COMPENSATION REVIEW BOARD

CRB No. 13-157

MAWALI KOCUVIE,
Claimant-Petitioner,

v.

D.C. PANCAKES, LLC and
LIBERTY MUTUAL INSURANCE CO.,
Employer/Carrier-Respondent.

Appeal from an November 12, 2013 Compensation Order By
Administrative Law Judge Linda F. Jory
AHD No. 13-441, OWC Nos. 691196 & 691197

Michael Kitzman for Petitioner
Robin M. Cole for Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 20, 2012 and April 22, 2012, Mr. Mawali Kocuvie injured his back while working as a food server for D.C. Pancakes, L.L.C. ("D.C. Pancakes"). On July 24, 2012, the parties attended an informal conference. A claims examiner determined Mr. Kocuvie had sustained a work-related back injury, but "the medical documentation did not indicate claimant was unable to work as a result of the injury;"[1] therefore, the claims examiner recommended D.C. Pancakes authorize physical therapy and deny payment of temporary total disability benefits. The claims examiner converted the Memorandum of Informal Conference into a Final Order on February 19, 2013. The Final Order was not appealed.

[1] *Kocuvie v. D.C. Pancakes, L.L.C.*, AHD No. 13-441, OWC Nos. 691196 and 691197 (November 12, 2013), p. 2.

Upon completion of physical therapy, Mr. Kocuvie returned to his treating physician, Dr. Geoffrey Kuang. Although Dr. Kuang did not find any strong physical evidence of disability, he recommended a functional capacities evaluation, and Mr. Kocuvie underwent the functional capacities evaluation on April 24, 2013.

On October 31, 2013, the parties participated in a formal hearing to resolve the following issues:

> 1. Whether claimant's alleged wage loss is causally related to the work related injuries of April 20, 2012 and April 22, 2012.
>
> 2. Determination of the nature and extent of claimant's alleged disability.[2]

In a Compensation Order dated November 12, 2013, an administrative law judge ("ALJ") granted Mr. Kocuvie medical benefits because his current low back problems are causally related to his April 20, 2012 and April 22, 2012 work-related accidents. The ALJ denied Mr. Kocuvie's request for wage loss benefits because he failed to prove he is unable to perform his pre-injury job as a result of his low back problems.

On appeal, Mr. Kocuvie asserts the ALJ's conclusion that he failed to establish a *prima facie* case of disability is in error because he testified as to the limitations caused by his pain, a functional capacity evaluation found him unable to perform the tasks required by his pre-injury employment, and his treating physician noted he is capable of work consistent with the functional capacity evaluation's restrictions. Mr. Kocuvie argues the Compensation Order fails to address (1) his treating physician's opinion regarding his physical abilities, (2) the findings in the functional capacity evaluation, and (3) Dr. John Cohen's opinion that Mr. Kocuvie is limited to light or sedentary duty. For these reasons, Mr. Kocuvie requests the Compensation Review Board ("CRB") reverse the Compensation Order and remand this matter.

In response, D.C. Pancakes argues the ALJ erred by finding Mr. Kocuvie's current complaints are causally related to his April 22, 2012 accident because D.C. Pancakes rebutted the presumption of compensability with multiple independent medical examination reports. On the other hand, D.C. Pancakes argues the ALJ correctly ruled Mr. Kocuvie is able to perform his pre-injury duties and, therefore, is not entitled to temporary total disability benefits.

ISSUES ON APPEAL

1. Did the ALJ properly apply the presumption of compensability to the issue of the causal relationship between Mr. Kocuvie's current back condition and his work-related accidents?

2. Did the ALJ fail to address (1) Mr. Kocuvie's pain that purportedly limits his physical abilities, (2) Dr. Kuang's opinion regarding Mr. Kocuvie's physical abilities, (3) the findings in the functional capacity evaluation, or (4) Dr. Cohen's opinion regarding Mr. Kocuvie's work capacity?

[2] *Id.*

3. Is the ALJ's ruling that Mr. Kocuvie failed to establish a *prima facie* case of disability supported by substantial evidence and in accordance with the law?

ANALYSIS[3]

On July 24, 2012, the parties participated in an informal conference. In a Memorandum of Informal Conference dated August 31, 2012, a claims examiner recommended D.C. Pancakes authorize physical therapy because on April 20, 2012 and April 22, 2012 Mr. Kocuvie sustained a work-related back injury; the claims examiner also recommended D.C. Pancakes deny temporary total disability benefits from April 23, 2012 to the date of the informal conference and continuing because the evidence did not indicate Mr. Kocuvie was unable to work as a result of his back condition.[4]

On February 19, 2013, the claims examiner converted the Memorandum of Informal Conference into a Final Order incorporating the contents of the Memorandum of Informal Conference by reference.[5] Neither party appealed the Final Order; therefore, it is conclusive on the issues of whether Mr. Kocuvie sustained a compensable back injury in April 2012 and whether he was entitled to temporary total disability benefits from the date of his injury at least until July 24, 2012, the date of the informal conference.[6]

Almost a year after the informal conference, on July 18, 2013, Mr. Kocuvie filed an Application for Formal Hearing. The claim for relief as stated in the Compensation Order is temporary total disability benefits from April 24, 2013 (the date of Mr. Kocuvie's functional capacities evaluation) to the date of the formal hearing and continuing and causally related medical expenses.[7]

The ALJ did not conduct a *Snipes* hearing, but she recited the issues from the bench:

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[3] 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. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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).

[4] Claimant's Exhibit 3.

[5] *Id.*

[6] *Coleman v. Community Alliance, Inc.*, CRB No. 08-198, AHD No. 03-046A, OWC No. 574318 (March 19, 2009), nt. 4 ("[T]he Recommendation and Memorandum [that] issued following the informal conference was converted to a Final Order**,** rendering it a Compensation Order**,** with the full force and effect of any other Compensation Order issued by the Agency under the Act."

[7] *Kocuvie* at 2.

> [T]he issues which we will address today are whether or not Claimant sustained an injury while in the course of his employment on April 20th, 2012, and April 22nd, 2012; whether or not Claimant's alleged disability is causally related to an injury that arose out of and in the course of his employment on April 20th, 2012, or April 22nd, 2012. Are there any corrections?
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> Ms. Cole: No, Your Honor.
>
> Judge Jory: Okay.
>
> Mr. Kitzman: No. Your Honor.[8]

This recitation of the issues is in direct opposition to the stipulation that "claimant sustained accidental injury to his back on April 20, 2012 and April 22[,] 2012 in the course of his employment."[9] After further discussion on the record, the actual issue was clarified as whether Mr. Kocuvie's then-current back symptoms and conditions are related to his industrial accident and whether he is entitled to wage loss benefits as a result of any disability since April 24, 2013 caused by compensable symptoms or conditions:

> Judge Jory: Okay. So why are we trying to admit the memorandum and you know that you can't?
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> Mr. Kitzman: Not attempting to admit the memorandum that underlies the issues before you here today. Prior to that there was a memorandum issued at OWC addressing whether an accidental injury occurred, and addressing whether there was a medical causal relationship. The final order was issued based on that memorandum, turning it into, in effect, a binding compensation order, which is why that's being admitted as Claimant's Exhibit 3.
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> Judge Jory: Well, first of all, Ms. Cole, do you have any objections to Claimant's Exhibits?
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> Ms. Cole: As you noted, that memorandum of informal conference, he's correct that it backs up the order. I don't know that it - - I object to the memorandum of informal conference because the order doesn't explicitly lay out there was an accident that was compensable. And the memo doesn't really back it up either. So I would object to asking that the memorandum of informal conference be admitted, especially asking that it be taken on its face value that everything she said in there is an order, when it was really recommendation.
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> Judge Jory: But if this is an order that you did not reject - -

[8] Hearing Transcript, p. 9.

[9] *Kocuvie* at 2.

Ms. Cole: We actually rejected the order. We neglected to request a formal hearing because what we did was go ahead and authorize the physical therapy. That's all that was going on - - that's all he was seeking at the time. So there was not a need for a formal hearing. We decided to go ahead and authorize the physical therapy, try to get him - - get the case done.

She went ahead and issued an order backing up what we said and we'll go ahead and let him do the physical therapy. But we never agreed that there was an accident.

Judge Jory: Wow. Okay. So you're not contending that Employer did not properly reject the recommendation?

Mr. Kitzman: I'm contending that under the Act the final order is binding on the issues laid forth in the memorandum of informal conference, because as the final order states, pursuant to Title 7, 219.22, DCMR the Office of Worker's [*sic*] Compensation hereby issues a final order setting forth the terms of the memorandum of informal conference. Which would in effect, mean that the Office of Worker's [*sic*] Compensation has, as the statute and regulations allow, converted that recommendation in to a final order, and that final order is the same as a compensation order in this case.

And now whether or not it expressly lays forth whether an accidental injury occurred, or whether it arose out of or in the course of the employment, it denies actually - - February 7th, 2012 claim states that no injury occurred on that date; states that subsequent injury work-related events did take place, and authorizes her, ultimately, physical therapy; the issue as a result of those work injuries of April 20th and April 22nd, 2012.

And it's the Claimant's contention, Your Honor, that while a memorandum [of] informal conference is expressly barred by the regulations, the point of where that memorandum is converted into an order pursuant to the regulations, it's no longer a memo. It's in fact a final order; a compensation order under the Act.

Judge Jory: Okay. Ms. Cole, I don't see how I'm supposed to go behind this final order and decide anything.

Ms. Cole: Well, I'm not sure I understand your question.

Judge Jory: I'll tell you what. I'm going to take a recess. I need to look this over to make sure that I even have jurisdiction to hear anything, and I'll take a look at what is contained in here because I don't preview exhibits often before the hearing. This might be a case where I should have.

So we're going to take a recess and I'm going to back and look at these, and I will come back and we can see where we're standing. Okay?

Mr. Kitzman: Yes, Your Honor.

Judge Jory: Thank you.

* * *

Judge Jory: So the order is final. The order adopts the findings that the Claimant sustained a work related injury on April 20th and April 22nd. But also it adopts the finding that there is no disability as a result of the injuries. So the only - - I was going to say we could have a hearing on the nature and extent, but unless there's been a change of condition - - in other words, the Employer can still contest causal relationship of ongoing disability, but you'd still have to make a finding - - or a showing that there's been a change of condition.

Mr. Kitzman: Yes, Your Honor. And I believe the change of condition, since the claim for TT is for April 22nd of 2013, which is subsequent to that, it's based on the FCE report, which was issued on April 24th, 2013, which limits Mr. Kocuvie to - -

Judge Jory: Okay.

Mr. Kitzman: - - to light duty activity.

Judge Jory: All right. So we need to amend the stipulation form, then. So you cannot contest that an injury occurred on April 20th or April 22nd. So we have to check stipulation on that form. But you can contest the causal relationship of any ongoing disability, which he did - - Claimant is on notice of that.

And then the nature and extent of disability as of April - -

Mr. Kitzman: Twenty-fourth, 2013, Your Honor.

Judge Jory: Okay. But you're claiming April 22nd, 2012.

Mr. Kitzman: I know, I noted that last night. That - -

Judge Jory: So it should be what?

Mr. Kitzman: April 24th, 2013.

Judge Jory: Okay. So employer can contest the causal relationship of the claim for relief as of April 24th, 2013. Are we straight on this, Ms. Cole?

Ms. Cole: Yes.

Judge Jory: And you're prepared to go forward on those two issues then?

Ms. Cole: Causal relationship and nature and extent as of April 24th, 2013. Okay. Got it.

Judge Jory: All right. And because of our discussion just now, I am going to admit all of Claimant's Exhibits 1 through 5. And Claimant waives any objection to admitting the memorandum of informal conference in the final order.[10]

In addition to the parties' stipulation, by law the Final Order has the same effect as a Compensation Order; in other words, Mr. Kocuvie sustained a compensable back injury in April 2012, but his disability did not prevent him from returning to his pre-injury work at least through the date of the informal conference in July 2012. Based upon the exchange at the formal hearing, the causation issue for resolution at the formal hearing was whether Mr. Kocuvie's current back condition is causally related to his compensable accidents in April 2012. There is no error in the ALJ's analysis of the causal relationship issue.

As the ALJ noted, Mr. Kocuvie was entitled to the presumption of compensability regarding his current back symptoms because consistent with the Final Order, the parties stipulated to work-related accidents which caused Mr. Kocuvie's initial back injury.[11] With the presumption of compensability invoked, the burden shifted to D.C. Pancakes to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[12] D.C. Pancakes attempted to satisfy that burden with the medical reports of Dr. Robert Gordon and Dr. John Cohen; however, in order for an independent medical examination report to satisfy an employer's burden, the independent medical examination physician must perform a personal examination of the claimant, review the relevant medical records, and state an unambiguous opinion contrary to the presumption of compensability.[13] For reasons adequately explained in the Compensation Order, D.C. Pancakes' evidence did not satisfy this requirement:

> As rebuttal evidence, employer relies on the IME reports of Drs. Gordon and Cohen. Dr. Gordon reported on June 19, 2012 that claimant had no objective findings and he strongly suspected that the changes on claimant's MRI were all pre-existing and degenerative in nature rather than anything related to what occurred on either of these occasions. Dr. Cohen opined on October 10, 2013 that claimant has chronic low back pain and the pain evidently predates his alleged incidents.

[10] Hearing Transcript, pp. 10-17.

[11] *McAfee v. Washington Hospital Center*, AHD No. 12-426A, OWC Nos. 656835 (August 13, 2013).

[12] *Waugh v. DOES,* 786 A.2d 595, 600 (D.C. 2001). (Citations omitted.)

[13] *Washington Post v. DOES,* 852 A.2d 909 (D.C. 2004).

> Neither Dr. Gordon nor Dr. Cohen was provided with a complete set of claimant's medical records. Dr. Gordon indicated back in June 2012 that if the actual x-rays become available [or] the medical records of Dr. Levitt, Unity Health Care or anyone else from either before or after April become available he would issue an addendum. Thus it appears that only the May 2012 MRI was provided to him. Similarly, Dr. Cohen indicated he could not find the initial evaluation or any of the subsequent follow-up notes of Dr. Kaung.
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> In keeping with the Court of Appeals guidance in *Washington Post v. District of Columbia Dep't of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*), employers evidence is sufficient to rebut the presumption when it is rendered by a qualified independent medical expert who, having examined the employee and reviewed the medical records, and renders an unambiguous opinion that the work injury no longer contributes to the disability. 214, 1219-20 (D.C. 2002). As noted above the independent medical experts did not review all of claimant's pertinent medical records and in fact requested that they be obtained and an addendum would issue. This did not happen. As such it cannot be concluded employer's IME reports meet the established *Reynolds* standard for rebutting the causal relationship of claimant's back symptoms or that the work injury no longer contributes to the alleged disability. Claimant benefits from the presumption that his back problems and alleged disability remain causally related to the work injury of April 22, 2008 [*sic*].[14]

There is no basis to overturn the ALJ's findings of fact or conclusions of law on this issue.

Turning to the nature and extent of Mr. Kocuvie's disability, if any, there is no requirement that an ALJ inventory all the evidence in the record,[15] but Mr. Kocuvie complains that the ALJ failed to address (1) Mr. Kocuvie's pain that purportedly limits his physical abilities, (2) Dr. Kuang's opinion regarding Mr. Kocuvie's physical abilities, (3) the findings in the functional capacity evaluation, and (4) Dr. Cohen's opinion that Mr. Kocuvie is limited to light or sedentary duty. These pieces of evidence are interrelated; for the sake of clarity, they are considered out of order.

Mr. Kocuvie reargues the facts before the CRB by asserting "the FCE report. . . found him unable to perform all the tasks required of his pre-injury employment."[16] Mr. Kocuvie's reading of the FCE report lacks objectivity and ignores the ALJ's reasonable assessment of that report:

> The FCE contains two conclusions[.] The first conclusion is:

[14] *Kocuvie* at 4.

[15] *Washington Hospital Center v. DOES*, 983 A.2d 961 (D.C. 2008).

[16] Memorandum of Points and Authorities in Support of Application for Review, p. 4.

> Mr. Kocuvie's current functional abilities and musculoskeletal findings demonstrate that Mr. Kocuvie can return to work in his previous full work capacity but with limitations. He exhibited functional deficits with prolonged walking, static standing, and benign tolerances that are required for him to perform his essential job demands of a food service worker. However it should be noted that there was evidence of exaggerated pain behaviors noted during functional activities which could imply that Mr. Kocuvie was giving a less than maximal effort.

CE 2 at 2. The second conclusion is:

> Mr. Kocuvie exhibited inconsistent objective deficits and pain mannerisms, and exhibited exaggerations of subjective complaints in combination with physiological responses (*i.e.*, increased heart rate with increased pain complaints) He had given an overall less than maximal and inconsistent effort during this evaluation and the conclusions may be not valid due to a less than maximal effort and some exaggerated pain behaviors.

CE 2 at 4.

> Keeping in mind that Dr. Kaung suggested the FCE because he did not see any evidence of disability on claimant's part, CE 1 at 2, the FCE does not establish that claimant ***is unable*** to perform his pre-injury duties as a food server. In so concluding, the undersigned finds that Industrial Rehabilitation Director who issued the FCE included twice the disclaimer that the conclusions may not be valid due to a less than maximal effort and some exaggerated pain behaviors negates any limitations the FCE determined claimant had or might have as a food server i.e., prolonged walking or static standing.[17]

Not only did the ALJ specifically address and reject the functional capacity evaluation, inherent in her assessment of that report is a credibility finding that based upon his "less than maximal effort and some exaggerated pain behaviors [that negate] any limitations the FCE determined claimant had or might have as a food server,"[18] Mr. Kocuvie's testimony regarding his pain is not credible. Because they are supported by substantial evidence, the CRB cannot disturb the ALJ's reading of the functional capacity evaluation or her reasonable inference about Mr. Kocuvie's credibility in regards to his purported pain.

Furthermore, Dr. Kuang did not issue any disability slip indicating Mr. Kocuvie is unable to perform his duties as a food server;[19] in his May 24, 2013 report he said, "I think it is okay for

[17] *Kocuvie* at 5-6. (Emphasis in original.)

[18] *Id.* at 6.

[19] *Id.* at 5.

Mr. Kocuvie to return to work as noted in the functional capacity evaluation."[20] Dr. Kuang's opinion is premised upon the functional capacity evaluation, and having rejected the functional capacity evaluation, the ALJ was under no obligation to accept any medical opinion premised upon it.[21]

Finally, Mr. Kocuvie's argument that Dr. Cohen's opined that Mr. Kocuvie is limited to light or sedentary duty is taken out of context. The full paragraph including Dr. Cohen's comment in this regard states

> This gentleman is fully recovered from any incident that occurred over a year ago on April 22, 2012. Unfortunately, any treatment for this gentleman is going to be colored by his [history of schizophrenia and bipolar disorder]. I believe he is fit to return to a sedentary or light duty status, but he can expect to have intermittent complaints of back and leg pain; also colored by his mental illness. He may benefit from 1 or 2 epidural injections. I would never expect him to return to regular duty as a server with his mental illness. Please contact me if you have any further questions regarding these matters. I believe that he suffered nothing more than contusions which are fully healed after 6 weeks post injury.[22]

Dr. Cohen's unequivocal opinion that Mr. Kocuvie has fully recovered from his work-related accidents means that although Mr. Kocuvie may have ongoing physical limitations and restrictions, they are not related to his compensable accidents.[23]

It was Mr. Kocuvie's burden to prove by a preponderance of the evidence the nature and extent of his disability.[24] The ALJ's ruling that Mr. Kocuvie failed to meet that burden is supported by substantial evidence in the record and is in accordance with the law.

CONCLUSION AND ORDER

The ALJ properly applied the presumption of compensability to the issue of the causal relationship between Mr. Kocuvie's current back condition and his work-related accidents. In addition, the ALJ adequately analyzed and explained the record evidence to reach the conclusion

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[20] Claimant's Exhibit 1.

[21] Neither party has raised any issue regarding the treating physician preference; therefore, it is not ripe for consideration in this appeal.

[22] Employer's Exhibit 3.

[23] Although the ALJ determined Dr. Cohen's opinion was not sufficient to rebut the presumption of compensability, that ruling did not preclude the ALJ from accepting Dr. Cohen's opinion regarding Mr. Kocuvie's current work capacity. See *Mwabira-Simera v. Sodexho Marriott Management*, CRB No. 08-186, AHD No. 08-126, OWC No. 629496 (January 28, 2009).

[24] *Golding-Alleyne v. DOES*, 980 A.2d 1209, 1215 (D.C. 2009).

that Mr. Kocuvie failed to establish a *prima facie* case of disability. The November 12, 2013 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

February 28, 2014
DATE