COMPENSATION REVIEW BOARD

CRB No. 13-132

SYLVIA BROWN-CARSON,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA OFFICE OF UNIFIED COMMUNICATIONS,
Self-Insured Employer-Petitioner

Appeal from a September 27, 2013 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. PBL 13-002, DCP No. 30120433947-0001

Lindsay M. Neinast, for the Petitioner
Richard Daniels, for the Respondent[1]

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

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

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on September 27, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) granted Claimant's request for an award of temporary total disability benefits from April 6, 2012 to the

[1] Richard Daniels, a non-attorney representative, appeared on Claimant's behalf at the formal hearing. There is no record of him or Claimant, acting *pro se*, filing a response to the instant appeal.

present and continuing, authorization for medical treatment, and payment of causally related medical expenses.[2]

Claimant has worked for Employer since 1987 as a telecommunications operator/911 call-taker, working four (4) ten-hour shifts per week. Her duties entailed answering emergency calls for police, fire, and emergency medical services and typing information into a computer aided dispatch system.

Claimant has a history of left carpal tunnel syndrome and was initially diagnosed in 1992. Claimant also has a history of left wrist pain. In 1993, Claimant requested and received reassignment to a payroll clerk position that required less typing. In 2004, Claimant resumed her position as a 911 operator. Claimant has experienced intermittent flare-ups of left wrist pain and tingling from 1993 to 2004 and in 2010. From the time of her initial diagnosis, Claimant has always self-medicated and worn a wrist splint. There is no record of Claimant seeking medical treatment for her condition and she has always been able to perform her assigned duties, until the instant claim was filed.

On March 28, 2012, Claimant complained of increased left wrist pain and numbness when typing and notified her supervisor that the left wrist pain and swelling prevented her from performing her job duties. It was determined that from January 2012 through March 2012, Claimant processed approximately three thousand three hundred (3,300) 911 calls.

On April 3, 2012, Claimant filed a disability claim with the District of Columbia Office of Risk Management/Public Sector Workers' Compensation Program (DCORM/PSWCP). Claimant was sent for a medical evaluation where a diagnosis of pre-existing left tenosynovitis, left carpal tunnel syndrome, and ganglion cyst was rendered.

On September 21, 2012, the PSWCP issued a Notice of Determination to Claimant denying her claim stating her condition was not related to her employment. This determination was based on Claimant's medical history and an independent medical evaluation (IME) performed by Dr. Steven Friedman on July 2, 2012. Claimant filed an application for a formal hearing to contest that denial.

The ALJ hearing the case determined that Claimant suffered an aggravation of a cumulative work injury that manifested itself on March 28, 2012, and that Claimant timely notified her supervisor of her disabling left wrist pain. In addition, the ALJ determined that Claimant filed a timely claim and has been unable to perform her work duties since March 28, 2012 due to her work injury and granted the claim for relief. While Employer has filed a timely appeal, there is no record of Claimant filing in opposition.

On appeal, Employer argues the ALJ erred in determining that Claimant provided timely notice of her injury and timely filed her claim due to a faulty application of the law, that the ALJ applied an incorrect standard of proof in determining whether Claimant made a proper showing

[2] *Sylvia Brown-Carson v. D.C. Office of Unified Communications,* AHD No. PBL 13-002, DCP No. 30120433947-0001 (September 27, 2013)(CO).

that her carpal tunnel was causally related to her employment, and that the ALJ's determination of causal relationship is not supported by substantial evidence or in accordance with the law.

ANALYSIS

The scope of review by the Compensation Review Board (CRB) is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.[3] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq*. ("Act"). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The initial issue below was whether Claimant provided timely notice of her injury to Employer. Under the Act, Claimant had thirty (30) days to notify her supervisor of her injury[4] and required an original claim[5] to be filed within two (2) years. Insofar as the ALJ found Claimant's injury initially occurred in 1992 but did not notify her supervisor of her injury and file her claim until 2012, Employer argues the ALJ's conclusion that Claimant provided timely notice and filed a timely claim constitute a faulty application of the law. We agree.

There is no dispute that Claimant has had a history of left carpal tunnel dating from 1992 when it was initially diagnosed. In addition, the ALJ found that Claimant credibly testified as to this diagnosis and to experiencing left wrist pain in 1992 while working as a 911 operator. The ALJ determined that "Claimant has presented a work scenario of what could be classified as a cumulative traumatic injury"[6] and further determined that "in a cumulative injury case, such as here, the manifestation rule applies to affix the date of injury."[7]

The ALJ and Employer cite the D.C. Court of Appeals decision in *King v. DOES*[8] for establishing the manifestation rule that has been adopted for application in this jurisdiction. This is incorrect. The Court acknowledged that this agency had used a manifestation rule, stating:

> The Department of Employment Services utilized a manifestation rule in at least one cumulative trauma injury case prior to the 1991 amendment of

[3] "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. DOES*, 834 A.2d 882 (D.C. 2003).

[4] D.C. Code § 1-623.19 (a)(1).

[5] D.C. Code § 1-623.22 (a). The time to file an original claim was changed from within three (3) years of the work injury to within two (2) years in an amendment that became effective September 24, 2010. The ALJ used the outdated timeframe in conducting her analysis.

[6] CO, p. 5.

[7] *Id.*

[8] 742 A.2d 460 (1999).

> D.C. Code § 36-303. In *Franklin v. Blake Realty Co*., H&AS No. 84-26, OWC No. 25856 (August 18, 1985), the claimant had sustained a cumulative trauma injury to her shoulder and arm during June 1983, but that injury did not manifest itself in debilitating pain and discomfort until some time [sic] in July 1983. The employer had changed insurance carriers at the end of June, and so one of the issues in the case was which carrier was liable on the claim. That dispute turned on whether the date of injury was considered to be before or after the employer switched carriers. For this purpose the Director "concluded that the date of injury for a cumulative traumatic injury is the date on which the *injury* manifests itself. The date on which the injury manifests itself is (1) the date on which employee first sought medical attention for his painful symptoms, whether or not he ceased work or (2) the date of disability, whichever first occurred." 742 A.2d, 471.

The Court went on to discuss other alternative rules that could be used to fix the time of injury in cumulative trauma cases and concluded:

> We make no judgment about the wisdom of adopting any particular time of injury rule with respect to the issue in this case. The choice of rule implicates many considerations bearing on the implementation of the WCA. The agency charged with administering the Act should make a choice in the first instance, after carefully analyzing the precedents discussed above – which, in this jurisdiction, plainly support, if they do not compel, adoption of some version of a manifestation rule – and the language, structure and purpose of the statute. *Id.* at 473-474. (Citation omitted.)

The choice left open by the Court in *King* was made by the CRB in matter of *Vanhoose v. Respicare Home Respiratory Care*[9], where it was stated:

> The rule for fixing the time of injury in cumulative trauma cases had not as of the time of the Court of Appeals' decision in *King* been firmly established by DOES. Consequently, after an examination of the possible rules that might apply, *see King*, 472 A.2d at 471-473, the Court remanded *King* to the agency to articulate the applicable rule of law. Because the parties settled the *King* case upon remand, there was no final resolution of this matter, at least within the context of the *King* case. Nevertheless, the Director has in several other decisions embraced the manifestation rule first articulated in *Franklin v. Blake Realty Company*, H&AS No. 84-26, OWC No. 25856 (Director's Decision, August 18, 1985), *i.e*. the date the employee first seeks medical treatment for his/her symptoms or the date the employee stops working due to his/her symptoms, whichever first occurs. *See, e.g*., *Walton v. Woodward & Lothrop*, Dir. Dkt. No. 88-152, H&AS No. 88-533 (May 16, 1989); and *Washington v. Pro-Football, Inc*.,

[9] CRB No. 07-022, AHD No. 06-342, OWC No. 626066 (July 23, 2007).

> Dir. Dkt. No. 98-37, H&AS No. 97-186 (July 16, 1999). The Compensation Review Board has similarly embraced the *Franklin* rule in fixing the "time of injury" under D.C. Code § 32-1503(a) for cumulative traumatic injury claims. *See Bagbonon v. Africare*, CRB No. 03-121, OHA No. 03-340 (November 1, 2005); and *Hall v. Daughters of Charity*, CRB No. 05-245, OHA No. 01-094A (January 6, 2006). Based upon the pleadings filed in the instant matter, the supplemental briefing specifically addressing this issue, and the oral arguments presented by legal counsel for the parties at hearing, this Panel finds no persuasive reason for departing from this case authority. Thus, upon remand the ALJ is to apply the manifestation rule adopted by the Director in *Franklin, supra*, and the CRB for determining "time of injury" under D.C. Official Code § 32-1503(a) in cumulative trauma cases, assuming the ALJ first finds, as a factual matter, that the Petitioner sustained a cumulative traumatic injury.[10]

In the instant matter, the ALJ found that Claimant has a history of carpal tunnel syndrome and was first diagnosed in 1992, that in 1993 she requested and was reassigned to a position that required less typing, that she resumed her position as a 911 operator in 2004, that she had intermittent flare ups of left wrist pain and tingling from 1993 to 2004 and in 2010, that she self medicated and wore a wrist splint but did not seek medical treatment for her condition, and that she never stopped working until experiencing a significant flare up on March 28, 2012. Based on these findings, the ALJ made the ultimate findings that:

> Claimant suffered an aggravation of a cumulative trauma work injury. Claimant's condition manifested on March, 2012 and she timely notified her supervisor of her debilitating left wrist pain on March 28, 2012. Claimant filed a timely claim for benefits after notifying her employer of her condition. Claimant has been unable to perform her work duties since March 28, 2012 due to her work injury.[11]

In making her ultimate findings, the ALJ has conflated the legal concepts of a discrete accident causing an injury and a cumulative trauma. The difference between the typical case of a discrete accident causing an injury (including an aggravating injury) and a cumulative trauma case is that in the latter case, it is not possible to identify a discrete event occurring at a particular date and time that causes or aggravated the injury. Instead, the cumulative traumatic injury becomes manifest only after the body's repeated exposure to individually minor traumas, insults, or harmful employment-related conditions.[12] It is possible for a discrete accident to aggravate a

[10] *Vanhoose, supra*, at 6.

[11] CO, p. 3-4.

[12] *King, supra*, at 468-469.

preexisting condition that was caused by repeated on-the-job trauma, but the ALJ in this case has not made that distinction.[13]

Rather than make that distinction, the ALJ went on to conclude:

> Under the *King* approach, the date of the manifestation of Claimant's cumulative injury is March 28, 2012, when her left wrist condition became disabling. The record reflects Claimant immediately notified her supervisor on March 28, 2012, was relieved of her duties and sent to urgent care for evaluation. Therefore the statutory notice requirement has been satisfied since Claimant reported her disabling condition to her supervisor within 30 days of its manifestation. The record also reflects Claimant filed a claim for benefits with DCORM on or about April 3, 2012. Therefore, Claimant has filed a timely claim within the three year statutory timeframe.[14]

In determining the date of injury as the date when Claimant's "left wrist condition became disabling", the ALJ misapplied the manifestation rule as first set forth in *Franklin* and adopted by the CRB for his jurisdiction in *Vanhoose*. As the Director stated in *Franklin* with regard to a cumulative injury case, the date on which injury manifests itself is (1) the date on which the employee first sought medical attention for his painful symptoms, *whether or not he ceased work*, or (2) the date of disability, *whichever first occurred*. (Emphasis added.) As made clear by footnote 6 of the CO, the ALJ placed her focus, incorrectly, on when Claimant's condition became disabling.[15]

In assessing the date in a cumulative injury case, the comparison is between the date medical attention is first sought for the pain and the date of disability, whichever occurred first. Further, when looking at the date medical attention is first sought for the painful condition, whether the condition causes the employee to cease work or not is not a factor. As the Director explained in *Franklin*:

> The fact that the employee continued working after medical attention does not negate the fact of the employee's injury, whatever the degree of impairment . . . . In many instances an employee will seek medical attention for a diagnosable injury long before he ceases working. I see no

[13] *Cf. Currie v. Washington Hosp. Ctr.*, H&AS No. 93-441, OWC No. 246754 (June 12, 1995). In *Currie*, the claimant suffered a work-related injury to her back, recovered, but continued to voice complaints of low back pain as a result of her work duties. As the severity of pain increased, claimant sought treatment and was diagnosed with degenerative arthritic changes to her low. After those symptoms abated, claimant had another work incident that caused significant back pain, and a hearing examiner found that claimant sustained an aggravation of her pre-existing degenerative disc disease that disabled her from performing her usual employment. The hearing examiner concluded that the subsequent work incident was an aggravation compensable under the Act.

[14] CO, p. 6.

[15] In fn. 6, the ALJ stated: "There is no evidence that Claimant's left carpal tunnel syndrome was a disabling condition between 1993 and February 2012."

> rationale for setting the date of the injury coincidentally with the date of disability when it is apparent to the employee and doctor that the employee has suffered an injury requiring medical attention.[16]

Evidence in the record clearly established that Claimant was first diagnosed with carpal tunnel in 1992 and the following year, 1993, asked to be detailed to a position that required less typing. The ALJ acknowledged that Claimant was aware in 1993 that certain of her work duties aggravated her left wrist condition and requested reassignment. The ALJ found that Claimant experienced intermittent flare ups from 1993 until March 2012 when her left wrist pain became too intensive for her to continue working.

While Claimant's condition became disabling on March 28, 2012, when applying the *Franklin* manifestation rule and determining which came first, it was the 1992 diagnosis of carpal tunnel and Claimant's contemporaneous realization that it was work related, that occurred first. Therefore, the ALJ's determination of March 28, 2012 as the date of injury is not in accordance with the law and cannot stand.

As no other conclusion can attain based on the record evidence and timely notice and timely claim are dispositive, the CO order is vacated and this matter is remanded to the ALJ to issue a CO denying the claim for benefits due to the failure to provide timely notice of injury within 30 days pursuant to D.C. Code § 1-623.19 (a)(1).[17]

CONCLUSION AND ORDER

The ALJ's determination that Claimant filed timely notice of injury and filed a timely claim is VACATED. This matter is remanded for the issuance of an order denying the claim for benefits.

FOR THE COMPENSATION REVIEW BOARD:

_____
HENRY W. MCCOY
Administrative Appeals Judge

January 24, 2014
DATE

[16] *Franklin, supra*, at 4.

[17] As this matter is being returned for the issuance of an order to deny the claim for disability benefits, consideration of Employer's other assignments of error is rendered moot.