CRB 12-083

SYLVIA MANNS,
Claimant-Respondent,

v.
XEROX CORPORATION AND SEDGWICK CMS, INC.,
Self-Insured Employer and Third-Party Administrator-Respondents.

Appeal from a Compensation Order on Remand by
Administrative Law Judge Anand K. Verma
AHD No. 09-076A, OWC No. 653614

Frank R. Kearney, Esquire, for the Claimant
Michael H. Daney, Esquire for the Self-Insured Employer

Before LAWRENCE D. TARR, MELISSA LIN JONES, AND JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges.*
Lawrence D. Tarr, *Administrative Law Judge* for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the employer, Xerox Corporation of the May 4, 2012, Compensation Order on Remand issued by Administrative Law Judge (ALJ) Anand K. Verma. In the COR, the ALJ determined the claimant sustained an accidental injury on September 18, 2008.

Because the ALJ again failed to follow the CRB's previous remand instructions, and because his findings are not supported by substantial evidence and are not in accordance with the law, we must REMAND.

PROCEDURAL HISTORY AND BACKGROUND FACTS OF RECORD

The claimant, Sylvia Manns, worked for the employer for about 20 years as a service technician; a job that required her to travel, climb, kneel, bend, and carry a tool bag and handcart that held a laptop computer and vacuum cleaner.

[1] Judge Russell has been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 12-01 (June 20, 2012).

It is the claimant's testimony that she sustained a work-related injury by accident on Thursday September 18, 2008, when the handcart tilted. The clamant said she twisted her right foot while trying to stop the cart from falling. She was able to perform her regular duties on the following work day, Friday September 19, 2008, although she testified that at night she had to soak her injured ankle and wrap it in a bandage.

On Monday, September 22, 2008, the claimant was treated at Kaiser Permanente, where she was examined by Dr. Claudia K. Donovan. Dr. Donovan diagnosed an ankle sprain and referred the claimant to her colleague, Dr. Brian O. Stephens, an orthopedic surgeon. Dr. Stephens examined the claimant on October 1, 2008, and diagnosed a right ankle sprain with a benign subchondral cyst.

On October 2, 2008, Dr. Donovan re-examined the claimant and reported the claimant had been disabled since September 25, 2008. After an MRI showed a right ankle vertical non-displaced fracture and a distal tibial osteochondral lesion, the claimant was referred to a podiatrist, Dr. Melissa L. Adams.

On October 29, 2008, Dr. Adams recommended a short leg cast for 5 to 6 weeks. The cast was removed on December 10, 2008. After several other examinations, the claimant was released to return to work on February 10, 2009.

The medical evidence also established that from sometime in 2005 until about three months before the alleged accident, the claimant had received medical care for ongoing right ankle and right foot pain that had not been medically causally related to the claimant's work for the employer.

The evidence further showed that since 2007, the claimant has had performance issues at her employment. Several times the claimant was written up for falsifying time sheets. On September 9, 2008, nine days before the alleged accident, the clamant attended a meeting with her supervisor and a company security official about the employer's belief that the clamant falsified her attendance record on August 20, 2008.

The claimant left the September 9, 2008, meeting when the company official began asking her about the alleged falsified time records. A follow-up meeting was scheduled for September 24, 2008. According to the employer's witnesses, the claimant never reported any accident before that meeting. At the meeting the claimant told her employer that she hurt her ankle and that the injury did not happen at home, but did not say it happened at work.

The claimant was placed on probation on September 24, 2008. According to the employer's witness, on the day after she was placed on probation, the claimant first reported that her injury happened at work on September 18, 2008.

In January 2010, the Honorable Anand K. Verma held a formal hearing on the claimant's request for temporary total disability benefits from September 24, 2008, to February 10, 2009. At the hearing, the employer defended the claim on the two grounds: (1) the claimant did not sustain a workplace injury but instead fabricated her accident and (2) any disability was not medically causally related to any alleged accident at work.

In his Compensation Order (CO) issued on March 17, 2010, Judge Verma determined the claimant was entitled to an award of the claim because, in his words:

> Employer has, however, produced no evidence to rebut the statutory presumption of compensability. Accordingly, the presumption of causal relationship between claimant's work injury on September 18, 2008, and her employment stands unrebutted.

Manns v. Xerox Corp., AHD No. 09-076, OWC No. 653614 (CO) (March 17, 2011) at 5.

The CRB reversed the ALJ's CO, primarily for two reasons.

The CRB held that the ALJ erred when he stated the employer "produced no evidence" to rebut the presumption because the record clearly showed the employer introduced evidence to rebut the statutory presumption:

> We find [the ALJ's] conclusion the employer produced "no evidence"] in error as there is evidence, in the form of medical reports prior to September 18, 2009 and the testimony of Mr. Perry, which could rebut the statutory presumption of compensability.

Manns v. Xerox Corp., CRB 10-100, AHD No. 09-076, OWC No. 653614 (September 15, 2011) at 3.

The second reason the CRB reversed the CO was because the ALJ failed to decide a critical issue that was raised at the hearing. The CRB noted that the hearing transcript established the employer contested the medical causal relationship of any injury to the alleged accident but the ALJ failed to state this as an issue and failed to discuss this issue in the CO:

> Moreover, we must note for clarity that a review of the transcript reveals that medical causal relationship was also a contested issue raised by the Employer to be adjudicated. Hearing Transcript at 7-8. This is not listed as an issue to be addressed in the CO and is not directly addressed by the ALJ. The ALJ, after finding an accidental injury occurred which arose out of and in the scope of her employment, ends his analysis and does not address the issue of medical causal relationship.

Id.

Because of these errors, the CRB reversed the ALJ's award and remanded the case back so that the ALJ could make a determination, applying the proper analysis, as to whether the claimant sustained an injury by accident on September 18, 2008 and, if so, whether any disability is medically causally related to that accident.

On September 30, 2011, ALJ Verma issued his Compensation Order on Remand (COR I). In COR I, the ALJ had this to say about one aspect of the CRB's decision:

> However, the CRB's assertion that the testimony of Fran Perry, claimant's supervisor would suffice to rebut the statutory presumption is confounding inasmuch as there is no precedent in this jurisdiction that allowed a lay opinion other than a competent medical opinion to specifically and comprehensively rebut the presumption of compensability.

Manns v. Xerox Corp., AHD No. 09-076, OWC No. 653614 (September 30, 2011) (COR I) at 3.

It is clear from this statement in COR I, that the ALJ has conflated the issues of injury by accident and medical causation and failed to recognize that a lay opinion may be sufficient to establish whether a claimant did or did not sustain an accidental injury at work as claimed.

Despite this misguided belief that a lay opinion may not used to rebut the presumption, the ALJ considered the opinion of the lay witness and also the medical evidence in denying the claim:

> Thus, predicated on the reliable medical evidence from claimant's treating physicians in conjunction with the credible testimony of claimant's supervisor, it is concluded claimant did not sustain the alleged right ankle injury on September 18, 2008. Accordingly, absent evidence supporting that an accidental injury occurred on September 18, 2008, the remaining issue need not be discussed.

Id at 4.

The claimant appealed the ALJ's decision in COR I. The CRB again reversed for several reasons.

First, the ALJ, as he had in the CO, failed to correctly identify and decide the issue of medical causal relationship. The CRB held:

> In both of the compensation orders in this matter, the ALJ dealt initially with the issue of whether Claimant sustained an accidental injury and then proceeded to ascertain whether that injury arose out of and in the course of her employment, notwithstanding that this was not specifically stated as a contested issue. Nonetheless, the ALJ listed legal causation as the second issue for resolution in both compensation orders and omitted any reference to the actual second issue in contention, whether any resulting disability was medically causally related to the work injury.

Manns v. Xerox Corp., CRB 10-100, AHD No. 09-076, OWC No. 653614 (March 21, 2012) at 4.

Second, the CRB pointed out that in his first CO, the ALJ found the claimant sustained an injury by accident but in COR I, the same ALJ looking at the same evidence, without explanation, found the claimant did not sustain an injury by accident:

> For the decision in [the COR I], the ALJ appears to have focused on the first enumerated instruction in the CRB's remand order. In doing so, the ALJ basically disavowed the findings of fact made in [the CO] as they were not incorporated by

> reference. New findings were made to support a new conclusion. Thus, in keeping with our standard and scope of review, the CRB is constrained to uphold this new conclusion provided it is supported by substantial evidence in the record. However, while the ALJ found there was substantial evidence to support the conclusion that Claimant did not sustain an accidental injury, we can not understand how he could justifiably do so by making a contradictory assessment of the same evidence and the exclusion of other evidence previously found to be persuasive.
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> * * *
>
> The ALJ in this matter has given separate and distinct interpretations to the same evidentiary record. While we know that under *Marriott* the evidentiary record is capable of producing substantial evidence to support divergent outcomes, the difference would usually attend when viewed and evaluated by different individuals, not by the same judge on separate readings of the same record. That said, the ALJ here has committed error on both occasions by his exclusionary statements of the evidence presented.

Id at 4-5.

The CRB further pointed out that the ALJ, once again, had misstated the evidence, this time to the claimant's detriment:

> In (the CO), the ALJ specifically stated that Employer, contrary to fact, had produced no evidence to rebut the statutory presumption that Claimant's accidental injury arose out of and in the course of her employment. Given this obvious omission, we were compelled to reverse and remand for the consideration of that rebuttal evidence. On remand, the ALJ has committed the same error, only now with respect to Claimant's evidence.

Id at 6.

The CRB criticized the ALJ for selectively using the evidence and remanded the case with specific remand instructions:

> Clearly, based on the above-referenced documentary evidence, that is still a part of the record in this matter, there is "ample evidence" in the record that appears to support Claimant's claim that she sustained an accidental injury on September 18, 2008. For the ALJ not to evaluate this evidence in making his determination and actually to have stated that no such evidence existed, when the facts are otherwise, constitutes error that must be corrected on remand.
>
> In attempting to resolve the issue of whether Claimant sustained an accidental injury on September 18, 2008, the ALJ has rendered two decisions in which he has selectively used the evidence to come to different conclusions. On remand, it is requested that the ALJ be of one mind and assess all the evidence presented by both

> parties that addresses whether an accidental injury occurred. To the extent the ALJ conjoins whether the injury arose out of and in the course of the employment with accidental injury, if it is determined that Claimant has invoked the presumption of compensability, he shall specifically set out the evidence adduced by Employer to rebut the presumption. If the presumption is rebutted, the evidence shall be assessed without that benefit to Claimant and with Claimant having the burden of proving by a preponderance of the evidence that the injury occurred.

Id at 7.

The ALJ issued his Compensation Order on Remand (COR II) on May 4, 2012. In COR II, the ALJ again changed his mind with respect to whether the claimant sustained an injury by accident. In COR II, as he had in the CO but not in CO I, the ALJ held the claimant sustained an injury by accident.

Also in COR II, the ALJ again failed to identify that the employer contested that the claimant's disability was medically causally related to the accident. Instead, the ALJ held "The injury, claimant sustained on September 18, 2008, is medically causally related to her employment." *Manns v. Xerox Corp.,* AHD No. 09-076, OWC No. 653614 (May 4 2012) ("COR II") at 3.

The employer timely appealed.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 *et. seq.,* (the "Act") at §32-1521.01(d) (2) (A).

Consistent with this standard of review, the CRB is constrained to uphold an order that is supported by substantial evidence, even if there also is 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, supra.*

DISCUSSION AND ANALYSIS

The employer's first assignment of error pertains to the ALJ's finding that the claimant sustained a work-related injury by accident.

The employer, noting that the ALJ failed to state the factual basis for concluding the claimant sustained an injury by accident or the reason for again changing his mind, argues that the ALJ's analysis is inadequate:

> While it appears that the ALJ has recognized that the Employer and Insurer presented evidence to counter the presumption, which is contrary to the statements made in his

> first compensation order, the most recent order does not actually discuss or evaluate the evidence presented.
>
> [COR II] does not analyze the wholly inconsistent manner in which the Claimant's ankle injury was reported to her primary physician. The Order does not assess the Claimant's credibility or even mention the Claimant's history of falsification of company records or her personnel issues arising from those repeated infractions, Further, the Order does not discuss her attendance at work after the alleged occurrence or the manner and the questionable timing of her claim that the ankle injury occurred at work (i.e. immediately after being placed on probation).
>
> Perhaps, most egregiously, the ALJ wholesale rejects the Claimant's long history of ankle problems prior to the date of injury as not relevant in any respect. He states "the medical report[s] generated prior to September 18, 2008, the date of accidental injury, could not possibly bear upon whether or not claimant's subsequent incurred injury was causally related to her employment." ([COR 2] at p. 4 (emphasis added). This statement makes clear that the ALJ is [sic] did not actually analyze all of the evidence presented. If he had, he would have at least considered the possibility that the Claimant did not experience an injurious event at work and that the observations made by her doctor on September 22, 2008, were the result of her continuing prior problems or an unrelated twisting event two weeks before.

Employer's Memorandum at what would be page. 8.

We agree with the employer that the ALJ's analysis in COR II is insufficient.

In COR II the ALJ held:

> In addressing first to the CRB's question whether the undersigned accorded disparate treatment to Dr. Donovan's medical report of September 22, 2008 which noted Claimant's September 18, 2008 accidental injury. On remand, the CRB further instructs that the Compensation Order on Remand should also resolve the question of medical causal relationship of Claimant's injury.
>
> Notwithstanding some variations in the medical notes pertinent to the date of claimant's injury, the undersigned recognizes it was error to have found that claimant did not suffer an injury September 18, 2008.

COR II at 3.

This conclusory statement by the ALJ neither assesses the evidence nor states any analysis. Moreover, in COR II the ALJ again failed to utilize the proper analysis and again failed to consider all of the evidence presented by the employer that challenged whether the claimant sustained an accidental injury.

Additionally, the ALJ erred in COR II with respect to the issue of medical causation because the ALJ again failed to discuss whether the claimant's period of temporary total disability from

September 24, 2008, to February 10, 2009 was medically causally related to the accidental injury of September 18, 2009.

As to this issue, in COR II the ALJ found the CRB's remand instructions on this issue "puzzling":

> The remand instruction was puzzling at best inasmuch as the medical report generated prior to September 18, 2008, the date of accidental injury, could not possibly bear upon whether or not claimant's subsequently incurred injury was causally related to her employment.

Id.

However, as the employer correctly noted in its memorandum, any confusion or puzzlement by the ALJ is not due to the CRB's remand instructions but by the ALJ's failure to consider that an employer may challenge causation not only with respect to whether an accidental injury arose out of and in the course of employment but also with respect to whether a medical condition resulted from a compensable injury at work.

As the employer accurately stated:

> [COR II] inexplicably states that the accidental injury on September 18, 2008 "**is medically causally related to her employment**" [COR II] at p. 3 (emphasis added). This is nothing more than a creative restatement of the ALJ's conclusion that the Claimant sustained an ankle injury arising out of and in the course of her employment. A careful reading of the remainder of the Order strongly suggests a misunderstanding of the issue of medical causation as the Order repeatedly refers to the issue as being whether the injury was medically causally related *to her employment.* The Order does not appear to appreciate the distinction between the two different forms of causation arguments that can arise in workers' compensation claims. As the Court of Appeals recognized in *Whitaker v. DOES,* 668 A.2d 844 (D.C. 1995), there is a [distinction between] "causation as it relates to a determination of whether an accidental injury arose out of and in the course of employment and *causation as it relates to whether a particular medical condition is a result of the compensable work injury." Id.* at 846 (emphasis added).[2]

Therefore, we must VACATE the ALJ's award and remand this case for new determinations by the ALJ with respect to whether the claimant sustained a work-related injury by accident and if so, whether the claimant's disability is medically causally related to that injury.

To avoid any further confusion or puzzlement, we shall identify the ALJ's tasks on remand.

[2] To further help alleviate the ALJ's puzzlement with respect to the evidentiary significance of pre-September 18, 2008, medical reports, we note that it is the employer's position that any disability either is medically causally related to the claimant's pre-existing ankle injuries or to a twisting event that happened about two weeks before the alleged injury at work, events which are documented in pre-September 18, 2008, medical reports.

The first issue for determination is whether the claimant sustained a work-related injury by accident, which necessarily involves determining whether the claimant proved entitlement to the presumption of compensability.

Initially, the ALJ shall consider the claimant's testimony and determine whether she made a prima facie showing that she sustained a work-related event that had the potential of resulting in or contributing to the disability. *Georgetown University v. DOES and Bentt, M.D., intervenor*, 830 A. 2d 865 (D.C.2003), *Johnson v. Omni Shoreham Hotel,* Dir. Dkt. No 03-06, OHA No. 02-240, OWC No. 573065 (March 21, 2003). If the ALJ determines that the claimant made a prima facie showing that she was injured on September 18, 2008, as alleged, he shall find the claimant invoked the presumption.

If the presumption is invoked, the ALJ then shall determine whether the employer rebutted the presumption. The ALJ shall consider all the evidence presented by the employer, such as the claimant's previous personnel problems, her attendance at work after the alleged occurrence and the employer's assertion of the "questionable timing of her claim that the ankle injury occurred at work (i.e. immediately after being placed on probation)" and determine if it is sufficiently specific and comprehensive to rebut the presumption.

If the ALJ determines that the employer rebutted the presumption, the ALJ then shall weigh all the evidence presented by both parties without the presumption and determine if the claimant proved by a preponderance of the evidence that she sustained an injury by accident arising out of and in the course of her employment on September 18, 2008.

If the ALJ determines the claimant sustained an injury by accident arising out of and in the course of her employment on September 18, 2008, the ALJ then shall consider the issue that he failed to consider in the CO, COR I, and COR II; whether any disability is medically causally related to this accident.

As to this issue, the first step is the same as with the dispute involving injury by accident. If the ALJ determined that the clamant made a prima facie showing that she sustained an accidental injury on September 18, 2008, he shall find she invoked the presumption with respect to the medical causal relationship between her injury and the accident.

If so, then the ALJ shall consider whether the employer rebutted the presumption after considering the employer's evidence that from about 2005 until about three months before the alleged accident, the claimant received medical care for ongoing right ankle and right foot pain that has not been medically causally related to the claimant's work for the employer.[3]

If the presumption is rebutted the ALJ shall then consider all the evidence presented by both parties, without the presumption, and determine if the claimant proved by a preponderance of the evidence that her disability is medically causally related to the September 18, 2008 accident at work and enter his award accordingly.

[3] For example, an October 17, 2005, office note from Kaiser Permanente stated the claimant injured both ankles and feet by running on the sidewalk. (EE 29).

Lastly, the employer did not contest any issues concerning the nature and extent of the claimant's disability so the ALJ does not need to address that issue.

CONCLUSION AND ORDER

The May 4, 2012, Compensation Order on Remand is not supported by substantial evidence and is not in accordance with the law. The May 4, 2012, Compensation Order on Remand is VACATED and this matter is REMANDED for further consideration in accordance with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

_____
LAWRENCE D. TARR
Administrative Appeals Judge

_September 17, 2012_____
DATE