COMPENSATION REVIEW BOARD

CRB No. 11-097

MARCUS A. GIBSON,
Claimant–Respondent,

v.

ABLE BODY READY STAFFING and AMERICAN CASUALTY CO. OF READING PA,
Employer/Insurer–Petitioner.

Appeal from an August 19, 2011 Compensation Order by
Leslie A. Meek, Administrative Law Judge
AHD No. 05-348B, OWC No. 586641

Joseph C. Veith, Esquire for the Petitioner
Michael J. Kitzman, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 16, 2003, Mr. Marcus A. Gibson was employed by Able Body Ready Staffing ("Able Body"). On that day, while driving a forklift, he hit a patch of ice and fell off the side of a 5 story building. He landed in a garbage dumpster and suffered multiple injuries that required extensive medical treatment including almost 30 surgeries.

A dispute arose over Mr. Gibson's entitlement to permanent total disability benefits. Following a formal hearing, an administrative law judge ("ALJ") issued a Compensation Order granting Mr. Gibson's claim for relief.[1]

On appeal, Able Body argues the ALJ did not address its defense of unreasonable refusal of medical treatment. Able Body also raises issues regarding to the ALJ's treatment of Mr. Carlos A. Encinas' testimony and its labor market survey.

[1] *Gibson v. Able Body Ready Staffing*, AHD No. 05-348B, OWC No. 586641 (August 19, 2011).

In response, Mr. Gibson asserts the Compensation Order is supported by substantial evidence. Mr. Gibson also asserts his drug addiction does not constitute an unreasonable refusal of medical treatment.

ISSUE ON APPEAL

Is the August 19, 2011 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS[2]

At the formal hearing, the first issue for resolution was whether Mr. Gibson's "current medical condition" is causally related to his work-related accident.[3] Neither party disputes the ALJ's application of the presumption analysis, but it is in the analysis of the rebuttal of the presumption of compensability that the problem begins.

First, the ALJ stated

> Employer challenges Claimant's assertion that his current medical condition is causally related to his work injury. To support its position Employer has presented, *inter alia,* medical reports concerning treatment for Claimant's injuries, a labor market survey report and the testimony of Mr. Carlos Encinas a vocational rehabilitation counselor.[4]

A labor market survey cannot be evidence that supports or refutes causal relationship.

In addition, the ALJ ruled

> [t]he medical report of Dr. John [*sic*] is enough evidence to lead a reasonable mind to reach a conclusion contrary to the proposition for which the presumption has been invoked. For this reason we must now weigh the evidence of record to determine if a causal relationship between Claimant's current condition and work injury exists.[5]

---

[2] 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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 International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[3] *Gibson*, *supra*.

[4] *Id*. at p. 6.

[5] *Id*. at pp. 6-7.

In his medical report, Dr. Johns rendered an opinion that Mr. Gibson is capable of returning to work on light duty for 8 hours a day;[6] however, this opinion regarding work capacity addresses the nature and extent of Mr. Gibson's disability, not the causal relationship of his current medical condition to his work-related accident.

Despite this misapplication of the presumption analysis, the ALJ's error is harmless because she went on to weigh the evidence with a preference for the opinions of Mr. Gibson's treating physicians and concluded

> [a]t the time of being discharged from both facilities, Claimant was still receiving active treatment for pain that is causally related to his work injury. It is apparent Claimant continued to experience great pain as a result of the work incident. It is further apparent that Claimant required prescription medicines for his work injuries and that but for his testing positive for cocaine, he would have continued receiving treatment for his injuries.
>
> Claimant's continued need for medical treatment is further evidenced by Claimant's medical treatment with High Point Regional Health System Emergency Room on June 2, 2010 where he was prescribed medication to manage his acute abdominal pain.
>
> Claimant's current medical condition is causally related to his work injury of January 16, 2003 and he is unable to return to his usual employment.[7]

To determine Mr. Gibson's current work capacity, the ALJ outlined the independent medical examination report of Dr. Fish, a physician retained by Mr. Gibson. Nowhere in the analysis of Dr. Fish's report did the ALJ set forth Dr. Fish's opinion regarding Mr. Gibson's physical limitation and restrictions, if any. On Able Body's behalf, Dr. Elkins examined Mr. Gibson, and according to the ALJ, he found Mr. Gibson was capable of sedentary work with no lifting over an occasional 10 pounds and restrictions for the right shoulder;[8] overall, Dr. Elkins found Mr. Gibson's likelihood of returning to any work "poor."[9] Without reaching any outcome regarding Mr. Gibson's current work capacity (other than the parties' concession that he cannot return to his pre-injury employment), the ALJ analyzed and rejected Able Body's labor market survey.

We have reviewed Mr. Encinas' testimony, and it supports the ALJ's determination that the labor market survey is based upon assumptions created by Mr. Encinas' failure to meet Mr. Gibson, his determination of Mr. Gibson's physical abilities without speaking to Mr. Gibson's treating physicians, his lack of knowledge of Mr. Gibson's complete work history, and his reliance upon generalities regarding the positions included in the labor market survey. Contrary to Able Body's

[6] *Id*. at p. 6.

[7] *Id*. at p. 7.

[8] *Id*. at p. 9.

[9] *Id*.

assertion, the ALJ's finding that the jobs in the labor market survey are not suitable is not "based solely upon the Respondent's own unruly behavior [and] the absence of any medical or vocational rehabilitation evidence suggesting that the Respondent's personality somehow precludes him from these employments [listed in the labor market survey]."[10] Given the detailed review of Mr. Encinas' testimony and the deficiencies in preparing the labor market survey, we affirm the ALJ's credibility ruling[11] and the ALJ's rejection of the labor market survey.

What remains is the conclusion that Mr. Gibson cannot return to his usual employment, and Able Body has not presented evidence of suitable, available, alternative employment. For this reason, we affirm the ruling that Mr. Gibson is permanently, totally disabled; however, the analysis cannot stop here.

At the formal hearing, Able Body raised the defense that Mr. Gibson's benefits should be suspended pursuant to §32-1507(d) of the Act[12] because Mr. Gibson's drug-abuse behavior caused him to be discharged from multiple healthcare providers and prevented him from obtaining further medical treatment.[13] Although the ALJ did note, "It is further apparent that Claimant required prescription

---

[10] Memorandum of Points and Authorities in Support of Application of Employer and Insurer for Review, p. 11.

[11] An ALJ's credibility determinations are entitled to deference. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

[12] Section 32-1507(d) of the Act states

> If the employer fails to provide the medical or other treatment, services, supplies, or insurance coverage required to be furnished by subsections (a) and (a-1) of this section, after request by the injured employee, such injured employee may procure the medical or other treatment, services, supplies, or insurance coverage and select a physician to render treatment and services at the expense of the employer. The employee shall not be entitled to recover any amount expended for the treatment, service, or insurance coverage unless the employee requested the employer to furnish the treatment or service or to furnish the health insurance coverage and the employer refused or neglected to do so, or unless the nature of the injury required the treatment or service and the employer or his superintendent or foreman having knowledge of the injury neglected to provide the treatment or service; nor shall any claim for medical or surgical treatment be valid or enforceable, as against the employer, unless within 20 days following the 1st treatment the physician giving the treatment furnishes to the employer and the Mayor a report of the injury or treatment, on a form prescribed by the Mayor. The Mayor may, however, excuse the failure to furnish such report within 20 days when he finds it to be in the interest of justice to do so, and he may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by a physician selected by the employer, or to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation, medical payments, and health insurance coverage during such period, unless the circumstances justified the refusal.

[13] Mr. Gibson explains the effect of his drug addiction as follows:

> Here, the Claimant did not refuse to attend his scheduled appointments. He did not refuse to take the prescribed medication. He repeatedly attempted to seek the recommended treatment. As stated by the Compensation Order, the sole reason that Mr. Gibson is not in pain management is the decision *by the provider* to not provide future treatment given the findings of a drug test. The Employer cites to no evidence that the Claimant refused treatment. The Employer cites to no evidence that the Claimant intentionally took drugs for the purpose of thwarting his medical treatment. The Employer requests suspension of benefits to alter a condition that is not alterable. Mr. Gibson did not refuse medical

medicines for his work injuries and that but for his testing positive for cocaine, he would have continued receiving treatment for his injuries,"[14] the ALJ has not applied this finding to Able Body's defense, and in order to conform to the requirements of the D.C. Administrative Procedures Act ("APA"),[15] (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.[16] Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding.[17]

The CRB is no less constrained in its review of Compensation Orders.[18] Moreover, the determination of whether an ALJ's decision complies with the APA requirements is a determination that is limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, 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 but must remand the case to permit the ALJ to make the necessary findings.[19] For this reason, the law requires we remand this matter.

CONCLUSION AND ORDER

The August 19, 2011 Compensation Order is AFFIRMED IN PART and REMANDED IN PART. The ALJ's ruling that Mr. Gibson is permanently, totally disabled is AFFIRMED, but because the ALJ has not rendered a ruling on Able Body's defense of failure to cooperate with medical treatment, this matter is REMANDED.

> treatment. The doctor refused to provide it to him. The facts in this case do not constitute a refusal of medical treatment and therefore the Compensation Order properly held that the cessation of pain management was not due to Mr. Gibson's refusal.

Respondent's Memorandum of Points and Authorities in Opposition to Application for Review at unnumbered pp. 8-9. (Italics in original.)

Mr. Gibson argues he did not fail to cooperate with medical treatment, but his version of the facts fails to recognize 1. His medical providers refused treatment because he tested positive for cocaine, and 2. His medical recommendations should not have to specify that if he engaged in activity that could result in his testing positive for cocaine he might not be eligible for further medical treatment.

[14] *Gibson*, *supra*, p. 7.

[15] D.C. Code §2-501 *et seq.* as amended.

[16] *Perkins v. DOES,* 482 A.2d 401, 402 (D.C. 1984).

[17] *King v. DOES,* 742 A.2d. 460, 465 (D.C. 1999) (Basic findings of fact on all material issues are required; only then can the appellate 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.")

[18] See *Washington Metropolitan Area Transit Authority v. DOES,* 926 A.2d 140 (D.C. 2007).

[19] See *Mack v. DOES,* 651 A.2d 804, 806 (D.C. 1994).

FOR THE COMPENSATION REVIEW BOARD:

_____
MELISSA LIN JONES
Administrative Appeals Judge

March 5, 2013
DATE