

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-028

CHRISTOPHER OLLEY,

Claimant–Petitioner,

v.

UNICCO SERVICE COMPANY AND TRAVELERS INSURANCE COMPANY,

Employer–Respondent.

Appeal from a Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 10-416, OWC No. 589485

Michael J. Kitzman, Esquire, for the Petitioner
Douglas A. Seymour, Esquire, for the Respondent

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

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

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official 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).

OVERVIEW

On February 4, 2003, Claimant-Petitioner (Petitioner) sustained a work-related injury when a carpet cleaning machine fell on his right foot, which was accepted as a compensable injury.¹ After receiving treatment during 2003 to 2004², Petitioner started treating with orthopedist Dr. Michael Franchetti on June 15, 2005 where he recommended that Petitioner be seen by a foot and ankle orthopedic specialist.

In an April 8, 2008 treatment report, Dr. Franchetti noted Petitioner was experiencing low back pain that he wanted to have treated. After an examination, Dr. Franchetti opined that Petitioner had a compensatory lumbar strain as a result of favoring his severely injured right foot sustained on February 4, 2003. He expressed the need for Petitioner to receive treatment to the lumbar spine.

Although Petitioner initially treated with foot specialist Dr. Scott Sauer on referral from Dr. Franchetti, he received his treatment in follow-up, commencing December 7, 2009, from Dr. Francis McGuigan, also a foot specialist. At this time, Dr. McGuigan placed Petitioner in an exoskeleton boot and restricted him to only sedentary work. On December 23, 2009, Dr. McGuigan recommended Petitioner obtain a new orthotic and custom-molded shoes, and released him to return to work without restrictions.

Petitioner filed an application for a hearing seeking temporary total disability benefits for the period Dr. McGuigan placed him in an off work status and authorization for treatment to his back. Employer-Respondent (Respondent) argued at the hearing that Petitioner's disability during the closed period was not related to his work injury and his back problems also were not medically causally related to the work injury.

After reviewing the evidence, the Administrative Law Judge (ALJ) determined that Petitioner's current medical condition and disability were not causally related to his work injury and denied the claim for relief. *Olley v. UNICCO Service Company*, AHD No. 10-416, OWC No. 589485 (March 10, 2011) (CO). Petitioner timely appealed with Respondent filing in opposition.

On appeal, Petitioner argues the ALJ committed error in finding that his foot condition and his back complaints were not medically causally related to his work injury. In opposition, Respondent counters that the ALJ's determination of no causal relationship is supported by substantial evidence and should be affirmed.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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, § 32-1501 *et seq.*, at

¹ Although counsel for the Employer acknowledged that voluntary payments were made, the period of the payments was not specified in the record. Hearing Transcript (HT) at pp. 11-12.

² As noted by the ALJ, these treatment records were not introduced into the hearing record.

§ 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 if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In Petitioner’s quest for wage loss benefits and authorization for treatment, the initial issue for resolution was whether both his disabling foot condition for the requested period and his resulting back pain from an altered gait were causally related to his work injury. According to Petitioner the statutory presumption of compensability, the ALJ determined that he presented testimony and medical reports to invoke the presumption and that Respondent presented evidence sufficient to rebut the presumption.

On appeal, Petitioner initially argues that the ALJ committed error in determining that his “present foot conditions were not medically causally related to his work injury.” Claimant’s Memorandum of Points and Authority, unnumbered p. 4. Specifically, Petitioner argues that the ALJ failed to address and then determine whether the work injury aggravated his preexisting foot problems. Petitioner also asserts as error the ALJ’s determination of no causal relationship with regard to his back complaints and the failure to afford the treating physician preference to the opinions of Drs. Franchetti and McGuigan.

The ALJ acknowledged that in this jurisdiction when weighing competing medical testimony, the opinions of a treating physician are given preference over the opinions by physicians who examine the claimant solely for purposes of litigation.³ This preference is in no way absolute as the ALJ may reject the opinion of the treating physician provided an explanation is given.⁴

In assessing the competing medical evidence, the ALJ determined that “neither party presented evidence prepared by Claimant’s treating physician” and therefore the preference afforded such an opinion was not operable here. CO at 7. The ALJ based this determination on her finding that no medical reports were submitted by any of the physicians who treated Petitioner immediately after and/or within two years of the work injury. Petitioner asserts this was error. While we agree, we ultimately deem the error to be harmless.

Petitioner submitted the medical reports of Drs. Franchetti and McGuigan. Both doctors examined Petitioner several times, diagnosed his condition, set forth treatment plans, prescribed medications, and in Dr. Franchetti’s case, referred him to a specialist. These actions were sufficient to make both doctors Petitioner’s treating physicians, at the specific time of their respective treatment, and thereby are sufficient to imbue their opinions with the preference when weighed against an IME physician.

³ *Kralick v. D.C. Dept. of Employment Services*, 842 A.2d 705 (D.C. App. 2004); *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350 (D.C. 1992).

⁴ *Lincoln Hockey v. D.C. Dept. of Employment Services*, 831 A.2d 913, 919 (D.C. App. 2003).

In the instant case, we deem the ALJ's error as harmless in that she did consider the opinions of Franchetti and McGuigan in the alternative as if they were the treating physicians and gave specific reasons as to why she found their opinions less persuasive than that of Dr. Danziger.

As to Dr. Franchetti, the ALJ reasoned that he "offered no explanation" as to the cause of Petitioner's rocker-bottom foot, nor made clear whether it was caused by the work injury. CO at 3. As to the post-traumatic degenerative changes to Petitioner's right foot, the ALJ reasoned that Dr. Franchetti provided insufficient information on the progression of these changes or any explanation to support his diagnosis of the right foot. *Id.*

With specific reference to Dr. Franchetti's diagnosis of Petitioner's back condition, the ALJ took issue stating:

While Dr. Franchetti's explanation that Claimant's lower back problem was caused by Claimant's limping, it is not clear from the doctor's reports, what caused Claimant's limp. It is unclear whether Claimant's limp was caused by his charcot's arthropathy, and whether the charcot's arthropathy resulted from his preexisting diabetes; or whether the charcot's arthropathy was caused by Claimant's work injury. It is unclear whether Claimant's limp was caused by his rocker bottom foot condition; or wearing orthotics that were in disrepair; or whether the limp was caused by Claimant's rigid pes planus type deformity; or whether said limp was caused by his bilateral diabetic neuropathy. For this reason, Dr. Franchetti's opinion is given little weight in consideration of the evidence presented at hearing. (Internal footnotes omitted.)

CO at pp. 4-5.⁵

In assessing the opinions of Dr. McGuigan, the ALJ while acknowledging that he appeared to make a causal connection between the work injury and the current disabling foot condition, also expressed the opinion that this condition could have been "exacerbated by an underlying history of diabetes, but the patient had no prior history of foot or ankle problems before his injury." CO at 5.

In sum, the ALJ determined, and at the same time addressed and disposed of Petitioner's aggravation theory, by stating:

⁵ In defining the term "charcot's arthropathy" in fn. 4 and the term "diabetic neuropathy" in fn. 6, the ALJ has gone beyond the record to define medical terms; a practice we deemed improper in *Gill v. Howard University Hospital*, CRB No. 09-112 (May 6, 2011). As we stated in *Gill*, whenever reference is made to "evidentiary matters outside the evidentiary record, due process requires the parties be afforded notice and the opportunity to contest the evidentiary matter." *Gill*, at 4 quoting *Simpkins v. Linens of the Week*, CRB No. 08-178 (August 6, 2009); citing *Renard v. D.C. Dept. of Employment Services*, 673 A.2d 1274, 1276 (D.C. 1996). While the ALJ here did not take judicial notice of the definitions, the definitions go far beyond mere definitional and while we find no error in this instance in the use of website definitions, we again stress that as the websites were created by a layperson and thus subject to being challenged, their use nonetheless was improper and the practice should be discouraged.

The reports authored by Drs. Franchetti and McGuigan failed to offer a thorough explanation of Claimant's foot condition and failed to offer a sound explanation of what, specifically caused his foot ailments. It is unclear whether his foot maladies were caused by his preexisting diabetes or the work injury.

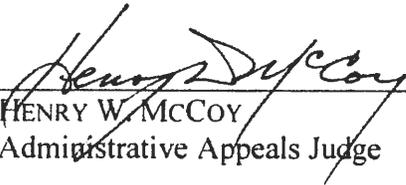
CO at 7.

After giving due consideration to the opinions of Drs. Franchetti and McGuigan, the ALJ found the IME opinion of Dr. Danziger more thorough, as he reviewed all of Petitioner's initial treatment reports, and those of Franchetti and McGuigan, and thus his opinion was given greater weight. After reviewing Petitioner's prior treatment records, Dr. Danziger gave detailed explanations to support his opinions, and to refute those of Franchetti and McGuigan, that Petitioner's back complaints were not causally related to the work injury and that the treatment provided by Dr. McGuigan during the contested period was solely related to his preexisting diabetes and charcot athroopathy. The ALJ's reliance upon Dr. Danziger's opinion is supported by substantial evidence in the record, and we will not disturb it.

CONCLUSION AND ORDER

The Compensation Order of March 10, 2011 is supported by substantial evidence in the record and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

July 7, 2011
DATE