GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 09-100

TARRY L. HARRIS,

Claimant–Petitioner,

v.

CVS PHARMACY, INC.

AND

GAB ROBINS,

Employer and Insurer–Respondent.

Appeal from a Compensation Order
Administrative Law Judge Leslie A. Meek
AHD No. 08-071B, OWC No. 640016

Michael J. Kitzman, Esquire, for Claimant-Petitioner

Joel E. Ogden, Esquire, for Employer and Insurer-Respondent[1]

Before E. COOPER BROWN, *Chief Administrative Appeals Judge,* JEFFREY P. RUSSELL, *Administrative Appeals Judge,* and LAWRENCE D. TARR,[2] *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Appeals Judge,* for the Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department Employment Services Director's Directive , DOES Administrative Policy Issuance No. 05-01 (February 5, 2005).

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[1] Attorney Chad Michael represented the employer and insurer at the formal hearing.

[2] Administrative Law Judge Tarr is appointed by the Director of the Department Of Employment Services (DOES) as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-06 (May 20, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

This appeal challenges a May 29, 2009, Compensation Order issued by an Administrative Law Judge (ALJ) from the Administrative Hearings Division, Office of Hearings and Adjudication, District of Columbia Department of Employment Services (DOES). The Compensation Order held Claimant-Petitioner (Petitioner) sustained an accidental injury to his lower back while working for Employer and Insurer-Respondent (Respondent) on March 14, 2007, and that he was temporary totally disabled for three days because of the accident.

Petitioner worked for Respondent as a merchandise handler. Petitioner's duties involved retrieving merchandise placing it on a conveyer belt that transported the merchandise from a basement warehouse to a sales floor, stocking the merchandise on the sales floor, and doing light maintenance work, such as sweeping and emptying trash.

Petitioner injured his back on March 14, 2007, when he lifted a box containing six, one- gallon bottles of water. He first received medical care for his injury on March 19, 2007, when he went to Fort Lincoln Medicine Center (Fort Lincoln). He was referred to Providence Hospital and was treated on March 26, 2007. He returned to Fort Lincoln, and was treated primarily by Dr. Darlene Lawrence, on April 2, 2007, May 14, 2007, July 11, 2007, and May 27, 2008. Dr. Robert O. Gordon examined petitioner on February 19, 2008, at the Respondent's request. Dr. Jeffrey Phillips examined Petitioner on February 26, 2008, at his attorney's request.

Petitioner filed a claim for benefits alleging he has been totally disabled since the accident on March 14, 2007, and that injuries to his back, legs, right shoulder and his erectile dysfunction were causally related to that accident. The ALJ found that Petitioner only injured his lower back in the accident and he only proved he was temporary totally disabled for three days. The ALJ also found that alleged injuries to Petitioner's legs, right shoulder and erectile dysfunction were not related to the March 14, 2007, accident.

Petitioner has appealed the determinations that he was not continuously disabled since the accident and that his leg, shoulder and erectile dysfunction injuries were not causally related to the accident. As will be discussed, because the ALJ did not explain the basis for these determinations, we must remand this matter to the ALJ.

ANALYSIS

Before discussing Petitioner's appeal, we first address Respondent's motion to file its brief out of time.

Petitioner filed his Application for Review on June 26, 2009. Respondent filed its response in opposition to the review application and Motion To File Out of Time on July 13, 2009, more than the fifteen calendar days permitted by CDCR 7-258.8.

In support of its motion to file out of time, Respondent avers that at the formal hearing, Chad Mitchell, then employed by Semmes, Bowen & Semmes, represented Respondent. At an

unspecified date after the formal hearing, Mr. Mitchell left the Semmes firm and began working for the law office of Guido Porcarelli. When Petitioner filed his Application for Review on June 26, 2009, he mailed a copy to Mr. Mitchell at the Porcarilli firm. Petitioner did not send a copy of the Application to the Semmes firm.

The Semmes firm, who has represented Respondent throughout this litigation, did not receive notice that Petitioner filed an application for review until the CRB sent it the Notice of Application for Review. This notice was received on either July 1 or July 6, 2009.[3]

Petitioner has not filed an objection to Respondent's motion to file its brief out of time nor has Petitioner challenged the factual representations stated in Respondent's motion.

CDCR 7-261.8 provides:

> The time periods specified for submitting any filing described in section 258, except that for the filing of an Application for Review, may be enlarged for a reasonable period when, in the judgment of the Board, and upon a showing of exceptional circumstances by the requesting party, an enlargement is warranted.

We find Respondent has established exceptional circumstances and grant its Motion to File Out of Time. Respondent established that it did not receive notice that Petitioner had filed for review until, at the earliest, July 1, 2009, and filed its opposition within fifteen days of that notice.

Turning to Petitioner's appeal, Petitioner alleges that the ALJ erred by awarding him temporary total disability benefits for just three days and by finding that injuries to his legs, shoulder and his erectile dysfunction were not related to the work accident.

The scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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 International v. District of Columbia Department of Employment Services*, 834 A. 2d 882 (D.C. 2003).

Consistent with this standard of review, this Review Panel will 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.

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[3] Respondent's Motion states that present counsel, Mr. Ogden, did not receive the Notice of Application for Review until July 6, 2009. Respondent attached a copy of the Notice as an exhibit to the motion. The Notice bears two date stamps, July 1, 2009, and July 6, 2009. We assume the firm received the Notice on July 1 and Mr. Ogden was given it on July 6, 2009. Respondent filed its opposition and motion within fifteen days of both dates.

It is also well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Official Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (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. *Perkins v. D.C. Department of Employment Services*, 482 A. 2d 401, 402 (D.C. 1984), D.C. Official Code § 2-509.

Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. D.C. Department of Employment Services*, 701 A. 2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King, supra*, 742 A. 2d. at 465, basic findings of fact on all material issues are required, for "[o]nly then can this 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." *See also Sturgis v. D.C. Department of Employment Services*, 629 A. 2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. *WMATA v. D.C. Department of Employment Services (Juni Browne, Intervenor)*, 926 A. 2d 140 (D.C. 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006).

The determination of whether an ALJ's decision complies with the foregoing APA requirements is a determination that is necessarily limited in scope to the four corners of the compensation order under review. Accordingly, where 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 upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. D.C. Department of Employment Services*, 651 A. 2d 804, 806 (D.C. 1994).

The ALJ, in the Findings of Fact, held "I find Claimant's alleged injuries concerning his legs, right shoulder and erectile dysfunction are not related to the alleged work injury of March 14, 2007." However, the ALJ did not explain the rationale for her finding anywhere in the CO. Without the ALJ's explanation as to the basis of her decision, the CRB cannot tell if these findings are supported by substantial evidence and in accordance with the law.[4]

We shall not discuss the other assignment of error, that the ALJ erred in limiting temporary total disability to three days, because the ALJ's decision regarding the causal relationship of the aforementioned medical conditions may affect her conclusion regarding disability.

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[4] The ALJ correctly identified the critical statute, D.C. Official Code § 32- 1521 and correctly stated the legal analysis with respect to the shifting burdens of proof and production related to that statute with respect to her findings that Petitioner sustained an accidental injury at work and gave timely notice. Respondent has not appealed those determinations.

CONCLUSION

The CRB is unable to find that the May 29, 2009, Compensation Order is supported by substantial evidence and is in accordance with the law.

ORDER

The May 29, 2009, Compensation Order is VACATED with respect to the findings that Respondent is not responsible for treatment to Petitioner's legs, right shoulder and for erectile dysfunction.

This case is remanded to the ALJ for an explanation of the basis for the factual determination that Petitioner's injuries to his legs and right shoulder and his erectile dysfunction are not causally related to the work accident and the effect, if any, of that determination on the finding regarding disability and for a new Compensation Order.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D. Tarr

LAWRENCE D. TARR
Administrative Appeals Judge

September 22, 2009
DATE