

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-079

Haidar Al-Nori,
Claimant-Petitioner,

v.

Four Points by Sheraton and Liberty Mutual Insurance Company,
Employer and Insurer-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 SEP 13 AM 10 43

Appeal from a Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 10-150A, OWC No. 664824

Michael J. Kitzman, Esquire, for the Petitioner

Robin M. Cole, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ MELISSA LIN JONES AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the claimant for review of the Compensation Order issued July 26, 2011 by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the District of Columbia Department of Employment Services (DOES). In that Compensation Order, the ALJ denied the claimant's request for temporary total disability benefits from September 28, 2010 through January 5, 2011 and from February 11, 2011 through the present and continuing.

¹ Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 23, 2011).

BACKGROUND

The claimant, Haidar Al-Nori, was employed as a bell person in employer's hotel, a job that requires him to lift and carry luggage to or from guest's arriving vehicles and a luggage rack, as well as to carry other items, including microwave ovens, to and from guest rooms.

On October 23, 2009, Mr. Al-Nori was struck on the left side of his body by a luggage cart while loading luggage into the trunk of a taxi. The employer, Sheraton, made voluntary payments of temporary total disability benefits from October 24, 2009 through September 27, 2010, and from January 6, 2011 through February 11, 2011.

Mr. Al-Nori obtained initial medical treatment from Kaiser Permanente, and ultimately came under the care of Dr. Frederic Salter and Dr. Richard Meyer, orthopedists in a shared practice group. He underwent an MRI of the low back, as well as two functional capacity evaluations and two courses of work hardening, and was evaluated by Dr. Joshua Ammerman, a neurosurgeon. Mr. Al-Nori was also examined on two occasions by Dr. Mark Scheer at the employer Sheraton's request for the purpose of independent medical evaluations (IMEs).

Upon Mr. Al-Nori's completion of the second work hardening program on February 9, 2011, Sheraton stopped paying temporary total disability benefits, as of February 11, 2011.

Mr. Al-Nori sought a formal hearing to have those benefits reinstated (along with payment of benefits which had been terminated September 28, 2010 and reinstated January 6, 2011). In a Compensation Order issued following that hearing, the ALJ denied the request.

Mr. Al-Nori timely appealed.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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 § 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 and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The central issue in this case and the only one in this appeal concerns the nature and extent of Mr. Al-Nori's disability, if any.

As the ALJ properly noted, on this issue, it is a claimant's burden to establish entitlement to the claimed level of benefits, and to do so by a preponderance of the evidence. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). And, as the ALJ further properly recognized, in the case of disability based upon wage loss, the District of Columbia Court of Appeals (DCCA) established a "burden shifting" schema in which a claimant has the initial burden of demonstrating an injury-related inability to perform the duties of the pre-injury job, which demonstration shifts the burden to the employer to either rebut that showing (i.e., demonstrate through medical evidence or otherwise that the claimant is capable of performing that job), or to demonstrate the availability of suitable alternative employment (either through an offer of modified employment with the employer, or the availability of other jobs in the marketplace for which the claimant could compete and likely obtain). Upon making such a showing, the burden reverts to the claimant to rebut employer's evidence of job availability, which can be done by demonstrating that despite diligence in searching for work, that search has not met with success. *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

Here is the entire analytic discussion contained in the Compensation Order addressing the extent of Mr. Al-Nori's claimed disability:

Claimant has not demonstrated that he is unable to perform his usual position. The final evaluation of Dr. Salter recommending that Claimant not undergo work hardening since it was doomed to failure occurred five days before Claimant completed work hardening. Claimant was able to complete work hardening and match his capabilities to his previous full-duty position.

Compensation Order, page 5. Although the ALJ discussed Dr. Scheer's October 18, 2011 IME report earlier in the Compensation Order, that discussion was limited to whether the claimed disability is causally related to the work injury. Nowhere in the Compensation Order does the ALJ consider the IME evidence as it relates to the nature and extent of disability.

As stated above, the first step in the analysis is a determination as to whether Mr. Al-Nori can physically return to the pre-injury job as a bell person. The ALJ relied exclusively upon the completion of the second program of work hardening in concluding that he can.

Review of the records of that program reveals that on discharge from the program, Mr. Al-Nori was assessed at a functional level wherein he could be expected to "occasionally" lift, carry, push and pull up to 50 pounds, and do so "frequently" with weights up to 30 pounds. This, according to the Discharge Summary, correlates to a "MEDIUM" Physical Demand Level. (EE 3). The Discharge Summary also notes that these measured capacities are not (or at least may not be) reliable, and could be expected to understate his true capacity, because of the assessor's observations of less than maximal effort, and of "illness" behaviors. EE 4. The summary also asserts that despite the possible (if not likely) understatement of his true physical capacity, the assessed level of capacity ("medium" work capacity) is compatible with the job description provided by the employer.

That job description is not included in the record, nor is it described in the Discharge Summary at all (EE 3). However, in the intake functional capacity evaluation summary (EE 2) on the first page thereof, the "DEMAND LEVEL OF JOB" is clearly stated to be "HEAVY", not "MEDIUM". How

the change from “heavy” to “medium” came about is not explained, nor is it acknowledged by the ALJ in the Compensation Order. Yet the Discharge Summary’s statement that Mr. Al-Nori can return to his pre-injury level of work is central to the ALJ’s rationale in denying the claim.

Beyond the troubling issues surrounding the Discharge Summary, we note that the Compensation Order does not mention the treating physician rules for assessing medical opinion. Both Dr. Salter and Dr. Myer opine on multiple occasions that Mr. Al-Nori is not capable of returning to work as a bell person. See, CE 1, CE Supplemental Exhibit 1.

Under the law of this jurisdiction, the opinions of a treating physician are accorded great weight. See, *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992) *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986). The rule is not absolute, and where there are persuasive reasons to do so, a treating physician’s opinion can be rejected, with sketchiness, vagueness, and imprecision in the treating physician’s reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of contrary opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

Although the ALJ didn’t base her decision upon IME opinion, she did reject Drs. Salter’s and Meyer’s opinions to the effect that Mr. Al-Nori could not return to work as a bell person. She gave no specific reason for rejecting Dr. Meyer’s views; she gave Dr. Salter’s unfulfilled prediction (a prediction that Dr. Meyer never made) contained in his final report dated February 4, 2011 (CE Supplemental Exhibit 1) that work hardening is “doomed to failure” as the sole reason for rejecting his opinion. Given the “great weight” to which treating physician opinion is entitled, this one reason is not sufficiently “persuasive”² to conform to the rule with respect to Dr. Salter’s opinion, and it has no relevance to that of Dr. Meyer.

The Compensation Order contains very limited findings of fact concerning the actual requirements of the pre-injury job. While it does contain findings that the job requires lifting and carrying luggage and appliances, and pushing and pulling luggage carts, there is no finding as to what the weights of these items are. Mr. Al-Nori testified on this subject, stating that bell persons carry 70, 80 or 100 pounds (HT 14). While the ALJ is not bound to accept these estimates from Mr. Al-Nori, they are the only specific evidence in the record on the subject, and absent a finding that Mr. Al-Nori’s testimony on this subject is somehow lacking in credibility³, we can not see how the referenced FCE Discharge Summary alone can support a finding that Mr. Al-Nori can return to work in the pre-injury job. The weights achieved in the referenced Discharge Summary, (lifting, pushing and pulling 50 pounds occasionally and 30 pounds frequently) do not equal the requirements as described by Mr. Al-Nori. Further analysis, fact finding, or explanation is required to understand the basis of the ALJ’s decision on this and other related matters.

² On this point we note that the ALJ does not discuss exactly how it is that the record supports a conclusion that the work hardening program succeeded, a discussion that is warranted given the problems outlined above concerning the change in the assessment of the work level of the pre-injury job from “Heavy” to “Medium”.

³ We stress that credibility is not merely a matter of honesty, but is centered upon reliability.

The following problematic matters require a remand for further consideration of this claim: (1) the absence of discussion concerning the significant and fundamental problem with the FCE Discharge Summary being at a variance from the intake form⁴ *vis a vis* the physical demand level of the pre-injury job, and the concomitant lack of an explanation as to how that variance does not defeat a finding that the Discharge Summary supports Mr. Al-Nori's being able to return to his pre-injury job; (2) the lack of findings of fact as to the requirements of the pre-injury job, including the lack of a credibility finding concerning Mr. Al-Nori's testimony concerning those requirements; (3) the paucity of persuasive reasons for rejecting the opinion of Dr. Salter that Mr. Al-Nori is incapable of returning to work as a bell person; and (5) the failure to identify any reason in connection with the rejection of the opinion of Dr. Meyer to that same effect.

Lastly, we note that we do not mean to suggest that we view this record as being one that compels a finding that Mr. Al-Nori remains disabled from his pre-injury job. A remand for further consideration is required because the Compensation Order does not contain sufficient findings of fact and analysis to support the denial.

CONCLUSION

The Compensation Order of July 26, 2011 does not contain sufficient findings of fact and analysis to support the finding that the claimant has the capacity to return to his pre-injury employment, rendering the conclusion that he is no longer disabled contrary to law.

⁴ Of course, it is not the variance with the intake form *per se* that is the root problem here, it is the fact that the level of documented physical capacity upon discharge is said to be "Medium", while at intake, the pre-injury job is described as being a "Heavy" job. Findings of fact sorting this out are needed, if the work hardening program is being used to support a finding that Mr. Al-Nori is capable of returning to his pre-injury job.

ORDER

The denial of the claim for relief in the Compensation Order of July 26, 2011 is vacated, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

September 13, 2011
DATE