GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-139

MICHELLE MORROW,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY and SEDGWICK,

Employer and Third Party Administrator - Respondents.

Appeal from a Compensation Order by
The Honorable Karen Calmeise
AHD No. 12-129, OWC No. 656073

Michael Kitzman, Esquire for the Petitioner
Sarah Rollman, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] JEFFREY P. RUSSELL,[2] and MELISSA LIN JONES *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board, MELISSA LIN JONES, concurring.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the July 27, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for 36% permanent partial disability benefits to the right foot, interest on

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2]Judge Russell is appointed by the Director of the DOES as an interim CRB Member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

accrued benefits, and payment of causally related medical treatment. We REVERSE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a traffic clerk for the Employer. The Claimant's duties involved standing for two work shifts (four hours each) observing and documenting rail and bus ridership throughout the transit system. On November 3, 2004, the Claimant developed pain and swelling in her feet. The Claimant immediately sought medical treatment with Dr. Kay Sofar. Dr. Sofar diagnosed the Claimant with plantar fasciitis of the right heel. The Claimant returned to work on November 4, 2004.

The Claimant continued to treat her plantar fasciitis, coming under the care and treatment of Drs. John Bubser and Gina Saffo. The Claimant underwent conservative treatment before ultimately undergoing right foot surgery in June of 2008.

On August 3, 2011, the Claimant underwent an independent medical evaluation (IME) with Dr. Joel Fecther. Dr. Fecther took a history of the Claimant's right foot problems and performed an examination. Dr. Fecther opined the Claimant suffered from a 36% impairment to the right foot as a result of working for the Employer in late 2004.

The Claimant also underwent two separate IME's at the Employer's request. On October 23, 2008, the Claimant was examined by Dr. John Cohen. Dr. Cohen opined that her plantar fasciitis was unrelated to her duties as a traffic clerk and related to other factors. Dr. Cohen opined the Claimant could return to work full duty at that time and had reached maximum medical improvement from her plantar fasciitis surgery.

On October 4, 2011, the Employer sent the Claimant to Dr. Samuel Mats for an IME. After taking a history from the Claimant, reviewing medical records, and performing a physical examination, Dr. Matz opined the Claimant's right plantar fasciitis was unrelated to her work injury. Dr. Matz further opined the Claimant required no further treatment as it relates to the work injury and was at maximum medical improvement. Dr. Matz did assign a 10% permanent partial disability impairment to the right foot due to the unrelated plantar fasciitis.

A Formal Hearing was held on May 15, 2012. At the Formal Hearing the Claimant requested an award of 36% permanent partial disability benefits to the right foot, interest on accrued benefits, and payment of causally related medical treatment. The Employer raised the issues of whether or not the Claimant provided timely notice, whether claimed injury was medically causally related to the work injury, and contested the nature and extent of the Claimant's alleged disability. A CO was issued on July 27, 2012 denying the Claimant's claim for relief, finding the Claimant had failed to provide timely notice to the Employer and that the Claimant had failed to prove that her right foot condition was causally related to the injury.

The Claimant timely appealed on August 22, 2012. On appeal, the Claimant argues first, that the ALJ erred in both law and fact by not finding the Claimant had provided actual timely notice. Second, the Claimant argues that the CO erred in concluding the Claimant's right foot condition

was not medically casually related the work injury by not properly addressing the opinion of the treating physicians and by not explaining the reasons behind the rejection of Dr. Fechter's opinion.

The Employer argues that the CO is supported by the substantial evidence in the record and should be affirmed.

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 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Claimant first argues that the CO erred in finding notice was not timely provided. The Claimant posits that the Employer had actual notice as "the evidence presented shows that Ms. Morrow informed her employer of the condition, that the work was aggravating that condition, and that she required accommodations at her physicians request," relying on *Keith v. Unity construction Co. of D.C*.[3] The Employer counters that it "did not have actual knowledge of a causal connection between her employment and her foot problems." Employer's argument, unnumbered.

The ALJ first correctly noted that although written notice was not timely provided by the Claimant to the Employer,

> An employee's failure to provide written notice will not bar a claim where either the Employer has actual knowledge of the injury and has not been prejudiced by the claimant's failure to provide written notice, or where the Claimant's failure is excused upon a showing of a satisfactory reason for not submitting the required notice. *See* D.C. Code §§ 32-1513(d)(1) and (d)(2). (See *Jiminez v. District of Columbia Department of Employment Services*, 701 A.2d 837 (D.C 1997).

CO at 4.[4]

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[3] Dir Dkt. 89-58, H&AS No. 89-202, OWC No. 500412 (7/12/90).

[4] See also *Howard University v. DOES*, 960 A.2d 603 (D.C. 2008) (Tagoe). In addressing prior proceedings, the District of Columbia Court of Appeals noted the CRB,

> rejected a "should have known" standard and concluded that subsection (d)(1) requires an employer to have "actual knowledge." Thus, the CRB concluded, in order for [D.C. Code] § 32-1513 (d)(1) to be satisfied, an employer must know that the injury arose out of the employment and that the injury occurred in the course of the employment, and an employer must have actual knowledge of the injury and its relationship to the employment." While the CRB's interpretation of subsection (d)(1) may not be compelled

After acknowledging the above, the ALJ stated,

> Claimant testified that she was informed by the treating physician on November 4, 2004 that her right foot problems were caused by her job duties. (HT 29 and 54). She further testified that, after her treatment, she informed her supervisor, Mr. Michael Lassiter of the 2004 work related injury. (HT 29) Mr. Lassiter testified that, in 2004, as a field coordinator, he would have been made aware that the Claimant suffered a work related injury. However, Mr. Lassiter denied that he either received a report or was told by the Claimant that she suffered a work related injury in 2004. (HT 77) Although Claimant may have asked to be able to sit more often after her right foot condition arose in 2004, Mr. Lassiter denies that the Claimant was accommodated due to a work-related condition.
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> Employer has adduced sufficient evidence to contradict Claimant's assertion that Employer was informed, within 30 days following the November 2004 work injury, that Claimant was experiencing right foot problems related to her work activities. Furthermore, Claimant has not presented a satisfactory reason to explain the failure to provide written notice in accordance with the Act. I find Claimant has not presented, by a preponderance of the evidence, support for a finding that the Employer was given either written or actual notice under the Act of a work related injury on November 3, 2004. Thus, the statutory exceptions to the written notice requirement are not applicable in this case. There was no timely actual notice to the Employer of the November 3, 2004 accidental work injury.

CO at 4.

A review of the evidence submitted as well as the testimony of the Claimant supports the ALJ's conclusion that the Claimant failed to give timely notice. Indeed, when asked what the claimant told her supervisor after her return from work, Mr. Lassiter, at the time, the Claimant responded,

> I told him that I had the problem with my foot, and that my doctor said I'm not supposed to be really standing on my feet as much, and I had asked what we were going to be doing for the next couple of weeks as far as scheduling, because he's responsible to schedule our work, and if I could have something that I didn't – that wouldn't require me to stand on my feet.

Hearing Transcript at 29.

Being aware of a medical condition does not impute notice upon an Employer. As the testimony shows, the Claimant did not indicate to the Employer her belief that her condition arose out of her employment. Furthermore, the Claimant's reliance on *Keith v. Unity Construction Co. of D.C.* is misplaced. In *Keith*, timely notice was found to have been given, in part because at the time of the injury, a Employer representative witnessed the event, a fall from a tree. In essence,

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> by the statutory language, it comports with the general rule throughout the United States and is not foreclosed by any prior decisions of this court. It is a reasonable construction; since subsection (d)(1) allows the employer's knowledge to substitute for timely written notification of the cause of the injury, it is logical that the employer must have actual knowledge of the cause for the subsection to be satisfied. Deferring to the CRB, we accept its answers to our questions as binding.

Id at 609.

the Employer must be made aware in some fashion of the Claimant's condition its relation to the Claimant's work. The Claimant in the case *subjudice* is arguing that the Employer, in essence, "should have known" a position we reject. *Tagoe*, supra.

The Claimant next argues that the ALJ erred by not properly addressing the opinions of the treating physicians and by failing to explain why Dr. Fecther's opinion was rejected in favor of Dr. Cohen and Dr. Matz's opinions. Prior to addressing the merits of the Claimant's arguments, we must comment on the ALJ's analysis.

A review of the CO reveals that although the ALJ acknowledged that claims under the Act are subject to the application of the presumption of compensability, discussed what a Claimant under the Act must show to invoke the presumption, what an employer must show to overcome the presumption, and what an ALJ must do with respect to weighing the evidence once the presumption has been overcome, she never reaches the point of actually applying these principals.

Immediately following the recitation of the legal principals underlying the presumption, the ALJ states that the Claimant's testimony "does not support her claim that her current right foot condition was caused by her job duties on November 3, 2004" and that because the treating physician's notes are indecipherable, they add nothing to the inquiry. The ALJ then proceeds to describe the opinions of the three IME physicians, stating that one (Dr. Fechter) opined that the foot condition is a work related aggravation, while two other (Drs. Matz and Cohen) opined to the contrary.

Although the ALJ should at this point have indicated whether Dr. Fechter's opinion was adequate to invoke the presumption, either standing alone or in conjunction with Claimant's testimony, she did not. This is error. However, in this case, it appears to be harmless, inasmuch as there is but one conclusion she could have reached: Dr. Fechter's medical report is adequate, as a matter of law, to invoke the presumption.

The evidence being such that the presumption had been invoked, it was then incumbent upon the ALJ to consider the Employer's evidence, and to consider whether it was adequate to overcome the presumption. Again, the ALJ failed to take this step. Again, this is error. However, as before, it appears in this case to have been harmless, inasmuch as the two IME reports undeniably are adequate, as a matter of law, to overcome the presumption.

At this point, the presumption analysis requires that the ALJ weigh the evidence anew, without regard to any presumptions, and with the Claimant bearing the burden of proving causal relationship by a preponderance of the evidence. It is impossible for us to tell from this CO whether this is the standard that the ALJ employed in her evaluation of the evidence, because nowhere in the Compensation Order is this standard acknowledged.

One might assume that the ALJ applied the proper standard, or some lesser standard such as "substantial evidence". If either were the case, there would be either no error (in the case of a preponderance), or it might be harmless error (in the case of substantial evidence). However, we don't know this to be the case. She may have applied some other, greater standard (such as clear

and convincing evidence, or no standard whatsoever. This tribunal cannot "fill in the gaps" by making its own findings or conclusions. *King v. DOES,* 742 A.2d. 460 (D.C. 1999).

In order for us to assess whether the Compensation Order is in accordance with the law, we must know what standard the ALJ assumed was appropriate. Accordingly, we must remand this matter to the ALJ for further consideration, and the issuance of a new CO in which the ALJ acknowledges that the proper standard is one that places the burden of proof upon the Claimant, by a preponderance of the evidence, and in which she identifies what evidence she relies upon in reaching her conclusion.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the July 27, 2012 Compensation Order are not supported by substantial evidence in the record and are not in accordance with the law. It is **REVERSED** and **REMANDED** consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

November 13, 2012
DATE

MELISSA LIN JONES, concurring:

I take no issue with the majority opinion that the administrative law judge properly resolved the question of notice or with the majority opinion that this matter must be remanded for a proper weighing of the evidence. I write separately specifically to address the apparent logic applied by the administrative law judge that because there are 2 opinions from independent medical examination physicians that do not relate Ms. Morrow's condition to her employment and only 1 opinion by another independent medical examination physician that does relate her condition to her employment, her condition must not be related to her employment. Without any analysis of the substance of the opinions, I cannot subscribe to the position that substantial evidence supports the conclusion that simply because 2 is greater than 1, the employer wins.

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MELISSA LIN JONES
Administrative Appeals Judge