COMPENSATION REVIEW BOARD

CRB No. 13-049

JULIO MORILLO,
Claimant–Respondent,

v.

RENAISSANCE HOTEL and MARRIOTT CLAIM SERVICES,
Employer/Carrier - Petitioner

Appeal from a March 27, 2013 Compensation Order by
Administrative Law Judge Saundra M. McNair
AHD No. 12-496, OWC No. 689047

James A. Cole, Esquire, for the Claimant/Respondent
Joel E. Ogden, Esquire, for the Employer-Carrier/Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a banquet server and bartender. He first experienced pain in his left arm and shoulder in August 2010 when he awoke during the night with severe pain. He sought treatment at Xpress Medcare where he was treated with an injection to the shoulder and pain medication. Claimant's shoulder pain continued but he lost no time from work. Claimant aggravated his shoulder pain lifting weights at home in late April 2011.

While at work on May 13, 2011, Claimant testified that he injured his left shoulder when he tried to prevent a heavy lunch cart that he was maneuvering with a co-worker from hitting a wall. The ALJ found that Claimant continued working, self-treated with an application of ice to the affected area, and later reported the injury to his supervisor.

The ALJ found that Claimant returned to work the next day but was not able to lift anything and then went to see a doctor about his injury on May 15, 2011.[1] The ALJ found that Claimant sought treatment at Xpress Medcare where he was seen by physician's assistant Bruce Abraham. Claimant was given a sling for his arm and told to return on Monday to get a referral for an MRI of the shoulder and humerus. The report from Xpress shows Claimant was treated on May 13, 2011 for left arm pain that began two weeks prior from a weightlifting injury.

The ALJ found that Claimant, on May 25, 2011, underwent an MRI that revealed a rotator cuff tear.[2] Claimant at some point came under the care of Dr. Syed Hasan, an orthopedic surgeon, who, on December 23, 2011, performed surgery on the torn rotator cuff.[3] Claimant remained off work until May 1, 2012 when Dr. Hasan released him to return to a light duty, desk job only, with lifting, pushing and pulling restrictions.

On October 2, 2012, Employer sent Claimant to Dr. Robert Gordon, an orthopedic surgeon, for an independent medical evaluation (IME). It was Dr. Gordon's opinion that neither Claimant's shoulder injury nor the surgery performed was related to pulling a cart at work. In a November 13, 2012 addendum, Dr. Gordon gave Claimant a 15% permanent partial impairment of the left shoulder related to the torn rotator cuff from weightlifting and 0% impairment related to anything that happened on May 13, 2011.

On October 5, 2012, Claimant's attorney sent him to Dr. Harvinder S. Pabla, an orthopedic surgeon, for an IME. Dr. Pabla deemed Claimant to be at maximum medical improvement for a May 13, 2011 work injury resulting in a left shoulder rotator cuff tear that was surgically repaired. Dr. Pabla opined that Claimant's medical condition and subsequent need for surgery was related to the work injury and gave him a disability rating of 40% permanent partial impairment to the left arm.[4]

Claimant filed a claim seeking temporary total disability benefits from May 15, 2011 to May 1, 2012; and, a schedule award of 40% permanent partial disability to the left shoulder and arm. After a formal hearing, a Compensation Order (CO) was issued granting Claimant temporary total disability for the requested period and granting a schedule award of 30%

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[1] The ALJ does not give a name of the doctor seen on May 15, 2011 and there is no medical record in evidence from any doctor for that date.

[2] While the ALJ found that Claimant underwent the MRI on May 25, 2011, that is the date the report was electronically signed. The date of service on the report is May 21, 2011.

[3] The ALJ appears to imply that Claimant started treating with Dr. Hasan in November 2011 and points out in fn. 3 of the CO: "The Claimant's Exhibits failed to provide page 1 of the Operative Notes or any other document to specifically state when the Claimant began treating with Dr. Hasan.

[4] Dr. Pabla gave Claimant's left arm a total permanent partial impairment rating of 45%, but attributed 5% to the preexisting injury when Claimant awoke in August 2010 with severe left shoulder pain.

permanent partial disability to the left arm.[5] Employer timely appealed with Claimant filing in opposition.

On appeal, Employer argues that the ALJ erred when she (1) determined that Claimant presented sufficient evidence to invoke the presumption of compensability; (2) that Employer did not rebut the presumption; and, (3) that there was substantial evidence that Claimant suffered an accidental injury that arose out of and in the course of his employment on May 13, 2011. Claimant counters that the ALJ properly applied the law to the facts to warrant affirming the CO. Employer did not appeal the nature and of disability.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the 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.[6] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005) (the Act), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order (CO) 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

DISCUSSION AND ANALYSIS

Employer's first assignment of error is that the ALJ improperly determined that Claimant presented sufficient evidence to invoke the presumption of compensability. It is Employer's argument that in order to benefit from the presumption, a claimant must first present credible evidence establishing a work-related event and ensuing injury. Employer contends that the ALJ improperly accorded Claimant the benefit of the presumption of compensability without first determining whether Claimant's testimony was credible. As it appears the ALJ has relied upon Claimant's testimony that he was injured at work on May 13, 2011 but that implied credibility determination is not supported by substantial evidence in the record, we agree.

As the ALJ noted in her recitation of the "Principles of Law", D.C. Code § 32-1521(1) establishes a rebuttal presumption that a workers' compensation claim comes within the provisions of the Act. However, in order for this presumption to arise, the claimant must offer some evidence of the existence of two "basic facts": (1) "death or disability", and (2) "a work-

[5] *Morillo v. Renaissance Hotel*, AHD No. 12-496, OWC No. 689047 (March 27, 2013) (CO).

[6] "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. DOES*, 834 A.2d 882 (D.C. 2003).

related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability."[7] Once the claimant offers such evidence, the presumption "operates to establish a causal connection between the disability and the work-related event, activity, or requirement."[8] Thus, in order for the presumption to arise, the claimant must first offer some evidence as to both "basic facts."[9]

At the formal hearing below, the ALJ was called upon to resolve the intertwined issues of whether Claimant sustained an accidental injury on May 13, 2011 that arose out of and in the course of his employment. With regard to the accidental injury, the ALJ made the following findings:

> On May 13, 2011 the Claimant alleged he suffered an injury to his left arm and shoulder while working in tandem with another co-worker to maneuver the Queen Mary Cart. The Claimant was pulling the cart while the other worker was pushing the cart; and while attempting to prevent the cart from hitting the wall, the Claimant pulled the cart and felt what he described as a "tear" in his arm. The Claimant continued to work…. After the lunch shift, the Claimant reported the injury to his supervisor, Jesus Apunte. Mr. Apunte accompanied the Claimant to the Loss Prevention Department and he completed paperwork regarding the injury with the assistance of someone in the department (the Claimant described the event and Loss Prevention Department person filled out the paperwork). At approximately 2pm, the Claimant attempted to treat his injury by applying ice to his arm. The Claimant continued to work the rest of the day; and worked the next day, but could not lift anything. On May 15, 2011, the Claimant went to see a doctor about the injury and to get medical notes for the Employer. The Claimant sought treatment at Xpress MedCare, and was treated by physician's assistant, Bruce Abraham. The Claimant was given a sling for his arm and told to return on the following Monday to get a referral for a MRI of the shoulder and humerus. He was released from Xpress MedCare on May 15, 2011 and did not return to work. On May 25, 2011, the Claimant underwent a MRI; and treated with physical therapy for approximately 5 months (HT pgs. 24-29, CE #4-5; EE # 3-4, and #6).[10]

As can be discerned from the above-quoted passage, the ALJ starts by stating "Claimant *alleges* he suffered an injury to his left arm and shoulder", then states the mechanism of injury with the perceived "tear" in the arm, and then later finds that after lunch "Claimant reported the injury to his supervisor." The ALJ then proceeds to find as to the date of initial treatment, the

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[7] *Ferriera v. DOES*, 531 A.2d 651, 655 (D.C. 1987) (emphasis in original).

[8] *Ferriera, supra*.

[9] *Id*., 531 A.2d at 655 n. 5 ("[T]he mere filing of a claim. . .is insufficient to invoke the presumption.").

[10] CO at p. 3.

practitioner providing that treatment, and date of follow-up diagnostics, and subsequent treatment. In doing so, the ALJ cites the evidence in the record that she relies upon for these findings. However, the inconsistencies between the findings made and the cited record evidence form the basis for Employer's argument that Claimant failed to provide credible evidence of a work-related event so as to invoke the presumption of compensability.

As Employer notes in its appeal, the ALJ has made no express credibility determination. However, given the ALJ's reliance on Claimant's direct testimony as to what transpired on May 13, 2011 and thereafter, the implication is that she found Claimant to be a credible witness.

The CRB has consistently been guided by the principle that credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole.[11] Such a determination should include more than a mere consideration of the witness' demeanor and appearance; it should include an overall evaluation of the testimony in light of its rationality, internal coherence, and consistency with other evidence in the record.[12] Thus, the credibility findings of an ALJ are entitled to great weight – when properly supported.[13]

In comparing the record evidence with the ALJ's findings, we note some of the inconsistencies:

1. The ALJ found Claimant was maneuvering the food cart with a co-worker; however, the October 5, 2012 IME report from Dr. Pabla (CE #1) states he was pulling the cart alone.
2. The ALJ found that the work accident occurred on May 13, 2011 with Claimant first seeking medical treatment on May 15, 2011. However, Dr. Pabla (CE #1) states Claimant saw his primary care physician, Bruce Abraham, on May 13, 2011. The only contemporaneous medical report in evidence (EE #3) is the May 13, 2011 treatment report by Bruce Abraham, a physician's assistant (PA) at Xpress MedCare.
3. Contrary to the ALJ's finding, Mr. Abraham reported that Claimant stated he was lifting weights two weeks prior when he heard a pop with ensuing pain.
4. The ALJ found Claimant underwent an MRI on May 25, 2011; however, that is the date the report was electronically signed. The MRI occurred on May 21, 2011.
5. The ALJ found that Claimant filed a written report the same day as the incident on May 13, 2011 but the record evidence documenting a written report shows the report was signed by Claimant on May 25, 2011 with the injury also occurring on that date.

The ALJ found that Claimant sought treatment at Xpress MedCare and was treated by Mr. Abraham, PA. The ALJ also found Claimant was given a sling for his arm and told to return the following Monday to get a referral for an MRI of the shoulder and humerus. These findings

[11] See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

[12] *Davis, supra* (citing, *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620 (1955).

[13] *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

are taken directly from EE #3, which specifically states May 13, 2011 as the treatment date. We note the further inconsistencies that the ALJ found Claimant first treated his alleged work injury on May 15, 2011 when the only treatment report is for May 13, 2011 and while the findings as to Claimant's treatment and referral are taken from that report, the ALJ makes no finding or reference to the weightlifting injury that is the basis for that treatment.

It is generally the case in this jurisdiction that in making a credibility determination, an administrative law judge will base the determination on the claimant's demeanor while responding to questions on direct and cross-examination, as well as the congruence between that testimony and the other record evidence.[14] Here there is no such congruence.

The inconsistencies between the ALJ's findings and the exhibits upon which those findings are based are quite evident. In addition, there are several occasions in the hearing transcription where the Claimant contradicted himself or did not remember when things happened. Findings as to credibility, whether express or implied, must be supported by substantial evidence in the record. In addition, in order to trigger the presumption of compensability, Claimant must produce some credible evidence of a work-related event, activity or requirement.[15]

In the case under review, there is a major discrepancy in the record between the alleged work injury on May 13, 2011 and the non-work-related weightlifting injury that was first treated on May 13, 2011. On remand, the ALJ shall make appropriate credibility findings in order to determine whether Claimant has presented credible evidence of a work-related event so as to trigger the presumption of compensability.

Employer's second argument on appeal is that the ALJ erred in determining that it did not present evidence specific and comprehensive enough to rebut the presumption of compensability. While Employer does not concede that the presumption was properly invoked, it argues that given the ALJ's determination that it was, it likewise follows that the evidence it presented in rebuttal was more than sufficient to sever the potential connection between the alleged injury and the job-related event at issue here. There is merit in Employer's argument.

To rebut the presumption, Employer states that it presented the IME and addenda from Dr. Gordon (EE #1), the May 13, 2011 medical report from Xpress MedCare (EE #3), and the work incident report dated May 25, 2011 (EE #6). It is the essence of Employer's argument that at the very least, these exhibits combined are more than sufficient to rebut the presumption.

With regard to Dr. Gordon's IME and addenda, Employer argues these reports meet the evidentiary standard set by the D.C. Court of Appeals to rebut the presumption. The standard established by the Court states

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[14] See, *e.g.*, *Bopp v. Clark Concrete Contractors*, AHD No. 12-527, OWC No. 692370 (February 28, 2013).

[15] *Bray v. Battle Transportation, Inc*., CRB No. 11-109, AHD No. 10-306A, OWC No. 571174 (March 8, 2012), aff'm *Bray v. DOES*, No. 12-AA-419 (D.C., March 8, 2013).

> We hold that an employer has met its burden to rebut the presumption of causation when it has proffered 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.[16]

Dr. Gordon first saw Claimant on October 2, 2012 where he took a patient history, performed an examination, and reviewed Claimant's available medical records.[17] Dr. Gordon proceeded to opine that Claimant had a rotator cuff repair that was not related to any injury at work on either May 13, 2011 or May 25, 2011. Dr. Gordon related Claimant's current condition to a preexisting impingement condition from August 2010 that was aggravated by a weightlifting injury on or about April 30, 2011. Dr. Gordon specifically opined that Claimant's current condition, the surgery performed and treatment received, was in no way related to pulling a cart at work in May 2011.

As can be discerned from the summation of Dr. Gordon's report, it can reasonably be assessed as meeting the test of an unambiguous opinion that the work injury did not contribute to the disability. However, instead of making this initial assessment of Employer's IME presented in rebuttal of the presumption, the ALJ proceeded to weigh Dr. Gordon's opinion against that of Claimant's treating physician, who the ALJ has determined to be Dr. Hasan. This is problematic because there are no medical treatment reports from Dr. Hasan in the record; only the December 23, 2011 operative report. In proceeding as she did, the ALJ has not followed the stated "Principles of Law" she initially laid out in the CO. On remand, the ALJ shall determine if Dr. Gordon's IME meets the test of *Reynolds* without weighing it against any other medical reports until after it is first determined that the presumption is rebutted.

Employer also submitted the May 13, 2011 treatment report from Xpress MedCare in rebuttal of the presumption. That report specifically stated that Claimant presented with shoulder pain that originated two weeks prior after a weightlifting session. The ALJ ignores the specific reference to a weightlifting shoulder injury in this report even though it lends support to the history taken by Dr. Gordon upon which he bases his opinion that no work-related shoulder injury occurred on May 13, 2011. On remand, the ALJ shall correct this omission.

As for the May 25, 2011 incident report, Employer notes that the ALJ further faults Dr. Gordon's IME for stating that no injury occurred on May 13, 2011 because it "is inconsistent with the fact that the Employer completed an incident report regarding the injury on the date of the incident." (CO at p. 10). We agree with Employer that this statement by the ALJ runs counter to the fact that the Employer did not complete an incident report on the date Claimant alleged he was injured at work. Rather, the incident report in evidence (EE #6) shows that it was completed

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[16] *Washington Post v. DOES*, 852 A.2d 909, 910 (D.C. 2004) (*Reynolds*).

[17] Employer's IME by Dr. Gordon occurred on October 2, 2012, a few days before Claimant's own IME by Dr. Pabla on October 5, 2012. Dr. Gordon did not acknowledge being aware of Dr. Pabla's opinion until his November 12, 2012 Addendum.

on May 25, 2011 for an injury occurring on that date. The ALJ has misread the exhibit in a manner that her reliance upon it is not only misplaced but inaccurate.

Employer's final argument is that the ALJ's decision that Claimant sustained an accidental work injury is not supported by substantial evidence. Employer essentially argues that the ALJ's decision is predicated upon "a misunderstanding of the key evidence and a whole acceptance of the Claimant's testimony despite its contradiction with the medical records."[18] As the ALJ has accepted Claimant's testimony that he was injured at work on May 13, 2011 in spite of this testimony being directly contradicted by the only treatment report in evidence and his own uncertainty on cross-examination when the injury occurred, we agree with Employer.

Our discussion above on Employer's first two assignments of error has pointed out the number of inconsistencies in the factual record. The ALJ has made findings of fact and conclusions of law based on this record evidence that does not account for these inconsistencies and at times takes some elements from exhibits while omitting others. A prime example is the May 13, 2011 Xpress MedCare treatment report that discusses a cause for Claimant's symptoms but the ALJ omits that cause from the CO, but includes from that report that Claimant was given a sling and told to return for a referral for an MRI. The result is a decision that Claimant sustained an accidental work injury that is not supported by substantial evidence.

CONCLUSION

The ALJ's determination that Claimant was entitled to the presumption of compensability that he sustained an accidental injury that arose out of and in the course of his employment was in error because the ALJ failed to first determine whether Claimant had presented credible evidence of a work-related event, activity or requirement in order to trigger the presumption. On remand, the ALJ shall make appropriate credibility findings, supported by substantial evidence in the record, that Claimant produced credible evidence of a work-related event or activity.

The ALJ's determination that Employer's evidence presented to rebut the presumption of compensability did not sever the connection between any alleged disability and the alleged work injury was in error as the ALJ failed to determine whether the totality of Employer's rebuttal evidence was specific and comprehensive enough to sever that connection. On remand, the ALJ shall first determine whether the totality of the evidence presented in rebuttal is sufficient to sever the connection between the disability and the work injury. If the presumption is rebutted, the ALJ shall weigh the evidence without benefit of the presumption with the burden on Claimant to prove by a preponderance of the evidence that he sustained an accidental injury.

As it has been determined that the presumption of compensability was not properly invoked and that the evidence submitted in rebuttal was not properly considered, the ALJ's determination that Claimant sustained an accidental work injury that entitled him to wage loss benefits and a schedule award is vacated.

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[18] *Memorandum of Points and Authorities in Support of Employer and Insurer's Application for Review*, pp. 19-20.

ORDER

The March 27, 2013 Compensation Order is not supported by substantial evidence and is not in accordance with the law. This matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

July 22, 2013
DATE