GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-090

DAVID P. MAJORS,
Claimant-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,
Employer/Insurer-Petitioner.

Appeal from a June 28, 2013 Compensation Order on Remand By
Administrative Law Judge Anand K. Verma
AHD No. 10-139, OWC No. 657877

Donna J. Henderson, Esquire for the Petitioner
Alexander Fernandez, Esquire for the Respondent

Before MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 17, 2009, Mr. David P. Majors was repairing an escalator while working for the Washington Metropolitan Area Transit Authority (WMATA). At a formal hearing more than three years ago, he alleged that during this repair work he sustained plantar fasciitis; he also alleged that his injury was exacerbated on March 6, 2009 when he attempted to lift an escalator floor plate.

In a Compensation Order dated July 29, 2010, an administrative law judge (ALJ) awarded Mr. Majors temporary total disability benefits from March 14, 2009 to June 3, 2009, causally related medical expenses, and penalties for WMATA's failure to timely controvert the claim.[1] The Compensation Review Board (CRB) vacated the Compensation Order and remanded the matter because the ALJ had erred by relying on a journal article introduced into the decision by the

[1] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (July 29, 2010).

ALJ, by failing to rule on objections to multiple exhibits, by improperly considering Mr. Majors' pre-planned vacation when assessing the nature and extent of Mr. Majors' disability, and by failing to properly analyze whether Mr. Majors' had sustained an accidental injury.[2]

The ALJ issued a Compensation Order on Remand on August 31, 2011 awarding Mr. Majors temporary total disability benefits from March 14, 2009 to May 26, 2009 (as opposed to June 3, 2009, the date Mr. Majors' pre-planned vacation ended).[3] The ALJ erroneously continued to rely upon the medical journal article he had introduced into the record without affording the parties an opportunity to respond to the officially noticed material; the ALJ still did not rule on WMATA's objection to Mr. Majors' exhibit 6; the ALJ still did not rule on WMATA's motion to supplement its exhibits post-hearing; the ALJ admitted but did not consider Mr. Majors' exhibit 5; the ALJ continued to place the burden on WMATA to prove an accident did not happen. For these reasons, the CRB vacated the Compensation Order on Remand, and the matter was remanded.[4]

In a second Compensation Order on Remand, the ALJ indicated there were two principal issues for resolution. Regarding the medical journals, the ALJ indicated "both parties will be afforded an opportunity to file their rebuttal"[5] but still granted Mr. Majors' claim for relief for temporary total disability benefits from March 14, 2009 to June 3, 2009 (even though the ALJ found "claimant was fit to return to work on May 26, 2009.")[6] In addition, the ALJ decided "it was not error to admit into evidence the otherwise relevant exhibits CE 6 and EE 2 to which both parties objected, especially absent any resulting prejudice to the objecting party."[7] Finally, the ALJ concluded "employer did not meet its burden of proving that the accidental injury did not occur."[8]

The CRB vacated the second Compensation Order on Remand in part on April 5, 2012. In very specific terms, the CRB directed the ALJ to address the following problems on remand:

> 1. 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

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[2] *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 10-160, AHD No. 10-139, OWC No. 657877 (July 28, 2011).

[3] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (August 31, 2011).

[4] *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 10-160, AHD No. 10-139, OWC No. 657877 (January 26, 2012).

[5] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (January 31, 2012).

[6] *Id.*

[7] *Id.*

[8] *Id.*

the evidence in coming to the ultimate conclusion of whether or not to award the Claimant's claim for relief.

2. With respect to the medical articles, if the ALJ continues to rely upon the articles, the ALJ must re-open the record to allow the parties an opportunity to review the articles and to respond to the official notice taken of their contents, prior to the issuance of a Compensation Order on Remand. Or, the ALJ can issue a Compensation Order on Remand based solely on the record before him which does *not* include the medical [articles].

3. Regarding the issue of accidental injury, the ALJ must first determine if the Claimant satisfied its initial burden of showing an accidental injury which arose out of and in the course of his employment occurred and explain what record evidence the ALJ is relying upon. If the Claimant satisfies his initial burden, then the ALJ must then analyze the Employer's evidence to determine if the Employer presented substantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. If the ALJ finds that the Employer submitted evidence specific and comprehensive enough to sever the connection between the injury and job related event, the ALJ shall so explain this finding and what evidence he is relying upon. If all this occurs, then the presumption falls from the case and the Claimant must prove, by a preponderance of the evidence, his injuries arose out of and in the course of his employment.[9]

The third Compensation Order on Remand issued on May 17, 2012.[10] The ALJ perpetuated his previous errors, and the CRB remanded the case for the ALJ to issue a new decision addressing 1. WMATA's Motion to Supplement, 2. the nature and extent of Mr. Majors' disability in the context of his pre-planned vacation, 3. inconsistent rulings on WMATA's rebuttal of the presumption of compensability, and 4. the proper standard of proof when weighing the evidence.[11]

WMATA now appeals the ALJ's fourth Compensation Order on Remand.[12]

[9] *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 12-032, AHD No. 10-139, OWC No. 657877 (April 5, 2012).

[10] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (May 17, 2012).

[11] *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 12-085, AHD No. 10-139, OWC No. 657877 (February 28, 2013).

[12] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (June 28, 2013).

ISSUES ON APPEAL AND ANALYSIS[13]

DID THE ALJ APPROPRIATELY RESOLVE THE ISSUE OF WHETHER MR. MAJORS SUSTAINED AN ACCIDENTAL INJURY ON FEBRUARY 17, 2009?

Ordinarily, the CRB is restricted to addressing the deficiencies addressed in the prior Decision and Remand Order; however, in the February 28, 2013 Decision and Remand Order, the CRB explained that certain unaddressed errors in the prior Compensation Order on Remand made it inappropriate for the CRB to discuss all of the issues WMATA had raised. As a result of the ALJ's repeated failure to address the deficiencies noted in the many remand orders, we must address this issue again now.

Since the beginning of this case, WMATA has contended Mr. Majors did not sustain an accidental injury. The requirement of an accidental injury is satisfied when something unexpectedly goes wrong with the human frame.[14] Although the issues of accidental injury and arising out of and in the course of employment may be inextricably intertwined, that intricate relationship does not excuse an ALJ from rendering a reasoned ruling on the issue of accidental injury when it has been raised by a party.[15]

The ALJ did not address this error in the June 28, 2013 Compensation Order on Remand. His most recent attempt is in the May 17, 2012 Compensation Order on Remand wherein he wrote

> The CRB questions what evidence the ALJ relies on to determine that the accidental injury occurred on February 17, 2009. The CRB is reminded of the 12-page long initial Compensation Order of July 29, 2010 which discussed in detail the occurrence of the accidental injury. The ALJ's are not required to inventory all the evidence reviewed. It was quite obvious in the original Compensation Order, the undersigned relied on Claimant's unrefuted testimony that he sustained the injury to his left foot on February 17, 2009. [Footnote omitted.] Employer, in an effort to rebut that testimony, presented two witnesses at the hearing who testified with respect to the alleged injury. However, neither of those witnesses lacked [*sic*] any personal knowledge of Claimant's injury. On that basis, it was concluded Employer failed to rebut Claimant's credible sworn testimony with specific and comprehensive evidence that he did not suffer the accidental injury.[16]

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[13] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand 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").

[14] *Washington Metropolitan Area Transit Authority v. DOES*, 506 A.2d 1127 (D.C. 1986).

[15] In order to conform to the requirements of the D.C. Administrative Procedures Act, the agency's decision must state findings of fact on each material, contested factual issue; those findings must be based on substantial evidence; and the conclusions of law must follow rationally from the findings.

[16] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (May 17, 2012).

Requiring WMATA to prove Mr. Majors "did not suffer the accidental injury" is not the proper standard, the law requires we remand this matter for analysis of this issue in the proper legal context as explained previously.

DID THE ALJ HAVE AUTHORITY TO RULE WMATA HAD NOT REBUTTED THE PRESUMPTION OF COMPENSABILITY?

In the June 28, 2013 Compensation Order on Remand, the ALJ concludes "Employer has not met the requisite burden under the Act."[17] This conclusion is based upon the ALJ's endorsement of his prior position in the May 17, 2012 Compensation Order on Remand:

> The issues of accidental injury and injury arising out of and in the course of employment are inextricably interlaced in that the requisite burden of proof to invoke the presumption of compensability remains the same to resolve both issues. Accordingly, Claimant has the burden of making an "initial demonstration" of an employment connection to his or her disability in order to invoke the presumption of compensability under § 32-1521. In other words, Claimant must demonstrate a disability and the existence of job-related event, activity, or requirement which has the potential to cause or contribute to the disability. After Claimant has made this showing, the burden then shifts to 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, it stands unrebutted.[18]

However, in July 2010[19] and in June 2013,[20] the ALJ specifically found WMATA's evidence was sufficient to rebut the presumption of compensability. It is the law of the case that WMATA has rebutted the presumption of compensability,[21] and once the presumption of compensability was rebutted, the burden was not on WMATA; therefore, the ALJ's conclusion that WMATA has not rebutted the presumption of compensability cannot stand.

DID THE ALJ APPLY THE PROPER STANDARD OF PROOF WHEN WEIGHING THE EVIDENCE?

Because the ALJ incorrectly ruled WMATA had failed to rebut the presumption of compensability, he did not weigh the evidence.

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[17] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (June 28, 2013).

[18] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (May 17, 2012).

[19] *Id.*

[20] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (June 28, 2013).

[21] The law of the case doctrine recognizes that "once the courts has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kristidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980).

DID THE ALJ ERR BY RELYING ON OFFICIALLY NOTICED MEDICAL JOURNALS?

WMATA argues "[t]he ALJ's statement that reference to the 'medical journal articles in COR 3 was . . . not done to prove or disprove the causality of plantar fasciitis' is disingenuous."[22] The CRB agrees.

The ALJ opens his findings of fact with "The medical journal articles were administratively noticed for reference to ascertain the etiology of plantar fasciitis."[23] In other words, the ALJ used officially noticed journal articles about general causation to find specific causation in this case; in other words, the ALJ drew a medical conclusion from officially noticed journal articles. It can be no clearer – the ALJ is without authority to insert in this case his medical opinion based upon this article.[24] That "[t]he cumulative opinion of claimant's treating doctors, Wilson, Miles, Siegel and Biru contributed to the determination of the causality of plantar fasciitis"[25] or that "the journal articles were not the sole determinants on the issue of causality"[26] is not good enough. As the CRB explained more than two years ago, the ALJ's attempt to rehabilitate his error is "unavailing inasmuch as it is not clear that given a truly fair review of the evidence without the taint of the journal articles the result reached is one based on an unaffected weighing of the evidence of record."[27]

DID THE ALJ RULE ON WMATA'S POST-HEARING MOTION TO SUPPLEMENT (MOTION)?

In the February 28, 2013 Decision and Remand Order, the ALJ was directed to rule on WMATA's Motion. In response, the ALJ decided it was not necessary to rule on the Motion:

> Now, addressing the CORB's final assignment of error that the ALJ failed to rule on the employer's post-hearing motion to supplement the record, the undersigned refers to the Remand Order dated July 28, 2011, which remanded to the OHA to address whether the ALJ erred by relying upon the medical journal articles that were not in evidence and whether the findings and conclusions of law in the July 29, 2010 Compensation Order were supported by substantial evidence in the record. The CORB also asserted that the ALJ improperly relied upon Dr.

[22] WMATA's Application for Review and Memorandum in Support of the Review of the Fourth Compensation Order on Remand, p. 6.

[23] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (June 28, 2013). p. 2.

[24] *Daly v. R. J. Reynolds*, CRB No. 12-023, AHD No. 10-193A, OWC No. 655062 (April 3, 2012). See also *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

[25] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (June 28, 2013). p. 2.

[26] *Id. at* p. 3 quoting *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (May 17, 2012).

[27] *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 10-160, AHD No. 10-139, OWC No. 657877 (July 28, 2011), p. 5.

> Kor's return to work slip from June 3, 2009, instead of May 26, 2009 to accommodate claimant's vacation time in Florida. [Footnote omitted.] The undersigned accordingly addressed the CORB's concerns in the COR 1 issued on August 31, 2011. However, following another Application for Review of the August 31, 2011 COR 1 by employer, the CORB in the February 28, 2013 Remand Order, cited that the ALJ failed to rule on the employer's post-hearing motion to supplement the record.
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> Even though, employer's June 24, 2010 motion to supplement a post-hearing exhibit consisting of claimant's 2008 diagnosis of plantar fasciitis was not ruled upon, employer was not prejudiced by that failure. Employer's post-hearing exhibit was supplemented to its exhibits admitted into evidence and was identified as EE 6 (handwritten supplementation of exhibit #6 in employer's exhibit list). [Footnote omitted.] This exhibit as posited by employer confirms claimant's December 16, 2008 CT scan of his right lower extremity at Virginia Hospital Center, which was consistent with, among other things, the evidence of old plantar fasciitis or the sequela of previous interstitial fascial tear. (EE 6).[28]

Setting aside the inconsistency of the ALJ's position that WMATA's exhibit is evidence Mr. Majors' suffered from plantar fasciitis prior to his alleged injury at work but WMATA is not prejudiced by the ALJ's failure to rule on the Motion to have this evidence considered, prejudice is not a consideration when assessing whether to admit exhibits post-hearing. It is within an ALJ's discretion to reopen the record to accept post-hearing evidence, and §32-1520(c) of the Act requires a showing of "unusual circumstances" (not prejudice) before post-hearing evidence can be considered. Until the ALJ rules on WMATA's Motion the CRB cannot exercise its appellate review and cannot affirm the resulting Compensation Order because it may not be based on all the evidence that should have been considered.

DID THE ALJ PROPERLY CONSIDER THE NATURE AND EXTENT OF MR. MAJORS' DISABILITY?

Assuming resolution of all other outstanding issues leads to the need to address the nature and extent of Mr. Majors' disability, the ALJ has perpetuated another error initiated in the original Compensation Order and already addressed by this tribunal in July 2011:

> 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, [*sic*] 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.[29] 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

[28] *Majors v. Washington Metropolitan Area Transit Authority*, AHD No. 10-139, OWC No. 657877 (June 28, 2013), pp. 5-6.

[29] Employer's Exhibit 1 at p. 20. Footnote in original.

> 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.[30]

So long as the Compensation Order on Review is not supported by reliable, medical evidence, the CRB cannot affirm it.

CONCLUSION AND ORDER

Given the continued failure of the ALJ to follow remand instructions to apply the law to the facts appropriately in this case, the CRB sees no way to adequately and fairly resolve this matter other than to VACATE the June 28, 2013 Compensation Order on Remand and to direct that on REMAND this matter be considered anew. The CRB lacks authority to exercise administrative control over the Office of Hearings and Adjudications and cannot direct that on remand a matter must be decided by an ALJ different from the ALJ who issued the decision on appeal;[31] however, when the substantive content of the decision on appeal lacks legal authority, the contradictory analysis over a protracted period of time suggests an intent to reach a specific conclusion, and the ALJ demonstrates unwillingness to follow the specific instructions of the CRB despite several remands to address the same errors (all of which needlessly prolong a process designed to provide swift relief), the CRB is compelled to recommend the matter be reassigned to a new ALJ in order to protect the parties' rights to fundamental fairness and due process.[32]

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

September 20, 2013
DATE

[30] *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 10-160, AHD No. 10-139, OWC No. 657877 (July 28, 2011), p. 5.

[31] *Galligan v. John F. Kennedy Center for Performing Arts,* CRB No. 04-28(R), OHA No. 03-045A, OWC No. 571106 (August 8, 2007).

[32] See *Gonzalez v. DOES*, No. 12-AA-1603, Mem. Op. & J. (D.C. August 7, 2013).