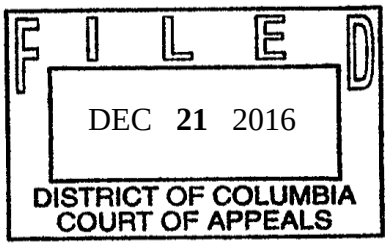
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-1278



JOHN S. HODGE, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

WINGS ENTERPRISES, *et al*., INTERVENORS.

On Petition for Review of Decision and Order
of the District of Columbia Department of Employment Services,
Compensation Review Board
(CRB-106-15)

(Submitted November 2, 2016 Decided December 21, 2016)

Before THOMPSON and BECKWITH, *Associate Judges*, and FARRELL, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner John S. Hodge challenges a Decision and Order of the Department of Employment Services ("DOES") Compensation Review Board ("CRB" or "the Board") that affirmed a Compensation Order on Remand in which a DOES Administrative Law Judge ("ALJ") denied petitioner's claim for worker's compensation wage-loss benefits on the grounds that he voluntarily limited his income and that his wage loss was caused by factors other than his work-related injury. We affirm the CRB's ruling.

I.

In November 2010, while working for intervenor Wing Enterprises, Inc. (the "Employer") as a rodman, petitioner sustained an injury to his wrist. After a period of light-duty work and physical therapy, he returned to full-duty work without medical restrictions on February 22, 2011. On October 11, 2011, the Employer terminated petitioner from his position, citing his tardiness to work, excessive absences, and use of his cellphone while at work.

About a year after his termination, petitioner was seen by orthopedic surgeon Joel Fetcher and complained of wrist pain and tingling in his wrists and hands. Dr. Fetcher recommended that petitioner undergo EMG nerve conduction studies to confirm whether he had carpal tunnel syndrome. Independent medical examiners concluded, however, that petitioner's wrist pain was unrelated to his work, and a utilization-review study concluded that a nerve conduction study was neither reasonable nor necessary.

The matter proceeded to an evidentiary hearing before ALJ Joan Knight on petitioner's claim for temporary total disability ("TTD") wage-loss benefits and payment of medical treatment expenses.[1] In an initial Compensation Order issued on November 20, 2014, the ALJ found that petitioner's hand/wrist condition was work-related, determined that the Employer was obligated to furnish the prescribed diagnostic study and medical treatment, and awarded petitioner TTD benefits from October 2011 "to the present and continuing." Although reciting in her Findings of Fact that the Employer had terminated petitioner's employment for tardiness and cell phone use while at work, the ALJ found "no evidence" that petitioner had voluntarily limited his income.

The Employer appealed to the CRB from the ALJ's determinations that appellant's hand/wrist condition is related to the workplace injury and that petitioner had not voluntarily limited his income.[2] The CRB upheld the ALJ's

[1] Petitioner had an earlier hearing before ALJ Anand Verma, who issued a Compensation Order that was later vacated.

[2] The Employer did not appeal the ALJ's determination that petitioner's requested medical treatment was reasonable and necessary.

determination that petitioner's condition is work-related. However, the CRB could not "reconcile" the ALJ's factual finding about the basis for the Employer's termination of petitioner's employment with the ALJ's conclusion that petitioner had not voluntarily limited his income. The CRB remanded the case for the ALJ to "fully analyze[]" the Employer's voluntary limitation of income defense.

On May 28, 2015, the ALJ issued a Compensation Order on Remand ("COR"), finding this time that petitioner "[wa]s not . . . a credible witness as it relate[d] to his reasons for his termination from employment . . . ." The ALJ concluded that petitioner's wage loss subsequent to October 11, 2011, his termination date, was not related to his November 21, 2010, work-related injury but instead "was caused by factors other than his injury" (in particular, "non-injury related transportation and parking problems"); that petitioner had voluntarily limited his income;[3] and that he was not entitled to TTD benefits after his termination date.

Petitioner appealed to the CRB, arguing that in making her credibility determination, the ALJ had failed to consider Dr. Fetcher's medical report indicating that petitioner had pain while driving, which petitioner asserted corroborated his testimony that his parking problems and resultant tardiness were injury-related. The CRB affirmed the COR, noting that the ALJ had implicitly taken into account the entire record and citing the ALJ's findings that petitioner "had returned to work without restrictions prior to his termination." The CRB affirmed, as "supported by . . . substantial evidence in the record and in accordance with the law[,]" the ALJ's ruling that petitioner's "wage loss after his termination for cause on October 11, 2011 was unrelated to his work injury." The petition for review followed.

II.

In workers' compensation cases, although this court reviews decisions of the CRB and not of the ALJ, we "cannot ignore the compensation order which is the

[3] *See* D.C. Code § 32-1508 (3)(V)(iii) (2012 Repl.) ("If the employee voluntarily limits his or her income . . . , the employee's wages after the employee becomes disabled shall be deemed to be the amount the employee would earn if the employee did not voluntarily limit his or her income . . . .").

subject of the [CRB's] review." *Marriott at Wardman Park v. District of Columbia Dep't of Emp't Servs.*, 85 A.3d 1272, 1276 (D.C. 2014) (internal citation and quotation marks omitted). "Our standard of review mirrors that which the Board is bound to apply." *Id.* (citation omitted). "That is, the Board was not entitled to consider the evidence *de novo* or to make factual findings different from those of the ALJ." *Id.* (citation omitted). "Rather, the Board was bound by the ALJ's findings of fact even if it might have reached a contrary result based on an independent review of the record." *Id.* (citation omitted). This court "will not disturb an agency's decision if it flows rationally from the facts which are supported by substantial evidence in the record." *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 929 A.2d 865, 869 (D.C. 2007) (internal quotation marks omitted). "'Substantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted).

Under the District of Columbia Workers' Compensation Act, D.C. Code § 32-1501 to 32-1545 (2012 Repl.), "[d]isability is an economic and not a medical concept, and any injury that does not result in loss of wage-earning capacity cannot be the foundation for a finding of disability." *Upchurch v. District of Columbia Dep't of Emp't Servs.*, 783 A.2d 623, 627 (D.C. 2001). "[T]he claimant ultimately has the burden to show by a preponderance of the evidence that his or her disability, in an economic sense was caused by the work injury." *Id.* at 628.

III.

Petitioner contends that it was error for the CRB to accept the ALJ's determination about his lack of credibility because there was "documentary evidence that [petitioner] had trouble finding parking because of his work injury . . . ." Specifically, petitioner asserts that the ALJ's negative assessment of his credibility was the result of the ALJ's failure to consider how petitioner's testimony was supported by Dr. Fechter's November 14, 2012, report that petitioner was having trouble driving due to pain in his hands. We are not persuaded by appellant's argument.

To begin with, petitioner did not testify at trial, as he suggests in his brief, that "his difficulties parking his truck (and thus getting to work on time) were due to his injuries . . . ." Rather, petitioner testified at the hearing that he was tardy because he "couldn't find a parking space for [his] truck . . . ." Moreover, Dr.

Fetcher's notation about the pain petitioner experienced while driving was based on petitioner's self-report during a medical visit that occurred no earlier than September 28, 2012 (the first date when Dr. Fechter saw petitioner), i.e., about a year or more after petitioner was terminated from his job. Thus, the notation was not an *opinion* entitled to special deference as coming from petitioner's treating physician and, in any event, was not evidence that petitioner's tardiness during the period leading up to October 11, 2011, was related to pain while driving.

Further, we reject petitioner's argument that the ALJ's adverse determination about his credibility was arbitrary and capricious. To the contrary, it was well-explained. As the CRB observed, the ALJ's credibility determination and finding that petitioner's testimony was unreliable rested heavily on the inconsistencies in the testimony, including "how [petitioner's] responses changed after [leading direct-examination] questions from counsel . . . ." We see in the record nothing that would justify a departure from the rule that "credibility determinations of an ALJ are accorded special deference by this court." *Payne v. Distict of Columbia Dep't of Emp't Servs*., 99 A.3d 665, 671 (D.C. 2014) (citation and brackets omitted).

IV.

Petitioner also argues that the CRB erred in affirming the COR because the ALJ's finding that he voluntarily limited his income is not supported by substantial evidence. He asserts that the ALJ "failed to acknowledge the restrictions placed upon [petitioner] by Dr. Fechter in his September 19, 2013[,] deposition," which petitioner characterizes as evidence that he was medically "restricted from working as an iron worker[.]"

Specifically, petitioner cites Dr. Fechter's testimony that, "at this point in time," he "would have [petitioner] avoid the kinds of symptoms [sic] that produce the numbness and tingling[,]" in particular "moving boxes" and "repetitive flexion/extension kinds of things or any involvement with . . . vibrating equipment . . . ." Petitioner contends that through the foregoing testimony, Dr. Fechter indicated that he could not perform his pre-injury work for the Employer, which involved repeatedly cutting, twisting, bending, and tying iron rods. Accordingly, petitioner argues, as of September 19, 2013, the date when Dr. Fetcher "restricted [him] from working as an iron worker[,]" and "could not have

voluntarily limited his income . . . because he could no longer do his pre-injury employment."

For a number of reasons, petitioner's argument is unavailing. First, it is not correct to say that Dr. Fechter restricted petitioner from work as a rodman. Dr. Fechter testified at his September 2013 deposition that he last saw petitioner on January 14, 2013 (even though petitioner was told to return two weeks later). Dr. Fechter acknowledged in his deposition that at that time, he had never "restrict[ed] [petitioner] from work . . . ." Dr. Fechter's deposition testimony, given eight months after he last saw petitioner (and almost two years after petitioner was terminated from his job with the Employer), about what he "would recommend for Mr. Hodge to avoid or to limit doing at this point in time[,]" does not amount to a restriction imposed by his treating physician limiting him from iron work (or any other work).[4]

Further, this case is governed by the principle this court adopted in *Robinson v. District of Columbia Dep't of Emp't Servs.*: "If the record shows no more than that the employee, having resumed regular employment after the injury, was fired for misconduct, with the impairment playing no role in the discharge, it will not support a finding of compensable disability." 824 A.2d 962, 965 (D.C. 2003) (internal quotation marks omitted) (quoting 4 Larson's Workers' Compensation § 84.04 [1], at 84-14 (2002)). By his own admission, two weeks after his February 2011 injury, petitioner was "back to full duty" at his job with the Employer and was not receiving medical treatment. He was fired months later, after having been warned about tardiness, because he "kept coming to work late . . . ." Thus, petitioner resumed his regular job with the Employer after his work-related injury and was subsequently terminated from his job for misconduct, "with the impairment playing no role in the discharge . . . ." *Id.* at 965. And, as in *Robinson*, "[p]etitioner has made no claim of pretextual or retaliatory discharge[.]" *Id.* at 964. On this record, the CRB did not err in upholding the COR, because, as in *Robinson*, the record "will not support a finding of compensable disability." *Id.* at 965 (citation and internal quotation marks omitted).

---

[4] Thus, this case differs from *Upchurch*, in which this court remanded the case for the ALJ to consider and give proper weight to the treating physician's deposition testimony that claimant Upchurch "could not have returned to work . . . at any time since the date of the work injury." 783 A.2d at 628.

Petitioner "ultimately ha[d] the burden to show by a preponderance of the evidence that his or her disability, in an economic sense, was caused by the work injury." *Id.* at 964 (citation omitted). Even if we assume that under D.C. Code § 32-1508 (3)(V)(iii), petitioner was permitted to establish his eligibility for wage-loss benefits at some point after his discharge for misconduct,[5] we are satisfied that the CRB reasonably upheld the ALJ's finding that petitioner did not meet the burden of proving a wage loss attributable to his work-related injury. (We reach that conclusion even taking into account (1) the record evidence that, a year or so after he was discharged from his job with the Employer, petitioner complained of symptoms that Dr. Fechter attributed to (suspected) carpal tunnel syndrome caused by his work for the Employer; and (2) the ALJ's undisturbed finding that petitioner's left wrist condition was caused by the February 2011 workplace injury.) Petitioner testified that after the Employer discharged him, he worked for three or four months in 2012 delivering carpet and tile (a job in which he "didn't use [his] hand that often"), and he did not attribute loss of that job to his wrist condition.[6] In addition, petitioner testified that, in late 2013 or early 2014, he applied for (and was offered) a job as a construction worker, apparently believing

[5] Although we sympathize with petitioner's argument (made to the CRB) that the Employer should not be "absolve[d] . . . of all responsibility for future limitations related to the work injury[,]" our opinion in *Robinson* suggests that § 32-1508 (3)(V)(iii) forecloses this opportunity since, as the ALJ found, petitioner voluntarily limited his income by committing the misconduct that led to his discharge. We recognized in *Robinson* the "seeming harshness in a forfeiture of all workers' compensation rights for relatively low-grade misconduct resulting in discharge," but agreed that "perhaps the only remedy for this is legislation comparable to those Unemployment Compensation provisions which handle discharge for misconduct . . . by a penalty of a limited number of weeks' compensation rather than complete loss of benefits." 824 A.2d at 965 (quoting 4 Larson's Workers' Compensation § 84.04 [1], at 84-15 (internal quotation marks and brackets omitted)).

[6] To the contrary, during the hearing before ALJ Verma, petitioner testified that he was fired from the carpet and tile delivery job after his employer learned that he had a bottle of beer in the delivery truck. During the hearing before ALJ Knight, petitioner offered no explanation for why his carpet and tile delivery job ended (and Judge Knight told the parties, without objection, that her determination would be based solely on the evidence before her).

he could do that work despite his wrist condition.[7] Thus, far from compelling the ALJ to find that petitioner's work-related injury rendered him disabled in the economic sense, the record contains substantial evidence to support a finding that petitioner remained able to work.

For the foregoing reasons, the decision of the CRB is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

[7] We acknowledge, however, petitioner's further testimony that after he informed a construction company representative that he had a carpal tunnel condition, the job was rescinded, with the job site "safety man" telling him that the work would "aggravate [his] hand" and he "didn't want to take that chance with [him]."

Copies to:

Timothy Fitzpatrick
Program Analyst
Department of Employment Services –
Compensation Review Board

David M. Snyder, Esq.
Chasen & Boscolo
7852 Walker Drive – Suite 300
Greenbelt, MD 20770

Jose L. Estrada, Esq.
Semmes, Bowen & Semmes
25 S. Charles Street – Suite 1400
Baltimore, MD 21201

Todd S. Kim, Esq.
Solicitor General – DC