

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services  
Labor Standards Bureau

Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD



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CRB No. 09-015

ANDRE P. HARTGROVE,

Claimant–Petitioner,

v.

ARAMARK CORPORATION AND SPECIALTY RISK SERVICES, INC.,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Leslie A. Meek  
AHD No. 04-476A, OWC No. 590360

Benjamin T. Boscolo, Esquire, for the Petitioner

Curtis B. Hane, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, and HENRY W. MCCOY<sup>1</sup>,  
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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

**DECISION AND REMAND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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<sup>1</sup> Judge McCoy is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 08-02 (September 30, 2008), in accordance with 7 DCMR § 252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

## OVERVIEW

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, D.C. Department of Employment Services, issued October 20, 2008. In that Compensation Order, the Administrative Law Judge (ALJ) denied Claimant-Petitioner's (Petitioner) claim for authorization for a medical procedure, concluding that Petitioner had failed to show a change in his condition that would warrant a modification of the previously issued Compensation Order. Petitioner filed an Application for Review on November 19, 2008 seeking review of that Compensation Order.

In 1987, Petitioner had undergone the surgical removal of a brain cyst with the insertion of a shunt and a subsequent surgical revision of the shunt in 1996. Years later while working for Employer-Respondent (Respondent), Petitioner, on August 2, 2003, bumped his head on a metal doorframe sustaining an injury to his head with resulting headaches, nausea, and some difficulty focusing. After a December 7, 2007 formal hearing in which the head injury was found to have arisen out of and in the course of his employment, Petitioner was awarded temporary total disability benefits from May 11, 2004 to the present and continuing and causally related medical expenses. See *Andre P. Hartgrove v. Aramack Corporation/Specialty Risk Services, Inc.*, OHA No. 04-476, OWC No. 590360 (June 27, 2005) (hereinafter, CO 1).

On May 15, 2007, Petitioner started complaining of and sought treatment for abdominal pain. Specifically, Petitioner sought authorization for a laparoscopic repositioning of the abdominal catheter which his treating physician considered to be the cause of his abdominal pain and which Petitioner argued was causally related to his 2003 injury. When Respondent refused to pay for the procedure, a formal hearing was held on August 18, 2008 where the presiding Administrative Law Judge (ALJ) deemed Petitioner's claim for treatment to constitute a modification of the prior Compensation Order. While finding Petitioner had presented sufficient evidence to demonstrate there was a reason to believe a change in his medical condition had occurred, the ALJ ultimately found Petitioner had failed to show a causal relationship between his current medical condition and his 2003 work injury and denied his claim for relief. *Andre P. Hartgrove v. Aramack Corporation/Specialty Risk Services, Inc.*, OHA No. 04-476A, OWC No. 590360 (October 20, 2008) (hereinafter, CO 2).

As grounds for this appeal, Petitioner argues the ALJ's characterization of his claim for relief as a modification was an error as a matter of law. Petitioner further argues, even assuming this was a request for a modification, the ALJ's conclusion that Petitioner did not demonstrate a reason to believe a change in his medical condition had occurred was not supported by the substantial evidence in the record and thus is not in accordance with applicable law.

Since the ALJ's decision is internally inconsistent and she failed to afford Petitioner the benefit of the statutory presumption of compensability, this matter must be remanded for the ALJ to make initial findings of fact and to afford Petitioner the presumption of compensability as to his claim.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

It is also well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Official Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each material, contested factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. D.C. Department of Employment Services*, 482 A.2d 401, 402 (D.C. 1984); D.C. Official Code § 2-509. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. D.C. Department of Employment Services*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King, supra*, 742 A.2d. at 465, basic findings of fact on all material issues are required, for "[o]nly then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law." *See also Sturgis v. D.C. Department of Employment Services*, 629 A. 2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. *See WMATA v. D.C. Department of Employment Services (Juni Browne, Intervenor)*, DCCA No. 06-AA-27 (June 14, 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006). The determination of whether an ALJ's decision complies with the foregoing APA requirements is a determination that is necessarily limited in scope to the four corners of the compensation order under review. Thus, where an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. D.C. Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994). So too, where the ALJ misapplies and/or misconstrues the governing law thereby warranting reversal of the compensation order under review, the CRB is constrained to remand the decision to the ALJ for a proper application of the law to the facts of the case. *See WMATA, supra*, 926 A.2d at 150.

With the foregoing principles of agency appellate review in mind, we turn to the issues raised by the present application for review.

Turning to the case under review, Petitioner initially argues that the ALJ made an error of law when she characterized his claim for medical treatment of abdominal pain as a request for modification of his prior compensation award, pursuant to D.C. Official Code § 32-1524, instead of as a new claim for abdominal surgery that was medically causally related to his 2003 work injury. In response, Respondent counters that the ALJ's application of the modification provision of the Act was not improper; but even if was, it constituted harmless error as the issue was resolved in Petitioner's favor. This Review Panel is of the opinion that inasmuch as the issue was one of medical causality, i.e. whether Petitioner's stomach complaints are work-related, it was error for the ALJ to treat the matter as a modification request.

The District of Columbia Court of Appeals has stated that § 32-1524 is designed for the review of a specific compensation award covering an issue "previously decided" by that order, and is not addressed to new issues that were not decided in the prior compensation award. *Capitol Hill Hospital v. D.C. Dept. of Employment Services*, 726 A.2d 682, 685 (D.C. 1999). Thus, the Act creates a specific procedure to revisit issues previously decided by a compensation order. See *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845 (D.C. 1998). In addition, it is the current state of the law in this jurisdiction that the term "compensation" in § 32-1524 does not include payments for medical care or treatment. See *Safeway Stores, Inc. v. D.C. Dept. of Employment Services*, 832 A.2d 1267 (D.C. 2003); also see *Kelly Millhouse v. WMATA*, CRB No. 06-085, AHD No. 95-348B, OWC No. 285708 (July 20, 2007).

In the case under review, Petitioner argues, and the record supports, that the injury and symptoms he sustained in his 2003 work injury had not changed, that he remained unable to work, and that he remained temporarily and totally disabled. Rather, Petitioner claims he has developed a new symptom, abdominal pain, which he asserts is causally related to his work injury and is making a new claim for medical treatment to address a new disabling condition that was not "previously decided." Accordingly, for the reasons stated and because this is a request for medical treatment and not a request to review a compensation award, this Review Panel is of the opinion that Petitioner's request for medical treatment in the instant matter constitutes a new claim and thus is not a request to modify the prior Compensation Order.

Next, Petitioner argues that substantial evidence exists in the record to support the conclusion that his ongoing abdominal pain and recommended abdominal surgery are causally related to his 2003 accidental injury. In addition, Petitioner argues the hearing record does not support the ALJ's conclusion that he is not a credible witness. In opposition, Respondent posits that the ALJ's decision should be affirmed in that Petitioner's evidence failed to show a causal relationship between his current medical condition and his work injury and his testimony at the formal hearing lacked credibility.

After finding Petitioner had presented evidence to demonstrate a reason to believe a change in his medical condition had occurred, the ALJ stated that the case would "proceed to a determination on the merits." The ALJ commenced her analysis with a determination that Petitioner was a less than credible witness.

In this jurisdiction, it is well-settled that the credibility findings of an ALJ are entitled to great weight. See *Murray v. D.C. Dept. of Employment Services*, 765 A.2d 980, 984-985 (D.C. 2001) citing *Dell v. D.C. Dept. of Employment Services*, 499 A.2d 102, 106 (D.C. 1985). The credibility findings must be predicated upon an ALJ's first hand observation of the witness's demeanor during the formal hearing, see *Santos v. D.C. Department of Employment Services*, 536 A.2d 1085, 1089 (D.C. 1988), as well as an evaluation of the witness's testimony in view of its rationality, internal consistency and the way it hangs together with other evidence of the record. See *Cohen v. A & A Hardware*, Dir. Dkt. No. 88-93, H&AS No. 86-272A, OWC No. 0075694 (July 2, 1990). In addition, the credibility finding, as with any other finding in a compensation order, must be supported by substantial evidence in the record and likewise must be set aside if not so supported. See *McDonnell v. Washington Gas Light Co.*, CRB No. 06-78, OHA No. 01-186B, OWC No. 283130 (December 11, 2006); *Washington Vista Hotel v. D.C. Dept. of Employment Services*, 721 A.2d 574, 578 (D.C. 1998).

In the Compensation Order, the ALJ found that the Petitioner was not credible because of his demeanor, his inability to recall important facts, and inconsistencies in his testimony. The ALJ delineated the bases for this determination by stating her reasons and citing specific supporting examples in the record for her decision to accord his testimony "very little weight." CO 2 at 5. After reviewing the record as a whole, the Panel determines that there is no error with this finding and the finding is based on substantial evidence. The ALJ's credibility finding was based not only on Petitioner's testimony but her observation and evaluation of his demeanor during the hearing. Under such circumstances, a fact-finder's determinations are entitled to special weight. See *Georgetown University v. D.C. Dept. of Employment Services*, 862 A.2d 387 (D.C. 2004). This Panel is constrained to uphold such a finding 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.

The issue left to be resolved is whether there is a medical causal relationship between the May 2007 reported onset of abdominal pain with the need for surgery and the 2003 work injury. The ALJ acknowledged evidence in the record from the prior Compensation Order that after suffering a head trauma at work on August 2, 2003, Petitioner underwent surgery on December 1, 2003 to replace his existing ventriculo-peritoneal (VP) shunt and that Petitioner's symptoms of headaches, nausea, the difficulty focusing, and the need for the surgical replacement of the shunt were causally related to the work injury. CO 2 at 4, citing CO 1.

The ALJ continued her discussion of the causal relationship issue with a review of the treating physician's reports starting with the May 15, 2007 and subsequent reports where Petitioner sought treatment for a new complaint of abdominal pain. Review of a CT scan showed "distal shunt tubing terminating near the liver" leading the treating physician to opine that this might be responsible for some of Petitioner's pain and discomfort. The ALJ discussed additional diagnostic tests, including a July 17, 2007 CT of Petitioner's head and abdomen, in which the scan of the stomach showed two different shunts in the soft tissue of Petitioner's right abdomen but which the ALJ noted were not mentioned in the treating physician's reports and specifically did not address the issue of which shunt required repositioning in the surgical recommendation to

relieve Petitioner's abdominal pain. The ALJ then proceeded to access sources outside the record to rectify a perceived absence of information on the structure, composition, and/or purpose of a VP shunt.

Finally, the ALJ cites a passage from a July 10, 2008 letter from Petitioner's treating physician addressed to his attorney stating the opinion that the continued abdominal pain might represent irritation from the abdominal catheter and require a laparoscopic repositioning. The need for the repositioning is then related back to Petitioner's work injury of 2003. With this final recitation, the ALJ proceeds to conclude that Petitioner has failed to prove that his "current medical condition is causally connected to the work accident of August 2, 2003." CO 2 at 8. It is the opinion of this Review Panel that the ALJ's requirement that Petitioner prove the causal relationship of his current medical condition to his work injury without first affording him the benefit of the statutory benefit of the presumption of compensability constitutes reversible error.

The Act creates a presumption that an employee's injury is compensable upon a showing by substantial evidence of a disability and a work-related event which had the potential to cause such a disability. The scope of the presumption also includes the causal relationship between the current disabling condition and the injury. See *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2d 844, 846 (D.C. 1995). However, the presumption can be rebutted if the employer presents substantial evidence that the complained of disability is not work-related. Once the presumption is rebutted, the injured worker must prove, by a preponderance of the evidence, the work-relatedness of the disability. See *Washington Hospital Center v. D.C. Dept. of Employment Services*, 744 A.2d 992, 998 (D.C. 2000).

In the instant case, the ALJ failed to make any specific findings of fact or discuss the evidence in the record in any manner that would suggest that she afforded Petitioner the benefit of the statutory presumption to which he was entitled. The ALJ identifies Petitioner's evidence which she analyzed including his testimony, medical reports, and diagnostic tests. The ALJ performed a detailed analysis of this evidence complete with her evaluative assessments as to whether the treating physician's recommendation for the repositioning surgery was supported by "any objective medical evidence or diagnostic tests." The ALJ's analysis is comprised totally and solely of Petitioner's evidence in order to reach her conclusion that he has not met his burden of proof.

At the very minimum, Petitioner's submission of his treating physician's July 10, 2008 letter provides sufficient record evidence to invoke the presumption on his behalf. The ALJ should have invoked the presumption which would have shifted the burden to Respondent to determine if evidence in rebuttal has been produced. If the presumption has not been rebutted, then the medical care as requested should be awarded. However, if sufficient evidence in rebuttal has been presented, the evidence should be weighed without reference to the presumption and with the burden upon Petitioner to prove by a preponderance of the evidence, the work-relatedness of his disability. As this was not done, this matter must be returned to the ALJ in order for her to not only make the appropriate findings of fact but to also afford Petitioner the benefit of the statutory presumption that his current disabling medical complaints are causally related to his 2003 work injury.

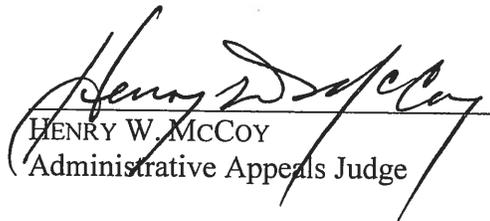
CONCLUSION

The ALJ's finding that Petitioner was a less than credible witness is supported by substantial evidence in the record. The ALJ's conclusion that Petitioner did not meet his burden of proof to show that his current medical condition was causally related to his work injury is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of October 20, 2008 is hereby REVERSED AND REMANDED. The conclusion that Petitioner did not meet his burden of proof to show a causal relationship between his current medical condition and his work injury is reversed and remanded with instructions to the ALJ to make appropriate findings of fact and to afford Petitioner the statutory presumption of compensability with regard to that causal relationship.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
Administrative Appeals Judge

January 26, 2009  
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DATE