

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-104

LEVI H. BUTLER III,

Claimant-Respondent,

v.

MURRAY'S STEAKS,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 08-432B, OWC No. 649302 and 648753

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 JUN 30 PM 11 54

Lisa Zelenak, Esquire, for the Petitioner

Jason Zappsodi, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Levi H. Butler III sustained an injury to his left leg on November 14, 2007 while moving merchandise using a "floor jack". His claim for workers' compensation benefits was accepted by his employer, Murray's Steaks (Murray's). He underwent a course of medical care which culminated in his undergoing a surgical repair of a meniscus in his left leg performed by Dr. Rida Azer on February 5, 2009. Prior to that surgery he had made an attempt to return to work on March 3, 2008, but he complained of pain and swelling in the knee and was taken off work. Mr. Butler commenced treatment with a new doctor, Dr. Kenneth Fine, as of December 7, 2009. Dr. Fine treated Mr. Butler through November 8, 2010. Dr. Fine has placed specific physical restrictions on Mr. Butler's

¹ Judges 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).

activities, being no lifting more than 20 pounds, no squatting or climbing, and no pulling more than 50 pounds.

Murray's had Mr. Butler evaluated by Dr. Louis Levitt for the purpose of an independent medical evaluation (IME) on August 24, 2010, at which time he opined that Mr. Butler has fully recovered from the injury and follow up surgery, that he was in need of no further medical care, and could return to work without restrictions. Based on this report, Murray's ceased payment of temporary total disability benefits as of July 8, 2010 and declined to provide further medical care recommended by Dr. Fine.

Mr. Butler requested a formal hearing to obtain reinstatement of those benefits, which hearing occurred July 12, 2011. Following that hearing, a Compensation Order was issued by the Administrative Law Judge (ALJ) before whom it was held, and on September 21, 2011, the ALJ issued a Compensation Order in which Mr. Butler's claim for resumption of temporary total disability benefits and for causally related medical care was granted.

Murray's appealed the Compensation Order. Mr. Butler opposed the appeal. We reverse the finding that Mr. Butler is disabled for the period claimed, vacate the award, and remand for further findings of fact.

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

As an initial matter, we note that one of the issues raised at the formal hearing and disposed of in the Compensation Order was the reasonableness and necessity of medical care, in the nature of pain management, recommended by Dr. Fine. The ALJ awarded the requested care. Although Murray's has appealed the award, it does not argue or discuss the issue of reasonableness and necessity. Therefore we do not consider that issue to be before us, despite the fact that, at least on this record, it does not appear that the mandatory utilization review process was undertaken prior to the issue being presented for consideration in a formal hearing. *See, Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

Turning to the matters that are before us, the parties stipulated that Mr. Butler sustained a compensable injury to his left leg on November 14, 2007, when he was moving large cases of

“Huggies” using a floor jack. The ALJ found, and Murray’s does not dispute, that when the injury occurred, Mr. Butler felt a “pop” in the back of his leg, that he was taken from the scene by ambulance, and that he ultimately required arthroscopic surgery to repair a meniscus that was torn in the incident.

Murray’s challenges the ALJ’s determination that Mr. Butler’s current knee complaints are sufficient to keep him from performing his pre-injury job, and argues that Mr. Butler’s testimony establishes that it is rheumatoid arthritis and an unrelated foot problem that keeps him from being able to wear footwear appropriate to working in walk-in refrigerators and freezers, and not the knee injury, that prevents him from doing that job. Murray’s also argues that the record contains no evidence concerning the physical requirements of the pre-injury job, thereby rendering the award of temporary total disability unsupported by substantial evidence, because even if one accepts that the restrictions imposed by Mr. Butler’s treating physician accurately reflects the limits of Mr. Butler’s physical capacity, there is nothing in the record to establish that his restrictions inhibit his work capacity.

The following are all the findings concerning the requirements of Mr. Butler’s pre-injury job contained in the Compensation Order:

On November 14, 2007, Claimant was working as a produce man when he was requested to move a floor display of cases of Huggies off the floor for a shipment setup ... with a floor jack [Compensation Order, page 2, FINDINGS OF FACT]

Claimant’s position with Employer required him to lift pallets of produce off the truck with a floor jack ... [and] he had to set up the produce by bending and lifting. Claimant loaded produce from the pallets into the freezer dressed in a jumpsuit with boots as required by Employer. [*id.*]

The Compensation Order also contains the finding that Mr. Butler attempted to return to work on March 3, 2008, “but his knee kept swelling [and he] was taken off work.” Compensation Order, page 2, FINDINGS OF FACT. Following this episode, according to the Compensation Order, Mr. Butler underwent an unsuccessful course of conservative treatment followed by surgery, performed by Dr. Rida Azer, to repair a torn meniscus in his left leg on February 5, 2009. Thereafter, according to the Compensation Order, he came under the care of Dr. Kenneth Fine, who ultimately imposed restrictions on Mr. Butler’s activities, being a 20 pound lifting restriction, a 50 pound pulling restriction, and prohibitions on squatting and climbing. Compensation Order, page 3, FINDINGS OF FACT.

In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 *et seq.*, an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings, and the failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

We quote from *King v. DOES*, 742 A.2d 460 (D.C. 1999) at 465:

Given the posture in which this case comes to us, we deem it appropriate to reemphasize that "the agency is required to make basic findings of fact on all material issues. Only 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." *Brown v. District of Columbia Dep't of Employment Servs.*, 700 A.2d 787, 792 (D.C. 1997) (citations omitted). "If the agency 'fails to make a finding on a material, contested issue of fact, this court cannot fill the gap by making its own determination from the record, but must remand the case for findings on that issue.'" *Mack v. District of Columbia Dep't of Employment Servs.*, 651 A.2d 804, 806 (D.C. 1994) (quoting *Colton v. District of Columbia Dep't of Employment Servs.*, 484 A.2d 550, 552 (D.C. 1984)).

In order for us to be able to review whether the Compensation Order's determination that Mr. Butler is compensably disabled, we must know three basic facts or sets of facts: what were the requirements of the pre-injury job, can Mr. Butler perform them, and if not, why not. While we know the ALJ's legal conclusion as to disability, the Compensation Order is silent as to the factual bases of that conclusion. We can no more fill the missing gaps than can the Court. See, *Aguilar v. UNICCO Service Co.*, CRB No. 09-061, OWC No. 646586 (April 19, 2010).

The Compensation Order does not contain findings of fact regarding the physical requirements of the pre-injury job or the current physical capacity of Mr. Butler, nor does it contain findings as to what is the cause of Mr. Butler's current inability to perform the job. While we do not necessarily agree with Murray's argument in this appeal that the Compensation Order must address its contention that Mr. Butler's testimony concerning his limitations from rheumatoid arthritis or relating to footwear establish that any disability results from other, non-injury causes, we do agree that the ALJ must make factual findings as to what the cause of any such disability is.

Lastly, Murray's takes issue with the ALJ's acceptance of Dr. Fine's opinions in preference to those of Dr. Levitt. Murray's arguments are essentially that the ALJ should have given more weight to Dr. Levitt than to Dr. Fine because Dr. Fine didn't treat Mr. Butler originally, and that the ALJ incorrectly asserted "that Claimant, had no sequelae of a sympathetic dystrophic response" and "that Dr. Levitt did not make any findings or give an opinion on whether Claimant suffered from patellofemoral pain syndrome when the Claimant upon examination continued to complain of pain". Murray's Memorandum in Support of its Application for Review, page 12.

We detect no legal error in the ALJ's assessment of the medical evidence in this case. Murray's asks that we substitute our assessment of the medical evidence for that of the ALJ, which is beyond our power in the absence of clear error. There is no dispute that Dr. Fine is a treating physician and that he treated Mr. Butler for a significant length of time; there is no doubt that Dr. Levitt is an IME physician who examined Mr. Butler only once. In light of the treating physician's preference (see, *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998)) and the deference to which the judgment of the finder of fact is entitled, we will not disturb the assessment of the medical evidence in this case.

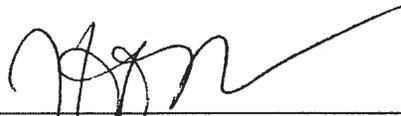
CONCLUSION

The lack of necessary findings of fact concerning the physical requirements of Mr. Butler's pre-injury job and his current physical capacity to perform those requirements, and regarding whether any current limitations on that capacity are the result of the stipulated work injury, renders the award of benefits unsupported by substantial evidence.

ORDER

The determination that Mr. Butler is disabled for the period claimed is unsupported by substantial evidence and it is vacated. The matter is remanded for further findings of fact and conclusions of law in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

January 30, 2012

DATE