

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-075

**AURA ALVAREZ-MEDINA,¹
Claimant- Petitioner,**

v.

**EMBASSY SUITES AND CHUBB GROUP INSURANCE COMPANY
Employer/Carrier- Respondent**

Appeal from an April 17, 2015 Compensation Order by
Administrative Law Judge Douglas A. Seymour
AHD No. 13-393, OWC No. 672436

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 AUG 25 PM 11 00

(Decided August 25, 2015)

Carlos A. Espinosa for Claimant
Barry D. Bernstein for Employer

Before LINDA F. JORY and MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 23, 2010, Aura Alvarez-Medina (Claimant), a cook, was cleaning an air extractor, when she fell off a stove. She sustained injury to her right ankle. On February 9, 2011, Claimant's treating physician determined Claimant had a 23% permanent partial impairment rating to the right lower extremity. At the request of Employer, claimant attended an independent medical examination (IME) with Dr. Edward Magur, and he became her treating physician. Dr. Magur performed surgery on January 9, 2012. After a functional capacity evaluation (FCE) was performed on June 25, 2012, she underwent work hardening. Claimant continued to experience pain in her right foot.

¹ Claimant's Application for Review indicates that Claimant's name is incorrectly captioned by the Compensation Order as Aura Medina Alvarez and asks that her name be changed to Aura Alvarez-Medina .

Through Employer's vocational rehabilitation, Claimant was hired by Chick-fil-A as a prep cook on October 2, 2012. She worked four hours a day. Claimant underwent an MRI of her right ankle on November 20, 2012, which revealed a possible non-displaced fracture/stress fracture; normal post-surgical change or moderate tendinosis, mild posterior tibial tendinosis and plantar fasciitis; mild chondrosis of the ankle joint; and edema which might represent early signs of sinus tarsi syndrome and evidence of prior lateral ankle sprain.

Claimant stopped working at Chick-fil-A because her visa expired. Claimant started working as a babysitter from May 7, 2013 to June 27, 2013. Claimant received payments of temporary partial disability benefits from May 7, 2013 to June 27, 2013 and temporary total disability benefits from June 28, 2013 through July 21, 2013.

A full evidentiary hearing occurred on August 8, 2013. The Claimant sought an award of temporary total disability (TTD) benefits from January 17, 2013 through May 6, 2013 and from June 28, 2013 through July 21, 2013, as well as authorization for additional causally related medical treatment, including but not limited to an MRI of the right ankle and interest on accrued benefits.

The Administrative Law Judge (ALJ) who conducted the hearing left the agency without issuing a Compensation Order (CO) and the matter was re-assigned. Following the issuance of a Show Cause Order, neither party objected to another ALJ deciding the matter based on the record which closed on June 23, 2014.

The parties filed a Consent Motion to Decide the Pending Matter Based on the Evidentiary Record on December 23, 2014. A Compensation Order (CO) issued on April 17, 2015. Therein, an ALJ concluded Claimant had failed to show by a preponderance of the evidence that her current right ankle condition is medically causally related to her July 23, 2010 work injury and that her right foot condition is not medically causally related to the work injury.

Claimant timely appealed. Claimant asserts the ALJ erred by incorrectly applying the statutory presumption of compensability. Employer responded asserting the CO is legally correct and supported by substantial evidence and should be affirmed.

ISSUE ON APPEAL

Is the April 17, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS²

² 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("Act"). "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. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this

Claimant asserts:

The ALJ incorrectly found that employer had rebutted the presumption of compensability by relying on the January 15, 2013 report of Dr. Magur, where he concluded that claimant's midfoot stress fracture was a new injury. The ALJ failed to note Dr. Magur had previously attributed this new injury to the stresses as a result of her Work Hardening Therapy. Dr. Magur's opinion does not indicate that this was a new injury outside her scope of employment or independent of her July 23, 2010 initial fracture. Consequently, this evidence does not rise to the substantial evidence required to rebut the presumption of compensability, which is more than a mere scintilla.

In reviewing the medical reports, the ALJ noted that Dr. Magur in his February 19, 2013 report prepared at the request of the Claimant, found that the stress fracture represented a new injury. However, Dr. Magur ['s] report actually states:

I was asked specifically if this (Stress fracture) represented a new injury or new condition and, in fact, it does. Presumably, this occurred during a work hardening in preparation to the patient back to work and as such is related to her previous and ongoing ankle condition.

Claimant's Brief at 5, 6 (citations omitted).

We agree the ALJ incorrectly applied the statutory presumption of compensability .

The ALJ cited the standard set forth by the District of Columbia Court of Appeals (DCCA) in *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004)(*Raymond Reynolds, Intervenor*) (*Reynolds*), evidence as well as the standard set forth by the DCCA in *Ferreira v. DOES*, 531 A.2d 651 (DC. App. 1987) and provided the following analysis with regard to employer's rebuttal evidence:

Employer relies on Dr. Magur's January 15, 2013 report, in which Dr. Magur concluded that claimant's midfoot stress fracture was a new injury. Therefore, based on Dr. Magur's January 15, 2013 opinion, I find employer has met its burden and has rebutted the presumption. *Ferreira, supra; Reynolds, supra*.

CO at 7.

scope of review, the CRB and this panel are bound 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.

While we acknowledge that the *Reynolds* standard applies to employer's IME opinion, it is accepted that the specific and comprehensive standard is often combined with the *Reynolds* standard:

Once the presumption has been invoked, the burden then shifts to Employer to present evidence in rebuttal by producing evidence specific and comprehensive enough to sever the causal connection between the work injury and the alleged subsequent disability. Employer can meet its burden to rebut the presumption of causation when it proffers a medical expert who, having examined Claimant and reviewed his medical records, renders an unambiguous opinion that the work injury did not contribute to the disability. If Employer meets its burden, the statutory presumption drops out of the case entirely and the burden reverts back to Claimant to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed to his disability.

Burke v. Washington Metropolitan Area Transit Authority, CRB No. 12-179. AHD No. 12-115, OWC No. 682335 (March 11, 2013).

We first look to the sole report relied upon by the ALJ in finding employer's evidence has rebutted the presumption and note that the document is a letter from the Workers' Compensation Claims Examiner addressed to Dr. Magur which states in its entirety:

Dear Dr. Magur:

Chubb Services Corporation administers the above workers' compensation claim.

We received email confirmation from your office staff on 1/8/13. In response to our prior correspondence dated 12/7/12 that it was your opinion that the right **midfoot stress fracture is a new injury for this Employee**. At your earliest convenience, please re-affirm this information, provide your signature and fax same back to this office. Thank you for your time.

MD Signature _____ Date 1/15/2013

Thank you and we appreciate your time in this matter.

Regards

Connie L. Miller
Workers' Compensation Claims Examiner

EE 4. (emphasis included)

We must agree with Claimant that Dr. Magur's signature on this "form letter" does not form an unambiguous opinion that Claimant's work injury no longer contributes to her disability.

Subsequent to Dr. Magur's signature on this form letter, Dr. Magur wrote on February 19, 2013:

First of all, for clarification with respect to her stress fracture of her medial cuneiform bone, I was asked specifically if this represented a new injury or new condition and in fact, it does. Presumably, this occurred during a work hardening in preparation to get the patient back to work and as such is related to her previous and ongoing ankle condition. She seems to have less pain and no swelling over the midfoot today. Presumably the stress fracture is healing as the patient has been essentially off of it since the time we made the diagnosis. I think that a repeat MRI scan to evaluate the healing of the injury sometime over the course of the next month or 2 would be valuable for documentation purposes that the stress injury has healed.

EE 7 at 1.

Review of the reports of Dr. Magur as well as his deposition testimony confirms Dr. Magur has not proffered an unambiguous opinion that Claimant's work injury has not contributed to Claimant's disability.

Dr. Magur was asked at his deposition repeatedly about the stress fracture by counsel for Employer:

Q: You were then asked on December 7, 2012, whether the possible stress fracture of the mid-foot was a new injury or a continuation from the July 23, 2010 injury is that correct?

A: That is correct.

Q: On December 28, 2012, you evaluated the claimant; is that correct?

A: That is correct.

Q In your report you stated, "We recall that in her work hardening program or at some point when she started bearing weight again, she developed a stress fracture of the cuneiform bone." Is that correct?

A. Yes.

Q. What time period were you talking about, August, September, October, November, what were you referring to?

A. It is unclear what I was referring to. The idea being that after her surgery she is protected weight bearing for a period of time and then we return her to therapy. The recovery process with her was slow. She presumably[had] been ramping up

her activity and at some point developed this stress reaction. And certainly this is new compared to the MRI we had before the surgery. It is a new situation.

The thing about an MRI scan is it doesn't imply etiology. It just tells you what the image area looks like on that day. It doesn't tell when it happened or how it got there. It would be like seeing a picture of a person with a black eye. The black eye doesn't imply that they got punched or they ran into a door or when exactly it happened. She had this reactive bone and presumably – she doesn't relay any history of a new injury or anything like that. Presumably as she is ramping up her activity, she started to develop the stress fracture.

EE 9 at 16 17.

The deposition of Dr. Magur abundantly supports Claimant's assertion that Dr. Magur does not indicate that the stress fracture was a new injury outside her scope of employment or independent of her July 23, 2010 initial fracture. Consequently, this evidence does not rise to the substantial evidence required to rebut the presumption of compensability. Another example under direct examination by counsel for Employer:

Q. So if the work hardening ended at the beginning of August 2012 and she was then doing her own, whatever she did with herself, ramped up, whatever she did on herself, and was working at a second job, does that still lead you to believe this is from the original injury?

Mr. Espinosa: Objection. Calls for speculation.

A. I could not accurately assess exactly when she got it or why she got it. Presumably it is related to the fact that her foot and ankle mechanics are not normal. She has had consistent pain since the time of the surgery. Her pain tends to be diffuse in nature, around the ankle and foot. Again etiology is not determined. Specifically when I see her, I would say is there anything else that is happening and what is going on and usually her answer is "I am doing my exercises, I am working with a therapist, and I am still having pain."

Q. As we stand here right now you have two conflicting opinions, is that correct?

A. Conflicting opinions with respect to --

Q. So is it fair to say that you don't know exactly what caused her injury; is that correct?

A. Yes that is fair to say – or the exact time when it began because she was ever pain free.

Q. But you don't know what caused that stress fracture?

A. That is right. Again etiology is not implied. To the best of my understanding of what was relayed to me by the patient there was no new injury.

EE 9 at 20, 21. See also EE 9 at 24 and 25.

According, to the above colloquy, Dr. Magur was not of the opinion there *was* a new injury and he concedes he has conflicting opinions and clearly does not have a specific or comprehensive opinion with regard to the etiology of the stress fracture or if the foot condition is the consequence of the work injury or not.

We conclude the ALJ's determination that her right foot condition is not medically causally related to the work injury is not supported by substantial evidence and is not in accordance with the law. This conclusion is accordingly reversed and the matter remanded to the ALJ to determine the nature and extent of claimant's disability as a result of the right foot and/or right ankle.

In so concluding, we must acknowledge that the sole issues raised at the formal hearing were whether claimant's right foot problem are causally related to the right ankle injury and the nature and extent of any disability. Employer did not raise the issue of whether claimant's right ankle problems are causally related to the work injury at the formal hearing or via the Joint Pre-Hearing Statement and the ALJ had no authority to decide this issue. *Transportation Leasing v. D.C. DOES*, 690 A.2d 487 (D.C. 1997), Accordingly this conclusion is also reversed.

On remand the ALJ should determine the nature and extent of Claimant's disability, consistent with the established law.

CONCLUSION AND ORDER

The Compensation Order herein appealed is REVERSED AND REMANDED. The Compensation Order's conclusion that Claimant's right foot problem and right ankle problems are not causally related to the July 23, 2010 work injury is REVERSED. The matter is REMANDED to AHD for a determination of the nature and extent of Claimant's disability as a result of her right foot and ankle problems and to award the requested causally related medical benefits.

So Ordered