

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-133

**BARRY RICE, JR.,
Claimant-Petitioner,**

v.

**D.C. UNITED C/O MAJOR LEAGUE SOCCER, LLC
and GREAT DIVIDE INSURANCE COMPANY,
Employer/Insurer-Respondent.**

Appeal from a July 21, 2015 Compensation Order by
Administrative Law Judge Gerald D. Roberson
AHD No. 14-554, OWC No. 711645

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JAN 22 AM 11 09

(Decided January 22, 2016)

Benjamin T. Boscolo for Claimant
Sheryl A. Tirocchi for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This case arises out of a work injury suffered by Barry Rice (Claimant) on August 29, 2010 while he was playing for D.C. United (aka Major League Soccer or MLS). A formal hearing was conducted in the above captioned matter on February 11, 2015. On July 21, 2015, a Compensation Order was entered finding that Claimant did establish that his concussion and symptoms arose out of and in the course of his employment but that Claimant did not establish entitlement to the requested temporary total or temporary partial disability benefits as a result of the August 29, 2010 work-related injury.

Claimant filed an Application for Review and Memorandum of Points and Authorities in support thereof (Claimant's Brief) with the Compensation Review Board (CRB), alleging that:

No evidence in the record supports the conclusion that Mr. Rice was released to resume playing professional sports because his headaches never stopped.

Employer filed Employer/Insurer's Opposition to Claimant's Application for Review asserting:

The Administrative Law Judge's conclusion that Claimant failed to establish an entitlement to TTD and TPD benefits is supported by substantial evidence and is legally correct.

ANALYSIS¹

The following facts found by the ALJ are not disputed:

On September 22, 2010, Dr. Mark Tekrony performed a neurological consultation to address Claimant's concussion and headache. Dr. Tekrony noted Claimant's memory was tested on [sic] following the August 29, 2010 event and September 14, 2010, and Claimant's performance declined between September 3, 2010 and September 14, 2010 for working memory. Examination revealed a well-developed young man with a healing laceration over his left eyebrow. Mental status, speech and language examinations were normal. Facial sensation and muscles of expression were normal. MRI testing of the brain and orbits was normal. Dr. Tekrony suspected the current headache was a direct result of the concussion, and associated with Claimant's relative lack of activity coupled with muscle spasm and perhaps rebound headache. Claimant's current headaches did not have any migraine features and was without any associated nausea, vomiting, photophobia, or phonophobia. Dr. Tekrony started Claimant on a Medrol Dosepak, and discontinued over the counter medications. Dr. Tekrony placed limitations on Claimant's activities, stating he will need to refrain from full impact play until his headache has resolved for two weeks. Dr. Tekrony cleared Claimant to start light exercise, which include walking, swimming and very light workouts with the team. Specifically Claimant was allowed to dribble, punt and jog at slow speeds. Claimant was not cleared for heading the ball, playing defender, playing keeper, or any activity that may result in even a minor head impact. CE 2, p. 7.

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Workers' Compensation 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. D.C. Code § 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 Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB and this panel are bound 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

Claimant completed the Player Information Form on November 18, 2010, stating "I am currently physically able to perform all of the duties required in professional soccer." EE 2, p. 3. Claimant acknowledged he had two concussions during the season. EE 2, p. 4. The Physician's Report, completed by Dr. Christopher Arnunciata, noted Claimant suffered two concussions, the last in August, and he found no residual symptoms. Dr. Arnunciata checked yes for normal exam. EE 2, p. 5. Dr. Arnunciata checked "yes" to the question "I have examined the above-listed player and found him to have NO physical injuries or orthopaedic problems or conditions that would prevent him from unlimited participation in professional soccer." EE 2, p. 6. Dr. Arnunciata indicated Claimant had passed the examination. EE 2, p. 6.

Claimant's contract ended with Employer on December 31, 2010. HT p. 38. Employer invited Claimant to the preseason in 2011, but ultimately declined to sign Claimant's contract option before the preseason started. HT p. 38. Claimant sought employment with other professional soccer teams. He went into training camp with the Chicago Fire, and he was released after three days because they decided it was not a good fit. HT p. 39. He did not have any concussive symptoms during his three days with Chicago Fire. HT pp. 39-40. Claimant also tried out for the Atlanta Silverbacks and F.C. Edmonton in Canada. HT p. 40. During these try outs, Claimant headed the ball [sic] experienced concussive symptoms, which included headaches, dizziness and loss of short term memory, and he had to stop. HT pp. 40-41. Claimant received a contract offer of \$ 30,000.00 from F.C. Edmonton, but he declined it. HT p. 51. Claimant received weekly unemployment compensation benefits in the amount of \$ 307.00 from March 2011 to June 2012. HT p.54

Claimant returned to the University of Kentucky in June 2012, and graduated in May 2013 with a B.A. degree in economics. From January 1, 2011 through September 30, 2013, Claimant earned wages as a coach for various clubs. HT p. 42.

CO at 3, 4.

In support of his assertion that the ALJ erred, Claimant asserts:

No neurologist not Dr. TeKrony, not Dr. Brown, not even the defense medical expert states that Mr. Rice ever stopped having headaches. Dr. TeKrony stated that Mr. Rice was not medically cleared to resume full activities as a soccer player until the headaches had been gone for two weeks. There is no indication that Mr. Rice ever went two weeks without a headache. Dr. Brown's history of Mr. Rice noted that Mr. Rice suffered from headaches every few weeks and they lasted five to six days. The Defense Medical Expert also acknowledges that Mr. Rice suffered from headaches. There is, thus, no indication from an expert medical witness that Mr. Rice was ever cleared to return to play professional soccer, and Mr. Rice's testimony indicates that while he was able to go for a few days without

suffering from headaches, he suffered from the headaches when he was attempting to practice with teams in Edmonton and Atlanta.

Claimant's Brief at 6.

Employer responds:

In addition to the lack of medical evidence indicating any disability from January 1, 2011 to October 30, 2014, Claimant's contemporaneous actions support the ALJ's ruling. According to Claimant's testimony, he was invited to return to DC United for the 2011 preseason, but was not signed to a new contract. Compensation Order at 3. Claimant then proceeded to search for employment with other professional soccer teams and tried out with the Chicago Fire, the Atlanta Silverbacks and F.C. Edmonton. *Id.* These actions are contrary to Claimant's current contention that he continued to suffer from headaches and was unable to return to his pre-injury employment. Claimant provided no evidence that he sought any medical advice, treatment, or medication or ever claimed he was unable to play professional soccer. Claimant's actions further provide evidence that Claimant was ready, willing and able to return to his pre-injury employment and suffered from no disability. The ALJ's ruling is legally correct and supported by substantial evidence.

Employers Brief at 6.

We have reviewed the record presented to the ALJ and we conclude that we agree with Claimant's assertion:

The one medical report that may indicate that Mr. Rice was cleared to return to playing soccer was the exit physical filled out by Dr. Annunziata. There, Dr. Annunziata did not offer a narrative history, describe any tests performed on Mr. Rice, but merely checked a box that said 'no physical injuries or orthopaedic problems or conditions that would prevent him from unlimited participation in professional soccer.' On its face, this report is a mere 'scintilla' of evidence – Mr. Rice's injuries were not orthopaedic in nature, but neurological. Furthermore, the Report does not demonstrate what tests (if any) Dr. Annunziata performed in the form of a physical examination. Lastly, this report is contradicted by all the other evidence in the record; Mr. Rice's testimony, Dr. TeKrony's medical reports, and both medical evaluations prepared for litigation.

The Compensation Order effectively substitutes its own medical opinion over that of the medical testimony of the record that Mr. Rice's headaches had cleared up because he stopped seeing a physician and was actively trying out for a player position. *See Ingagliato [v. Sibley Memorial Hospital, CRB No. 12-185(January 25, 2013)] supra.* This substituted opinion ignores the training and experience of the treating and litigation neurologists (particularly Dr. TeKrony, who says Mr. Rice should not play until he has gone two weeks without headaches) which have

found Mr. Rice suffers from headaches, Mr. Rice's testimony of periods where he was suffering from headaches, and the previous finding of fact that Mr. Rice suffered from headaches due to the accidental injury of August 29, 2010. The substantial evidence, however, supports only the conclusion that Mr. Rice's headaches prevented him from performing as a professional soccer player during the time period in question. *See Logan*, 805 A.2d at 242. Thus, reversal is required.

Claimant's Brief at 6, 7 (citation added).

With regard to the sole contention Claimant raises in his appeal which concerns the nature and extent of Claimant's disability, the ALJ wrote:

The record reveals Claimant received a contract offer from F.C. Edmonton in 2011, which reflects an ability to continue Claimant ultimately declined the contract offer, indicating it was a personal decision, and no doctor told him he could not play. HT p. 51. While Claimant maintains he suffered headaches during this period of these try-outs, he did not seek medical treatment, and no doctor documented these headaches or attributed them to the work incident of August 29, 2010. As such, Claimant has failed to established [sic] entitlement to temporary total disability and temporary partial disability benefits for the period of January 1, 2011 through October 30, 2014.

We agree that the CO substitutes its own medical opinion over that of the medical testimony of the record that Mr. Rice's headaches had cleared up because he stopped seeing a physician and was actively trying out for a player position. While Claimant did testify under direct examination that he did not have any concussive symptoms during the three days he tried out for the Chicago Fire team, he was not asked nor did he volunteer whether he actually headed the ball while trying out for that club. HT at 39, 40. However he testified that he tried out for two other clubs, the Atlanta Silverbacks and F.C. Edmonton and during these tryouts he headed the ball. Claimant testified that during the course of the tryouts he experienced immediate headaches, short term memory loss, dizziness and that those symptoms did not abate since his last concussion in August 2010. HT at 40, 41. Under cross examination, by counsel for employer Claimant testified that he was actually offered a position with F.C. Edmonton and that he declined the offer. Claimant was asked under cross-examination if there was a doctor that indicated at that time that he was not able to play soccer or if it was a personal decision not to continue to play soccer. Given these two choices, Claimant answered "personal decision". HT at 50. Claimant was then asked if following the decline if he continued to look for any additional professional soccer opportunities and Claimant answered:

No, because I – I couldn't. Any time I came – headed the ball, I would have the same symptoms that I received – when I had when I had a concussion.

HT at 52.

Included in his findings of facts which have not been disputed is the finding “during these try outs, [sic] Claimant headed the ball experienced concussive symptoms, which included headaches, dizziness and loss of short term memory, and he had to stop”. CO at 3.

Claimant testified he made the decision to go back to school and to find other employment to support himself while he did so. This is consistent with his treating physician, Dr. TeKrony’s opinion rendered on September 22, 2010:

I have cleared him to start light exercise, which would include walking swimming, and very light workouts with the team. Specifically, he is allowed to dribble, put, and jog at slow speeds. He is not cleared for heading the ball, playing defender, playing keeper, or any activity that may result in **even a minor head impact**.

CE 2 at 2. (emphasis added).

Dr. Tekrony’s opinion is not challenged until three and a half years later in 2014 with the independent neurological evaluation of Dr. Jerry Freidman.

We reject Employer’s assertion that:

While it is true that no doctor expressly stated that Claimant went two weeks without a headache, that fact is not dispositive on the analysis. Both Dr. Annunziata and Claimant, through his statements and actions, provide evidence that almost a month after Dr. TeKrony’s report, Claimant was able to return to full duty.

This Panel finds it reasonable that on November 18, 2010, the day Claimant completed the Player Information Form, Claimant thought he was going to be able to play professional soccer, notwithstanding the fact that he initially checked the “No” box. We further acknowledge that despite Dr. TeKrony’s unequivocal direction that Claimant was not cleared for heading the ball or any activity that may result in even a minor head impact, Claimant attempted to try out for other soccer clubs. As Claimant found out, he was unable to do so without symptoms, we do not agree that Dr. Annunziata’s checking “yes” adjacent to the statement “I have examined the above-listed player and found him to have NO physical injuries or orthopaedic problems or conditions that would prevent him from unlimited participation in professional soccer”, to be sufficient to warrant disregard of Dr. TeKrony’s neurological opinion. EE 2 at 4,

We cannot make a determination that the ALJ’s conclusions have followed rationally from the findings of facts. In so concluding, we are mindful that we are bound 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, supra* at 885. However, given that the conclusions of the ALJ do not flow rationally from the evidence, we cannot conclude the CO is supported by substantial evidence and must reverse the ALJ’s denial of disability benefits.

CONCLUSION AND ORDER

The Conclusion of Law that Claimant did not establish entitlement to temporary total disability and temporary partial disability benefits for the period of January 1, 2011 through October 30, 2014 is reversed as it is not supported by substantial evidence and not in accordance with the law. The matter is remanded to AHD to award Claimant the requested temporary total and temporary partial disability benefits.

So ordered.