GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-051

MICHAEL VALLEZ,
Claimant–Respondent

v.

PROGRESSIVE NURSING STAFFERS and
PROPERTY & CASUALTY INSURANCE GUARANTY CORP.,
Employer/Carrier–Petitioners.

Appeal from a April 4, 2013 Compensation Order By
Administrative Law Judge Gerald Roberson
AHD No. 98-531I, OWC No. 526392

W. John Vernon, Esquire, for the Petitioner
Frank Kearney, Esquire, for the Respondent

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and HENRY W. MCCOY, *Administrative Appeals Judges.*

HEATHER C. LESLIE, 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-Petitioner (Employer) of the April 4, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for permanent partial disability benefits from September 1, 2012 to the present and continuing and authorization for medical treatment. We VACATE, in part, and REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant worked as a certified emergency room nurse for the Employer. On February 22, 1998, the Claimant was assaulted by a patient and sustained multiple injuries, notably to his left ankle and left wrist. The work injury ultimately led to several surgeries to his left ankle and left wrist.

The Claimant's case proceeded to several formal hearings resulting in CO's. Pertinent to the appeal before the CRB, on June 1, 1999, a CO was issued which found that the Claimant's left ankle injury was medically causally related to his February 22, 1998 work injury. The parties stipulated to an average weekly wage (AWW) of $1,400.00. The ALJ authorized the requested medical treatment and awarded temporary total disability benefits beginning on October 2, 1998. The Employer subsequently sought a modification of this order in 2001, alleging that the Claimant voluntarily limited his income. In a CO issued March 30, 2001, the ALJ determined that the Claimant had voluntarily limited his income and reduced his wage loss benefits from temporary total disability benefits to permanent partial disability based on wage loss, with a credit retroactively granted to the Employer. The ALJ found that the Claimant could perform the alternative employment presented by the Employer and reduced the Claimant's entitlement to benefits accordingly. The Claimant was also awarded permanent partial disability of 10% to each the left lower extremity and left upper extremity.

On June 14, 2007, a CO was issued after the Claimant requested a modification of the 2001 order. The Claimant sought an increase in the amount of permanent partial disability awarded to the left lower and left upper extremity. After a full evidentiary hearing, the ALJ awarded a 35% permanent partial disability to his left upper extremity and 27% permanent partial disability to his left lower extremity.

The Employer and Claimant agreed that the Employer had overpaid the Claimant $63,921.30 as of November 6, 2009. To recoup this credit, the Employer stopped paying disability benefits until the credit was recovered in full. The Claimant alleges the credit was satisfied on September 1, 2012. The Employer maintained the credit was not satisfied.

The Claimant continued to seek treatment since his injury. After moving away from Washington, D.C, the Claimant came under the care and treatment of Dr. Faustino Bernadett, a pain management specialist. Dr. Bernadett has recommended epidural injections and medication. The Employer has not authorized this treatment.

On February 19, 2013 a full evidentiary hearing was held. The Claimant sought an award of permanent partial disability benefits from September 1, 2012 to the present and continuing and authorization for medical treatment. The issues presented for resolution were whether the current medical treatment requested was causally related to the work injury and whether the Employer had received the full credit for the agreed upon overpayment. A CO issued on April 4, 2013 which granted the Claimant's claim for relief in its entirety.

The Employer timely appealed. The Employer argues the ALJ erred as a matter of law when finding the Employer had recouped the overpayment credit, that the ALJ erred in not finding the

Employer entitled to an additional credit for overpayment of a previous CO, and that the ALJ erred in finding the Claimant's current medical treatment medically causally related to his work injury.

The Claimant opposes the Application for Review arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

We first address the Employer's second and third argument. The Employer argues the 2007 CO which awarded additional permanent partial disability to the lower extremity was "indisputably an award of compensation for the foot under the statute" and that the Employer, having erroneously paid the 2007 order for the leg, is entitled to a credit.

We begin by noting that "lower extremity" is not listed as a scheduled member under D.C. Code § 32-1508(3)(A) – (S). We have stated previously,

> A schedule award refers to the formula for compensating permanent partial disability described in D.C. Code § 32-1508(3)(A) -- (S), which lists certain parts of the body, specifically, (B) Leg lost, 288 weeks' compensation. While "leg" is specifically listed as a scheduled body part, the case law in this jurisdiction is replete with the term "lower extremity" being used interchangeably with "leg" when a schedule award to that body part is at issue.
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> In *Golding-Alleyne*, the DCCA endorsed this interchangeability when it stated that claimant's doctor had rated her left leg impairment at 20% and then footnoted the language in the doctor's report where he gave a 20% impairment rating to the left lower extremity.[1] And, similar to the instant case, the ALJs in Hearings and Adjudication have regularly adjudicated cases where the claimant has injured his back resulting in radiating pain to the lower extremities wherein a claim for a

[1] *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009) at 214.

> schedule award to the lower extremities is sought and an award granted.[2] Insofar as the "lower extremity" and the "leg" are synonymous for purposes of the Act, it was error for the ALJ to deny Claimant's claim for a schedule award to both lower extremities by stating the Act does not provide for an award to the "lower extremity".

Whipps v. Dominican Mechanical Construction, CRB No. 12-111, AHD No. 12-085 (October 10, 2012).

We also note, in addition to the above language, that D.C. Code § 32-1508(3)(D) lists the foot as a scheduled member. While we agree that lower extremity and leg are synonymous for purposes of the Act, this rule is not absolute, especially in cases such as the case before us where there is disagreement whether the permanent partial disability award should be to the leg or foot because of an ankle injury. A review of the 2007 order reveals the ALJ acknowledged the parties arguments wherein the Claimant argued the award should be for the leg and the Employer argued the award should be for the foot. After having addressed the applicable arguments, the ALJ concluded,

> Therefore, the ankle is an impairment to the foot for purposes of the matter at hand. (Footnote omitted.)

Vallez v. Progressive Nursing Staffers, AHD No. 98-531C, OWC No. 526392 (June 14, 2007) at 7.

Unfortunately, the 2007 CO in the "Conclusion of Law" section awarded the Claimant's request for modification concluding stating that the Claimant qualified for a 35% permanent partial disability to his upper left extremity and a 27% permanent partial disability for his left lower extremity. In the "Order" section, the ALJ summarily granted the Claimant's request for relief, which, as the Claimant argued before the ALJ then and before us now, was for an award to the leg.

Clearly, the Order lacks specificity in exactly what was ordered. It cannot be said the order was "indisputably an award of compensation for the foot" as the Employer urges. Indeed, the Employer believed after receipt of the 2007 CO that the award was for the leg and paid in accordance under this belief. It was incumbent upon the Employer at that time to appeal the CO to the CRB or take other appropriate measures to ensure that the CO was clear as to what was in actuality granted. As it stands, it is beyond our jurisdiction to comment upon an un-appealed order from 2007 to attempt to clarify what was awarded.[3] The Employer's argument is rejected.

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[2] See *Smalls v. DCWASA*, AHD No. 11-210, OWC No. 663192 (July 6, 2012); *Cheeks v. WMATA*, AHD No. 10-533A, OWC No. 668706 (October 27, 2011); *Johnson v. WMATA*, AHD No. 08-088A, 640907 (October 20, 2009).

[3] We also urge the parties and the ALJ to avoid such confusion in the future and refrain from using "upper extremity" or "lower extremity" and utilize the body parts listed in D.C. Code § 32-1508(3)(A) -- (S) when pursuing scheduled member awards.

The Employer next argues that the ALJ's finding that the Claimant's current medical treatment is causally related to the work injury is in error as it is not supported by the substantial evidence in the record nor is it in accordance with the law. Specifically, the Employer argues the ALJ's reliance on Dr. Bernadett's opinion was in error as Dr. Bernadett's diagnosis "were not, in fact or argument, medically causally related to the Claimant's work related injury." Employer's argument at 9. Moreover, the Employer argues that the conflicting and nonspecific medical evidence was not only enough to rebut the presumption of compensability, but also that the absence of a specific diagnosis and opinion was enough to defeat the Claimant's claim. We disagree.

A review of the CO reveals the ALJ found the opinions of Drs. Bernadett, Olga Ginzburg, and Joel Kent sufficient to invoke the presumption, a finding the Employer does not appeal. Having invoked the presumption, it is well settled that the Act's presumption of compensability operates only "in the absence of evidence to the contrary." In *Ferreira,* the Court of Appeals held, that "[o]nce the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." *Ferreira,* 531 A.2d at 655; Parodi, 560 A.2d at 526; *Waugh v. D.C. Department of Employment Services*, 786 A.2d 595, 600 (D.C. 2001).[4] The Court has held that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability. *Washington Post v. D.C. Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*). At the Formal Hearing, the Employer argued the same arguments presented before us now.

On this point the ALJ stated,

> To rebut the presumption, Employer relied mainly on argument and did not offer any medical evidence. Employer argued the diagnosis of DDD was predicated on inaccurate medical history with the treating physicians believing Claimant required a microdiskectomy in 1991 as a result of the 1998 work incident. HT p. 122. Employer also argued the diagnosis was generic and made reference to Claimant's age. HT pp. 121 and 127.
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> While Dr. Vimal Lala, a pain management specialist, provided incorrect medical history in the report dated February 27, 2011, Claimant has offered sufficient medical evidence from the remaining treating physicians to establish medical causal relationship. CE 7, pp. 71-72. Additionally, Dr. Marian Shaw, an internal medicine specialist, offered findings based on inaccurate medical history as well. Dr. Shaw diagnosed chronic pain with lumbar radiculopathy, and related the condition to the injury Claimant sustained several years ago. Dr. Shaw was obviously confused regarding the date of the surgical procedure for the lumbar

[4]"Substantial evidence," as defined by the D. C. Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. D. C. Department of Employment Services,* 834 A.2d 882 (D.C. 2003).

> spine. Dr. Shaw indicated the work incident occurred in 1998, and appeared confused when she reviewed medical evidence from Dr. Erland indicating Claimant had the microdiskectomy in 1992. CE 9, pp. 86-87. Despite these shortcomings, Dr. Kent had previously related Claimant's radiculopathy to the work incident. Therefore, the evidence from Dr. Shaw does not disqualify the previous findings from Dr. Kent relating Claimant's lumbar radiculopathy to the work incident. The remaining treating physicians provided accurate medical history regarding Claimant's preexisting back microdiskectomy and attributed the lumbar radiculopathy and degenerative disc disease to the chronic back pain stemming from the work accident of February 22, 1998. Therefore, Employer has not offered substantial evidence to rebut the presumption of compensability, thus entitling Claimant to the recommended medical treatment, including medication, physical therapy, epidural steroid injections and pain management.

Vallez, supra at 8-9.

This paragraph follows a lengthy discussion outlining the treatment and opinions rendered by Dr. Bernadett, Dr. Kent and Dr. Ginzburg. The Employer offered no evidence or medical opinion to opine the Claimant's condition was unrelated to the work injury to rebut the presumption, a fact the ALJ found fatal to the Employer's defense. With the presumption un-rebutted, the ALJ concluded the Claimant's degenerative disc disease and resulting symptoms were medically casually related to the work injury. We affirm this finding.

Finally, addressing the Employer's first argument, the Employer argues that the ALJ, in using the calculation put forth by the Claimant, erroneously used an average weekly wage of $1,400.00 and not the reduced AWW of $1,120.00 as reflected in the 2001 CO. The Employer argues that the ALJ impermissibly modified the prior order by adjusting the AWW. We agree with the Employer.

A review of the procedural history reveals that in the 2001 CO, the ALJ found the Claimant had voluntarily limited his income by refusing a job within his physical capabilities and that the Employer was to "pay claimant continuing wage loss benefits based upon the average weekly wage available for working twenty hours weekly in the telephone triage position.[5]" In the "Order" section, the ALJ determined the Employer was to pay the Claimant based upon an average weekly wage of $1,120.00.[6] This CO was appealed and affirmed by the then Director.[7] Based upon the record before us, the parties have not sought to modify that AWW since the 2001 Order, including most notably the Claimant.

Thus, until such time as either party seeks to modify the AWW, the Claimant's continuing wage loss benefits is controlled by the AWW of the 2001 Order which is the law of the case. As such,

[5] *Vallez v. Progressive Nursing Staffers*, OHA No. 98-531B, OWC No. 526392 (March 30, 2001) at 8.

[6] We are uncertain, based upon the CO before us, how the ALJ calculated the weekly wage. We assume this sum represents the AWW of the alternative position, a telephonic triage nurse.

[7] *Vallez v. Progressive Nursing Staffers*, Dir. Dkt. No. 01-45; OHA No. 98-531B (December 6, 2001).

we are forced to remand the case with instructions to determine whether or not, based upon the AWW as found in the 2001 Order, the Employer has recouped the credit owed, thus entitling the Claimant to continuing wage loss benefits.[8]

CONCLUSION AND ORDER

The April 4, 2013 Compensation Order AFFIRMED, in part, and VACATED, in part. The Compensation Order's conclusion that the Employer is not entitled to a credit for overpayment of the 2007 Compensation Order, and that the Claimant is entitled to the medical treatment requested is AFFIRMED. The Compensation Order's conclusion that the Employer has recouped the overpayment is VACATED and REMANDED for further findings of facts and conclusions of law consistent with this opinion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

December 2, 2013
DATE

[8] The ALJ may do this in any manner necessary to ascertain the rights of the parties, including opening the record to allow for additional evidence or memorandum.