GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-103

JOSE PADILLA,
Claimant-Petitioner,

v.

RED COATS, INC. and
AMERICAN CASUALTY CO.,
Employer/Carrier-Respondent.

Appeal from a July 19, 2016 Compensation Order
of Administrative Law Judge Lilian Shepherd
AHD No. 16-121, OWC No. 717346

(Decided December 6, 2016)

Carlos A. Espinosa for Claimant[1]
Matthew S. Tidball for Employer

Before LINDA F. JORY, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Jose Padilla ("Claimant") worked as a day porter for Red Coats, Inc. ("Employer"). As a day porter, Claimant's duties included cleaning floors. On May 28, 2014, Claimant dropped a bucket that was more than half full of water onto his left foot. On May 30, 2014, Claimant's foot was bothering him and he called his supervisor, Sergio Trujillo, who took Claimant to seek medical treatment at Kaiser Permanente. On the same day, Claimant went to the Washington Hospital Center. Claimant was found to have a gangrenous toe and he was taken to the operating room the next morning and had his left fourth toe amputated.

[1] Claimant was represented by Brian Riley at the formal hearing

On June 2, 2015, at the request of Claimant, Dr. Michael Franchetti performed an independent medical evaluation (IME) of Claimant. Dr. Franchetti opined that Claimant had a post-crush injury of the left foot that resulted in the development of gangrene necessitating left fourth toe amputation as a result of the May 28, 2014 work injury.

At the request of Employer, Dr. Louis Levitt performed an IME of Claimant on August 4, 2015. Dr. Levitt concluded that the lesion of Claimant's left foot that led to the amputation of the fourth toe was a direct consequence of the work injury that occurred on May 28, 2014.

Dr. Levitt was provided with the medical records from Kaiser Permanente and the Washington Hospital Center. On February 29, 2016, Dr. Levitt authored an addendum to the IME of August 4, 2015. Dr. Levitt indicated that there is no report that a bucket dropped on the toe as was the history Claimant provided to Dr. Levitt on August 4, 2015. Dr. Levitt opined that with the new information provided, Claimant's left foot pathology is a direct consequence of what appears to be non-work related trauma and his diabetes.

A dispute arose as to whether current treatment for Claimant's alleged disability and medical treatment was causally related to a work injury that occurred on May 28, 2014. A formal hearing was held before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES") and the parties presented the following issues for adjudication:

1. Did Claimant sustain an injury in arising out of and in the course of is employment?
2. Is Claimant's condition for which he sought medical treatment causally related to his work injury?

A Compensation Order ("CO") issued on July 19, 2016 wherein the ALJ concluded Claimant did sustain an injury that arose out of and in the course of his employment on May 28, 2014. The ALJ further concluded Claimant's disability is not medically causally related to the work place incident on May 28, 2014 and Claimant's request for temporary total disability ("TTD") benefits and medical benefits was denied. *Padilla v. Red Coats, Inc.*, AHD No. 16-121, OWC No. 717346 (July 19, 2016).

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief"). In his appeal, Claimant asserts that the ALJ erred by incorrectly applying the statutory presumption of compensability, and argues therefore that the CO is not in accordance with the law. Claimant further asserts the ALJ failed to correctly apply and consider the aggravation rule.

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review ("Employer's Brief"). In its opposition, Employer requests an affirmation of the CO and asserts that the CO is in accordance with prevailing law and that the "aggravation rule" does not apply.

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), 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) (*"Marriott"*). Consistent with this scope of review, the CRB is also 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant asserts:

> In our case at hand, the Administrative Law Judge (ALJ) found that on May 28, 2014 the Claimant sustained an accidental work related injury that arose out of and in the course of employment. However, the ALJ found no medical causal relationship between the accidental injury and the resulting injury or amputation of the left fourth toe. In her Compensation Order, Judge Shepherd relied mainly in [sic] one medical report from Washington Hospital Center casting doubt as to the cause of the initial injury as claimed by the Claimant. The report concerns a hand-written comment from Washington Hospital Center that allegedly suggest an alternative cause on injury. (walking barefoot).
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> The rest of the medical records provide no other evidence of the cause of the accidental injury that may dispel the credible description provided by the Claimant at the hearing on the happening of the injury. The medical records however, clearly showed, that Claimant sustained a gangrenous infection in his fourth toe, which required an amputation, likely associated with his underlying diabetes mellitus. Dr. Levitt's report is also significant for showing that prior to his May 28, 2014,[sic] the Claimant has never experienced ulcers or dysvacular problems associated with his diabetic condition.
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> Eventually, Dr. Levitt changed his medical causal connection opinion based on the medical records obtained from Washington Hospital Center, and one must assume on the one hand-written note from Washington Hospital allegedly indicating that claimant was walking barefoot when he sustained an injury to his foot. This report is contradicted by the credible Claimant's testimony, and his denial of ever having provided such information to Washington Hospital [sic]. Consequently, the Washington Hospital report does not rise to the substantial

> evidence required to rebut the presumption of compensability, which is more than a mere scintilla.
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> While the ALJ found that the claimant sustained an accidental injury during the course of his employment, (a bucket fell on Claimant's foot), in a contradicting finding, the ALJ held that the resulting injury, (the infection and subsequent amputation of the 4th toe), was not causally related to the accidental injury during the course of employment. These contradictory findings do not conform to the law of the District of Columbia which provides that conflicting unclear opinions should be decided in favor of the Claimant. Also, in accordance with the presumption of compensability in the Act, doubts are to be resolved in favor of the Claimant.

Claimant's Brief at 6, 7 (citations omitted).

We disagree with Claimant that in accordance with the presumption of compensability in the Act, doubts are to be resolved in favor of the Claimant, as it is well settled that once Employer has rebutted the presumption of compensability a claimant must meet the burden of establishing by a preponderance of the evidence that the resulting injury (in this instance, the infection and subsequent amputation of the 4th toe), was causally related to the accidental injury sustained during the course of employment. We find that Employer's response correctly describes the ALJ's analysis:

> By summary, Judge Shepherd found that the claimant met his burden of proof to invoke the presumption through his testimony that he dropped a bucket of water on his foot. (C.O. at 5) All that this establishes is that there was a work "event" and a presumption that the disability is causally related to the accidental injury. (C.O. at 6) ("As Claimant has demonstrated an accidental injury that arose out of and in the course of his employment, the presumption extends to the medical causal relationship between his alleged disability and the accidental injury. Accordingly, Claimant has met the presumption that his current condition is medically causally related under the Act."). *Id* at 7.
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> Judge Shepherd then cited the facts and arguments the Employer contends supports the claimant's current condition was the result of a non-work related injury. This came in the form of an IME an Addendum by Dr. Levitt, and medical records form Kaiser Permanente and Washington Hospital Center from May 30, 2014. (C.O. at 7). Specifically, Dr. Levitt's IME addendum noted the claimant's early medical records contradicted the history the claimant provided to him at the IME examination. (E.E. at 4). Those early records do not mention any work injury or even a bucket related injury, and instead cite a laceration injury due to walking barefoot. (*See, infra*).

Employer's Brief at 5, 6.

As neither party has challenged the ALJ's determination that Employer failed to produce sufficient and comprehensive evidence to sever the presumption that Claimant sustained an injury to his left foot on May 28, 2014, this conclusion is affirmed.

The ALJ stated that "this presumption extends to the medical causal relationship between an alleged disability and the accidental injury, correctly citing to *Whittaker v. DOES*, 531 A.2d 844 (D.C. 1995). The ALJ repeated the presumption methodology in determining the ultimate issue of compensability and placed the burden back on Employer. Although the ALJ did not explicitly refer to the DCCA decision in *Washington Post v. District of Columbia Dep't of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*)[2] the analysis and conclusion reached were premised upon the opinion of Dr. Levitt, which clearly meets the *Reynolds* standard. That is, it is undisputed that Dr. Levitt is a qualified medical expert who examined Claimant, reviewed Claimant's relevant medical records, and rendered an unambiguous opinion that the work injury did not contribute to the disability. It is not error to fail to cite *Reynolds* so long as the ALJ properly applied the standard in the CO.

The ALJ set forth the preponderance of evidence standard Claimant must meet after Employer has been found to have rebutted the presumption. The ALJ further stated that that the opinion of the treating physicians are ordinarily preferred as witnesses as opposed to doctors who have been retained to examine injured workers solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d. 1350 (D.C. 1992). With regard to Claimant's evidence the ALJ stated:

> Claimant relies on the medical records from Kaiser Permanente. In reviewing the medical records, the information that was provided to the medical personnel was that Claimant noticed a lesion on his foot but he ignored it. A separate note indicated that the Claimant apparently cut his left fourth toe against something while walking barefoot a few days ago. There is nothing from the treating physicians that indicated Claimant suffered a work related injury.
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> Claimant also relies on the IME of Dr. Franchetti, who opined that Claimant sustained a crush injury to his left foot when it was crushed with a bucket of water. Dr. Franchetti described Claimant's injury as a crushed injury and indicated that Claimant's x-ray revealed no fractures or dislocations of his crushed fourth toe but apparent soft tissue injury with suggestion of possible gas in the soft tissues of the left fourth toe raising the suspicion of infectious etiology. Dr. Franchetti does not expand on any of the assessment in his opinion.
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> Claimant's medical records from Kaiser Permanent and Washington Hospital Center do not establish the medical causal relationship. Claimant's IME from Dr. Franchetti is not persuasive and is not entitled to the treating physician preference.

[2] The law is clear that to rebut the presumption the employer must proffer the opinion of a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability. *Reynolds, supra.*

CO at 7, 8.

We conclude the ALJ properly did not afford any preference to the IME opinion of Dr. Franchetti. Inasmuch as we are precluded from re-weighing the evidence, we conclude the ALJ's determination that Claimant did not meet his burden of producing by a preponderance of the evidence that the subsequent toe amputation and disability are causally related to the May 28, 2014 work injury is supported by substantial evidence and in accordance with the law. *Marriott, supra.*

Finally, with regard to Claimant's assertion that the ALJ failed to correctly apply and consider the aggravation rule, Employer contends that this issue was not raised or argued at the Formal Hearing, therefore there is no basis to raise this issue now. After a thorough review of the Joint-Prehearing Statement, the Exhibits, and the hearing transcript there is no indication that Claimant was asserting that he had a previous injury to the amputated toe. To the contrary, in his opening statement, Claimant's counsel stated:

> The evidence will show that he had no problems with his left foot before this bucket fell on his left foot before this bucket fell on his left foot, and that he's had no subsequent accidents involving his left foot. And there's no --- therefore, no other reason for him to have the problems, or for him to have needed the treatment that he had after the accident in this case.
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> He is diabetic and he had been diabetic for many years prior to the accident in this case, and his diabetic condition did not include problems with his left foot.

HT at 12.

Consequently, the CRB declines to address that issue for the first time on appeal.[3]

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant sustained an injury that arose out of and in the course of his employment on May 28, 2014 is **AFFIRMED**. The ALJ's conclusion of law that Claimant's disability is not medically causally related to the workplace incident on May 28, 2014 is supported by substantial evidence and in accordance with the law and is therefore **AFFIRMED**.

So ordered.

[3] *See Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997).