

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services**

**VINCENT C. GRAY
MAYOR**



**LISA M. MALLORY
DIRECTOR**

CRB No. 12-015

VIVIAN CLARK,

Claimant–Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer—Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. 11-240, OWC No. 67726

Donna J. Henderson, Esquire, for the Petitioner

Daniel Bastien, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ LAWRENCE D. TARR, AND HEATHER LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Vivian Clark is employed by the Washington Metropolitan Area Transit Authority (WMATA) as a station manager. She claimed that she was injured while walking on hard concrete floors over an extended period of time, which she alleges aggravated her pre-existing Achilles tendonitis. WMATA declined to accept her claim for workers' compensation benefits, asserting that her complaints were not caused by her employment as a station operator, but rather are totally and completely the result of the pre-existing condition.

¹ Judges Russell and Leslie were appointed by the Director of DOES as interim Board Members pursuant to DOES Administrative Policy Issuance Nos. 11-01 and 11-02 (June 23, 2011).

Ms. Clark presented her claim at a formal hearing which occurred before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on November 3, 2011. There was no dispute that Ms. Clark was unable to perform her regular tasks during this time period, or that this inability was the result of Achilles tendonitis and related problems. The only dispute concerned whether this incapacity from employment was work-related. Ms. Clark presented her own testimony that she was engaged in her routine duties when, on December 14, 2010, after traversing the concrete floor of the station, she experienced a sudden onset of Achilles pain, causing her to sit down immediately; that she sought treatment the following day at Kaiser Permanente, and was taken off work, a status she maintained until returning to work May 15, 2011. She also presented medical reports from Dr. Joel Fechter opining that her Achilles tendonitis had been aggravated by her employment.

WMATA contended that it was not, and presented medical evidence concerning prior treatment for Achilles tendonitis that Ms. Clark received, an independent medical evaluation (IME) report from Dr. Ian Weiner, and the *de bene esse* deposition of Dr. Mark J. Sheer. These IME physicians contended that Ms. Clark had not sustained an injury as a result of her employment.

On January 9, 2012, the ALJ issued a Compensation Order (CO) awarding the claimed benefits, temporary total disability from December 15, 2010 through May 15, 2011. In the CO, the ALJ determined that Ms. Clark's Achilles tendonitis was aggravated by walking on hard concrete floors, an activity which sometimes included walking hurriedly, and which occurred with some frequency.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See*, 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), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

WMATA argues that Dr. Fechter's participation in the care of Ms. Clark does not warrant his being treated as a "treating physician" for the purposes of the treating physician preference because he never saw or treated Ms. Clark until after she returned to work, and hence was not a treating physician at the time for which she sought an award of temporary total disability.

There does not appear to be any question that Dr. Fechter became Ms. Clark's treating physician, in the sense that he is a physician and he treated Ms. Clark. We can detect no error in the ALJ treating

him as such. Further, while the ALJ did not undertake any analysis in arriving at a determination that Dr. Fechter is a treating physician, such analysis is not generally undertaken when, as here, the physician in question has provided multiple (in this case four) treatment visits to a patient over a significant period of time (in this case approximately three months).²

WMATA also argues that Dr. Fechter's opinion that Ms. Clark's condition was aggravated by her employment should either not have been accepted, or that the ALJ erred in not explaining why his opinion was accepted, for another reason: his reports contain two specific factual errors which undercut their reliability.

The first error is Dr. Fechter's writing in his initial report that that Ms. Clark's injury involved her having taken a fall at work. Ms. Clark concedes in this appeal that this is an error, but argues that because Dr. Fechter acknowledged that her Achilles tendonitis pre-existed the alleged date of injury in this claim, the doctor's error is irrelevant.

The second apparent error WMATA points to is Dr. Fechter's description of Ms. Clark's medical history prior to sustaining the alleged work injury as "a history of pain to the left Achilles tendon in the summer of 2010 for a few weeks. No injury. Pain resolved without treatment." This is erroneous, WMATA argues, because medical records from Kaiser Permanente show that as late as December 2010 Ms. Clark was seen for foot, heel and Achilles tendon pain, that she was instructed to wear an orthotic boot and an Achilles sleeve, and she underwent physical therapy as late as January 5, 2011.

Ms. Clark does not address this argument in her response to the appeal, other than suggesting that "the previous pain she experienced in her foot mild [sic] and was severely aggravated by her work injuries".

In the CO, the ALJ wrote the following:

As noted by the Court of appeals in [*Washington Hospital Center v. DOES and Paul A. Thielke, Intervenor*, 821 A.2d 898 (2003) (*Thielke*)] it is only with respect to treating physicians that reasons for rejecting a physician's opinion must be explained.

CO, VI. DISCUSSION, page 5. While the ALJ is correct as far as she goes, we take this opportunity to quote *Thielke* at some greater length:

Nevertheless, this court's task is not to parse finely the reasons given by the finder of fact for accepting one set of expert opinions rather than another. Only with respect to *treating* physicians have we even held that the examiner must give reasons for rejecting medical testimony, *see Canlas v. District of Columbia Dep't of Employment*

² WMATA asserts that whether Dr. Fechter is or is not a treating physician is itself a factual issue in dispute to which it is entitled to have addressed in the CO, pursuant to the District of Columbia Administrative Procedure Act (DCAPA), D.C. Code § 2-501 *et seq.*, at 2-509 (e). However, WMATA does not direct us to anything in the record that suggests that it raised this issue with the ALJ, and our review of the transcript fails to identify anything said by WMATA's counsel that would have identified the issue as being in dispute.

Servs., 723 A.2d 1210, 1211-12 (D.C. 1999), ***although such an explanation obviously facilitates appellate review by the Director and this court.*** The hearing examiner went on to explain that the studies relied on by WHC's experts establishing the infrequency of abnormal response to viral vaccinations did not include "subjects exactly like [Thielke] -- an individual with severe cerebral brain damage who is then given an MMR shot as an adult." Dr. Kurzrok, Thielke's other expert, had opined that "his former severe head injury . . . may have placed him at increased risk for . . . reaction [to the vaccine]," and Dr. Mayle's opinion was even stronger that "a febrile [*i.e.*, fever] reaction to the injected material . . . has been known throughout the literature to precipitate seizures in those patients who have some type of brain damage . . . that predisposes to seizure activity." Although Dr. Mayle did not cite "the literature" he had in mind (as indicated, WHC did not take his deposition to challenge this assertion among others), and his conclusion that "this observation is well-known to all neurologists" was not shared by Drs. Rickler and Peterson, neither point invalidates the examiner's inference that Thielke's pre-existing injury may have worked to shorten the normal reaction time between the vaccination and seizure effects of the kind he experienced.

Id., at 904 (initial italicized portion in original, bolded italicized portion added).

We point out that while the court in *Theilke* noted in passing the *Canlas* rule that rejection of treating physician opinion must be explained, it went on to suggest that reasons for rejection of non-treating medical testimony is useful, and proceeded to discuss with approval how, in that very case, such explanations were given.

WMATA also argues in this appeal that the CO contains reference to an error in the transcript of the *de bene esse* deposition of one of its medical experts, Dr. Mark J. Sheer, which WMATA contends it corrected, with the ALJ's agreement, on November 9, 2011 by submitting a corrected page from the court reporter. The original, erroneous transcript reported Dr. Sheer stating that for walking to cause Achilles tendonitis, it would require "brisk walking that is very aggressive, almost in a job type of maneuver", whereas in the corrected transcript, "job" is replaced with "jog". See, WMATA's Memorandum in Support of AFR, page 17.

This error was brought to the ALJ's attention in WMATA's closing argument, and the ALJ allowed 10 days within which to obtain a corrected transcript. WMATA contends that the correction was made. In the CO, however, in Finding of Fact 25, the ALJ found that the testimony referred to "a job type maneuver".

While in the hearing the ALJ suggested that the difference between "job" and "jog" in this context is of little relevance, we can't agree that the difference between a doctor's opinion that an injury caused by a "jog type maneuver" on the one hand, and a "job type maneuver" on the other, is irrelevant where the central issue is whether the injury was sustained in the course of the patient's performing her *job*. Further, the fact that the ALJ made a separate specific factual finding in connection with the matter suggests that the ALJ, at least by the time she composed the CO, felt that it was relevant.

In the appeal phase of this case, WMATA has identified what appear to be numerous potential errors in the factual underpinnings of Dr. Fechter's report. We do not agree with Ms. Clark's assertion on appeal that the conceded error concerning the fact that she did not sustain her claimed injury while falling is *necessarily* obviated by Dr. Fechter's concession that Ms. Clark's underlying condition pre-existed the alleged work injury, nor do we agree with her suggestion that the Kaiser Permanente records document only a mild pre-existing problem. See, e.g., CE 1, January 5, 2011 Physical Therapy report noting pain being reported to be an 8 or 9 on a scale of 10.

Dr. Fechter also made an apparent error when he stated that Ms. Clark's prior problems lasted only "a few weeks" and required no medical treatment.

The ALJ's error concerning the contents of the *de bene esse* deposition requires a remand for clarification. On remand, we invite (but do not direct) the ALJ to heed the suggestion of the DCCA contained in the above quotation from *Thielke*, and if on reconsideration she again decides to reject the opinions of the evaluating physicians and accept those of Dr. Fechter, to explain why the apparent errors contained in Dr. Fechter's reports are either not actually errors, or alternatively why they are not significant.

The ALJ was not in error for not having undertaken to do this in the original CO, particularly in light of the fact that WMATA did not attack Dr. Fechter's opinions on these grounds at the formal hearing. However, now that they have been raised we agree with WMATA that they are not insignificant, and obtaining the ALJ's first hand, valuable insights could prove highly useful and enlightening. It will certainly "facilitate any further appellate review" by the CRB or the court if that becomes necessary.

CONCLUSION

The finding that Dr. Sheer testified that a "job type maneuver" is unsupported by substantial evidence, requiring a remand for further consideration of the issue in light of the corrected transcription.

ORDER

The award of compensation contained in the Compensation Order of January 9, 2012 is vacated, and the matter is remanded for further consideration in a manner consistent with foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

s/ Jeffrey P. Russell

JEFFREY P. RUSSELL
Administrative Appeals Judge

April 10, 2012
DATE