

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-122

WILLIE ROBINSON,

Claimant–Respondent,

v.

FORT MYER CONSTRUCTION COMPANY AND TRAVELER’S INSURANCE COMPANY,

Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
AHD No. 08-150C, OWC Nos. 610245 and 645716

Gerard J. Emig, Esquire, for the Petitioner

Eric M. May, Esquire, for the Respondent

Before JEFFREY P. RUSSELL¹, LAWRENCE D. TARR AND MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Panel:

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Fort Myer Construction Company (Fort Myer) and Traveler’s Insurance Company for review of the October 11, 2011 Compensation Order (the CO) issued by an Administrative Law Judge (ALJ) in the hearings section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied Willie Robinson’s claim for temporary total disability (ttt) benefits from and after November 6, 2010, and granted his claim for ttt benefits from May 27, 2010 through and including November 5, 2010. Fort Myer filed a timely appeal of the award that was made, to which

¹ Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-03 (June 23, 2011).

appeal Mr. Robinson filed a timely opposition. Mr. Robinson did not appeal the denied portion of his claim.

BACKGROUND

Mr. Robinson sustained two accidental injuries while employed by Fort Myer, the details of which are irrelevant to the present dispute. The injuries were to his right and left shoulders and arms. The parties ultimately submitted a Stipulation resolving Mr. Robinson's claims for schedule awards to both arms and ongoing wage loss benefits, which Stipulation was approved by the Office of Workers' Compensation (OWC) on April 14, 2009. Pursuant to that Stipulation, among other things, Mr. Robinson was deemed unable to return to his pre-injury job, he declined to participate in vocational rehabilitation, and he was deemed to have a residual wage earning capacity of \$459.00 per week which resulted in his having sustained an ongoing wage loss entitling him to receive \$760.67 per week in wage loss benefits.

On May 27, 2010, Mr. Robinson underwent surgery on his right rotator cuff. Following surgery, there was a period of recuperation during which he underwent physical therapy, from which he was discharged on November 5, 2010.

Mr. Robinson requested that Fort Myer resume ttd payments from the date of the surgery forward, which Fort Myer declined to do. The matter was submitted for resolution by an ALJ in DOES at a formal hearing on July 27, 2011, following which the ALJ issued a CO on October 18, 2011. In the CO, the ALJ granted the claim up to and including November 5, 2010, the date Mr. Robinson was discharged from physical therapy, and denied the claim thereafter. This appeal followed.

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

Preliminarily, the ALJ denied the claim for ttd benefits from and after the end of the recuperative period, based upon her findings that Mr. Robinson's capacity for work following the surgery was unchanged from what it was at the time of the stipulation. That finding and the denial of the claimed ttd for this period has not been appealed by Mr. Robinson, is not challenged by him in these proceedings. Accordingly, the denial of ttd from and after November 6, 2010 is affirmed.

Fort Myer argues that the award of the closed period of ttd from the date of surgery though November 5, 2010 (the recuperative period) is erroneous inasmuch as there is no record evidence supporting a necessary fact for such an award, to wit, that Mr. Robinson was unable to perform work at the level that he was able to perform at the time of the Stipulation. That is, Fort Myer argues that in order for an award of resumed ttd to be made, it must be shown that Mr. Robinson's post-surgical recuperative condition was such that his capacity to earn wages had been reduced from the \$459.00 weekly capacity that was stipulated to by the parties, to zero.

Mr. Robinson argues that the ALJ acted properly, and cites as reasons to affirm the ALJ the assertions that he was undergoing physical therapy three times per week, wore a brace and an arm sling, and was unable to comb his hair, brush his own teeth, or dress himself during the period in question.

While it is true that Mr. Robinson testified to these limitations, and while it is possible that one could conclude that such limitations might impair or even prevent a person from working, it is equally true that the ALJ did not make any specific findings of fact concerning these alleged limitations during the recuperative period, nor did she make any findings concerning whether, on this record, if such restrictions were in fact found to exist they would have the effect of rendering Mr. Robinson totally disabled while they persisted.

Indeed, the only findings of fact concerning the effect of the surgery upon Mr. Robinson's functional capacity, including his capacity for work, are that "Claimant's right shoulder restrictions and complaints did not increase following the May 27, 2010 right shoulder surgery. Claimant has returned to [sic] wage earning capacity that he had prior to the 2010 right shoulder surgery." CO, page 3, Findings of Fact.

The rationale employed by the ALJ in making the award is contained in the following paragraph:

Following the May 27, 2010 right rotator cuff surgery, the treating physician recommended the Claimant undergo physical therapy to improve his range of motion. (CE 8) Claimant [sic] was released from physical therapy treatment on November 5, 2010. *Therefore, I find Claimant not medically released to perform work duties in any capacity from May 27, 2010 to November 5, 2010.*

CO, page 3, Discussion (emphasis added).

The italicized portion of the quote is a *non sequitur*. It does not necessarily follow that merely undergoing physical therapy to improve range of motion renders an individual totally disabled. Further, in order to be "medically released" to perform work, one must initially have been medically restricted from performing work.

It is the finding of such physical limitations and/or medical restrictions that is lacking in the CO, and which lack renders the award unsupported by substantial evidence and not in accordance with the law.

While it is a claimant's burden to establish entitlement to the requested level of benefits, we are not unmindful of the fact that Mr. Robinson underwent a significant operative procedure on May 27, 2010, and that it is possible that he was in fact totally disabled during the period of his recuperation. Clearly, the ALJ felt that he was. The problem with the award and the Compensation Order itself is that the ALJ did not make findings of fact concerning Mr. Robinson's capacity for work during the period that she awarded ttd benefits.

Rather than merely vacating the award, given the humanitarian purposes of the Act, we believe that a remand to the ALJ is necessary to permit further consideration of the claim during the recuperative period, to permit specific findings concerning what limitations, if any, Mr. Robinson had during that period of time which may have rendered him totally disabled.

CONCLUSION

The denial of the claim for temporary total disability benefits from November 6, 2010 to the present and continuing is supported by substantial evidence and is in accordance with the law. The award of temporary total disability benefits from May 27, 2010 through November 5, 2010 is not supported by substantial evidence and is not in accordance with the law.

ORDER

The denial of the claim for temporary total disability benefits from and after November 6, 2010 is affirmed. The award of temporary total disability benefits from May 27, 2010 through November 5, 2010 is vacated. The matter is remanded for further consideration of the claim for the period May 27, 2010 through November 5, 2010 in a manner consistent with the foregoing discussion.

FOR THE COMPENSATION REVIEW BOARD:

s/ Jeffrey P. Russell

JEFFREY P. RUSSELL
Administrative Appeals Judge

May 21, 2012
DATE