26/2007. His complaints are due to pre-existing osteoarthritis. With regard to the right hip and right knee, he may continue working at full duties as a bus operator without restrictions. No further medical treatment or diagnostic studies are indicated with regard to the right hip or the right knee, except for routine post-operative follow-up for the right total hip arthroplasty, but again, this is not causally related to the alleged work incident on 10/26/2007. There is no future temporary or permanent disability as it relates to the right hip or the right knee and his prognosis is excellent.

EE 11 at 6.

Dr. Scheer examined Claimant and reviewed his medical records and rendered an unambiguous opinion that a 2007 work injury did not contribute to his right hip surgery and subsequent disability, thereby meeting the *Reynolds* standard. Dr. Scheer opined that Claimant's difficulties were due to preexisting problems and were not due to any work-related injury. The ALJ's conclusion that Employer presented specific and comprehensive evidence to sever the connection between Claimant's right hip and a job-related event is supported by substantial evidence and is in accordance with the law.

With regard to Claimant's assertion that substantial evidence does not support the ALJ's conclusion that Claimant's testimony was not credible, Claimant asserts:

Assuming arguendo, that the Employer had successfully rebutted the presumption of compensability, the reasoning underlying the Compensation Order's weighing of the evidence is not explained, and is thus arbitrary and capricious and reversal is required. When weighing the two positions, the ALJ's determination rests upon the rejection of both Mr. Marshall's testimony and Dr. Franchetti's medical opinion in favor of the Employer's IME. This rejection is based on arbitrary and capricious finding that Mr. Marshall was incredible, and thus reversal is mandated.

* * *

A determination of the credibility of a witness ought to involve more than consideration of the witness' demeanor and appearance. It should apprehend the overall evaluation of testimony in light of its rationality, internal consistency and the manner in which it hangs together with other evidence of the record. *McAlister v. Flippo Constr. Co.*, CRB No. 08-045, 2008 DC Wrk. Comp LEXIS 51 (March 25, 2008). However, a specific factual determination that a[n] injured worker lacked credibility must be accompanied by a discussion as to how the injured workers' testimony was in conflict with the record evidence. *See Grant-Hopkins v. Alion Science and Technology*, CRB No. 14-027, 2014 DC Wrk. Comp LEXIS 228 *5 (June 26 2014)(Decision and Remand Order). There must be some detail and specificity in the Compensation Order to permit a determination as to whether that credibility assessment is arbitrary and capricious. *Id.*

Claimant's Brief at 8.

We agree with Claimant that a determination of credibility, like other findings of fact, must be supported by substantial evidence in the record. As the CRB has stated "Such a determination should involve more than a mere consideration of the witness' demeanor and appearance; it should include an overall evaluation of the testimony in light of its rationality, internal coherence, and consistency with other evidence of record. *McAlister v. Flippo Construction Company*, CRB No. 08-045, AHD No. 03-314, OWC No. 585987 (March 25, 2008).

The ALJ in in the instant matter stated:

In weighing the competing independent medical opinions, the undersigned is not persuaded by Dr. Franchetti's IME opinion and gives no weight to his report with regard to establishing a fact that Claimant had a work-related event, activity, or requirement which had the potential of resulting in or contributing to the Claimant's right hip disability/injury. First, the history provided by Dr. Franchetti relies wholly on Claimant's recitations. Having found Claimant not credible the history is inherently unreliable and is rejected. Second, Dr. Franchetti does not explain in his report and opinion how he reached his conclusion that Claimant's occupation as a bus driver aggravated and contributed to the development of

Claimant's progressive right hip arthritis. Third, Dr. Franchetti does not explain or outline how it is medically that Claimant's occupation as a bus driver aggravated and contributed to the development of Claimant's progressive right hip arthritis. Dr. Franchetti's report contains a conclusion without any support, thus is unreliable and rejected.

Upon consideration and review of the record evidence in its entirety, Claimant's version of events cannot be credited. The medical evidence relied upon by Claimant does not support his claim and the undersigned is not persuaded that Claimant sustained an aggravation injury, while operating a 9300 series bus in October of 2007, which resulted in a compensable disability under the Act.

CO at 6, 7.

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 there may be some merit in Claimant's argument that the ALJ's credibility determination is not properly supported, nonetheless, in this instance, to the extent this can be considered error, it is deemed harmless. The medical records documenting Claimant's right hip treatment contain no mention of an injury occurring at work. There is little other evidence except for those records for the ALJ to compare with Claimant's testimony. We conclude the ALJ did so with her determination that "The medical evidence relied upon by Claimant does not support his claim and the undersigned is not persuaded that Claimant sustained an aggravation injury, while operating a 9300 series bus in October of 2007, which resulted in a compensable disability under the Act". CO at 7.

The presumption of compensability was invoked based on Claimant's IME physician's report. In weighing the medical evidence, the ALJ found the same report did not meet the evidentiary burden of a preponderance of the evidence. According to the ALJ, Dr. Franchetti's report contains a conclusion without any support because Dr. Franchetti did not explain how Claimant's occupation as a bus driver aggravated and contributed to the development of Claimant's progressive right hip arthritis. There is no basis to find reversible error based on the credibility determination.

We address at this juncture Employer's opposition to Claimant's appeal although it primarily is based on a mis-reading of the CO. Employer asserts "Substantial evidence supports the determination that Claimant failed to invoke the presumption of compensability". Employer's Brief at 4.

Employer explains:

Claimant further argues that his report to Dr. Ford on October 26, 2007 that 'he was having pain in his right hip and right leg while driving a bus' along with the 2014 opinion of Dr. Franchetti, was adequate to invoke the presumption of compensability. This is incorrect for two reasons, First, a review of the 2007 medical record of Dr. Ford reveals that at no point did Claimant relate his problems (recall, he only complained of right knee problems on this date) to his job

as a bus operator. Second, Dr. Franchetti provides absolutely no basis for his conclusion that Claimant's work aggravated his right hip, nor is it clear that he reviewed medical records or had an adequate understanding of Claimant's work duties.

Employer's Brief at 5.

Employer refers to footnote 2 of the CO, which Employer asserts Claimant fails to address:

Had Claimant invoked the presumption of a workplace injury, based upon Dr. Scheer's IME report Employer would have overcome the presumption. In weighing the evidence absent the presumption Dr. Scheer's IME report and deposition testimony would have been deemed more persuasive and reliable than Dr. Franchetti's IME report, as discussed above for the undersigned to conclude Claimant did not suffer a compensable work place injury.

CO 7 at n2.

It is unclear why the ALJ included this footnote near the conclusion of a CO where, although the ALJ did not find Claimant's testimony supported by the medical records with regard to the mechanics of the injury. the presumption of compensability was found to have been invoked with the report of Dr. Franchetti. Nevertheless with the presumption invoked, the ALJ shifted the burden to Employer to rebut the presumption, and as noted above, provided an adequate analysis to explain why she found Dr. Scheer's report met Employer's burden. Employer's reliance on the footnote is misplaced given the analysis provided in the CO.

CONCLUSION AND ORDER

The CO is supported by substantial evidence, is in accordance with the law and is AFFIRMED.

So ordered.