GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-075

IVAN H. TOOKS,
Claimant–Petitioner,

v.

SAGENT PARTNERS, LLC and
THE HARTFORD INSURANCE COMPANIES,
Employer/Insurer-Respondent.

Appeal from a May 18, 2016, Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 16-108, OWC No. 729136

(Decided October 25, 2016)

Krista N. DeSmyter for Claimant
Chad A. Michael for Employer

Before JEFFREY P. RUSSELL, GENNET PURCELL and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Ivan H. Tooks ("Claimant") was employed by Sagent Partners, LLC ("Employer") as a desktop support specialist, a job which entails a significant amount of crawling and kneeling in tight spaces in order to gain access to connection points and other equipment related to computers and networks.

A formal hearing was conducted on April 5, 2016 before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division of the Office of Hearings and Adjudications in the District of Columbia Department of Employment Services.

At that hearing, Claimant sought an award of temporary total disability and medical care for injuries he alleged he had sustained on March 30, 2015 while employed by Employer. Three issues were in dispute at that hearing: (1) Did Claimant sustain an accidental injury by accident which arose out of and in the course of his employment?; (2) Did Claimant give Employer timely notice of his alleged work accident of March 30, 2015?; and (3) Were the alleged injuries and disabilities claimed medically causally related to the claimed work accident?

At the hearing Claimant testified that on the date in question he was required to crawl under a desk or workstation and upon trying to back out of the cramped space he banged his left knee. He further testified that he reported the incident a few days later to his supervisor, Ms. Etuk Ebeomobomb, received medical care from his family physician, Dr. Lynn Yarborough, and from orthopedic physician Dr. Sameer B. Shammas. He claimed that he sustained injuries to his knee and hip and that he requires further medical care and is currently unable to return to work.

Employer contested the claim, and adduced testimony from one of Employer's administrative personnel, Michelle Womack, who was responsible for tracking Claimant's time and attendance for payroll purposes. Ms. Womack testified that Claimant had advised her that he had missed time from work following the date of the alleged injury after sustaining an injury at the gym. Employer also relied upon what it contended were inconsistent and non-credible testimony from Claimant in asserting that no such accidental injury had occurred at work on March 30, 2015.

On May 18, 2016, the ALJ issued a Compensation Order ("CO") finding Claimant had adduced sufficient evidence to invoke the presumption of compensability, that Employer had adduced sufficient evidence to overcome that presumption, and upon weighing the evidence and finding Claimant to lack credibility, concluding that Claimant had failed to prove that he had sustained a work-related injury by a preponderance of the evidence.

Claimant filed a timely Claimant's Application for Review and Memorandum in Support of Claimant's Application for Review ("Claimant's Brief"), arguing that: (1) Employer had failed to adduce sufficient evidence to overcome the presumption of compensability; (2) the CO did not address Claimant's medical evidence and afford him the benefit of an evidentiary preference favoring the opinions of treating physicians; and (3) the ALJ's credibility determinations concerning Claimant's testimony were insufficient to be sustained, rendering the finding that Claimant had failed to meet his burden of proof unsupported by substantial evidence.

Employer filed a timely Respondent's Response and Supporting Memorandum in Opposition to Claimant's Application for Review ("Employer's Brief"), arguing that the ALJ's determination that Claimant had failed in his burden of proof is supported by substantial evidence, and arguing in support that the ALJ's credibility and factual determinations were similarly supported.

Because the ALJ's credibility determinations are supported by substantial evidence in the record as well as by the ALJ's assessment of Claimant's testimonial appearance and demeanor, the finding that Claimant had failed to meet his burden of establishing that he sustained a work-related injury and disability under the Act are affirmed.

ANALYSIS

Claimant begins by arguing that he has adduced sufficient evidence to invoke the presumption that his alleged injury is causally related to his employment. Since the ALJ found this to be so and it is not disputed in this appeal, we need not address it further.

Claimant then argues that Employer failed to adduce evidence "specific and comprehensive enough" to overcome that presumption.

The first part of this argument is that the ALJ's determinations were premised upon "negative evidence", being numerous missing references to a work injury in certain medical reports, and a failure by Claimant to mention a work-related cause of his injuries to Employer until long after the alleged incident. Claimant asserts that "'negative evidence', that is, the absence of reference to a work injury, "is not sufficient to rebut the presumption because negative evidence is neither specific nor comprehensive." In support of this argument Claimant relies upon *Shipman v. Fresenius Medical Care Holding,* CRB No. 06-13 (January 11, 2006). Claimant's Brief at 9.

The CRB has taken the opportunity to elucidate *Shipman's* "negative evidence" concept and explain that the statement that "negative evidence is insufficient to overcome the presumption" is, standing alone, an overbroad and sometimes inaccurate statement of the law. The following quotation is from *Fowler v. Howard University*, CRB No. 15-160 (March 23, 2016):

> Claimant overstates and oversimplifies the law on this point. The following is the relevant portion from *Shipman*:
>
> > While it is true that any member of this panel could have reached another result, i.e., that Petitioner's evidence, specifically Respondent's failure to tell Dr. Azure that she had suffered a work injury on March 31, 2004 was sufficient to rebut the presumption, the ALJ's approach is consistent with the Court of Appeals finding that negative evidence is not sufficient to rebut the presumption as it is neither specific nor comprehensive. *See Bobby Brown v. Dept. of Employment Services*, 700 A.2d 787 (1997); *Onofre v. Lorinczi*, Dir. Dkt. 95-48, OHA No. 92-302A, OWC No. 209231 (September 13, 2000).
>
> The first sentence in the *Shipman* quote makes clear that a contrary result would have been permissible, and then the remainder of the quote explains that nonetheless the ALJ's analysis in that case was not without support from court precedent.
>
> To accurately understand *Shipman*, one must also consider the underlying court ruling. The *Shipman* quote is a brief distillation of the District of Columbia Court of Appeals far less sweeping analysis in *Brown v. DOES,* 700 A.2d 787 (D.C. 1997):
>
> > Negative evidence, in some circumstances, may be adequate to inform a factual determination. *See Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. 216, 224, 554 F.2d 1075, 1083 (1976). The court in *Swinton* provided the example that "if a man has no blood in his sputum, no cough, no weakness, no headache, no elevation of temperature of pulse, no stuffiness of pain in

> the chest – then from all facts, a doctor can say 'with reasonable medical certainty,' or as a matter of probability that this man does not have pneumonia." *Id.* (quoting *Wheatley v. Adler,* 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) [*Wheatley*]. The evidence relied on by WMATA is not of that nature. Evidence that some of the medical reports in 1990 and 1991do not contain statements attributed to Brown about the nature of his work or the 1983 or 1987 accidents is not the caliber of evidence required to meet the burden of overcoming the presumption of compensability. "The presumption *may be dispelled by circumstantial evidence* specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Id.* In order for the absence of statements in the reports in this case to have evidentiary significance, we must assume that Brown had the level of knowledge sufficient to make the association in 1990 and 1991 between his condition and the earlier injuries and was obliged to report it each time he saw a doctor, but also that any such statements, if made, would have been recorded in the reports. Such a leap would require undue speculation. Therefore, we do not view the absence of statements attributed to Brown in some of the medical reports to rise to the level required to sever the connection between the 1992 injury and Brown's prior injury and disability.
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> *Brown,* 700 A.2d at 792, 93 (emphasis added).
>
> Far from supporting a blanket rule that negative evidence can *never* be sufficient to overcome the presumption, *Brown* explicitly states the opposite, and *Shipman* allows that it would not have been error had the ALJ in that case so found. We emphasize the proposition enunciated in *Brown* that "Negative evidence, in some circumstances, may be adequate to inform a factual determination" [and] its reliance on *Wheatley* that 'The statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *cf. Swails v. Forever 21*, CRB No. 14-138 (March 2015) (the failure of a medical report for an alleged work-related injury to contain reference to a work-connection is insufficient to rebut the presumption).

Id., at 7-9.

In the CO before us, the ALJ wrote:

> To rebut the presumption, Employer asserts that medical evidence of record and testimony of Michelle Womack contradicts Claimant's assertion the he was injured on March 30, 2015 while at work.
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> In support of its position, Employer relies upon the prescription note written by Dr. Yarborough on May 18, 2015, which does not refer to a work related accident. Employer also relies on the first four medical reports from Dr. Shammas, covering the period of May 5, 2015 to May 28, 2015, none of which reference a work related

> accident. Employer also relies on Ms. Womack's testimony that Claimant informed her in April of 2015 that he injured himself at the gym.
>
> Thus, based upon the above findings, I find Employer has offered specific and comprehensive rebuttal evidence that claimant's injuries did not arise out of his employment and has thus rebutted the presumption of compensability.

CO at 5.

Although not referred to by the ALJ in this summarization paragraph, we note that prior to analyzing the presumption/rebuttal issue, the ALJ found that:

> On May 5, 2015, Claimant began treating with Dr. Sameer Shammas, an orthopedist [as suggested by Dr. Lynn V. Yarborough, Claimant's initial treating physician]. In his report of that date, Dr. Shammas notes Claimant presented with "generalized pain very much limited to his left hip region. The only extra activity he recalls doing is riding his bicycle. No actual fall or direct trauma." Dr. Shammas diagnosed Claimant with synovitis of the left hip and prescribed Relafen and Vicodin. Claimant continued to receive conservative treatment for left hip pain from Dr. Shammas on May 11, 18, and 28, 2015. CE 2.

CO at 3.

These are the four visits where there was no mention of any work trauma in connection with Claimant's complaints, but in which an alternative cause was put forth by Claimant for his injury to which the ALJ refers in his analysis. It is in that context that the ALJ found the lack of mention of any work-related cause to the alleged injuries in Dr. Shamus' first four medical reports to be relevant.

Further, it is not merely the absence of reference to any such work-related cause that the ALJ relied upon: he refers to family physician Dr. Lynn Yarborough's note within a week of the alleged incident, which report lacks any reference to work-related event (CO at 3), and to the testimony of Michelle Womack, who the ALJ wrote testified that:

> [She is] an operation specialist with Employer, [who] is responsible for onboarding paperwork for new employees and timecard payroll. She was Claimant's main contact while he was working for Employer. Ms. Womack would communicate weekly with Claimant in order to get his timesheet so he could get paid. In April of 2015, Claimant called and told her he was out a few days because he had hurt himself at the gym. On May 26, 2015, Claimant called her and told her "That him [sic] and his doctor had figured out where his injury was sustained, and it was two months earlier at work." In response, Ms. Womack initiated an injury report and sent it to Claimant so that he could add his statement. HT 65 – 74.

CO at 4.

It is also this testimony to which the ALJ referred in finding the lack of reference to a connection between the claimed injuries and the alleged March 30, 2015 work incident.

These are five separate times when one might reasonably expect that Claimant would have mentioned the work incident as an instigating cause of his pain complaints, where he did not, and in two of which he attributed his problems to riding a bicycle or working out at the gym.

This is a far different circumstance and evidentiary constellation than the failure to mention a work relationship in "some" medical reports as the court discussed in *Brown* and which underlies the holding in *Shipman.*

We reject Claimant's argument that the evidence relied upon by the ALJ to find that the presumption of compensability has been rebutted is insufficient for that purpose. It is sufficient to do so, and the ALJ's conclusion in that regard is affirmed.

Claimant next argues that the ALJ failed to accord him the benefit of the treating physician preference in weighing the medical evidence. Although Claimant's Brief contains a lengthy exposition on the treating physician preference, none of which is in dispute, there is no mention or citation in the brief to any record evidence in this case from any treating physician in connection with this argument. No specific doctor is mentioned nor is any specific expression of opinion identified as having been given inadequate consideration.

As the CRB has noted before, ""Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. District of Columbia*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); *see also Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived)." *Nocket v. Lockheed Martin*, CRB No. 15-171, at 4 n. 1 (April 4, 2016). Further, given the fact that the ALJ found that no accident occurred, any issue concerning opinions of the treating physicians is moot.

It is neither within our province to comb through the record and find whether there are evidentiary bases of a petitioner's arguments, nor would it be proper for us to do so. Such an undertaking would place the CRB in the role of an advocate as opposed to an arbiter concerning the legal sufficiency of a compensation order that is brought before us for review. Accordingly, we reject Claimant's un-expounded-upon complaint concerning the treating physician preference.

Finally, Claimant argues that the findings in the CO concerning Claimant's lack of credibility are not supported by the record "because the Compensation Order did not refer to the testimony harmonizing the apparent contradictions". Claimant's Brief at 11.

The following is the discussion of Claimant's credibility from the CO:

> With the presumption having fallen from the case, the burden of proof now rests with the claimant. Having had the opportunity to listen to claimant's testimony, and to observe both his demeanor and appearance at the formal hearing, I did not find claimant a credible witness. Thus I accord Claimant's testimony little, if any, weight.

To begin with, claimant testified on two different occasions during the formal hearing, that he "... clanged his knee ..." only one time while crawling under a cubicle on March 30, 2015. However, in his typed addendum to Employer's Report of Injury, claimant wrote, in pertinent part, "... I had to crawl under on my knees about 4 to five feet to reach the network port bumped my knee a couple of times in crawlspace area ..." HT 23, 24. EE 8 at 10.

In addition, Dr. Yarborough, who Claimant testified he first sought treatment with for his alleged work-related accident, makes no reference to a work-related accident, or to Claimant's hip or knee, in her prescription note of May 18, 2015 [sic] Rather, Dr. Yarborough notes only that Claimant was seen for a "medical condition." HT 27, CE 4.

Further, although Claimant testified he told Dr. Shammas during his first four visits that he hurt his knee at work, Dr. Shammas makes no reference in his first four medical reports, which cover the period of May 5, 2015 through May 28, 2015, to a work related accident. In fact, in his very first medical report of May 5, 2015, Dr. Shammas states, in pertinent part: "He comes in today complaining of very generalized pain very much limited to the left hip region. The only extra activity he recalls doing is riding his bicycle. No actual fall or direct trauma." (emphasis added) [sic] Thus, Dr. Shammas' initial history directly contradicts Claimant's testimony that he "bumped" or "clanged" his knee. HT 24, 37, 38, 40. CE 2 at 20.

Not only is there no reference to a work-related incident in Dr. Shammas' first four reports, there is also no reference to Claimant's left knee until the May 18, 2015 report. In fact, although Claimant testified Dr. Shammas was treating him for his "swollen knee", the first indication of knee treatment is the May 11, 2015 report which reflects that Claimant "...also has been experiencing mild generalized bilateral knees." (emphasis added) CE 1, 2. HT 29.

Moreover, it is not until June 9, 2015, that Dr. Shammas refers an alleged work injury, noting that Claimant "... wrote a complete report regarding an injury he sustained to his left hip and back while at work. He failed to mention that information at the first visit." This revised history by Dr. Shammas directly contradicts Claimant's testimony that he told Dr. Shammas during each of his first four visits that he injured himself at work. HT 38 – 41.

I also found Claimant's testimony concerning Ms. Ebeomobomb's response to his reporting the alleged incident not credible. When asked on direct examination what Ms [sic] Ebeomobomb's response was to reporting the incident, Claimant's answer was evasive, not once referring to Ms. Ebeomobomb but rather to "They", and then without any reference to Ms. Ebomobomb [sic], his supervisor, in response to his to his reporting the alleged incident.[3] HT 25, 26.

> By way of contrast, I found persuasive, and accord great weight to, the credible testimony of Michelle Womack that Claimant informed her in April of 2015 that he had hurt himself at the gym. I also found persuasive her credible testimony that despite weekly contact with Claimant, it was not until May 26, 2015, almost two months after the alleged accident, that Claimant first informed her he had allegedly been hurt at work. Her testimony directly contradicted Claimant's testimony that he called Ms. Womack in April of 2015 and informed her "... that I had hurt my leg onsite." HT 51, 67, 68, 69.
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> Accordingly, based on the foregoing, I find that Claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury by accident which arose out of and in the course of his employment.
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> [3] I also note that Claimant did not offer into the evidence the testimony of his Team Lead, Etuk Ebeomobomb, to whom Claimant allegedly reported the injury to [sic] a couple of days after the alleged incident. Claimant testified that Ms. Ebeomobomb is still employed with Employer. HT 49.

CO at 5–6.

From Claimant's formulation of the alleged error, it appears that Claimant agrees that the ALJ was correct in identifying contradictions and inconsistencies in Claimant's testimony, but that the ALJ was obligated evaluate the record in such a way as to see if there were any plausible explanations for the Claimant's otherwise non-credible testimony.

Claimant cites no authority for the proposition that such an undertaking is required of a fact-finder, and we are aware of none. Indeed, legal authorities cited by Claimant concerning an ALJ and credibility determinations stand for the propositions that "Findings on credibility are within the sound discretion of the ALJ", citing *Ogden v. Bon Appetit*, CRB No. 09-031 (March 2, 2009), and "Normally an ALJ's decision which is based on credibility findings deserve special weight, because the ALJ has the opportunity to observe the appearance and demeanor of the witness", citing *WMATA v. DOES*, 683 A.2d 470 (D.C. 1996). CO at 11.

Claimant does argue that "a specific factual determination that an injured worker lacks credibility must be accompanied by a discussion as to how the workers' testimony was in conflict with the record evidence", citing *Grant-Hopkins v. Alion Science and Technology*, CRB No. 14-207 (June 26, 2014), and similar legal propositions in *Murray v. DOES*, 765 A.2d 980 (D.C. 2001) and *McAlister v. Flippo Constr. Co.,* CRB No. 08-045 (March 25, 2008).

We have no quarrel with this proposition. However, we find that the above quoted discourse by the ALJ adequately explains the ALJ's position concerning credibility. Claimant's arguments in this case are little more than expressions of disagreement with the ALJ's assessment of the evidence and a request that we reweigh that evidence, making our own assessment of what that evidence shows, and substitute our judgment for that of the ALJ. This we are without power to do.[1]

[1] Claimant also repeats the argument concerning the insufficiency of "negative evidence" in this section of Claimant's Brief. Having already addressed this argument, we need not repeat here what was discussed above concerning negative evidence.

We are not unaware of that it could be argued that the CO contains a finding of fact, which, if read in isolation could be seen as in conflict with the finding that no work-related injury occurred. Were it not clear from the remainder of the CO that the ALJ ultimately rejected a finding that Claimant's evidence was sufficient to support a finding that such an injury had been sustained and did so for adequate reasons, and had this inconsistency between that paragraph and the remainder of the CO been raised as a grounds for appeal, we would consider remanding the matter for reconciliation of this paragraph with the remainder the CO. As it is, however, we shall assume that the third paragraph in the Findings of Fact was intended by the ALJ to be a recitation of Claimant's testimonial allegations, particularly given the insertion of quotation marks, and not an ultimate factual finding.

CONCLUSION OF LAW

The ALJ's credibility determinations are supported by substantial evidence in the record, as well the ALJ's assessment of Claimant's testimonial appearance and demeanor, and the finding that Claimant had failed to meet his burden of establishing that he sustained a work-related injury by a preponderance of the evidence is AFFIRMED.

So ordered.