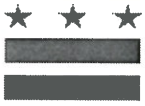
GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 JUN 9 PM 1 24

CRB No. 15-013

ZINA HUNTER,

Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,

Employer–Petitioner.

Appeal from a Compensation Order on Remand of January 2, 2015 issued by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 10-092, DCP No. 30100852406-0001

Harold Levi for Claimant
Frank McDougald for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, AND HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

PROCEDURAL HISTORY

On September 23, 2013 a Compensation Order was issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the District of Columbia Department of Employment Services (DOES). That Compensation Order was issued for the purpose of determining Claimant's entitlement to benefits under the D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act, or PSWCA). In that Order, the ALJ determined that Claimant's right foot injury was included within the injury that has been accepted as compensable by the Public Sector Workers' Compensation Program (PSWCP), granted Claimant's claim for medical care for both feet, and resumed temporary total disability benefits, which had been terminated based upon the results of an Additional Medical Evaluation (AME) performed on February1, 2012 which

concluded that Claimant's right foot injury was unrelated to the table dropping incident or the "subsequent treatment" therefor, and that Claimant had recovered sufficiently to permit her to return to her pre-injury job.

The District of Columbia Department of Youth Rehabilitation Services (Employer) appealed that award to the Compensation Review Board (CRB), arguing that DOES did not have jurisdiction to consider claims related to the right foot because the PSWCP had yet to issue a Notice of Determination in connection with the right foot, having only accepted the claim for injuries to Claimant's left foot.

Claimant opposed the appeal, arguing that under the facts of this case, the right foot injury should be considered as part of the accepted injury under the "quasi course of employment" theory, inasmuch as Claimant asserts that right foot injury resulted from a fall that she sustained while leaving her doctor's office wearing a "CAM Boot" on her left foot and using crutches.

The CRB vacated and reversed the award because the PSWCP had not issued a notice of determination (NOD) concerning whether the right foot injury is compensable under the Act, thereby denying DOES jurisdiction to hear the claim at this time, and the Compensation Order did not make clear whether the award of ongoing temporary disability benefits was premised upon incapacity related to the right foot. The matter was remanded for further consideration and explanation.

The ALJ issued a Compensation Order on Remand (COR) on January 2, 2015, again granting Claimant's claim for temporary total disability benefits, which COR was appealed by Employer to the CRB. Claimant filed an opposition to that appeal.

Because the facts upon which the award is based are supported by substantial evidence the COR is affirmed.[1]

FACTS OF RECORD AND ANALYSIS

Claimant worked for Employer as a Recreational Specialist at the Oak Hill Juvenile Services facility. Part of her duties included setting up recreational equipment. On July 24, 2010, Claimant and an Oak Hill resident were carrying a table. The resident dropped his end of the table, causing Claimant to drop her end onto her left foot.

Claimant filed a claim under the Act for a left foot injury, which was accepted by the PSWCP on August 26, 2010 (EE 3). She was treated by several physicians for a contusion and three fractured toes. That treatment included wearing "CAM Boot", which is a type of removable, hard cast-like support, and using crutches.

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[1] The scope of review by the CRB, as established by the PSWCA and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a written 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act (PSWCA)), at § 1-623.28 (a), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to 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.

On August 23, 2010, Claimant alleges that while leaving the office of her treating physicians, she stumbled and fell down four steps outside the doctors' office, injuring her right foot and ankle. Nonetheless, Claimant was authorized to return to light duty work on October 14, 2010 by one of her physicians, and Claimant attempted to do so. For reasons not discussed in the Compensation Order of September 23, 2013, Claimant's employment was terminated "shortly" after her return on October 25, 2010, and her temporary total disability benefits were resumed. Claimant testified that she advised her claims examiner, Selma Taylor, of the right foot injury, but no additional claim form was filed, and no separate written notice of acceptance or denial has been issued regarding the right foot and ankle.

Although Employer contested Claimant's assertion at the time of the formal hearing that the right foot injury claim had been "deemed accepted" (HT 11), and "is not a matter that is before" the ALJ (HT 24), the Compensation Order did not identify jurisdiction over the claim as a contested issue. Further, although the Compensation Order identified "nature and extent of Claimant's remaining disability" as an issue, it contained no discussion distinguishing whether the finding of a current inability to return to the pre-injury job is premised in whole or in part upon ongoing incapacity due to the injury that has been accepted. Although the ALJ discussed the AME's findings, he did not make clear whether he accepted or rejected them vis a vis the ability to return to work. Rather, the ALJ wrote:

> The IME of Dr. Weiner indicates that based upon a review of her medical records, diagnostic reports and examination Claimant's *work related injury* has resolved and her *remaining disability* is not sustained in the performance of her duties.

Compensation Order of September 23, 2013, p. 5 (emphasis added).

Following this recitation of his interpretation of the AME report, the ALJ undertook an analysis that included consideration of whether, despite a lack of medical causation, the right ankle injury was nonetheless compensable as a mater of legal causation, and determined that it was. Based upon this determination, the claim was granted.

In the appeal of the Compensation Order, the CRB did not consider whether the ALJ's analysis and determination that the alleged right foot and ankle injuries are ultimately compensable under the theory expounded upon in the Compensation Order. The CRB noted that it was undisputed that no separate written claim had been made for the right foot and ankle condition, that the condition was related to a fall at a later date, place and time, and is to a different body part, than the claim that had been accepted. Further, the CRB pointed out that it was undisputed that there has been no NOD issued with regard to the compensability of that injury.

The CRB quoting from *Jaiyeola v. D.C. Public Service Commission*, CRB No. 13-022, OHA No. PBL 00-058B, DCP No. LT-DPE000340 (July 26, 2013):

> It is now settled that a Final Determination by DCP [now known as the PSWCP] is a prerequisite to AHD's adjudication of a request for benefits. That is to say, AHD does not have jurisdiction to determine a claim unless the employer has issued a determination denying liability for that claim.
>
> In 2012, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL 05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code §1-623.24 (b) (1) requires that the employer

> make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, OHA No. PBL08-066, DCP No. DCP007970 (July 2, 2012). Since *Sisney*, the CRB consistently has held that a notice of determination is a prerequisite for AHD to have authority to hold a formal hearing: *Downing v D.C Public Schools*, CRB No. 12-081, AHD No. PBL 11-015, DCP No. 30090824958-0001(August 3, 2012), *Brooks v. DCDMH*, CRB No. 10-062, OHA No. PBL 96-065B, DCP No. 7610100001199-0016 (August 16, 2012), *Newby v. DCPS,* CRB No 10-162, OHA No. PBL 01-064D, DCP No. LT-PARK001712 (September 11, 2012), *Freeman-Cunningham v. D.C. Dept. of Transportation*, CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (September 19, 2012, *Jackson v. D.C. Housing Authority,* CRB 12-104, AHD PBL No. 11-022A, OWC No. 30110173190-0001 (November 11, 2012), *Bonds. v. D.C. Dep't of Corrections*, CRB No. 12-038,AHD No. PBL08-061D, DCP No. 300903255759-001 (December 6, 2012) and *Buitrago v. D.C. Health HIV/AIDS Administration,* CRB No. 12-076, AHD No. PBL10-032C, DCP No. 761010-006-0001 (March 20, 2013).

The CRB also noted that the issue was presented to the ALJ but was not discussed or analyzed from the jurisdictional perspective. Claimant did not dispute that the PSWCP has not made a determination with respect to whether the right foot and ankle injury is compensable

The CRB acknowledged that on the record from the formal hearing, the ALJ could have determined whether Claimant was unable to return to work due to her left foot condition alone, without regard to the condition of the right foot and ankle, or that the ALJ could have concluded that it was the right foot and ankle problems alone that prevent her from doing so.

The CRB therefore vacated the award for lack of clarity, and remanded the case for further consideration of the claim for temporary total disability and ~~to~~ vacated the award of medical care to the right foot and ankle until such time as DOES obtains jurisdiction over that claim. Specifically, the CRB wrote:

> CONCLUSION AND ORDER
>
> The award of benefits related to the right ankle was rendered without DOES having proper jurisdiction, and is vacated. The award of temporary total disability benefits is vacated as being inadequately explained given the multiple claims of the cause of the underlying incapacity, and the matter is remanded for further consideration of the temporary total disability claims considering the effect of the accepted injury only.

Decision and Remand Order of January 28, 2014, p. 4.

On January 2, 2015, a Compensation Order on Remand was issued, in which the ALJ found that Claimant's left foot and ankle injury continued to disable Claimant from her job, and ordered that Claimant's temporary total disability benefits be restored.

Employer filed an Application for Review (AFR) of the Compensation Order on Remand and a Memorandum of Points and Authorities in support thereof (Employer's Brief). Employer argued

that the ALJ impermissibly "considered" the right foot injury in making the award for disability related to the left foot, and that the ALJ improperly weighed the evidence.

Claimant filed and opposition to the AFR and a Memorandum of Points and Authorities in support thereof (Claimant's Brief), asserting that the Compensation Order on Remand is supported by substantial evidence and should be affirmed.

Employer makes two arguments in Employer's Brief.

The first is that the ALJ erred by "considering" the right foot injury when making an award for the left leg. Quoting from Employer's Brief:

> The CRB has made it abundantly clear that an ALJ lacks jurisdiction to adjudicate a claim unless a final determination, also known as a Notice of Determination, has been issued by the Public Sector Workers' Compensation Program [PSWCP] [citations omitted]....
>
> In the instant matter, although the ALJ found he lacked jurisdiction to award benefits for the right ankle, in awarding Claimant benefits for her left foot he stated that "I relied on Claimant's testimony and the reports of Dr. Smith who has treated Claimant for **both injuries since the date of the injuries to the present**" (emphasis added). COR at 8. Thus, in awarding Claimant PSWC benefits for her left foot, the ALJ considered an injury (right ankle) for which he clearly lacked jurisdiction. Here, the ALJ not only mentioned the right ankle injury, he **relied** on that injury to support the award to Claimant for her left foot injury. Pursuant to the January 28, 2014 DRO, the ALJ lacked jurisdiction, for any reason, to consider the right ankle injury because the PSWCP has never made a determination regarding that injury. Accordingly, the January 2, 2015 COR should be vacated.

Employer's Brief, p. 5 (bold in original).

The language quoted by Employer from the Compensation Order in the above passage is the only reference to Claimant's right foot or ankle to which Employer has directed our attention.

We agree with Employer's implied acknowledgement that there is a difference between an ALJ mentioning something and an ALJ relying upon something. What we do not agree with is that the mention made by the ALJ suggests "reliance" upon anything related to the right ankle injury in making the award based upon the left foot. In other words, while the right foot was "mentioned", we see nothing to suggest that the existence of the right ankle injury had any impact upon the award related to the left foot injury.

Employer's second argument is that "The Compensation Order is Not Supported by Substantial Evidence". This argument is premised upon Employer's view that the ALJ did not accord the

AME report of Dr. Ian Weiner "proper weight", asserting that the report "clearly shows Claimant had recovered from the injury and was able to return to work." Employer also argues that the ALJ gave inadequate reasons for not accepting the AME opinion. Employer's Brief, p. 6.

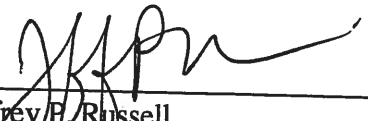
Again, we disagree. As a general principle, it is the province of the fact finder, and not an appellate review body, to determine what weight to give the evidence. See, *George Washington University v. Violand*, 940 A.2d 965 (D.C. 2007); *Bowser v. Clark Construction*, CRB No. 14-004, AHD No. 11-046(B) (August 14, 2014). Further, "'Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Washington Metro Area Transit Auth.*, 926 A.2d at 147 (quoting *Ferreira v. District of Columbia Dep't of Emp't Servs.*, 667 A.2d 310, 312 (D.C. 1995))." *Reynolds v. DOES*, 86 A.3d 1157 (D.C. 2014), at 1160.

The ALJ relied upon Claimant's testimony, her written job description, and the views expressed by Dr. Frank Smith, her treating physician, who opined on April 8, 2013 that Claimant had "constant" left toe pain, at a level such that she cannot continue working, was in danger of developing Reflex Sympathy Disorder (RSD) and may require reconstructive surgery. He also indicated that he viewed Dr. Weiner's report as being somewhat speculative, and as not being informed by any information later than medical reports in 2011. Compensation Order, p. 8. Employer does not dispute that Dr. Smith opined as the ALJ stated, or that Dr. Weiner did not have any medical reports later than 2011.

The evidence cited by the ALJ is such evidence that "a reasonable might accept" it to support the proposition that Claimant's left foot remains injured and disabling. Hence, the award is supported by substantial evidence.

CONCLUSION AND ORDER

The Compensation Order on Remand's findings of fact are supported by substantial evidence and the award restoring Claimant's temporary total disability benefits is in accordance with the law, and is affirmed.



Jeffrey P. Russell
Administrative Law Judge

JUNE 9, 2015
DATE