

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-059

BENJAMIN TOURÉ,
Claimant–Petitioner,

v.

FAIRMONT HOTELS AND RESORTS and ZURICH AMERICAN INSURANCE COMPANY,
Employer and Insurer–Respondent.

Appeal from an April 19, 2013 Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 11-167B, OWC No. 679676

Benjamin T. Boscolo, Esquire, for the Petitioner
Mark W. Bertram, Esquire, for the Respondent

Before JEFFREY P. RUSSELL AND HENRY W. MCCOY, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

Benjamin Touré sought temporary total disability and medical benefits for an injury to his back and leg which he alleged he sustained while working for Fairmont Hotels and Resorts (Fairmont). Fairmont declined to accept Mr. Touré’s claim, asserting that he had not sustained the alleged injury at work. The dispute was presented for resolution to an Administrative Law Judge (ALJ) in the hearings division of the District of Columbia Department of Employment Services (DOES). A formal hearing was conducted on February 13, 2013, following which the ALJ issued a Compensation Order on April 19, 2013. In the Compensation Order, the ALJ denied the claim, finding that Mr. Touré had not sustained an accidental injury. Mr. Touré filed a timely appeal of the Compensation Order with the Compensation Review Board (CRB), to which Fairmont filed a timely opposition.

Mr. Touré argues on appeal that Fairmont failed to adduce sufficient evidence to overcome the presumption of compensability because in his view the independent medical evaluation (IME) upon which the ALJ relied is internally inconsistent and premised upon the doctor’s lack of belief in the credibility of Mr. Touré. Mr. Touré posits that IME physicians are not competent to render opinions

on credibility. Further, Mr. Touré argues that there is an insufficient basis for the ALJ to reject his treating physician's opinion that he did sustain the injury and that it was disabling for the period claimed.

Fairmont argues that the ALJ's findings of lack of credibility on the part of Mr. Touré are adequate to support the rejection of the treating physician's opinion, given that it is dependent upon the veracity of Mr. Touré, which veracity the ALJ rejects.

Because the conclusion that Mr. Touré did not sustain an accidental injury is irreconcilably inconsistent with the ALJ's Findings of Fact concerning the events of April 2, 2011, and because the Compensation Order fails to identify the record evidence upon which those Findings of Fact are based, the denial of the claim is vacated, and the matter is remanded for further consideration.

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.*, at § 32-1521.01 (d)(2)(A), (the Act), 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

In order to withstand substantial evidence review, an Agency decision must make findings of fact on each material contested issue, those findings of fact must be supported by substantial evidence in the record, and the legal conclusions reached must flow rationally from those facts. Further, the factual findings contained in such an Agency decision may not be materially inconsistent with one another.

In order to conform to the requirements of the District of Columbia Administrative Procedures Act (DCAPA), D.C. 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. DOES*, 482 A.2d 401, 402 (D.C. 1984); D.C. 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. DOES*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King v. DOES*, 742 A.2d 460, 465 (D.C. 1999), 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. DOES*, 629 A. 2d 547 (D.C. 1993). The CRB is no less

constrained in its review of compensation orders issued by AHD. See *WMATA v. DOES*, (*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). Thus, 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. DOES*, 651 A.2d 804, 806 (D.C. 1994).

Although it is frequently stated that an ALJ need not present an inventory of all the evidence that was considered in making the necessary factual findings, in order for the CRB to carry out its statutory obligation to conduct an appellate review, a compensation order must identify with sufficient specificity the evidence that was relied upon in making those factual findings, and acknowledge and address evidence that is presented in direct support of or in opposition to a claim. See, *Kyle v. Safeway Stores, Inc.*, CRB No. 12-117, AHD No. 12-116, OWC No. 685101 (October 9, 2012), *Green v. Palomar Hotel*, CRB No. 11-065, AHD No. 10-582, OWC Nos. 673571 and 673273 (November 10, 2011).

In this case, two issues are identified in the Compensation Order¹ as being in dispute: Whether Mr. Touré sustained an accidental injury at work on April 2, 2011, and if so, what is the nature and extent of his disability. No issue of a medical causal relationship between the alleged disability and the alleged accidental injury was identified in the Compensation Order as being in dispute. See, Compensation Order, page 2, "Issues".

In the "Findings of Fact", the ALJ wrote:

Claimant worked as a Houseman for Employer. His work duties included [...] removing trash [...]. It was necessary for Claimant to lift, bend and walk frequently [...] to perform those tasks. He performed his assigned job duties with no difficulty prior to April 2, 2011.

On that date, Claimant was in a storage room, lifting a heavy trash bag out of a plastic container when the bag broke. At that moment, he felt pain from the left shoulder down the left side of his back to his waist. The pain was as if a back muscle was tightening. He also noticed a "grabbing" feeling in his left calf muscle.

[...] He completed his work shift that day, went home, and had his wife massage his back with BenGay.

Compensation Order, page 2 – 3.

¹ We do not have the AHD administrative file before us and hence do not know whether issues concerning causal relationship were subject to written stipulation. On remand, the ALJ shall be certain that all disputed issues are identified and resolved, if necessary.

We stress that these are denominated as “Findings of Fact”, and that the ALJ did not characterize these findings as merely describing Mr. Touré’s testimony. They establish, as a matter of law, the requisite elements of an accidental injury under the Act.²

Yet, after undertaking a “Discussion” in which Mr. Touré’s medical course is discussed, including the IME performed by Dr. Marc Danziger to the effect that “Claimant did not sustain a definitive acute injury”, as well as certain aspects of the application of the statutory presumption of compensability under D.C. Code § 32-1521 (1), and in which the ALJ indicates that Claimant was found to be a non-credible witness, she wrote as follows in the “Conclusions of Law”:

Based upon the record evidence, I conclude that Claimant did not sustain an accidental work injury of the back on April 2, 2011.

Compensation Order, page 5.

This conclusion does not flow rationally from the above quoted “Findings of Fact”, and is irreconcilably at a variance from them.

It is evident from the Compensation Order that the ALJ had serious misgivings about Mr. Touré’s credibility. Not only does it contain an explicit statement to that effect, in discussing Dr. Danziger’s opinion, it refers to “the alleged April 2, 2011 work injury”.

It is apparent from the “Discussion” that the ALJ was troubled by certain unspecified “clear discrepancies between the contemporaneous medical records and Claimant’s description of the chronology of his symptoms and on the contravening testimony of [Employer’s] witnesses.” Compensation Order, page 4. While some “discrepancies” are identified elsewhere in the Compensation Order (e.g., a reported “date of onset” of March 5, 2011 in the first medical record following April 2, 2011, the lack of low back complaints in that record, and the lack of any reference to a work connection to his complaints until the first medical report of Dr. Neil Green, which the ALJ found coincided with the date that Mr. Touré first retained counsel), the Compensation Order is completely silent as to the nature of “the contravening testimony of [Fairmont’s] witnesses”.

And regardless of the failure to identify which discrepancies were deemed compelling, the general finding that Mr. Touré lacks credibility, and the lack of specificity as to what contravening testimony was felt to be more credible, the fact remains that the Compensation Order made factual findings that establish the happening of an accidental injury under the Act.

While under some circumstances we would be compelled to reverse the Conclusion of Law that Mr. Touré did not sustain an accidental injury at work on April 2, 2011, we also note that the Compensation Order fails to identify upon what evidence it was found that on that date “Claimant was in a storage room, lifting a heavy trash bag out of a plastic container when the bag broke. At that moment, he felt pain from the left shoulder down the left side of his back to his waist. The pain was as if a back muscle was tightening. He also noticed a ‘grabbing’ feeling in his left calf muscle.”

² We hasten to add that they do not necessarily establish the existence of a disability, either at the time of the injury or thereafter, nor do they establish that any later existing incapacity for work is causally related to this work injury.

One might surmise that this factual finding was premised upon Mr. Touré's testimony to that effect. However, the Compensation Order is silent on the question as to what evidence the ALJ relied in making those findings of fact, and is clear about the ALJ's being unconvinced by at least some aspects that testimony.

Therefore, because we are unable to discern upon what evidence the ALJ relied in reaching the above quoted Findings of Fact, we are not able to consider whether they are based upon and supported by substantial evidence.

Case law has established that there are three sequential steps when analyzing a case with respect to the statutory presumption: the invocation step, the rebuttal step, and the weighing all evidence without the presumption step. At the first step, an ALJ must determine whether the presumption is invoked. To invoke the presumption that an injury arose out of and in the course of employment, the claimant's evidence must establish two elements: (1) that she sustained a work-related event and (2) that event had the potential of resulting in or contributing to her disability. *Georgetown University v. DOES and Bentt, M.D., Intervenor*, 830 A. 2d 865 (D.C. 2003).³

Here, because of the internal inconsistencies between the ALJ's statements in her Finding of Fact and her Discussion and Conclusion sections, we are unable to tell whether or not the ALJ found the claimant sustained a work-related event. Accordingly, rather than reverse the conclusion that Mr. Touré did not sustain an accidental work injury on April 2, 2011 and remand for further consideration of the remaining issue of nature and extent of disability, we vacate the conclusion that Mr. Touré did not sustain an accidental injury, and remand the mater for further consideration and fact finding, in which the ALJ makes the necessary findings of fact on the issue, identifying the evidence upon which those findings are premised, and then, if necessary, the ALJ is to further consider such additional issues as were in dispute but which were not reached.

³ Of course, in this particular case, as far as we can tell from the CO, the only disputes are whether the alleged trash bag incident occurred, and if so, the nature and extend of disability.

CONCLUSION AND ORDER

The Conclusion that Mr. Touré did not sustain an accidental injury at work on April 2, 2011 is inconsistent with the Findings of Fact concerning the events of that date, and is therefore vacated. The evidence upon which those Findings of Fact were premised is not identified in the Compensation Order, and we are thus unable to ascertain whether they are supported by substantial evidence. 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

June 26, 2013
DATE