COMPENSATION REVIEW BOARD

CRB No. 11-116

LARRY BURNETT,

Claimant–Petitioner,

v.

TANGENT CABLE SYSTEMS AND OHIO CASUALTY GROUP INSURANCE,

Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 11-145, OWC Nos. 675842 and 675853

Justin M. Beall, Esquire, for the Petitioner

Robin M. Cole, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR, AND HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Larry Burnett for review of the Compensation Order dated September 29, 2011 issued by an Administrative Law Judge (ALJ) in the hearings division of the District of Columbia Department of Employment Services (DOES). In that Compensation Order, the ALJ denied Mr. Burnett's claim for disability compensation benefits and medical care for injuries he alleged he sustained while in the employ of Tangent Cable Systems.

[1] Judge Russell is appointed by the Director of DOES as a Board Member pursuant to DOES Administrative Policy Issuance No. 11-03 (June 23, 2011).

Mr. Burnett worked for Tangent Cable Systems (Tangent) as an electrician, installing control components for a security system at a bank headquarters that Tangent was outfitting. He alleges that he injured his right hand on July 14, 2010, when he had to install a large number of security card readers, a process that involved stripping a lot of small wires and connecting them to the readers. He alleges that the repetitive work resulted in his experiencing cramping in his right hand. He also alleges that on August 3, 2010, he was bending and lifting a heavy cable reel after spending the day working in an unusually low, awkward position installing card readers, resulting in his feeling a "pull" in his low back. On that date he alleges that he wrote out a report of these two injuries on the back of his weekly report log, which he claims to have faxed to his supervisor's office at Tangent. He continued to be employed by Tangent until the middle of September, 2010, when the project ended and he picked up work with other employers on different jobs thereafter. He began treating for low back pain and right wrist discomfort with Dr. Raymond Drapkin, a physician he had been treated by in the past, on November 23, 2010.

Mr. Burnett sought disability compensation and medical benefits from Tangent, which declined to provide them, asserting that Mr. Burnett was not disabled from employment in his usual occupation, that he didn't injure himself while employed by Tangent, and that he didn't provide timely notice of the injury to Tangent.

The dispute was presented on July 27, 2011 to an ALJ in DOES for resolution. On September 29, 2011, the ALJ issued a Compensation Order (the CO) in which she found that Mr. Burnett gave timely notice of the alleged injuries to Tangent, but that he failed to establish by a preponderance of the evidence that he had sustained either injury.

Mr. Burnett filed a timely appeal of the CO with CRB, to which Tangent filed an opposition. Tangent did not appeal the finding of timely notice, but did oppose the appeal of the denial of benefits.

We affirm.

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. Official Code § 32-1501, *et seq.*, ("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

As an initial matter, we must note that assessing the legal sufficiency of the CO is problematic due to internal inconsistencies and phraseology that obscures the meaning of various aspects of the CO. Nonetheless, if we can reasonably discern the intent of the ALJ, we will do so, with an eye towards avoiding unnecessary and unproductive delay in resolving this dispute.

While the question of whether the claimant sustained a compensable injury or injuries is identified as an issue, the "Background" portion of the CO is phrased as if the existence of two distinct injuries on two distinct dates is a given. Further, in identifying the contested issues, it is unclear if there was a contest about whether there were any injuries at all, whether there was a back injury but not a hand injury, or a hand injury but not a back injury, or, even if there were such injuries, whether they occurred on the specified dates. Beyond this, Issues 2, 3 and 4 are so phrased as to obscure if it is disputed that the alleged hand injury and/or back injury was work related, as opposed to some other cause(s), if it/they are work related, whether one or the other or both injuries are disabling (i.e., causing a wage loss), and if so, whether such disability is medically causally related to the alleged work injuries.

The confusion is little allayed when, in the Analysis, the ALJ discusses the issue of "whether or not an injury within the purview of the Act occurred". After identifying numerous District of Columbia Court of Appeals (DCCA) cases that stand for the propositions that (1) there is a statutory presumption that a claim is compensable, and (2) that a compensable injury need not be the result of a discrete or single identifiable event, the ALJ wrote:

> Claimant has not made a persuasive initial showing. Although Claimant has shown the existence of a work-related event, activity or requirement which had the potential to cause or contribute to his lower back and right hand injury, he has provided *de minimis* credible evidence of a July 14, 2010 or August 3, 2010 work injury.

CO, page 5. It is difficult to tell whether the ALJ is saying that Mr. Burnett has produced only *de minimis* evidence of work injuries to his back and hand, or has produced a sufficient quantum of evidence to establish presumed work injuries to his back and hand, but not that these injuries occurred on the dates set forth, or something else. Given that the ALJ stated that Mr. Burnett had not made a "persuasive initial showing", and that she characterized such evidence in support of the showing as "*de minimis*" [2] and inasmuch as this cited evidence is based solely on Mr. Burnett's testimony,[3] it would appear that the ALJ was ruling that Mr. Burnett had not adduced sufficient evidence to invoke the presumption that he had sustained either injury, or any injury, at work.

She continued on, completing the paragraph:

> Claimant testified that he injured his right hand on July 14, 2010 while installing card readers […]. Claimant testified that his right hand went into spasm after installing 40 or 50 devices. Claimant testified that he attempted to fax a weekly

[2] *De minimis* is "Trifling; minimal" and "(Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case". BLACK'S LAW DICTIONARY, SEVENTH EDITION, Bryan A. Garner, Editor in Chief, *West Publishing Group*, 1999.

[3] As is discussed *post*, the ALJ found Mr. Burnett to lack credibility, a finding which we affirm.

> report to his immediate supervisor on July 14, 2010 to report the incident. With respect to the August 3, 2010 injury, Claimant testified that while working on the concourse level moving cable reels, he felt a pull or something in his back. Claimant continued to work after feeling the pull in his back. The weekly report submitted by Claimant states both injuries occurred on August 3, 2010.

After this recitation of the supposedly trifling evidence, the ALJ, somewhat surprisingly, wrote:

> Claimant has shown a disability, i.e., that he suffered injury to his back while performing his usual work duties. Claimant has invoked the presumption.

The ALJ does not state that Mr. Burnett invoked any presumption with regard to his right hand, and she uses the term "disability" inaccurately. "Disability" under the Act means "physical or mental incapacity because of injury which results in loss of wages", with "injury" being defined as "accidental injury […] arising out of and in the course of employment". D.C. Code §32-1501 (8) and (12). More notably, though, she determined that despite the inconsequential nature of Mr. Burnett's evidence, he nonetheless is entitled to the presumption that he sustained a compensable injury to his back, and since that evidence included the date of injury as being August 3, 2010, we assume that that is the date of injury for this presumed injury. Since the evidence for the hand is of no different character than the evidence for the back, we can only assume that the omission of reference to the hand was inadvertent, and that the ALJ also determined that Mr. Burnett's evidence was sufficient to invoke the presumption that he sustained a work related injury to his right hand on July 14, 2010.

Inasmuch as any infirmity inherent in this evidence can be taken into account when considering whether the presumption has been rebutted and in the weighing of the evidence if matters come to that, we conclude that a finding that Mr. Burnett had adduced, through his own testimony, sufficient evidence to invoke these presumptions is in accordance with the law. Thus despite the lack of clarity, we find no reversible error in that determination.

In considering whether Tangent had adequately overcome the presumption, the ALJ relied upon two items: prior medical records of Dr. Drapkin evidencing a significant prior back injury sustained in 2000 (EE 3, discussed later in this Decision and Order), and the fact that Mr. Burnett did not stop working for this employer until the job ended, and that he then found work with a new employer doing similar work. We find no error in the ALJ finding that Mr. Burnett had suffered very significant injuries to the same body parts a decade earlier for which he underwent surgery to his back and was determined to be permanently totally disabled, and that he also reportedly fractured his right hand around that time, and her determination that this evidence is sufficiently specific and comprehensive to rebut the presumption that any back or hand condition that he currently exhibits is causally related to the alleged work injuries of July 14 and August 3, 2010.

The ALJ then weighed the evidence anew and without regard to any presumptions. She properly identified the appropriate standard for the burden of proof in this weighing, that being that Mr. Burnett bears the burden of demonstrating the work injuries by a preponderance of the evidence.

Upon weighing the evidence, the ALJ made a Finding of Fact that Mr. Burnett is not a credible witness. Although she explained the reasoning behind this as being that his testimony "is not supported by the evidence of record", that statement is not preceded by any description of the evidence of record, and is immediately followed by three paragraphs chronicling Mr. Burnett's having obtained the rather extensive care to his low back, including surgery, from Dr. Raymond Drapkin from December 14, 2000 through October 31, 2003. The ALJ also found that those records characterized Mr. Burnett as being permanently totally disabled from employment. The records also refer to Mr. Burnett having developed reflex sympathy dystrophy (RSD) to his left leg, and having sustained a fracture injury to his right hand. This is all medical history which Mr. Burnett had failed to disclose when questioned on cross-examination about any prior injuries: he specifically denied ever having injured his back prior to the instant claimed injuries. HT 48.

Although the ALJ gave lack of record support corroborating Mr. Burnett's testimony as the reason for her negative finding concerning his credibility, the fact that she immediately followed that assessment with a detailed description of the evidence concerning the prior medical care that he had denied having received suggests that what the ALJ meant to state was that his credibility is poor because his testimony is contradicted by this evidence. And, we agree that this record evidence is adequate to support the ALJ's finding that Mr. Burnett lacks credibility, a finding to which we defer.

This Finding of Fact was the one of two bases for the ALJ's ultimate denial of the claim. The other was that the only evidence other than the testimony of Mr. Burnett of such work injuries is the current medical records and reports of Dr. Drapkin, which she determined are wholly dependent upon the discredited word of Mr. Burnett. Again, we find no error in the ALJ determining that a claim premised upon nothing more than the word of a non-credible claimant does not meet the burden of proof standard.

Lastly, we must address the medical records from the prior injury. Tangent requested leave to submit post-hearing the medical records concerning the prior medical treatment Mr. Burnett received from Dr. Drapkin. The record does not disclose why Tangent did not produce these records at the formal hearing, but, over Mr. Burnett's objection, the ALJ granted Tangent 15 days within which to submit the records, at which point she would rule on their admissibility.

In the CO, the ALJ decided to admit them, and her decision hinged upon them in large part. Mr. Burnett has not challenged the admissibility of these records in this appeal, nor does he challenge the ALJ's description of their contents.

The ALJ did not assign an exhibit number or numbers to these documents. For clarity, we denominate them Employer's Exhibit (EE) 3, being 35 pages, each page representing a progress note from Dr. Drapkin or one of his associates, spanning the time frame of January 14, 2000 through November 10, 2003.

CONCLUSION

The Compensation Order is supported by substantial evidence, and the denial of the claim is in accordance with the law.

ORDER

The Compensation Order of September 29, 2011 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

May 23, 2012
DATE