

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-150

**RICHARD G. GRAF,
Claimant–Petitioner**

v.

**PRO FOOTBALL, INC. D/B/A THE WASHINGTON REDSKINS,
Employer – Respondent.**

Appeal from a July 6, 2010 Compensation Order on Remand by
Administrative Law Jeffrey Russell
AHD No. 95-346, OWC No. 274721

Alan D. Sundberg, Esquire, for the Petitioner
Marc A. Antonetti, Esquire, for the Respondent

Before HEATHER C. LESLIE, HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*,

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 for review filed by the Claimant - Petitioner (Claimant) of the July 6, 2010, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimants's request for disability benefits. We AFFIRM, in part and VACATE, in part.

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was a football player for the Washington Redskins, playing as a defensive linebacker. The parties agree that the Claimant sustained an injury on August 26, 1994 during a pre-season game. The Claimant suffered an injury to his cervical spine. Because of this injury, the Claimant was placed on the injured reserve list and did not play during the 1994 football season. The Claimant's contract expired in February of 1995 and was not renewed by the Washington Redskins. The Claimant did not play professional football again, for the Employer or any other

professional team. The Claimant subsequently found employment at a health and fitness center on July 8, 1995.

A full evidentiary hearing was held on October 17, 1995. The Claimant sought an award of temporary total disability benefits and permanent partial disability benefits. A Compensation Order was issued on February 20, 1998 granting the Claimant's claim for relief. The Employer timely appealed.

The District of Columbia Court of Appeals (DCCA) issued an order on October 4, 2001 reversing the Compensation Order.¹ The DCCA noted that the "employer challenges on the sufficiency of the evidence to support the hearing examiner's permanent partial disability determination."² The DCCA remanded the case for further consideration of three issues:

1. On remand, the ALJ was directed to weigh the respective medical opinions and determine which one should be credited or rejected. The ALJ was directed to provide reasons for which physician was credited over the others.
2. The DCCA directed that the ALJ "address explicitly the employer's claim that Graf was terminated for reasons other than a work-related injury and that his medical condition did not result in a wage loss." *Graff*, 782 A.2d at 748, and.
3. The DCCA ordered that "proceedings on remand should also include consideration of the impact, if any, of the claimant's projected work-life in the employment at the time of injury upon the wage loss under D.C. Code §§ 36-308(3)(V)(ii), - (iii). *Id.*

On July 6, 2010, a Compensation Order on Remand was issued.³ The COR concluded that "Claimant's loss of wages from employment for the period claimed is not the result of the work related injury, the disabling effects of which injury had resolved prior to the commencement of the claim period."⁴ The COR denied the Claimant's claim for wage loss benefits.

The Claimant timely appealed. The Claimant argues first, the COR was in error in denying all claimed periods of disability which included the award of temporary total disability which was not subject to an appeal by the Employer. Second, the Claimant argues the COR failed to address the effect of the Claimant's disc herniation and that as a result, the COR is unsupported by the substantial evidence in the record. Third, the Claimant argues that the COR erred when concluding the Claimant's injury was not a factor in the end of his football career.

The Employer opposes the Claimant's application for review. The Employer argues that the COR is supported by the substantial evidence in the record and should be affirmed. Specifically, the Employer argues the substantial evidence in the record supports a finding that the Claimant is not disabled from playing professional football. The Employer also acknowledges that the temporary

¹ *Graff v. DOES*, 782 A.2d 735 (D.C. 2001).

² *Id.* at 741.

³ *Graf v. Pro-Football, Inc., et al*, AHD No. 95-346, OWC No. 274721 (July 6, 2010).

⁴ *Id.* at 26.

total disability benefits were never the subject of an appeal and that since these benefits were previously paid by the Employer, a remand is unnecessary on this point.

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 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §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 must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

Addressing the Claimant's contention that the ALJ went beyond the scope of the remand in denying all disability benefits, even the closed period of temporary total disability benefits, we must agree. As the Employer concedes, the award of temporary total disability benefits was never appealed and was paid by the Employer. The Employer appealed only the award of permanent partial disability benefits to the DCCA. As the DCCA stated,

The Employer challenges only the sufficiency of the evidence to support the hearing examiner's permanent partial disability determination.⁵

While we do find the denial of the temporary total disability benefits to be in error, we agree with the Employer that a remand is not necessary to rectify this error. The CRB does have the authority, pursuant to D.C. Code § 32-1521.01(d)(2)⁶, to amend an order. Pursuant to this authority under the Act, we amend the COR to deny *only* the permanent partial disability claim from July 8, 1995 to the present and continuing. The un-appealed award of temporary total disability from March 1, 1995 to July 7, 1995 remains in effect. The rest of our discussion will center on whether or not the COR's denial of the Claimant's permanent partial disability award is supported by the substantial evidence in the record and in accord with the law.

The Claimant next argues that the COR failed to adequately address the "issues concerning the claimant's radicular complaints" by failing to address the Claimant's contention that the disc herniation is also causing, at least in part, the Claimant's disability apart from the cervical stenosis. In this regard, the Claimant relies on footnote 4 of the DCCA's decision which states,

⁵ *Graf, supra* at 782 A.2d at 741.

⁶ D.C. Code § 32-1521.01(d)(2) states the CRB panel shall,

Dispose of the matter under review by issuing an order affirming the compensation order; reversing the compensation order, in whole or in part, and amending the order based on the panel's findings, or by remanding the order to the issuing Administrative Law Judge for further review...

Although Dr. Jackson agreed that Graf should not play if he continued to have radiating symptoms, the Order does not indicate that the permanent disability finding was based upon this factor alone. Indeed, there was some evidence that professional football players often play while experiencing pain. Whether Graf's other physical complaints and condition caused by the work-related injury resulted in his inability to resume playing professional football, separate and apart from the finding of stenosis, is an issue for the hearing examiner to address on remand.

Specifically, the DCCA stated "there is no way to determine from the order that the hearing examiner would have found that Graf could not return to professional football if stenosis was not present." *Graf, supra* at 743.

A review of the COR reveals the ALJ analyzed the medical opinions of several physicians, including Dr. Jackson, Dr. Torg, and Dr. Kriss. The ALJ noted that Dr. Jackson diagnosed the Claimant with a "cervical strain with radiculitis" and further opined the injury was not career ending. COR at 12. The ALJ also noted that Dr. Kriss opined the Claimant suffered from acquired cervical stenosis, but that Dr. Kriss "does not mention the other symptoms on which the Claimant now relies in reaching his conclusion that Mr. Graff had sustained a career ending injury." COR at 14. The ALJ also notes,

All of the other physicians who examined Claimant either disagreed with Dr. Kriss's conclusion that Claimant suffered a career ending injury or did not mention any findings that supported Dr. Kriss' opinion. For example, Dr. John Long, the radiologist who initially interpreted the MRI, made absolutely no mention in the MRI report that Claimant had the condition of cervical stenosis. (Emp. Ex. 30 (Medical record (MRI) of John Long, M.D. dated August 29, 1994).) Dr. Joseph Torg, a specialist in the area of cervical stenosis, does not believe that Claimant has cervical stenosis. (Emp. Ex. 1 (Medical record of Joe Torg, M.D. dated October 11, 1995); Emp. Ex. 3 at 35 ll. 5-8). Dr. Torg specifically noted that Dr. Long did not comment on the presence of spinal stenosis. (Emp. Ex. 3 at 32 (Deposition of Joe Torg, M.D. (October 12, 1995)) Most importantly, Dr. Jackson, Claimant's treating physician, does not believe that Claimant has cervical stenosis. (Emp. Ex. 41 at 49 ll. 14-21.)

Dr. Jackson disagreed with Dr. Kriss' conclusions regarding the MRI. As Dr. Jackson testified in response to a question from Claimant's counsel that it was his medical opinion that:

If he [Dr. Kriss] felt that his patient was going to be crippled or going to have significant problems after looking at this MRI, then he [Dr. Kriss] misread the MRI.

(*Id.* at 71-72.)

COR at 16.

Relying upon Dr. Torg's opinion, the ALJ specifically states that "Dr. Torg concluded that Claimant did not have a herniated disc as a result of his August 26, 1994 injury." COR at 19. It is clear reviewing the COR that the ALJ did take into account the MRI, the opinions of the physicians, as well as the Claimant's complaints in coming to the ultimate decision that the injury was not a career ending event. After having reviewed this evidence, the ALJ determined the Claimant did not suffer from a career ending injury, concluding,

Dr. Jackson, Claimant's treating physician, does not believe that Claimant has cervical stenosis. (Emp. Ex. 41 at 49-50.) Dr. Jackson examined Claimant on the sidelines at the time of the accident, and treated him for four months after the injury. (Tr. at 88; Emp. Ex. 41 at 11; Emp. Exs. 17-24.) Dr. Torg has done the only study in the country on professional football players with the condition of cervical stenosis. (Emp. Ex. 3 at 23-25.) Given these doctors' backgrounds in professional sports, given Dr. Jackson's experience with Claimant, and given Dr. Torg's expertise with the condition of cervical stenosis, the great weight of the medical evidence supports Employer's position that Claimant did not suffer a career ending injury due to acquired cervical stenosis in August 26, 1994. (*Id.*)

Moreover, Claimant does not have any other physical disability which prevents him from playing professional football. (*See* Emp. Exs. 1, 3, 30, and 41.)

COR at 22.

We reject the Claimant's argument that the ALJ did not consider the claim that he is disabled, in part, from a disc herniation, a different injury from cervical stenosis. We find the ALJ considered all of the medical evidence, the MRI results, and the diagnosis and opinion of Dr. Kris upon whom the claimant primarily relies. We find no error in this. What the Claimant is asking us to do is re-weigh the evidence in his favor, a task we cannot perform.

The Claimant next argues the ALJ erred in concluding the Claimant's injury did not play a factor in the ending of his football career. We disagree. We start with the definition of disability in the District of Columbia which is the physical or mental incapacity because of injury which results in the loss of wages.⁷ Thus, if a Claimant is not working for reasons other than his or her injury, the Claimant is not disabled under the Act.

When determining whether or not the Claimant was disabled because of his injury, the ALJ found the testimony of Mr. Charles Casserly, a General Manager of the Employer, credible as to the reasons for the Claimant's termination after the football season. COR at 7. The ALJ concluded,

Mr. Casserly stated, and I so find, that had Mr. Graf not had the injury, he would have been terminated and that the injury was irrelevant to Mr. Graf's tenure and the termination of his employment as a professional football player for Employer. (*Id.* at 30.)

⁷ *See Upchurch v. DOES*, 783 A.2d 623 (D.C. 2001).

Employer terminated Claimant for lack of skill in August of 1994; as Mr. Casserly testified "[w]e had made a decision back in August of 1994 that Rick Graf was not good enough to play on our football team at that time." (*Id.* at 16 ll. 19-23.) The Redskins did not believe that Claimant possessed sufficient skill to play in the NFL. (*Id.* at 17 ll. 7-13.) Only after his release did Claimant inform Employer that he was not healthy enough to play in a regular season game, and therefore should be placed on injured reserve. (*Id.* at 15-16.) Claimant's treating physician, Charles Jackson, M.D., agreed, and the player remained as an employee of the Employer until the expiration of his contract in February of 1995. (*Id.*)

Claimant's contract of employment for the 1994 football season expired on the last day of February 1995. (Emp. Ex. 7.) Mr. Casserly recalls that following the expiration of Mr. Graf's contract, Mr. Graf's agent asked if there was interest in resigning him (Emp. Ex. 5 at 20), but after the expiration of his contract, he was not re-signed to play professional football with Employer. (*Id.* at 16-17.) Claimant did not receive an offer to play professional football with any other professional football team. (Tr. at 140.)

Mr. Casserly testified, and I find, that Claimant's "medical condition was never a consideration for not re-signing him in 1995." (Emp. Ex. 5 at 19 ll. 20-21.) Claimant knew at the time he negotiated his 1994 contract with Employer that he was a long shot to make the professional football team. (*Id.* at 18.)

COR at 10.

The ALJ, relying in part on *Burge v. DOES*⁸, concluded that "the reason that the Claimant is not engaged in the occupation of playing professional football is because he no longer possesses the requisite skill and ability to do so and Claimant himself decided to stop playing." COR at 24. We affirm this finding.

As stated above, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion.

⁸ 842 A.2d 661 (D.C. 2004).

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the July 7, 2010 Compensation Order on Remand are AFFIRMED in PART and VACATED in part.

Pursuant to D.C. Code § 32-1521.01(d)(2), the CRB hereby amends the Compensation Order on Remand to deny *only* the permanent partial disability claim from July 8, 1995 to the present and continuing. The un-appealed award of temporary total disability from March 1, 1995 to July 7, 1995 remains in effect.

We affirm all other aspects of the Compensation Order on Remand as being supported by the substantial evidence in the record and in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

April 2, 2013

DATE