

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

THE COMPENSATION REVIEW BOARD

CRB No. 12-085

**DAVID P. MAJORS,
Claimant–Respondent,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,
Self-Insured Employer and Third Party Administrator–Petitioner.**

Appeal from a May 17, 2012, Compensation Order on Remand by
Administrative Law Judge Anand K. Verma
AHD No. 10-139, OWC No. 657877

Donna J. Henderson, Esquire for the Self-Insured Employer-Petitioner
Manuel R. Geraldo, Esquire for the Claimant-Respondent

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, HEATHER C. LESLIE, and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the employer of the May 17, 2012 Compensation Order on Remand (COR) issued by Administrative Law Judge (ALJ) Anand K. Verma in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES).

In that COR, which was written after this case was remanded for the third time, the ALJ granted the claimant’s requests for temporary total disability and causally related medical expenses. Because the ALJ again failed to follow remand instructions, we must VACATE the COR and REMAND this case to the ALJ for a new decision.

FACTS OF RECORD AND PROCEDURAL HISTORY

This case involves the claim of David P. Majors who alleged that on February 17, 2009, he sustained plantar fasciitis when his foot slipped while repairing an escalator during the course of his employment for the employer, the Washington Metropolitan Area Transit Authority (employer or WMATA). The claimant also alleged that this injury was exacerbated on March 6, 2009 when he attempted to lift an escalator floor plate while at work.

After two formal hearings, the ALJ issued a Compensation Order on July 29, 2010, in which he awarded the claimant temporary total disability benefits and assessed penalties against the employer for its failure to timely controvert the claim. *Majors v. WMATA*, AHD No. 10-139, OWC No. 657877 (July 29, 2010).

WMATA appealed. On July 28, 2011, the CRB issued a Decision and Remand Order (DRO), vacating the CO. The CRB determined that the ALJ had committed five errors:

- The ALJ had improperly relied upon medical articles not introduced into evidence by the parties,
- The ALJ failed to rule on the employer's objection to claimant's exhibit 6,
- The ALJ failed to consider employer's exhibit 5,
- The ALJ erred when assessing the nature and extent of the claimant's disability from May 26, 2009 to June 2, 2009, and
- The ALJ improperly placed the burden on the Employer to show that an accident did not occur.

The CRB vacated the award and remanded the matter to the ALJ so that he could correct these errors. *Majors v. WMATA*, CRB No. 10-160, AHD No. 10-139 (July 28, 2011).

The ALJ issued a COR on August 31, 2011. *Majors v. WMATA*, AHD No. 10-139, OWC No. 657877 (August 31, 2011). The employer timely appealed and the CRB vacated and remanded this decision because the ALJ failed to correct three of his previously identified errors and ALJ committed another reversible error:

- The ALJ, as he had done before, based his decision on medical journals that were not submitted by the parties into evidence,
- The ALJ, as he had done before, failed to rule on the Employer's objections to Claimant's exhibit 6,
- The ALJ, as he had done before, failed to place the burden of proving the first step of the presumption analysis on the claimant, and
- The ALJ failed to rule upon the Employer's post-hearing supplemental exhibits.

Majors v. WMATA, CRB No. 10-160, AHD No. 10-139, OWC No. 657877 (January 26, 2012).

The ALJ issued his third decision, the second COR, on January 31, 2012. *Majors v. WMATA*, AHD No. 10-139, OWC No. 657877 (January 31, 2012). The employer timely appealed and the CRB vacated and remanded this decision because the ALJ again failed to correct several of the errors for which the case had been remanded:

- The ALJ, without notice, based his decision on medical journals that were not submitted by the parties into evidence,
- The ALJ again misplaced the burden of proof with respect to the presumption of compensability analysis, and
- The ALJ failed to rule on the employer's post-hearing motion to supplement the record.

Majors v. WMATA, CRB No. 12-032, AHD No. 10-139, OWC No. 657877(April 5, 2012).

The ALJ responded by issuing the COR that is the subject of this review, *Majors v. WMATA*, AHD No. 10-139, OWC No. 657877 (May 17, 2012). In this COR, the ALJ awarded the claimant temporary total disability benefits from March 14, 2009 through June 3, 2009 and causally related medical expenses. The employer timely appealed.

On review, the employer argues that the ALJ again failed to comply with the remand instructions. We agree with the employer and must vacate the award and remand this case to the ALJ.

DISCUSSION AND ANALYSIS¹

The first error relates to the ALJ's refusal to comply with one of the remand instructions; his refusal to rule on the employer's post-hearing motion to supplement the record.

One of the defenses asserted by WMATA is that the claimant's plantar fasciitis is not medically causally related to the February 17, 2009 event. On June 22, 2010, after the close of the formal hearing, but before the ALJ issued the CO, WMATA filed a Motion to Submit Later Received Medical Record.

¹ On review, the CRB is limited to making a determination as to whether the factual findings of the COR 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. Code §§ 32-1501 to 32-1545(2005) at §32-1521.01 (d) (2) (A) and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

The CRB must uphold the COR if it is supported by substantial evidence, even if there is substantial evidence in the record that could support a contrary conclusion and even if the CRB would have reached a contrary conclusion based on that evidence. *Marriott*, 834 A.2d at 885. The CRB "may not consider the evidence de novo and make factual findings different from those of the hearing examiner." *Id.*

WMATA moved to supplement the exhibits with a medical record it received from the Virginia Hospital Center. This record described the claimant's visit to an emergency room on December 16, 2008, almost three months before the alleged industrial accident. The record says the claimant was experiencing right lower extremity pain and

Ossification is identified...likely due to plantar fasciitis or potentially the sequelae of a prior interstitial fascial tear.

A CT scan taken that day listed as one of three impressions: "Evidence of old plantar fasciitis or the sequela of previous interstitial fascial tear."

The employer's motion requested that the ALJ admit this medical record which it argues is relevant to the issue of medical causal connection. The ALJ did not rule on the WMATA's motion to admit what was proffered as Employer's Exhibit 6, before he issued the CO nor did the ALJ identify or discuss the motion or the exhibit in the CO or in his two CORs.

In the most recent remand order, the CRB's May 5, 2012, Decision and Remand Order, the CRB, in clear and unambiguous language, directed the ALJ to comply with three instructions. The first instruction related to WMATA's Motion and directed the ALJ to grant or deny the motion and, if granted, consider this evidence.

In their written statements on review, both parties acknowledge that the ALJ failed to comply with this remand instruction. (Employer's memorandum at 10-11, Claimant's memorandum at 4-5).

We agree and therefore must remand this case with the identical instruction that the ALJ either misunderstood or ignored:

The ALJ must either grant or deny the Employer's Motion to Supplement their exhibits post hearing. If the ALJ grants said motion, the ALJ must consider the evidence in coming to the ultimate conclusion of whether or not to award the Claimant's claim for relief.

Because the decision and analysis to be made by the ALJ concerning proffered Exhibit 6 could affect entitlement to an Award, it is not appropriate for the CRB to discuss all of WMATA's assignments of error now. However, to foster judicial economy and with the goal of perhaps avoiding another appeal, the CRB directs the ALJ's attention to the following:

(1) In his CO, the ALJ awarded temporary total benefits through June 3, 2009. The CRB's July 28, 2011, Decision and Remand Order, held:

WMATA's argument that in assessing the nature and extent of Mr. Majors' disability the ALJ relied upon recitations offered by Mr. Majors, as opposed to medical opinions of Mr. Majors' work capacity, has merit. Dr. Alex Kors, the treating physician, intended to return Mr. Majors to work on May 26, 2009, but because Mr. Majors had planned a vacation to Florida until June 2, 2009, the

doctor modified Mr. Majors' off work status until after the vacation. A pre-planned vacation is not a work-related disability, and on remand, if the ALJ concludes Mr. Majors has sustained an accidental injury arising out of and in the course of his employment on February 17, 2009, he must assess Mr. Majors' disability not as a function of his personal plans but as a function of his work capacity as supported by reliable, medical evidence.

In his first COR, issued August 31, 2011, the ALJ awarded benefits through May 26, 2009. The ALJ also awarded benefits through May 26, 2009 in his next COR, dated January 31, 2012.

However, without any explanation, in the COR that is presently before us, the ALJ's awarded benefits through June 3, 2009.

Therefore, if the ALJ awards benefits on remand, he should clarify which is the correct date for ending indemnity benefits and if that date is June 3, 2009, the ALJ shall state his rationale for awarding benefits through that date.

(2) With respect to the second step of the presumption analysis, in the July 29, 2010 CO the ALJ found that the employer rebutted the medical causal connection presumption:

Inasmuch as employer offered specific and comprehensive evidence rebutting the presumption of compensability, the presumption falls from consideration and the entire evidence must be weighed without regard to the presumption.

The claimant did not appeal this finding. However, in the COR presently before the CRB, the ALJ, without any explanation, contradicted his earlier finding and held the employer had not rebutted the presumption:

After Claimant has made this showing, the burden shifts to the employer to offer "specific and comprehensive" evidence sufficient to sever the potential connection between a particular injury and the work-related incident. Where, as here, Employer fails to rebut the invoked presumption of compensability, [the causal connection] stands un rebutted.

While an ALJ generally does not have to inventory the evidence relied on, in a case such as this, where the ALJ issues inconsistent decisions on a finding that was not appealed, the ALJ must explain why his previous unappealed determination is not the law of the case.

It appears from the discussion that follows the ALJ's inconsistent finding in this COR, that the ALJ now believes Dr. Weiner's IME opinion is not sufficient to rebut the presumption. However, the only evidence from the employer that was before the ALJ now that was not before him when he found the presumption rebutted was Dr. Weiner's critique of the journal articles.

Therefore, the ALJ, after discussing his legal authority to revisit this issue, must also explain why he found Dr. Weiner's IME sufficient to rebut the presumption in the CO but not in this COR. In this regard, the ALJ is reminded that to rebut the presumption the employer must

present an unequivocal medical opinion not ‘disprove causality with an absolute certainty.’” *Safeway Stores v. DOES*, 806 A. 2d 214, 1220 (D.C. 2002).

(3) The record does not explain the ALJ’s obstinate refusal to accept the proper standard of proof for the third step of the presumption analysis. In the COR, the ALJ, without reference to any legal authority makes the following incorrect statement:

The standard of proof required in determining of the medical causal relationship is the substantial evidence and not the preponderance of the evidence, as cited by the CRB.

The ALJ’s statement is contrary to law. The ALJ is directed to this holding of the DCCA which remains the law in our jurisdiction:

If the employer succeeds in proffering substantial evidence of non-causation, the statutory presumption drops out of the case entirely. The burden then reverts to the claimant to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed to his or her disability.

The Washington Post v. DOES and Reynolds, Intervenor, 852 A.2d 909 (D.C. 2003).

CONCLUSION AND ORDER

The May 17, 2012, Compensation Order on Remand is not supported by substantial evidence and is contrary to law. This case is remanded to the ALJ for a new decision that is constant with this decision.

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
Chief Administrative Appeals Judge

February 28, 2013
Date