

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

**COMPENSATION REVIEW BOARD
CRB 11-153**

**BRENDA MURPHY,
Claimant-Petitioner,**

v.

**HOWARD UNIVERSITY HOSPITAL AND SEDGWICK CMS,
Self-Insured Employer and Third Party Administrator, Respondent.**

Appeal from a Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 11-162, OWC No. 654533

Matthew J. Peffer, Esquire, for the Claimant¹
William Schladt, Esquire, for the Employer and Third Party Administrator

Before LAWRENCE D. TARR, JEFFREY P. RUSSELL² AND HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the request filed by the claimant for review of the November 23, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In the CO, the ALJ denied the claimant's claim because she determined that there is no medical causal relationship between the claimant's current lumbar condition and her 2008 accident at work.

We AFFIRM.

¹ The claimant was represented by Jason Zapposodi, Esquire, at the formal hearing.

² Judge Jeffrey P. Russell has been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

BACKGROUND FACTS OF RECORD

The claimant, Brenda Murphy, worked for the employer, Howard University Hospital, as a nursing assistant. The claimant testified that on April 15, 2008, she tripped and fell in the employer's parking lot after her heel caught in a rocky hole, sustaining what was later described in medical records as a Lisfranc injury to her left foot with subluxation of the tarsal metatarsal joints.

The claimant has a complex medical history that includes diabetes, hypertension, and difficulties with low back pain. In November 2007, the claimant injured her low back at work when she assisted a patient and was treated by an orthopedic surgeon, Dr. Sanakara R. Kothakota. Dr. Kothakota diagnosed degenerative spondylosis of the lumbar spine, osteoarthritis in both hips and a history of deep venous thrombosis with vena cava filter. Although Dr. Kothakota referred the claimant to physical therapy, recommended home exercises, prescribed medication and recommended the claimant return in two weeks, the claimant testified she did not go back to Dr. Kothakota and only missed two days of work.

Four days after the 2008 injury at work, on April 19, 2008, the claimant presented at the employer's emergency room with complaints of bilateral lower extremity swelling of two or three days duration. The claimant was admitted with problems of decompensated acute-on-chronic heart failure, history of asthma, uncontrolled diabetes mellitus, chronic kidney disease, hypertension, and acute hypoxic respiratory insufficiency.³ The claimant left the hospital on April 24, 2008, against the advice of her doctors.

About three months later, the claimant was admitted to Prince George's Hospital Center from July 19 to July 25, 2008. The admission report stated the claimant was admitted because of a number of medical conditions, one of which was a fractured left ankle. The claimant returned to Dr. Kothakota who casted her injured foot and prescribed crutches and a brace.

Dr. Kothakota also examined the claimant on April 28, 2008, May 29, 2008, June 20, 2008, and August 8, 2008. The claimant testified she began to experience worsening low back pain in June 2008. None of Dr. Kothakota's reports from these examinations stated the claimant was experiencing any low back pain.

At the conclusion of his last examination on August 8, 2008, Dr. Kothakota released the claimant to return to work on a trial basis. He wanted to see the claimant one month later, but no reports from any other examinations by Dr. Kothakota have been submitted.

The claimant began treating with Dr. John E. Bubser, a podiatrist, on October 18, 2008. Dr. Bubser reported he has been treating the claimant for a diabetic neurotrophic ulceration which was secondary to Charcot osteoarthropathy. Dr. Bubser reported the claimant cannot return to her regular work because of her foot problems.

³ It should be noted that although there is no mention of an accident at work in this medical report, the employer stipulated that the claimant sustained an injury at work on April 15, 2008.

Apparently at Dr. Bubser's suggestion, the claimant was seen by her primary care physician, Dr. Lipishree Nayak, who, in turn, referred her to an orthopedist for her back pain in November 2009. Dr. Michael Magee, at Capital Orthopedic Specialists, examined the claimant on November 9, 2009, and reported the claimant was having right posterior hip pain from an incident in 2006, when she was pushed during a CPR class. Dr. Magee injected the claimant with lidocaine, and prescribed physical therapy and medicine.

The claimant was examined by Dr. Magee's associate, Dr. Leonid Selya, on December 12, 2009. Dr. Selya diagnosed advanced degenerative disc disease, lumbosacral instability with spinal stenosis and radiculopathies. Dr. Selya recommended a lumbar spine MRI. Neither Dr. Magee nor Dr. Selya suggested that the claimant's problems were related to the April 15, 2008, accident at work.

Also admitted into evidence were reports from about thirty-five physical therapy sessions that the claimant received at Rehab at Work under the guidance of Renee M. Harrigan, DPT. Ms. Harrigan has stated her belief that the claimant's low back pain is a "likely result" of the structural changes caused by the claimant's left foot fractures.

Dr. Marc B. Danziger, an orthopedic surgeon, examined the claimant on May 12, 2009, March 1, 2011, and July 19, 2011, at the employer's request. It is Dr. Danziger's opinion that the claimant sustained a Lisfranc injury when she fell on April 15, 2008 and that by March 1, 2011, the fracture did not require any further treatment but that any ongoing medical treatment needed by the claimant was caused by her diabetes and Charcot neuropathy.

At his final IME examination on July 19, 2011, Dr. Danziger has stated the claimant had not presented with back problems at either of his earlier IMEs and that her back problems "in no way" were related to her work injury. The ALJ denied the claim and the claimant timely appealed.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed CO are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of Act.

Consistent with this standard of review, the CRB is constrained to uphold a CO that 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. *Marriott, supra*.

ANALYSIS

In the Compensation Order, , the ALJ first determined the claimant was entitled to the rebuttable presumption that there is a causal relationship between the accident and her current back condition and that the employer's evidence sufficiently rebutted the presumption. The ALJ held:

In that Dr. Danziger's opinion successfully rebuts the presumption regarding Claimant's back condition, the burden reverts to Claimant to prove, by the preponderance of the evidence, her entitlement to the medical benefits claimed. Although the rationale set forth in the findings and conclusions of Murphy's physical therapist were cogent and persuasive, the weight of the medical evidence fails to support her claim.

In that Murphy's treating physicians do not provide an opinion regarding the medical causal connection between her back complaints and her severe left foot deformity, the IME opinion of Dr. Danziger must take precedence. There is a dearth of medical evidence to show that the need for further medical attention to Claimant's lumbar area is related to the 2008 work accident.

CO at 5, (Citation and exhibit reference omitted).

On review, the claimant first argues that the ALJ erred as a matter of law when she determined Dr. Danziger's opinion "must take precedence." The claimant does not deny that Dr. Danziger was the only medical doctor who opined on the issue of medical causation. The claimant argues that the ALJ erred because the claimant could not afford to pay for a medical report and therefore giving Dr. Danziger's opinion preference is wrong because it "necessarily excludes those claimants unable for financial reasons or otherwise to procure such an opinion on their behalf." *Id.* at 4, 6.

We disagree that the ALJ erred. The law places the legal burden on the claimant to prove her case by a preponderance of the evidence. We know of no authority, and the claimant has not provided any, that permits the CRB to ignore this burden because a party has insufficient economic resources to obtain evidence.

Moreover, it is speculation to suggest that had the claimant gotten a report, the doctor would have said there was a medical causal connection. Proof must go beyond surmise, conjecture, or speculation. *Matthews v. D.C. Dep't of Child and Family Services*, CRB No. 09-078, AHD PBL No. 06-075; DCP No. 761010-0008-2003-0002 (June 23, 2009), citing *Jones v. D.C. Dep't. of Corrections*, Dir. Dkt. No 22-00, OHA PBL 00-18, OBA No. 002171 (April 20, 2001).

The claimant further argues that the ALJ should have accepted the opinion of physical therapist Harrigan over that of Dr. Danziger. This argument asks us to reweigh evidence, which is something that we cannot do. As is often noted, the CRB must uphold a Compensation Order that 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. *Marriott, supra*.

The claimant additionally argues that the ALJ erred in relying on Dr. Danziger's opinion because he incorrectly stated that the claimant "now has new complaints of low back pain." This argument also has no merit.

The complete sentence in which this phrase appears stated "She now has new complaints of low back pain despite in my (March 11, 2011) IME of having no back symptoms."

Dr. Danziger's March 11, 2011, report stated the claimant presented "in no acute distress" and that "[h]er low back remains non-tender in the midline and paraspinal muscles and there is full flexion, extension, lateral bending and lateral rotation." Therefore, as to Dr. Danziger, the claimant's back complaints in July 2011 were new since she did have those complaints when he last examined her in March 2011. His medical opinion is not premised on an incorrect factual predicate as argued by the claimant.

Lastly, the claimant argues that the ALJ erred because she failed to make finding of fact on whether the claimant's low back and right hip pain from April 15, 2008, up to Dr. Danziger's July 19, 2011, examination were causally related to the accident at work. However, the CO identified the issue presented as "Is there a medical causal relationship between Claimant's current lumbar condition and her 2008 employment injury." Therefore, the ALJ did not err in not deciding whether the claimant's complaints between April 2008 and July 2011, were medically causally related to the work accident.

CONCLUSION AND ORDER

The ALJ's determination that the claimant's current back symptoms are not medically causally related to her work injury is supported by substantial evidence in the record and is in accordance with the applicable law. The November 23, 2011, Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
ADMINISTRATIVE APPEALS JUDGE

March 20, 2012

Date