COMPENSATION REVIEW BOARD

CRB No. 10-181

CARMELO FIUMARA,

Claimant–Respondent,

v.

MARRIOTT CORPORATION AND MARRIOTT INTERNATIONAL INC.,

Employer and Third-Party Insurer–Petitioners.

Appeal from a Compensation Order of
Administrative Law Karen R. Calmeise
AHD No. 09-467A, OWC No. 587392

Matthew J. Peffer, Esquire, for Claimant
Jeffery W. Ochsman, Esquire, for Employer and Insurer

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review of the September 24, 2010, Compensation Order (CO) issued by the workers' compensation Hearings and Adjudication section of the District of Columbia Department of Employment Services (DOES).

In the September 24, 2010 CO, an Administrative Law Judge (ALJ) awarded the claimant continuing permanent total disability benefits beginning on March 11, 2009, causally related medical treatment, and accrued interest. As will be more fully discussed, although we reverse the ALJ's finding that the claimant's right leg condition is causally related to the accident, we AFFIRM the ALJ's other findings and the award for permanent total disability benefits.

BACKGROUND

Carmelo Fiumara (claimant) injured his low back and left leg when he lifted a heavy door on December 17, 2002, while employed as a plumber/cabinet maker for the Marriott Corporation (employer). His work for this employer required that he stand for long periods, lift and hold power equipment, and perform heavy physical labor.

The employer voluntarily paid the claimant temporary total disability benefits from December 20, 2002, to March 9, 2003, and from November 21, 2003, to June 2, 2004, and temporary partial disability benefits from July 12, 2003, to August 15, 2003. The claimant also received permanent partial disability benefits for the 20 percent loss to his left leg, pursuant to a stipulation that was approved by the Office of Workers' Compensation on August 18, 2005.

In the present claim, the claimant sought an award for continuing permanent total disability benefits, beginning on March 11, 2010, alleging he could not do his regular work because of pain in both legs caused by bilateral reflex sympathetic dystrophy (RSD). The employer contested the medical causal relationship between the accident and the claimant's bilateral RSD and also the nature and extent of the claimant's disability.

The ALJ found that the claimant's bilateral RSD was caused by the December 17, 2002, accident, and that the claimant proved he was entitled to permanent total disability benefits, finding his condition continued for a sufficiently lengthy period to be permanent, that he cannot return to his former occupation, and that the employer did not make available suitable or alternative employment. *Fiumara v. Marriott Corp.,* AHD No. 09-467A, OWC No 587392 (September 24, 2010) at 5, 8.

The ALJ entered an award for permanent total disability benefits and the employer timely appealed.

THE STANDARD OF REVIEW

The CRB reviews an ALJ's decision to determine whether the factual findings of the Compensation Order are based upon substantial evidence and whether the legal conclusions drawn from those facts are in accordance with applicable law. See, D.C. Official Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d) (2) (A). "Substantial evidence" 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). Thus, the CRB "may not consider the evidence *de novo* and make factual findings different from those of the [ALJ]." *Id.*

The CRB is bound by an ALJ's findings of fact, even though the CRB may have reached a contrary result based on an independent review of the record. If substantial evidence exists to support the ALJ's findings, the existence of substantial evidence to the contrary does not permit the CRB to substitute our judgment for that of the ALJ. The CRB may reverse an ALJ's decision only when it is unsupported by substantial evidence or is otherwise legally incorrect. *Id.* at 885-86.

ANALYSIS

The employer's first assignment of error relates to the ALJ's finding that the claimant's current complaints in both legs, diagnosed as RSD by Dr. Friedler on July 8, 2009, were causally related to the 2002 accident at work. The employer argues that the ALJ's decision should be reversed because the ALJ erred in concluding that the claimant's right leg condition is causally related to the work injury. Memorandum at 7.

We find the ALJ erred in finding that the claimant's right leg condition is causally related to the accident at work. The claimant conceded, "Mr. Fiumara's right leg pain has been found to be not causally related to the work accident of December 17, 2002." Claimant's memorandum at what

would be pages 8-9. Moreover, two previous decisions have held there is no medical causal connection between the claimant's right leg symptoms and the work accident.[1]

Therefore, we reverse that part of the ALJ's CO that held the claimant's current right leg complaints are causally related to the 2002 accident at work.

However, despite this error, we affirm the ALJ's conclusion that the claimant proved medical causal relationship between his current disability and the accident.

The ALJ found medical causal relationship because the claimant presented sufficient evidence to invoke the presumption and that the employer had not rebutted the presumption.[2] The employer did not challenge the ALJ's presumption analysis.

The ALJ's finding regarding causal relationship was not solely based on her incorrect finding that the claimant's right leg condition was causally related to the accident. The ALJ's conclusion also was based on her finding that the claimant's post-March 11, 2009, disabling symptoms in his left leg were caused by the work accident. *Fiumara v. Marriott Corp.,* AHD No. 09-467A, OWC No 587392 (September 24, 2010) at 4. Compensation is awarded if a disability arises in part out of an employment injury. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

Therefore, we reverse the ALJ's finding that the claimant's right leg symptoms are medically causally related to the work accident but affirm her finding that the claimant's post-March 11, 2009 disabling condition is causally related to the 2002 accident.

The employer's second assignment of error relates to the ALJ's finding that the claimant proved entitlement to permanent and total disability benefits. The employer challenges the ALJ's finding that it failed to offer a suitable job or alternative employment.[3]

In reaching her conclusion that the claimant proved entitlement to permanent and total disability benefits, the ALJ relied on the DCCA's decision, *Logan v. DOES*, which held:

> Once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform…Where employer meets this evidentiary burden, claimant, in order to sustain a disability finding, must either successfully challenge the legitimacy of

[1] On February 28, 2008, an ALJ held the claimant's right hip condition was not causally related to the December 17, 2002, accident at work. *Fiumara v. Marriott Corp.,* AHD No. 05-230B, OWC No 587392 (February 28, 2008). The claimant did not appeal this decision. On September 15, 2009, the CRB reversed an ALJ's May 21, 2009, CO that had awarded the claimant permanent partial disability benefits under the schedule for loss to his right leg. *Fiumara v. Marriott Corp.,* CRB No. 09-085, AHD No. 05-230C (September 15, 2009).

[2] The ALJ apparently made alternative findings with respect to whether the employer rebutted the presumption. The ALJ held that the IME opinion of Dr. Gary London was not sufficient to rebut the presumption because he had not reviewed a March 3, 2010, EMG and nerve conduction study that was completed six months after Dr. London's most recent IME report. In a footnote, the ALJ apparently made the alternative finding that if the presumption was rebutted, her weighing of the evidence preponderated in the claimant's favor because of the evidentiary preference granted the opinion of a treating physician. *Fiumara v. Marriott Corp.,* AHD No. 09-467A, OWC No 587392 (September 24, 2010) at 5, and fn 2.

[3] The employer does not challenge the ALJ's findings that the claimant's condition was permanent or that it reached maximum medical improvement.

> the employer's evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment.

805 A 2d 237 at 240, 243 (D.C. 2002).

The ALJ described the claimant's work for this employer as follows:

> As part of his work for Employer, Claimant worked as a cabinet maker, carpenter, and maintenance worker. In this position he repaired furniture, hung doors, and assisted in hotel renovations.

The ALJ held the claimant could not perform this work and that the employer did not offer suitable or alternative employment:

> However, I find the Claimant's ability to walk and stand for short periods of time, bend and lift bags of items and lift heavy items unassisted on occasion, does not prove he can stand, walk, bend, and operate power woodworking equipment eight hours a day as is required as a carpenter/cabinet maker.
>
> Employer has presented no evidence to show that a suitable job or alternative employment is/was made available to Claimant given his age, lack of education, lack of English language skills, and specialized skills in woodwork and cabinet making.

Fiumara v. Marriott Corp., AHD No. 09-467A, OWC No 587392 (September 24, 2010) at 2, 7.

The employer challenges the ALJ's finding that it failed to offer a suitable job or alternative employment. We find substantial evidence supports the ALJ's decision.

The employer argues that the ALJ found that the claimant's only limitation was that he could not lift more than 20 pounds and that it provided appropriate light duty work that met this restriction. Memorandum at 9-10.

While we acknowledge that some portions of the ALJ's CO could support the employer's view, we do not read the ALJ's decision as finding that the claimant only had a lifting restriction. In the above quoted passage from page 7 of the CO, the ALJ referred to the claimant's inability to lift and also to his inability to stand, walk, bend, and operate equipment eight hours a day. This shows the ALJ found that in addition to a lifting restriction, the claimant had these other restrictions—restrictions that prevented the claimant from doing his regular work. *Fiumara v. Marriott Corp.,* AHD No. 09-467A, OWC No 587392 (September 24, 2010) at 3.

The ALJ correctly applied the *Logan* analysis. The claimant established a *prima facie* case because his evidence proved he could not perform his usual, pre-injury work. Therefore, the burden shifted to the employer to prove there were other jobs available that the claimant could perform. The employer only proved the claimant could return to employment that met one of his medically imposed restrictions.

CONCLUSION

The ALJ's finding that the claimant's current right leg condition is medically causally related to the work accident neither is supported by substantial evidence nor is in accordance with applicable law. The ALJ's other findings and the award of permanent and total disability benefits are supported by substantial evidence and in accordance with applicable law.

ORDER

The finding that the claimant's right leg condition is medically causally related to the 2002 work accident is REVERSED. The ALJ's other findings and the award of permanent and total disability benefits, are AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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Lawrence D. Tarr
Administrative Appeals Judge

April 12, 2011
Date