CRB No. 11-078

CHARLES DAVIS,

Claimant–Petitioner,

v.

STANDARD BUSINESS FURNITURE AND SPECIALTY RISK SERVICES,

Employer and Insurer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Heather Leslie
AHD No. 11-095, OWC No. 652717

Frank R. Kearney, Esquire, for the Petitioner

Shawn M. Nolan, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Charles Davis was a shipping and receiving manager for Standard Business Furniture (Standard) who injured his back on August 19, 2008 while moving inventory. Standard provided medical care and temporary total disability benefits for a period of time. Then, in a letter dated February 14, 2011, based upon a January 21, 2011 medical report in which Mr. Davis's treating physician outlined Mr. Davis's physical restrictions and limitations, Standard made an offer of modified duty work to Mr. Davis. Mr. Davis did not show up for work on the date stated in the offer letter, and Standard ceased paying temporary total disability benefits as of March 9, 2011.

[1] Judge Russell was appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 (June 23, 2011).

Mr. Davis sought reinstatement and continuation of temporary total disability benefits at a formal hearing conducted on June 28, 2011 before an Administrative Law Judge (ALJ) in this agency.

At the hearing, Mr. Davis adduced medical records and reports from his physician and from a functional capacity evaluation (FCE) which delineated certain physical capacities and restrictions on activity. He also testified that, while at the time of the injury he had been living during the week with a friend and co-worker in Gainesville, Virginia, which he testified is 45 miles from the District of Columbia, since the date he was injured that friend had left the employ of Standard and no longer lived in the Gainesville residence. Thus, he testified, he now lives in Free Union, Virginia, a city from which he rode (as a passenger) on the day of the hearing to the hearing site in D.C., which trip he testified took five hours due to his needing to stop and take a stretch periodically. He also testified that upon his receipt of the offer letter, he telephoned his employer, and the owner of the company could not tell him exactly what the job that was being offered entailed. He testified that he did not report to the work site as instructed in the letter.

Mr. Davis also adduced a document signed by Dr. Sandeep Teja, a treating physician, restricting Mr. Davis to a one hour commute to work. The document was undated, but the ALJ noted that it had been faxed to the doctor's office from Mr. Davis's counsel's office on February 25, 2011, and was faxed back to counsel's office from the doctor's office on March 1, 2011.

In a Compensation Order issued July 19, 2011, the ALJ determined that, although the nature of the job was not conveyed to Mr. Davis when he called, it was in fact within his capacity, being a job which involved shipping and tracking of inventory. The ALJ denied the claim for temporary total disability benefits from and after March 9, 2011, finding that in failing to appear at the work site and attempt to perform the job being offered, Mr. Davis had voluntarily limited his income.

Mr. Davis timely appealed the Compensation Order, to which appeal Standard filed an opposition.

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

Mr. Davis argues that the ALJ erred in three ways, two of which are related to the claimed restrictions upon his ability to commute to Washington, D.C. from his current home in Free Union, Virginia.

First, he asserts that the ALJ's reasons for rejection of the one hour commute limit were insufficient to support that rejection, and second he argues that the ALJ's determination that the Washington, D.C. area is the relevant labor market in which Standard is obligated to make employment available (or, alternatively, in which a determination of job availability is analyzed) is not in accordance with the law.

As to the first point, Mr. Davis argues that because it is uncontradicted by any evidence adduced by Standard, the ALJ's rejection of the purported medical opinion from a treating physician that Mr. Davis is "restricted from commuting more than 1 hour one way in order to work" is not in accordance with the law. He also argues that the ALJ gave only one reason for rejecting the validity of the restriction – that it was not on the doctor's letterhead—and that that reason is insufficient a basis for rejecting the opinion.

However, the ALJ gave several reasons for rejecting the validity of the restriction. She noted that the note containing the restriction, contained in CE 1, was undated, but that from fax date stamps it appeared to have originated initially from Mr. Davis's attorney's office on February 25, 2011 (which is more than two weeks after Standard made the offer of light duty employment) and on March 1, 2011 it was returned via fax from the doctor's office, with handwritten changes; that the restriction was not previously noted in the doctor's January 21, 2011 medical report; and that, unlike the January 21, 2011 report it was not on the doctor's letterhead. She concluded from these facts that it was an attorney generated report which the doctor signed off on after making a change.

As the finder of fact and the person assigned the duty to judge credibility, the ALJ's assessment of the evidentiary value of the exhibit is entitled to great deference. We will not, in the absence of clear error, substitute our own views as to credibility for those of the ALJ. While we might have decided otherwise, we can't say that the ALJ's reasons for rejecting the restriction were not rational and record based. Accordingly, we decline to upset them.

As to the second point, the ALJ found that subsequent to the injury, Mr. Davis moved from Gainseville, which she found to be 45 miles from D.C., to Free Union, which she characterized as being "5 hours away" from D.C. Mr. Davis asserts that this finding is unsupported by substantial evidence because he testified that it took him 5 hours on the day of the formal hearing to travel from Free Union to D.C., due to the need to stop frequently and stretch his legs. He asserts that "Free Union, VA is only 2 hours away", as opposed to Gainesville, which he asserts is an hour and a half away from D.C. Petitioner's Memorandum, page 2.

This semantic difference is of no moment for two reasons. First, if one takes Mr. Davis at his word, moving to Free Union did, in fact, move *him* 5 hours away, at least if he chooses to drive. Second, the ALJ rejected the validity of the one hour driving restriction as discussed above.[2]

[2] Although not cited by the ALJ, we note that Dr. Teja, in EE 2, stated that Mr. Davis had a tolerance of 45 minutes in a static, seated position, and that he required a five minute stretching break every hour. How this is consistent with a one hour commute restriction is not apparent.

The third asserted error concerns the nature of the job offer and the letter communicating it. Mr. Davis points to the fact that when he called Standard's business office and spoke to the author of the offer letter and the owner of the company, neither of them could tell him what the job entailed, and the letter he received did not contain an attachment identified in the letter as describing the job.

However, Mr. Davis does not suggest why these facts invalidate the job offer, or render it ineffective, and we discern no error in the ALJ's finding that these facts did not render the job offer invalid. The evidence supports the finding that Standard offered Mr. Davis a job, in writing, and in that offer asserted that the proffered position was within Mr. Davis's physical capacity as described by his doctor. The ALJ found, and Mr. Davis does not dispute, that the job was in fact within Mr. Davis's capacity.[3] The ALJ acted within her discretion in finding that Mr. Davis's failure to appear for the job represented a voluntary decision on his part not to attempt to perform a job that had been offered and had been represented to be within his capacity. As such, the conclusion that Mr. Davis had voluntarily limited his income within the meaning of D.C. Code § 32-1508 (3)(v)(iii) is in accordance with the law.

However, the effect of such a voluntary limitation of income is not denial of wage loss benefits. Rather, as the ALJ noted in footnote 3, the section provides that where such a limitation occurs, a claimant's "wages after becoming disabled shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities." In this instance, the parties stipulated to an average weekly wage (AWW) of $694.80. The offer letter states an hourly rate and a number of weekly hours at which Mr. Davis would be employed. We must remand the matter to permit further fact finding concerning the extent of ongoing wage loss that Mr. Davis suffers and an award commensurate with any such wage loss, in the nature of temporary partial disability as established by D.C. Code § 32-1508 (5).

CONCLUSION

The finding that Mr. Davis voluntarily limited his income by failing to accept the modified position offered by Standard is supported by substantial evidence and is in accordance with the law. However, the denial of ongoing benefits based upon wage loss is not in accordance with the law, inasmuch as Mr. Davis continues to be entitled to temporary partial disability benefits pursuant to D.C. Code § 32-1508 (5).

[3] The job was described in a document, EE 1, that was supposed to have been attached to the offer letter but which Mr. Davis testified was not attached to the letter that he received.

ORDER

The denial of temporary total disability benefits is affirmed. The matter is remanded for further findings of fact and an award of temporary partial disability benefits based upon Mr. Davis's continuing ongoing wage loss as determined under D.C. Code § 32-1508 (5).

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

February 22, 2012
DATE