GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-069

ROBERT A. FORD,
Claimant–Petitioner,

v.

ALL GLASS SYSTEMS, INC.

AND

LIBERTY MUTUAL
Employer/Insurer – Respondents.

Appeal from a Compensation Order by
The Honorable Linda F. Jory
AHD 08-342A, OWC No. 615181

Matthew Peffer, Esquire for the Petitioner
Richard W. Souther, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the Claimant, Robert A. Ford, for review of a June 29, 2011, Compensation Order (CO), issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In that CO, the ALJ denied the claimant's request for continuing permanent total disability benefits. The CO also determined that the Claimant's need for bilateral total knee replacements was not causally related to the work injury of March 7, 2005 and that the Claimant had unreasonably refused Employer's vocational rehabilitation efforts warranting a suspension in temporary total disability benefits beginning July 15, 2010. We affirm.

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

BACKGROUND FACTS OF RECORD

The Claimant injured his left ankle on March 7, 2005 while working for the Employer. The Claimant sought treatment for his left ankle with Dr. Abdul Razaq. Dr. Razaq recommended conservative treatment for his left ankle, which did not provide relief. The Claimant was referred to Dr. Lloyd Cox who ultimately performed two surgical procedures on his left ankle.

The Claimant underwent vocational rehabilitation after it was determined that he was limited to light duty work. Mr. Blake Clark was the vocational counselor who was assigned to assist the Claimant to obtain work within his restrictions. Job leads were forwarded to the Claimant.

The Claimant also began to experience problems with both knees and was subsequently diagnosed with severe bilateral knee osteoarthritis. The Claimant was advised that he would need bilateral knee replacement.

A Formal Hearing was held on May 26, 2011. The Claimant sought an award finding his need for bilateral knee replacement to be causally related to the work injury and permanent total disability benefits. The Employer sought an order suspending the Claimant's temporary total disability benefits due to alleged non cooperation with vocational rehabilitation. A CO was issued wherein the ALJ found the need for bilateral knee replacement to be unrelated to the work injury in light of comments made by Dr. Cox. The ALJ further found that the Claimant had unreasonably failed to cooperate with vocational rehabilitation and suspended the Claimant's benefits effective July 15, 2010. Finally, the ALJ determined that the Claimant was not permanently and totally disabled, finding that the Claimant's ankle condition was not permanent and could improve after knee replacements.

The claimant 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 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. "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 §32-1521.01(d)(2)(A) of Act.

Consistent with this standard of review, the CRB is constrained to uphold a Compensation 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.*

ANALYSIS

On review, the claimant first argues that the ALJ erred as a matter of law in finding that the Employer presented evidence specific and comprehensive enough to rebut the presumption that the Claimant's bilateral knee problems are causally related to the March 7, 2005 injury. The Claimant specifically argues that Dr. Cox, in his deposition, "did not render a firm and unambiguous opinion that the work accident neither caused nor contributed to Mr. Ford's knee problems." Claimant's Argument at 8.

It is well settled in this jurisdiction that there is a presumption, in the absence of evidence to the contrary, that the claim comes within the provisions of D.C. Code §32-1521(1)(2001) and is compensable. In order to benefit from the Act's presumption of compensability, a claimant has the burden to show: (1) a disability and (2) a work-related event, activity, or incident that "has the potential of resulting in or contributing to the . . . disability." *Ferreira v. D.C. Department of Employment Services,* 531 A.2d 651, 655 (D.C. 1987). Stated another way, once the Claimant has offered credible evidence of a disability and the existence of a work related event, activity, or incident he enjoys the presumption of compensability. However, the Act's presumption of compensability operates only "in the absence of evidence to the contrary." In *Ferreira,* the Court of Appeals held, that "[o]nce the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." *Ferreira,* 531 A.2d at 655; Parodi, 560 A.2d at 526; *Waugh v. D.C. Department of Employment Services,* 786 A.2d 595, 600 (D.C. 2001). The D.C. Court of Appeals extended this presumption of compensability to the medical causal relationship between an alleged disability and the accidental injury, thereby conferring a causal relationship between a claimant's employment and his/her medical condition, including a disabling aggravated condition. *Whittaker v. D.C. Department of Employment Services,* 688 A.2d 844, 846 (D.C. 1995).

A review of the CO reveals that the ALJ first found the Claimant presented sufficient evidence to invoke the presumption of compensability that his bilateral knee conditions were related to the work injury, a finding not appealed. Having found the presumption invoked, the ALJ turned to the evidence submitted by the Employer to determine whether or not that evidence was specific and comprehensive enough to rebut the presumption. The ALJ specifically relied upon four medical reports authored by Dr. Cox. Dr. Cox specifically opined in three of those four reports that the Claimant's bilateral knee condition was not related to the work injury. We find no error in the ALJ finding these reports and the opinions rendered in them to be specific and comprehensive enough to rebut the presumption of compensability.

Moreover, the CO directly addressed the Claimant's argument that the deposition testimony was not enough to overcome the presumption. Specifically the CO stated,

> Contrary to counsel's assertion while Dr. Cox agreed that it is universally accepted that an injury to a joint can aggravate a pre-existing condition, Dr. Cox went on to explain to counsel after he testified that within a reasonable degree of medical certainty the knee arthritis is not related to his ankle injury
> (CE 1 at 27, 28):
>
> > There is no question that Bob Ford had pre-existing knee osteoarthritis. So you know, it makes absolute sense to me that the falls could aggravate his knee arthritis, i.e. aggravate his knee pain. Do I believe the fall caused the x-ray findings? No. He had those, you know, the week before the fall No if, ands or buts.
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> CE 1 at 34.

Ford v. All Glass Systems, AHD No. 08-342A, OWC No. 615181 (June 29, 2011).

We find no error in the ALJ's reasoning and reject the Claimant's argument that the deposition

testimony alone renders the opinions enunciated in Dr. Cox's reports not "firm and unambiguous."

The Claimant next argues that the CO erred in not finding the Claimant permanently and totally disabled and takes specific issue with the CO's statement that the Claimant's ankle condition is not permanent. Specifically, the Claimant argues the conclusion that bilateral knee surgery is based upon speculations. "This conclusion is not based upon substantial evidence in the record, but based upon speculation: there is no evidence in the record Mr. Ford will be able to obtain the requested knee surgery, and no evidence that is will help Mr. Ford's condition." Claimant's Argument at 9. We disagree.

A review of the CO reveals the following:

> It is unclear what claimant is relying on to support his claim for permanent total disability. Claimant has submitted the testimony and an opinion from Trudy Koslow, vocational rehabilitation consultant, that claimant is unable to obtain and/or sustain gainful competitive employment at this time. In addition to claimant's physical restrictions, Ms. Koslow cited claimant's limited education, limited work history and lack of computer skills. While serving to establish claimant's total disability, this opinion does not establish that claimant's condition will not improve during claimant's lifetime. A review of the most recent report in claimant's exhibit package is dated February 4, 2010. In this report Dr. Cox opines that the knees and ankle are working in concert to limit claimant's ability to function but that with the knee replacements claimant "would tolerate the ankle much better and that would certainly be much more functional." CE 3 at 1. Dr. Cox was not asked by claimant's counsel about the permanency of claimant's disability in his deposition, submitted by claimant as CE 1.
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> Dr. Cox did however agree claimant could do some work even without the knee replacements. CE 1 at 41 and added that his (Dr. Cox's) ability to "rehab the ankle that lives next door to these bad knees and to get this individual rehabbed and back to work I've been unable to do it". CE 1 at 54. Claimant submits the IME report of Dr. Gordon. Dr. Gordon agrees claimant could do light or sedentary work activity but would have to avoid work that requires climbing, squatting, working at unprotected heights, running or standing for prolonged periods without an opportunity to rest. Dr. Gordon does not mention the need for knee surgery, however, or how the knee surgeries could improve claimant's functioning or work capabilities. Accordingly, the undersigned is not persuaded Dr. Gordon's statement that claimant's ankle has reached maximum medical improvement can lead to a conclusion that claimant's disability is permanent in nature. Given claimant's young age and his physician's insistence that the knee replacements will help him deal with the ankle I cannot conclude that claimant's ankle condition is permanent at this juncture.

Ford, supra at 7-8.

Contrary to Claimant's assertion that there was no evidence that knee surgery would not improve the Claimant's condition, Dr. Cox, as explained in the passage above specifically states that knee surgery would improve the Claimant's condition. Furthermore, the Claimant concedes that he desires to have knee replacement surgery. Thus, the CO's finding that the Claimant's ankle

condition is not permanent is supported by the evidence.

Finally, the Claimant argues that he has not unreasonably refused the Employer's vocational rehabilitation services. Specifically, the Claimant argues his refusal was justified. We disagree. There is no one test for failure to cooperate; the determination is made on a case-by-case basis. The totality of the circumstances, including but not limited to, the medical status of the employee, the conduct of the employee, the conduct of the vocational rehabilitation service, and the conduct of the employer are examined and weighed for indicia of a pattern of conduct evincing an unwillingness to cooperate with vocational rehabilitation. See, *Johnson v. Epstein, Becker and Green*, Dir. Dkt. No. 01-11, OHA No. 98-273B, OWC No. 519621 (September 22, 2004).

A review of the CO reveals that the ALJ took into consideration the testimony of the Claimant, the Vocational Counselor, and the job leads forwarded to the Claimant when concluding,

> [T]he undersigned has reviewed the detailed list of jobs prepared by Mr. Clark and the jobs listed appear on their face to be consistent with the light duty restrictions placed on claimant. Moreover, I have found his testimony at the formal hearing regarding the amount of work he has put into the job search efforts to be sincere and demonstrate how zealous he was in his approach to help claimant secure suitable employment. In sum, it is clear to the undersigned that Mr. Clark was actually looking for available work for claimant and not simply preparing a list for litigation purposes of available jobs. Moreover, as the record reflects, Dr. Cox testified in his deposition that there are jobs that claimant could be doing: "Yeah. He could so do some jobs. Certainly, I think, he could drive a vehicle. He could be a cab driver. He might be able to, you know, deliver light parts if there's not a lot of walking". CE 1 at 43.
>
> On the other hand, I have found claimant's failure to follow up on these 40 well researched job leads to be an unreasonable failure to cooperate with employer's vocational efforts which warrants suspension of benefits effective July 15, 2010, the first date the vocational counselor became aware claimant was not complying by applying for the majority of the job leads provided to him. The suspension shall remain in effect until such time as claimant puts forth full cooperation with employer's rehabilitation efforts.

Ford, supra at 9.

We find no error in the above. Moreover, contrary to the Claimant's assertion that the ALJ did not take into consideration the records or testimony of the Claimant's vocational counselor, Ms. Trudy Koslow, the ALJ specifically mentioned Ms. Koslow when she acknowledged that the Claimant had "submitted the testimony and an opinion from Trudy Koslow." *Ford, supra* at 7.

We find the CO conclusion that the Claimant unreasonably failed to cooperate with vocational rehabilitation to be supported by the substantial evidence in the record and affirm the ALJ's finding. The crux of the Claimant's arguments is that there is substantial evidence in the record to support an award of the requested benefits. As stated above, the CRB and this Review Panel are constrained to uphold a 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*

International, supra. Here the ALJ's decision is supported by the substantial evidence in the record.

CONCLUSION AND ORDER

The June 29, 2011 Compensation Order is supported substantial evidence and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

February 9, 2012
DATE