GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-123

SYLVIA J. MANNS,

Claimant–Petitioner,

v.

XEROX CORPORATION AND SEDGWICK CMS CORPORATION,

Employer/Carrier–Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
AHD No. 09-076A, OWC No. 653614

Frank R. Kearney, Esquire, for the Claimant-Petitioner
Michael H. Daney, Esquire, for the Employer-Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE[1], and JEFFREY P. RUSSELL[2], *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

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

[1] Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

[2] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

OVERVIEW AND PROCEDURAL HISTORY

Claimant alleged that while working as a service technician for Employer on September 18, 2008, she twisted her right foot when she stepped off a curb and as a result she was disabled from September 24, 2008 to February 10, 2009. Employer contested her claim for disability benefits on the basis there was no accidental injury and even if the injury occurred, any resulting disability was not medically causally related.

After a formal hearing, the presiding Administrative Law Judge (ALJ) granted Claimant's claim for relief.[3] The ALJ found Claimant proved she had suffered an accidental injury and that Employer had produced no evidence to rebut the statutory presumption of compensability. The ALJ determined that the record evidence "conclusively establishes claimant suffered an accidental injury, while at work on September 18, 2008, which arose out of and in the course of her employment."[4] Employer timely appealed arguing that the ALJ failed to consider any of the evidence it submitted to rebut accidental injury or causal relationship.

In resolving the issues raised on appeal, the CRB stated:

> A review of the CO reveals that in coming to the determination that an accidental injury had occurred which arose out of and in the course of her employment, the ALJ *solely* relied upon testimony of the Claimant and the medical reports generated after September 18, 2009 (sic). The ALJ stated,
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> > Employer has, however, produced no evidence to rebut the statutory presumption of compensability.
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> *Manns v. Xerox Corporation, et al.*, AHD No. 09-076, OWC No. 653614 (March 17, 2010).
>
> We find this statement in error as there is evidence, in the form of medical reports prior to September 18, 2009 (sic) and the testimony of Mr. Perry, which could rebut the statutory presumption of compensability. Upon remand the ALJ shall address the Employer's evidence as necessary to determine whether or not the Employer has rebutted the statutory presumption of compensability. If so, then the presumption falls from the case and the burden of production shifts to the Claimant to prove, by a preponderance of the evidence, that a work-related injury or event caused or contributed to her disability and the competing evidence is weighed without reference to the presumption of compensability. (Citation omitted.)[5]

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[3] *Manns v. Xerox Corporation*, AHD No. 09-076A, OWC No. 653614 (March 17, 2010) (*Manns I*).

[4] *Id*. at 5.

[5] *Manns v. Xerox Corporation*, CRB No. 10-100, AHD No. 09-076A, OWC No. 653614 (September 15, 2011), pp. 3-4.

In concluding that the CO was not supported by substantial evidence and not in accordance with the law, the CRB reversed and remanded for further consideration with specific instructions:

> Thus, consistent with the foregoing discussion, upon remand the ALJ shall make the necessary findings of fact and conclusions of law, including any necessary credibility findings, addressing the correct issues: 1) whether or not an accidental injury within the scope of the Act occurred on September 18, 2009 (sic) and, if so; 2) whether or not the Claimant's disability is medically causally related to the September 18, 2009 (sic) injury.

Manns, CRB No. 10-100, p. 4.[6]

In a Compensation Order on Remand (COR), the ALJ re-examined the record evidence as to whether Claimant sustained an accidental injury on September 18, 2008 and determined "conclusively" that Claimant did not and denied the claim for relief.[7] The ALJ reasoned that, given the medical evidence from Claimant's treating physicians noting her history of right ankle pain coupled with the credible testimony of her supervisor that no injury was mentioned to him, Claimant did not sustain a right ankle injury on September 18, 2008.[8] Claimant proceeded to file a timely appeal with Employer filing in opposition.

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. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard 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.

On appeal, Claimant challenges whether the COR is supported by substantial evidence and is accordance with the law. Specifically, Claimant argues that the ALJ, contrary to the CRB's directive, did not determine whether Employer's evidence rebutted the presumption of compensability. Claimant takes the position that the ALJ did not follow the CRB's instructions and had he done so, Employer's evidence would not have been found comprehensive enough to

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[6] The CRB also determined that medical causal relationship was a contested issue that was raised at the formal hearing by Employer but the issue was neither listed in the CO nor was it addressed by the ALJ. Accordingly, the ALJ was directed to specifically address the issue if it was determined that an accidental injury within the scope of the Act had occurred. *Id.*

[7] *Manns v. Xerox Corporation*, AHD No. 09-076A, OWC No. 653614 (September 30, 2011) (*Manns II).*

[8] *Id*., p. 4.

rebut the presumption and, even if it was found to have rebutted the presumption, a weighing of the evidence without the benefit of the presumption would prove Claimant's claim for relief by a preponderance of the evidence.

In both of the compensation orders in this matter, the ALJ dealt initially with the issue of whether Claimant sustained an accidental injury and then proceeded to ascertain whether that injury arose out of and in the course of her employment, notwithstanding that this was not specifically stated as a contested issue.[9] Nonetheless, the ALJ listed legal causation as the second issue for resolution in both compensation orders and omitted any reference to the actual second issue in contention, whether any resulting disability was medically causally related to the work injury.

In the initial CO in the matter, *Manns I*, the ALJ found that Claimant twisted her ankle on September 18, 2008 while attempting to keep a cart loaded with equipment from tipping over, accepted Claimant's testimony as to what she told her treating physician at the initial treatment for that injury, and favorably evaluated the treating physicians' medical reports of Claimant's subsequent treatment. The ALJ accordingly concluded this constituted substantial evidence that Claimant "sustained an accidental injury at work within the meaning of § 32-1501(12)[10] on September 18, 2008."[11]

In *Manns II*, the ALJ found that Claimant "allegedly twisted her foot" on September 18, 2008, gave credence to the time difference stated by the treating physician as to when the incident occurred, relied upon the medical reports prior to September 18, 2008 of the treatment to Claimant's right ankle, and found Claimant's supervisor credible that no mention was made by Claimant that she sustained an injury during a telephone conversation. Based on this evidence, the ALJ determined that given the "reliable medical evidence from claimant's treating physicians" coupled with the "credible testimony of claimant's supervisor" allowed him to conclude that Claimant "did not sustain the alleged right ankle injury on September 18, 2008".[12]

Claimant's arguments on appeal can be synthesized into the basic assertion that, in the COR, the ALJ did not follow the CRB's instruction to evaluate the evidence adduced by Employer to determine whether it rebutted the presumption of compensability. Although it was determined that the ALJ had erred in stating Employer had submitted no evidence to rebut the presumption that the injury sustained on September 18, 2008 had arisen out of and in the course of employment, the first enumerated instruction, directed the ALJ to determine whether or not an accidental injury within the scope of the Act occurred on September 18, 2008.

For the decision in *Manns II*, the ALJ appears to have focused on the first enumerated instruction in the CRB's remand order. In doing so, the ALJ basically disavowed the findings of fact made in *Manns I* as they were not incorporated by reference. New findings were made to support a new conclusion. Thus, in keeping with our standard and scope of review, the CRB is

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[9] See Hearing Transcript, p. 7-8.

[10] D.C. Code § 32-1501(12) states: "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment.

[11] *Manns I, supra*, p. 4.

[12] *Manns II, supra*, p. 4.

constrained to uphold this new conclusion provided it is supported by substantial evidence in the record.[13] However, while the ALJ found there was substantial evidence to support the conclusion that Claimant did not sustain an accidental injury, we can not understand how he could justifiably do so by making a contradictory assessment of the same evidence and the exclusion of other evidence previously found to be persuasive.

In both the initial CO and the COR, after reciting the stipulations, the ALJ repeated the first paragraph wherein the findings were made regarding Claimant's work history with Employer, her duties, the physical demands of the job, a description of work incident giving rise to the injury in question, and Claimant's self-treatment. This initial paragraph is set out almost verbatim with one significant difference. In describing the work incident and self-treatment, the ALJ found in the CO

> On September 18, 2008, after claimant unloaded said items from her car and placed on a handcart, the cart tilted and when she attempted to save the vacuum cleaner and lap top computer from the tilted cart at the curb, she twisted her right foot. While home in the evening, claimant soaked her foot in water with Epsom salt and applied an Ace bandage around the injured foot. She reported to work the next day and repeated said remedial measures at home over the weekend.

Manns I, p. 2.

In the COR, in describing this same incident, the ALJ inserted the word "allegedly" so when Claimant attempted to save the cart from tipping over "she allegedly twisted her right foot." Even though Claimant has now "allegedly" twisted her right foot, she still went home that evening, soaked the foot and "applied an ACE bandage around the injured foot." *Manns II*, p. 2. Given the exact same recitation of how the incident unfolded, the ALJ provides no explanation for the change in the factual outcome.

In assessing the September 22, 2008 initial treatment report of Claimant's treating physician, Dr. Claudia Donovan, the ALJ presented alternative interpretations to the statement contained in the report that the injury in question occurred two weeks prior. In the CO, the ALJ relied upon Claimant's testimony to refute the doctor's notation that the injury occurred two weeks ago. In fact, the ALJ reasoned that the "inconsistent date of injury" did not negate the occurrence of an injury on September 18, 2008. In the COR, however, the ALJ accepted the inconsistency as evidence that the injury did not occur on September 18, 2008 as claimed.

The ALJ also gives disparate treatment to the September 22, 2008 treatment report with regard to how it either supports or disproves whether Claimant sustained an accidental injury. In the CO, the ALJ found that Dr. Donovan diagnosed an ankle sprain, ordered an MRI, and referred her for orthopedic follow-up where the date of injury is verified and the totality of the medical evidence after September 22, 2008 was deemed substantial evidence that an accidental work injury was sustained by Claimant. In the COR, the ALJ found that on September 22, 2008, Dr. Donovan "did not diagnose any acute injury." The ALJ did not mention any of Claimant's medical reports after September 22nd. Rather, he used medical reports from May 2008 to confirm Claimant's prior history of right ankle pain to conclude that no work injury occurred on September 18th.

[13] *Marriott, supra*.

The ALJ in this matter has given separate and distinct interpretations to the same evidentiary record. While we know that under *Marriott* the evidentiary record is capable of producing substantial evidence to support divergent outcomes, the difference would usually attend when viewed and evaluated by different individuals, not by the same judge on separate readings of the same record. That said, the ALJ here has committed error on both occasions by his exclusionary statements of the evidence presented.

In *Manns I*, the ALJ specifically stated that Employer, contrary to fact, had produced no evidence to rebut the statutory presumption that Claimant's accidental injury arose out of and in the course of her employment. Given this obvious omission, we were compelled to reverse and remand for the consideration of that rebuttal evidence. On remand, the ALJ has committed the same error, only now with respect to Claimant's evidence.

In concluding that Claimant did not sustain an accidental injury on September 18, 2008, the ALJ stated

> Thus, predicated on the reliable medical evidence from claimant's treating physicians in conjunction with the credible testimony of claimant's supervisor, it is concluded claimant did not sustain the alleged right ankle injury on September 18, 2008. Accordingly, absent evidence supporting that an accidental injury occurred on September 18, 2008, the remaining issue need not be discussed.

Manns II, p. 4.

The ALJ's reasoning is faulty in two respects. The ALJ references reliance on the reliable medical evidence of Claimant's "treating physicians" but only evaluated the initial report of Dr. Donovan, which he used to prove the negative after previously using it corroborate that the injury occurred. Omitted from any consideration are all of the subsequent orthopedic reports lending support to injury having occurred on September 18, 2008. While there is no general requirement for an ALJ to inventory the evidence used in resolving an issue, there is a requirement to acknowledge and address evidence adduced in support of the contested issue under consideration.

The ALJ also erred in his final statement that there was an absence of evidence that would support that accidental injury occurred on September 18, 2008. This statement flies in the face of the ALJ's statements in the initial CO that

> "[t]he record contains ample evidence of the work-relatedness of claimant's injury. Dr. Stephens, to whom claimant had been referred for an orthopedic evaluation on October 1, 2008, opined she suffered a right ankle twisting injury while trying to move a loaded cart at work on September 18, 2008. (CE 1).
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> In completing the Carrier's Form 51 "Physician's Extension for Disability Benefits," Dr. Adams unequivocally noted on December 18, 2008, that claimant's accident on September 18, 2008, was work-related. (CE 2). Likewise, in her verification of claimant's treatment on January 28, 2009, Dr. Wilson affirmatively answered to the question of whether her injury on September 18, 2008, was work-related. (CE 1).

Manns I, p. 5.

Clearly, based on the above-referenced documentary evidence, that is still a part of the record in this matter, there is "ample evidence" in the record that appears to support Claimant's claim that she sustained an accidental injury on September 18, 2008. For the ALJ not to evaluate this evidence in making his determination and actually to have stated that no such evidence existed, when the facts are otherwise, constitutes error that must be corrected on remand.

In attempting to resolve the issue of whether Claimant sustained an accidental injury on September 18, 2008, the ALJ has rendered two decisions in which he has selectively used the evidence to come to different conclusions. On remand, it is requested that the ALJ be of one mind and assess all the evidence presented by both parties that addresses whether an accidental injury occurred. To the extent the ALJ conjoins whether the injury arose out of and in the course of the employment with accidental injury, if it is determined that Claimant has invoked the presumption of compensability, he shall specifically set out the evidence adduced by Employer to rebut the presumption. If the presumption is rebutted, the evidence shall be assessed without that benefit to Claimant and with Claimant having the burden of proving by a preponderance of the evidence that the injury occurred.

CONCLUSION

The Compensation Order on Remand of September 30, 2011 is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order on Remand of September 30, 2011 is VACATED and this matter is REMANDED for further consideration in keeping with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

March 21, 2012
DATE