

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

CRB No. 14-152

**JOHN HODGE,
Claimant-Respondent,**

v.

**WINGS ENTERPRISES, INC. and
GALLAGHER BASSETT SERVICES, INC.,
Employer and Third-Party Administrator-Petitioners.**

Appeal from a November 20, 2014 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 13-364, OWC No. 695532

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 APR 20 AM 11 52

Tony Villeral for the Employer
Michael Kitzman for the Claimant

Before HEATHER C. LESLIE, MELISSA LIN JONES and LINDA F. JORY, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant, who is left hand dominant, was working as an iron worker/rodman when he began to experience pain and tingling in his left hand in November of 2010.

Claimant sought treatment with Howard University Hospital Emergency Room on November 21, 2010 for left hand complaints. Claimant subsequently was sent to Concentra by the Employer for pain in the left upper arm and forearm. Claimant was diagnosed with a left wrist sprain, received conservative care, and was taken off of work for a period of time. Claimant subsequently returned to work.

On October 11, 2011, Employer terminated Claimant from his position for tardiness and using his phone while at work.

On September 28, 2012, Claimant began treatment with Dr. Joel Fechter. After a physical examination and history of the injury, Dr. Fechter diagnosed the Claimant with carpal tunnel syndrome and recommended an EMG for confirmation of this diagnosis. Employer did not authorize the requested EMG.

Employer sent Claimant for two independent medical evaluations (IME) with Dr. Louis Levitt and Dr. Richard Barth. Claimant first saw Dr. Barth on August 28, 2013. Dr. Barth took a history of Claimant's injury and treatment to date, and performed a physical examination. Dr. Barth opined Claimant suffered from left wrist and hand pain of unclear etiology that was not work related. Dr. Barth did not feel that Claimant suffered from carpal tunnel syndrome and that he could go back to work fully duty. Dr. Barth further opined that Claimant reached maximum medical improvement from his work injury and required no further treatment.

Claimant saw Dr. Levitt on August 25, 2014. Similar to Dr. Barth, Dr. Levitt took a history of Claimant's injury and treatment to date, and performed a physical examination. Dr. Levitt found Claimant had a normal examination and no "active musculoskeletal process that requires evaluation or treatment." Dr. Levitt opined Claimant could return to work full duty and had recovered from any injury that he experienced in 2010.

Employer sent Claimant's medical records for utilization review which generated an independent review report on September 4, 2014. After reviewing the medical records, the UR determined the request for an EMG and further treatment was neither reasonable nor necessary.

A full evidentiary hearing was held on September 9, 2014. At that hearing, Claimant sought temporary total disability benefits from October 11, 2011 to the present and continuing, authorization for medical treatment, and payment of causally related medical benefits. The issues presented were whether Claimant's left hand and wrist condition are medically causally related to his employment, the reasonableness and necessity of the diagnostic testing recommended by Dr. Fechter, the nature and extent of Claimant's disability, and whether Claimant voluntarily limited his income. A Compensation Order (CO) was issued on November 20, 2014 which granted Claimant's claim for relief.

Employer appealed. Employer argues the Administrative Law Judge (ALJ) erred in determining Claimant had not voluntarily limited his income and also in concluding Claimant's left hand and wrist condition is medically causally related to the work injury. The Employer did not appeal the finding that Claimant's requested medical treatment was reasonable and necessary.

Claimant opposes Employer's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB 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.

ANALYSIS

We address Employer's second argument first. Employer argues the ALJ erred in finding the Claimant's left wrist and hand condition medically causally related to his work accident. Employer argues that as the Claimant waited for an extended period of time to seek treatment with Dr. Fechter who failed "to account for the fact that the Claimant did not seek treatment until September 28, 2012," and then returned to work in another capacity after his termination, Claimant failed to meet his burden to prove a medical causal connection. Employer's argument unnumbered at 7.

After finding the Claimant had invoked the presumption of compensability, and the Employer had rebutted that presumption, the ALJ weighted the evidence to determine whether the Claimant had shown, by a preponderance of the evidence, that the left wrist and hand condition are medically causally related to the work injury. The ALJ held:

Claimant testified his job involved repetitive cutting, twisting, bending and tying rebar and he began to experience pain and tingling in his left hand. He was evaluated at Howard University Hospital and initially diagnosed with possible carpal tunnel syndrome. Claimant wore a wrist splint and underwent a trial of physical therapy prior to his termination from his employment. He was subsequently evaluated by Dr. Fechter who suspected carpal tunnel syndrome and has recommended further diagnostic testing. The record reflects, Dr. Fechter through deposition testified and confirmed there was persistent numbness and tingling in the bilateral wrists and hands and wanted to confirm the diagnosis with the EMG conduction studies. Conversely, Dr. Levitt opined in his IME report that Claimant's physical examination is devoid of any measurable or detectable pathology and Claimant had a simple strain tying rebar in December 2010. Dr. Barth opined in his IME report, that Claimant had left wrist and hand pain of unclear etiology and there is no causal relationship between Claimant's work related activities and his current symptoms.

It is determined the medical records presented by Claimant from Concentra, Howard University Hospital along with the medical opinions of Dr. Fechter accepted and given greater weight than the IME opinions and assessments of Dr. Barth and Dr. Levitt. The record evidence established that Dr. Fechter regularly treated Claimant from September 28, 2012 until January, 2013. For the numbness and tingling to his wrists and hands and therefore; is in a better position to give a medical opinion addressing the Claimant's condition. Dr. Fechter's opinions are most reliable regarding causation of the ongoing condition and are substantiated with the available objective medical findings. Dr. Barth and Dr. Levitt on the other hand, provided no medical treatment and each evaluated Claimant on one occasion for litigation purposes. The IME opinions of Dr. Barth and Dr. Levitt are therefore rejected. The record evidence is sufficient to demonstrate Claimant's left wrist condition remains causally related to his work injury.

CO at 6. (internal citation omitted).

As the above passage shows, the ALJ took into consideration all the evidence presented, including the fact that Claimant did not begin to treat with Dr. Fecther until September 28, 2012. While there is a gap in time in treatment, this does not by itself render suspect Dr. Fecther's medical opinion regarding whether Claimant's left wrist and hand condition is medically causally related to the work injury and Employer points to no case law or statutory authority in support. The ALJ weighed the evidence and found the treating physician's opinion more persuasive. What the Employer is asking this panel to do is to reweigh the evidence in Employer's favor, a task we cannot do, 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. The ALJ's conclusion that the left wrist and hand condition is medically causally related to the work injury is affirmed.

Addressing Employer's first argument, Employer argues the ALJ erred in concluding Claimant did not voluntarily limit his income as he was terminated for reasons unrelated to his work injury. Employer relies upon *Upchurch v. DOES*, 783 A.2d 623, 627 (D.C. 2001) (*Upchurch*) and *Robinson v. DOES*, 824 A.2d 962 (D.C. 2003) (*Robinson*) in argument.

As the Court noted in *Robinson*,

In *Upchurch, supra*, this court addressed a similar contention by an employer that the worker had been "terminated . . . for failing to keep his superior apprised of his work status and failing to follow the procedures of the department." 783 A.2d at 625. The court first explained the relevant legal framework:

Disability 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. The statutory presumption of compensability once there has been an on-the-job injury[, D.C. Code § 32-1521 (2001),] may be rebutted if an employer proves by substantial evidence that the disability did not arise out of and in the course of employment. Thus, where rebuttal evidence is presented, the 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 963-964.

The CRB noted in *Burrows v. M.C. Dean*:

The factual scenario and analysis in *Robinson* is given by the court, and we repeat it here:

Petitioner [claimant] was injured on January 24, 2000, while at work for the employer-intervenor (Flippo). After a short absence he was given suitable light-duty work at full wages. On March 22, 2000, however, Flippo discharged him for violation of its employee attendance rules. Petitioner then sought workers' compensation for the period March 20, 2000, to October 9, 2000,

when he began new employment. An . . . [ALJ] denied the claim on the ground that during the period for which Petitioner sought compensation, he suffered no wage loss as a result of the injury but instead had "voluntarily limited his income by not abiding by [Flippo's] rules, which forced [Flippo] to terminate him." The Director of . . . [DOES] affirmed this ruling on appeal.

The ALJ found that, although petitioner had been injured on the job, "any wage loss [he incurred] after March 20, 2000 is not due to his work injury" because "suitable light duty employment within his restrictions" -- and at his full wages -- "was available and offered" to him by Flippo." Rather, petitioner was terminated by Flippo because of his failure to report to work on February 14, March 15, and March 21, 2000, despite written and oral warnings following the first two non-appearances.

Petitioner does not take issue with the ALJ's finding that Flippo had made suitable light duty work available to him at full pay after his injury and up to the time he was discharged.

In this case, the Director applied the *Upchurch* framework correctly, and his conclusion that Flippo had rebutted the presumption of compensability and petitioner had failed to show the necessary causal connection between the injury and wage loss is supported by substantial evidence.

That conclusion is in keeping with the principle stated in 4 LARSON'S WORKERS' COMPENSATION, § 84.04 [1], at 84-14 (2002) that "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."

Robinson, supra, at 963 -- 965. Notably, the court added a footnote at the end the above quoted passage, which reads as follows: "By 'regular employment', we assume LARSON would mean suitable light-duty employment as well." *Id.*, at 965, footnote 4.

CRB No. 08-144, AHD No. 08-019 (January 28, 2009) at 4-5.

Turning to the CO that is the subject of this appeal, we note first that in the findings of fact, the ALJ does acknowledge that the Claimant was terminated from his employment. Specifically, the ALJ found:

Claimant returned to work and continued to perform his duties tying rebar. Claimant continued to have intermittent left wrist pain. On October 11, 2011, Employer terminated Claimant's employment for tardiness and using his phone while at work. Following his termination Claimant was unable to seek treatment for his left wrist. HT pp. 30-31, 36-37.

CO at 3.

Thereafter, in the discussion section when analyzing the issue of nature and extent, the ALJ concluded:

Conversely, based upon the IME medical opinions of Drs. Barth and Levitt, Employer argues that Claimant's complaints of hand and wrist pain is not a result of a work injury and if it was, he has reached maximum medical improvement, requires no further treatment and is capable of returning to work in a full duty capacity. The undersigned is not persuaded by Dr. Barth's or Dr. Levitt's opinion with regard to Claimant's ability to perform regular-duty work as a rebar workman. Furthermore, Employer presented no evidence to show that Employer provided Claimant an opportunity to return to suitable work, consistent with his physical restrictions, earning the wages he had prior to the work accident to establish he voluntarily limited his income. Moreover, no evidence was introduced that showed that Claimant has voluntarily limited his income by not returning to work or resuming gainful employment.

CO at 9. (internal citation omitted).

We cannot reconcile the above finding of facts with the quoted discussion.. As the finding of facts and hearing transcript bear out, Claimant testified that he returned to work and was terminated for tardiness and there were issues regarding his phone usage while at work. Thus, the ALJ's failure to discuss whether Claimant's disability thereafter is related to his work related injury or to non-injury factors, namely his termination as raised by the Employer, is in error.

We have previously said:

While it is true that an ALJ is not obligated to inventory or catalogue all the documents and testimony relied upon and considered in reaching a decision, a party is entitled to have its legal arguments taken into consideration, and it is error to fail to address a party's evidence-based claims or defenses. A failure to address and resolve all material issues renders an agency decision unsupported by substantial evidence. *See, Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984); *Committee of 100 on the Federal City v. D.C. Dep't of Consumer and Regulatory Affairs*, 571 A.2d 195 (D.C. 1990); *See also, Braxton v. Marty's Restaurant*, CRB

No. 09-032, AHD No. 06-092, OWC No. 618209 (January 29, 2009); *Mendez v. D.C. Public Schools*, CRB No. 08-163, AHD No. PBL 02-024 (May 30, 2009).

Ramirez v. Whole Foods Market, CRB No. 13-164, AHD No. 13-032 (March 18, 2014).

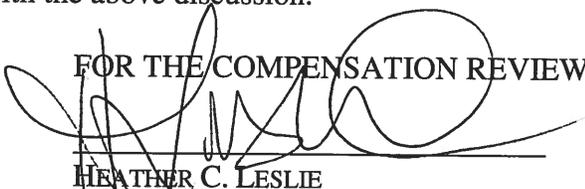
We are also mindful that it is also well settled in this jurisdiction that to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Code § 2-501 *et seq.* for each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each 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. D.C. 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).

While the ALJ may still have reasons to reject the Employer’s arguments, until such time as the ALJ addresses and fully analyzes the voluntarily limitation of income defense, taking into consideration *Upchurch* and *Robinson*, we cannot say the conclusions of law flow rationally from the findings nor that the CO is supported by the substantial evidence in the record and in accordance with the law.

CONCLUSION AND ORDER

The November 20, 2014 Compensation Order is AFFIRMED in part, and VACATED and REMANDED, in part. The conclusion that Claimant’s left hand and wrist condition is medically causally related to the work injury is AFFIRMED. The conclusion that Claimant has not voluntarily limited his income is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:


HEATHER C. LESLIE
Administrative Appeals Judge

April 20, 2015
DATE