

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-154

MICHELLE MORROW,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Self-Insured Employer/Respondent.

Appeal from a November 26, 2014 Compensation Order on Remand
by Administrative Law Judge Karen R. Calmeise
AHD No. 12-129, OWC No. 656073

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Michael J. Kitzman, for Claimant
Sarah O. Rollman, for Employer

Before, LINDA F. JORY, MELISSA LIN JONES, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the Claimant's request for review of a Compensation Order on Remand (COR) issued on November 26, 2014 by the Administrative Hearings Division (AHD) which found that Claimant's right foot and plantar fasciitis condition causally related to her work employment. The administrative law judge (ALJ) granted payment for causally related medical expenses. Claimant's claim for permanent partial disability benefits was denied as the administrative law judge (ALJ) determined in a prior Compensation Order (CO) that Claimant failed to provide Employer timely notice of her work related injury.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a traffic clerk for the Employer. The Claimant's duties involved standing for two work shifts (four hours each) observing and documenting rail and bus ridership throughout the transit system. On November 3, 2004, the Claimant developed pain and swelling in her feet. The Claimant immediately sought medical treatment with Dr. Kay Sofar. Dr. Sofar diagnosed

the Claimant with plantar fasciitis of the right heel. The Claimant returned to work on November 4, 2004.

Claimant obtained an independent medical examination (IME) opinion from Dr. Joel Fechter that she suffered from 36% impairment to the right foot as a result of working for the Employer. The Claimant also underwent two separate IMEs at the Employer's request. Both IME physicians opined that Claimant's plantar fasciitis was unrelated to her duties as a traffic clerk.

A dispute arose as to whether Claimant had provided Employer with timely notice of her foot condition; whether the claimed injury was medically causally related to a work injury, and the nature and extent of the Claimant's alleged disability. A Formal Hearing was held. At the Formal Hearing, Claimant requested an award of 36% permanent partial disability benefits to the right foot, interest on accrued benefits, and payment of causally related medical treatment. A CO was issued, denying the Claimant's claim for relief, finding the Claimant had failed to provide timely notice to the Employer and that the Claimant had failed to prove that her right foot condition was causally related to the injury. *Morrow v WMATA*, AHD No. 12-129, OWC No. 656073 (July 27, 2012)

The Compensation Review Board issued a Decision and Remand Order (DRO) on November 13, 2012. Because the CRB determined the CO was not supported by substantial evidence and was not in accordance with the law, it reversed and remanded the matter to the AHD for further consideration consistent with that DRO. *Morrow v Washington Metropolitan Area Transit Authority*, CRB No. 12-139 AHD No. 12-129, OWC No. 656073 (November 13, 2012 (July 27, 2012)).

The ALJ issued a COR on November 26, 2014 which granted Claimant's request for medical expenses. The ALJ determined Claimant met her burden by a preponderance of the evidence that Claimant's employment caused her right foot and plantar fasciitis. As the ALJ relied on the CRB's language regarding her previous determination that claimant did not provide timely notice of her injury, the ALJ declined to discuss Claimant's request for PPD benefits.

ISSUES ON APPEAL

1. Did the ALJ err in declining to decide the issue of timely notice a second time?
2. Is the COR supported by substantial evidence and in accordance with the law?

STANDARD OF REVIEW

The function of the CRB is appellate review; depending upon the type of order on appeal, the standard of review applied by the CRB differs. When a party appeals a Compensation Order, the 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; if the Compensation Order 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, the CRB must affirm that Compensation Order. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C.2003).

ANALYSIS

Claimants' only contention on appeal is that the COR erred finding Claimant did not provide notice. Employer responded asserting that the finding that Claimant failed to give timely notice was affirmed by the CRB, therefore the relief requested by Claimant should be denied.

On the issue of timely notice the CRB wrote the following:

A review of the evidence submitted as well as the testimony of the Claimant supports the ALJ's conclusion that the Claimant failed to give timely notice. Indeed, when asked what the claimant told her supervisor after her return from work, Mr. Lassiter, at the time, the Claimant responded,

I told him that I had the problem with my foot, and that my doctor said I'm not supposed to be really standing on my feet as much, and I had asked what we were going to be doing for the next couple of weeks as far as scheduling, because he's responsible to schedule our work, and if I could have something that I didn't – that wouldn't require me to stand on my feet.

Hearing Transcript at 29.

Being aware of a medical condition does not impute notice upon an Employer. As the testimony shows, the Claimant did not indicate to the Employer her belief that her condition arose out of her employment. Furthermore, the Claimant's reliance on *Keith v. Unity Construction Co. of D.C.*, Dir. Dkt. 89-58, H&AS 89-202, (July 12, 1990) is misplaced. In *Keith*, timely notice was found to have been given, in part because at the time of the injury, a Employer representative witnessed the event, a fall from a tree. In essence, the Employer must be made aware in some fashion of the Claimant's condition its relation to the Claimant's work. The Claimant in the case *subjudice* is arguing that the Employer, in essence, "should have known" a position we reject.

DRO at 4, 5.

We note that the DRO ends the notice analysis there and proceeds to discuss the ALJ's application of the presumption of compensability as it is applied to the causal relationship of claimant's right foot plantar fasciitis. The CRB found that the ALJ erred as she did not indicate if the medical opinion was adequate to invoke the presumption, however the error was harmless, "inasmuch as there is but one conclusion she could have reached: Dr. Fechter's medical report is adequate as a matter of law, to invoke the presumption". DRO at 5. The CRB further found the

ALJ failed to consider whether Employer's evidence was adequate to overcome or rebut the invoked presumption and again found harmless error "as the two IME reports undeniable are adequate as a matter of law to overcome the presumption. Id. The CRB explained and concluded:

At this point, the presumption analysis requires that the ALJ weigh the evidence anew, without regard to any presumptions, and with the Claimant bearing the burden of proving causal relationship by a preponderance of the evidence. It is impossible for us to tell from this CO whether this is the standard that the ALJ employed in her evaluation of the evidence, because nowhere in the Compensation Order is this standard acknowledged.

One might assume that the ALJ applied the proper standard, or some lesser standard such as "substantial evidence". If either were the case, there would be either no error (in the case of a preponderance), or it might be harmless error (in the case of substantial evidence). However, we don't know this to be the case. She may have applied some other, greater standard (such as clear and convincing evidence, or no standard whatsoever. This tribunal cannot "fill in the gaps" by making its own findings or conclusions. *King v. DOES*, 742 A.2d. 460 (D.C. 1999).

In order for us to assess whether the Compensation Order is in accordance with the law, we must know what standard the ALJ assumed was appropriate. Accordingly, we must remand this matter to the ALJ for further consideration, and the issuance of a new CO in which the ALJ acknowledges that the proper standard is one that places the burden of proof upon the Claimant, by a preponderance of the evidence, and in which she identifies what evidence she relies upon in reaching her conclusion.

DRO at 5, 6.

It is clear from the above language of the CRB that on remand the ALJ was required to weigh the evidence of record to determine if by a preponderance of the evidence, claimant's right foot plantar fasciitis is causally related to her employment. On remand, the ALJ weighed the evidence of record and concluded that:

The preponderance of the evidence supports the finding that Claimant's work duty caused her right foot and plantar fasciitis condition.

DRO at 5.

Neither party has appealed this conclusion and the CRB does not reweigh evidence so long as there is substantial evidence in the record to support the ALJ's finding. In light of the treating physician preference, we find the ALJ's conclusion that Claimant's right foot condition is causally related to her employment is supported by substantial evidence and in accordance with the law.

Although neither party refers to the CRB's Conclusion and Order in the DRO, we must repeat it as we can discern no other reason why Claimant would raise the ALJ's determination that Claimant failed to provide timely notice to employer a second time. The CRB wrote:

The findings of fact and conclusions of law contained in the July 27, 2012 Compensation Order are not supported by substantial evidence in the record and are not in accordance with the law. It is **REVERSED** and **REMANDED** consistent with the above discussion.

DRO at 6. [Emphasis added]

We note the CRB clearly found no error with the ALJ's determination of untimely notice by Claimant in the original CO, based on the language quoted above. We further agree with Employer that:

In the present appeal, Claimant alleges that the ALJ erred in her determination that notice was not timely. However, the ALJ did not address that issue in the COR. Further her conclusions on this issue were addressed and affirmed in the previous Decision and Remand by the CRB. There is no legal or factual basis to disturb that determination. No new findings or conclusions were issued and no new arguments have been advanced. Thus, the relief requested in the Application for Review should be denied.

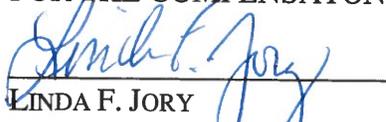
Opposition to Claimant's Application for Review at 5.

We find no error with the ALJ's statement that the CRB affirmed her conclusion that Claimant did not provide timely notice, notwithstanding the language of the CRB's Conclusion and Order. It is clear that the previous CRB decision affirmed the CO with respect to timely notice and reversed and remanded the ALJ's finding with respect to the medical causal relationship of the plantar fasciitis to the employment.

CONCLUSION AND ORDER

The November 26, 2014 Compensation Order on Remand is supported by substantial evidence and in accordance with the law and is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:


LINDA F. JORY
Administrative Appeals Judge

April 13, 2015
DATE