

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 05-209

FRED TILLERY,

Claimant – Respondent

v.

GIANT FOOD, INC. AND MAC RISK MANAGEMENT, INC.,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA No. 04-129; OWC No. 589991

Michael L. Dailey, Esquire, for the Petitioner

Alan J. Lowe, Esquire, for the Respondent

Before: LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and FLOYD LEWIS,
Acting Administrative Appeals Judge.

FLOYD LEWIS, *Acting Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code §32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility for administrative appeals filed

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on January 27, 2005, the Administrative Law Judge (ALJ) granted Claimant-Respondent's claim for temporary total disability benefits from January 18, 2003 to September 21, 2003, with payment of related medical expenses and denied Claimant-Respondent's claim for a schedule award for permanent impairment to his right foot. Employer-Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Employer-Petitioner alleges that the ALJ's finding of a causal relationship of Claimant-Respondent's right hip and right knee, is not supported by substantial evidence in the record and that the ALJ incorrectly applied the presumption of compensability.

In its appeal, although Employer-Petitioner indicated that it reserved the right to file a Memorandum in support of its Application for Review, this pleading was not submitted. No opposition to the appeal was filed by Claimant-Respondent.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this Review Panel are constrained 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.

Turning to the case under review herein, Employer alleges that Claimant did not sustain a causally related injury to his right leg and hip on January 8, 2003 in the course of his employment and he is not entitled to temporary total disability benefits from January 18, 2003 through September 21, 2003. Employer specifically contends that the ALJ ignored the medical records from Provident (sic) Hospital that suggest Claimant denied a recent fall or trauma and diagnosed him with non-traumatic pain. Employer also argues that the ALJ incorrectly applied the presumption of compensability, by failing to "incorporate the undisputed medical testimony on the form of medical records, into his analysis."

prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

An employee's claim is presumed to come within the provisions of the Act. D.C. Official Code § 32-1521(1) (2001). Upon presentation of credible evidence of an injury and a work-related event or activity that has the potential of resulting in or contributing to the injury, a claimant invokes the protection of the presumption. *Ferriera v. District of Columbia Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The focus then shifts to the employer to produce evidence specific and comprehensive enough to sever the presumed connection between the employment-related event and the injury. Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). In addition, the scope of the application for the presumption has been expanded to include the causal relationship between the current disabling condition and the injury. *Whittaker v. District of Columbia Department of Employment Services*, 668 A.2d 844, 846-847 (D.C. 1995).

The ALJ noted that Claimant testified that he slipped and fell on a wet floor at work injuring his right side and foot. Claimant submitted medical reports from Providence Hospital's emergency room and medical opinions and reports from Dr. Joel Fechter, an orthopaedic surgeon and his treating physician, Dr. Bonnie Simpson, indicating a traumatic work injury to Claimant's right foot, in support of his claim. Thus, the ALJ found that Claimant had successfully invoked the presumption and the burden shifted to Employer to produce evidence specific and comprehensive enough to sever the presumed connection between Claimant's injury and the employment-related event.

The ALJ found that Employer did not rebut the presumption, stressing that Employer did not present an independent medical evaluation to rebut the presumption of causality. Employer argued that the emergency room hospital records suggest that Claimant's right foot problems may have been the result of a prior or subsequent injury and that there was no traumatic fall. However, contrary to Employer's contention on appeal that the ALJ ignored this material, the ALJ specifically found that absent other corroborating evidence, this allegation of an intervening cause of Claimant's injury was no more than conjecture. After reviewing these hospital records, (Claimant's Exh. No. 3; Employer's Exh. No. 2), this panel can find no reason to disturb the ALJ's conclusion on this point, as the speculative nature of this information fails to meet the required level of specific and comprehensive evidence necessary to rebut the presumption.²

Finally, concerning the presumption, Employer's argument that the ALJ's analysis of the presumption was flawed because of the failure to incorporate the undisputed medical testimony of medical reports, must also be dismissed. The ALJ clearly considered the reports of Drs. Fechter and Simpson, and as discussed earlier, Employer did not require Claimant to undergo an independent medical examination in an attempt to rebut the presumption of causality in this matter. Thus, Employer's argument on this point is simply without merit, as a review of the record shows that the ALJ analyzed and considered all of the medical evidence that was presented.

² It is noted that, in describing the burden on Employer to present substantial evidence specific and comprehensive enough to rebut the presumption, at times the ALJ, we assume inadvertently, states "substantive" evidence instead of the correct standard of "substantial" evidence.

Since Employer did not present evidence sufficient enough to rebut the presumption, the ALJ correctly proceeded to evaluate this claim with Claimant receiving the benefits of the presumption that his foot impairments were causally related to his work injury. Although the evidence of record supports the ALJ's conclusion that the presumption was invoked and not rebutted, the presumption does not extend to the nature and extent of Claimant's disability, as Claimant has the burden of producing substantial evidence that he is entitled to the level of benefits requested. *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986).

At the hearing, Claimant testified that he fell in the cooler at work on January 8, 2003 and after the pain in his foot became unbearable, he went to the emergency room on January 18, 2003. He was referred to Dr. Simpson on January 30, 2003, and after reviewing Claimant's MRI and EMG/nerve conduction studies, Dr. Simpson opined that as the result of trauma, Claimant suffered entrapment neuropathy of the right lateral sural nerve and severe contusion of the right tarsal bones. Dr. Simpson treated Claimant with physical therapy, orthotics, strengthening exercises and was of the medical opinion that he should remain off from work until September 21, 2003. Claimant's Exh. No. 2.

It is widely accepted in this jurisdiction that there is a preference given to the opinion of a treating physician. *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350, 1353 (D.C. 1992). The ALJ found that there was no specific reason given for rejecting the opinion of Dr. Simpson and this physician's diagnosis and opinion was accorded great weight in determining that Claimant was unable to perform his employment duties from January 18, 2003 to September 21, 2003. After reviewing the record as a whole, there is substantial evidence to support this conclusion.

As a result, Employer-Petitioner has not presented any persuasive argument to reverse the ALJ's determination that Claimant-Respondent was temporally totally disabled from January 18, 2003 through September 21, 2003. Since the ALJ's findings of fact are based on substantial evidence in the record as a whole and in accordance with the law, the Compensation Order must be affirmed.

CONCLUSION

The Compensation Order of January 27, 2005, which awarded Claimant-Petitioner temporary total disability benefits from January 21, 2003 to September 21, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of January 27, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Acting Administrative Appeals Judge

April 25, 2005
DATE