

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-105

HENRY L. BAKER,

Claimant–Petitioner,

v.

FIRST TRANSIT AND NEW HAMPSHIRE INSURANCE COMPANY,

Employer and Insurer–Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
AHD No. 11-258A, OWC No. 672618

Krista N. DeSmyter, Esquire, for the Petitioner

Julie D. Murray, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HEATHER C. LESLIE, AND HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

Petitioner Henry L. Baker suffered neck and shoulder strains while driving a bus full time for First Transit. The injury occurred when the bus that he was operating was struck by another vehicle. At the time of the injury, Mr. Baker was also employed working full time for the United States Postal Service, delivering express mail to various post offices.

Prior to the injury, Mr. Baker worked significant amounts of overtime. After the injury, he missed a period of time from work, but was ultimately released by his treating physicians to full time, full duty work.

¹ Judges Russell and Leslie are appointed by the Director of DOES as Board Members pursuant to DOES Administrative Policy Issuances No. 12-01 and No. 12-02 (June 20, 2012).

After a period in that status, one of his treating physicians issued a “no overtime” restriction. Mr. Baker sought partial disability compensation based upon the difference between his present earnings and his pre-injury average weekly wage, arguing that his injury has prevented him from working overtime. Respondent declined to pay the ongoing partial disability benefits, so the matter was presented an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) for resolution.

Following a formal hearing conducted on May 3, 2012, the ALJ issued a Compensation Order on June 11, 2012, in which he denied the claim for temporary partial disability based upon wage loss. Mr. Baker appealed by filing an Application for Review and Memorandum of Points and Authorities in Support of Application for Review (Petitioner’s Memorandum) with the Compensation Review Board (CRB). First Transit opposed the appeal by filing an Opposition to Claimant’s Application for Review (Respondent’s 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.*, 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

Citing *Dell v. DOES*, 499 A.2d 102 (D.C. 1985), Mr. Baker argues that the ALJ’s determination that Mr. Baker’s testimony concerning his overtime earnings is not credible is not supported by substantial evidence.

We note preliminarily that, contrary to the implication in Mr. Baker’s Memorandum, while it is true that a mere assertion that a witness lacks credibility, without reference to reasons for that finding, is generally insufficient, nothing in *Dell* supports a suggestion that demeanor alone is an insufficient basis upon which to assess credibility. Indeed, demeanor assessment was the only basis mentioned by the court in *Dell* as being a basis for deferring to a hearing examiner’s credibility finding.

We recognize that the CRB has, in the past, cited *Dell* for the proposition that witness credibility determinations must be supported by substantial evidence. Mr. Baker cites such a case, *McAlister v. Flippo Construction Co.*, CRB No. 08-045 (March 25, 2008). However, as stated in the concurrence to *McAlister*, the District of Columbia Court of Appeals has, to our knowledge, not yet ruled that anything more than demeanor assessment is *required* in making credibility determinations.

The two cases cited by the CRB in *McAlister* to support the proposition that “credibility determinations must be supported by substantial evidence in the record” are *Dell* and *Murray v. DOES*, 765 A.2d 980 (D.C. 2001). *Dell* does not address anything beyond the role that assessment of demeanor has in deferring to the credibility determination upon reviewing a decision of the fact finder. *Murray* does not state that anything beyond assessing demeanor is required either. Rather, the court in *Murray* reversed a decision that was premised upon a finding of lack of credibility, because one of the record-based reasons upon which the credibility determination was made was clearly erroneous.

Thus, the argument that “no factual basis” is cited by the ALJ for finding Mr. Baker’s testimony concerning overtime to lack credibility, even if true, would not be a basis for reversal, assuming the ALJ made reference to demeanor factors, which he did in this case, calling Mr. Baker’s testimony “evasive” (as well as “vague”, which could also be considered a demeanor based characterization), and referencing a specific transcript portion in support of that assessment. Compensation Order, page 4.

Beyond this, though, it is apparent that the ALJ relied upon additional “factual” or “record based” reasons for determining that Mr. Baker’s testimony regarding the subject of his pre- and post-injury overtime experience, and particularly his capacity to perform overtime work lacked credibility.

Among the reasons was that the testimony that Baker was unable to work overtime post-injury was inconsistent with the fact that he did in fact work overtime post-injury (CO, page 4). He also deemed the testimony that working overtime was problematic because it caused Mr. Baker to experience pain to lack logical force, given that as much as 40% of the overtime working time was “downtime”, in which Mr. Baker did no work and was not driving at all, and that when Mr. Baker was working overtime, he was performing the same functions and tasks that he performed during his regular work hours (CO, page 5). Similarly, the ALJ cited the fact that, despite being advised by his physicians (belatedly after several months of returning to work without restrictions) not to work overtime, Mr. Baker nonetheless worked overtime (CO, page 5). Further, the ALJ cited the lack of corroborating complaints of pain attributed to working overtime in the medical records as making Mr. Baker’s claim of incapacity from such work “more suspect” (CO, page 4).

Mr. Baker’s complaints in this regard in this appeal are in fact little more than disagreements with the ALJ’s assessment of the evidence and the demeanor of the witness, which are matters to which the reviewing authority must give great deference, even where that authority might have reached a different conclusion. *Dell*, *supra*.

Mr. Baker also argues that the ALJ erred in finding that he was “estopped” from asserting the claims raised in this case. After arguing that the evidence of post-injury overtime work was too small or insignificant to permit an inference of capacity to work overtime, Mr. Baker states “Without citing any legal authority, the Compensation Order concludes that these minutes [they are in fact hours] somehow prevent Mr. Baker from asserting his claim.” Petitioner’s Memorandum, page 8.

It is true that the ALJ wrote that “It is unarguable that despite his doctor’s orders against any overtime work, Claimant performed it on nine different occasions and suffered no discomfort to his

left shoulder. As such, Claimant is estopped from raising the issue that it was his infirm left shoulder that became a catalyst in his partial wage loss.” Compensation Order, page 5.

In legal discourse, “estop” means “To bar or prevent by estoppel”, which in turn means “A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has legally been established as true.” BLACK’S LAW DICTIONARY, SEVENTH EDITION, Bryan A. Garner, Editor in Chief, West Group (1999), page 570.

The above-quoted portion of the Compensation Order is the third and second from the last sentence in the “Analysis” section of the CO. It follows six paragraphs of discussion concerning the ALJ’s perception of the shortcomings of Mr. Baker’s evidence, which discussion begins with the ALJ properly noting that where the issue is nature and extent of disability, the burden is upon the claimant (and hence, in this case, upon Mr. Baker) to prove entitlement to the requested level of benefits by a preponderance of the evidence. *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). In this case that would mean both the availability of a specific amount of overtime work, and the incapacity to perform it.

Within that rule is the notion that such evidence must be credible. It is instructive to consider that the court, in *Murray*, *supra*, implicitly acknowledged that a mere lack of credibility on the part of a claimant is sufficient to deny the claimant the benefit of the presumption of compensability. That is, despite reversing the determination that the claimant in *Murray* lacked credibility, the court returned the case to the agency to permit further consideration of the claimant’s credibility, pointing out that the initial credibility determination had been faulty because it had been based on a demonstrable factual error. The ALJ was again free to rule that the claimant lacked credibility, and thus had failed to adduce adequate evidence to invoke the presumption of compensability.

Given that the burden upon a claimant to invoke the presumption of compensability is lower than the preponderance standard applicable to this case, it is within the ALJ’s discretion to find that a claimant has failed in his burden due to the lack of credible evidence in support of the claim. It is evident from the Compensation Order that the ALJ was of the view that Petitioner’s testimony, that he lacked the physical capacity to work overtime, was not credible, and that without that testimony the claim is inadequately supported.

It is in that sense that we view the ALJ employed term “estopped”, not in its technical legal sense. While it would be best, especially in legal writing, for writers to avoid usages that engender confusion or which are technically inaccurate, we do not view the ALJ in this case as having denied the claim because the ALJ thought that Mr. Baker is for some reason barred from *asserting the claim*. Rather, it is evident to us that the ALJ denied the claim because he determined that Mr. Baker had failed in meeting his burden of proof. And, as discussed above, that determination is supported by substantial evidence.

Lastly, we comment upon the concluding substantitive sentence in the Compensation Order, where the ALJ wrote “Lost wages is [sic] not to be determined by a workers’ loss of actual earnings but by his loss of ability to earn.” This inartfully drawn sentence could easily be misconstrued: the usage of the terms “lost wages” and “loss of earnings” can too easily be read as implying a reduction in wages or earnings because they have been “lost” due to injury. However, when read together with

the “loss of ability to earn”, it appears that the ALJ actually meant “lesser” or “lower” earnings or wages, not “lost” or “loss of” earnings or wages. The ALJ determined that Baker has the capacity to work overtime (or more precisely, has failed to demonstrate that he lacks that capacity) assuming overtime is available and he wants to work it, and, in that sense, the sentence is a correct statement of the law.

Because we affirm the Compensation Order on these grounds, we will not address, and do not mean to be taken to endorse, First Transit’s arguments concerning the inapplicability of lost wages resulting from a compensable injury due to an inability to work overtime, to the compensation rate to which a claimant is entitled. We do note that the only authority that First Transit cited on the subject were decisions of the hearings branch, not from the District of Columbia Court of Appeals, the Director of DOES, or the CRB, and are therefore not considered authoritative for the purposes of precedent.

CONCLUSION

The denial of the claim for temporary partial disability benefits is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of June 11, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 9, 2012
DATE