

In the Matter of the Compensation of
CHARLES L. CHASE, Claimant

WCB Case No. 13-05442

ORDER ON REVIEW

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Reviewing Panel: Members Lanning, Johnson, and Somers. Member Lanning dissents in part.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Fulsher's order that affirmed an Order on Reconsideration that awarded 11 percent whole person impairment and 27 percent work disability for a left ankle condition. On review, the issues are permanent disability (impairment and work disability).

We adopt and affirm the ALJ's order with the following supplementation to address claimant's argument that his base functional capacity (BFC) should be "Very Heavy." *See* OAR 436-035-0012(8)(k).¹

The ALJ affirmed the Order on Reconsideration's work disability award, in which the Appellate Review Unit (ARU) determined claimant's BFC to be "Medium." The ALJ noted that the ARU had considered claimant's sworn affidavit, but that it relied on a regular job description submitted by the SAIF Corporation's insured and the strength categories found in the Dictionary of Occupational Titles (DOT) for a "Cook, Specialty (hotel & rest)" (DOT # 313.361-026), and "Cook, Short Order (hotel & rest)" (DOT # 313.374-014). Reasoning that the Director's rules do not indicate that a worker's affidavit alone can be used to determine a worker's BFC, and considering the discrepancy between claimant's affidavit and the regular job description and the DOT codes' strength categories, the ALJ concluded that claimant did not prove that the ARU erred in determining his BFC to be "Medium."

On review, claimant argues that the regular job description and DOT codes do not accurately describe his job-at-injury. Therefore, according to claimant, his sworn affidavit, in conjunction with the employer's job analysis, should be used to establish that his BFC is "Very Heavy." For the following reasons, we disagree and affirm the ALJ's decision.

¹ Claimant's claim was closed by a July 2, 2013 Notice of Closure. (Ex. 42). Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1).

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). As the party challenging the Order on Reconsideration, he also has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).

BFC means an individual's demonstrated physical capacity before the date of injury or disease. OAR 436-035-0012(8)(a). OAR 436-035-0012 provides, in pertinent part:

“(9) Base functional capacity (BFC) is established by using the following classifications: sedentary (S), light (L), medium (M), heavy (H), and very heavy (VH) as defined in section (8) of this rule. *The strength classifications are found in the Dictionary of Occupational Titles (DOT)*. Apply the subsection in this section that most accurately describes the worker's base functional capacity.

“(a) The highest strength category of the job(s) successfully performed by the worker in the five (5) years prior to the date of injury.

“(A) A combination of DOT codes when they describe the worker's job more accurately.

“(B) A specific job analysis, which includes the strength requirements, may be substituted for the DOT description(s) if it most accurately describes the job. If a job analysis determines that the strength requirements are in between strength categories then use the higher strength category.

“(C) A job description that the parties agree is an accurate representation of the physical requirements, as well as the tasks and duties, of the worker's regular job-at-injury. If the job description determines that the strength requirements are in between strength categories then use the higher strength category.” (Emphasis supplied).

Here, in the five years before his December 17, 2011 compensable injury, claimant worked for SAIF's insured as a "Line Cook." (Exs. 4, 44-1). He submitted a job description for a "Line Cook" that was generated by the employer, which provided a "Description of the Position," "Requirements of the Job," and "Essential Functions of the Job." (Exs. 44-3, 44A). The employer's job description did not include lifting/strength requirements. (*Id.*) In an attached sworn affidavit, claimant agreed that the employer's job description was accurate about many of the job functions. (Ex. 44-1). However, he attested that the job description did not specify his particular job duties such as lifting full kegs weighing over 100 pounds, and tubs of dirty dishes/fries/pickles weighing over 50 pounds. (Ex. 44-1-2).

The determinative issue is what role claimant's affidavit has in establishing his BFC. Contrary to claimant's contention, while we consider the record as a whole (including the job duties and physical demands of the relevant job), OAR 436-035-0012(9)(a) requires that the strength category for the at-injury job be determined by the category assigned in the DOT, a specific job analysis, or a job description agreed upon by the parties. *See Lavonne L. Hauser*, 52 Van Natta 883 n 5 (2000); *Gloria J. Wiley*, 50 Van Natta 781 (1998); *Kathron D. Parsons*, 45 Van Natta 954 (1993). A claimant's affidavit may be corroborative of either a DOT description or a specific job analysis, relevant for determining what DOT description applies, or whether a DOT description or job analysis is more accurate. *Gaylen J. Kiltow*, 64 Van Natta 1136, *recons*, 64 Van Natta 1296, 1299 n 2 (2012) ("[W]e recognize that a claimant's affidavit may be corroborative of either a DOT description or a specific job analysis, or that such an affidavit may be relevant for determining what DOT description applies, or whether a DOT description or specific job analysis is more accurate."); *Wiley*, 50 Van Natta at 781.

While probative of which DOT code most accurately describes his at-injury job, claimant's affidavit may not be relied upon to determine that no DOT description accurately describes his job, such that, consequently, his strength category must be determined without regard to the DOT.² *Parsons*, 45 Van Natta at 955 (a claimant's description is relevant to the determination of which DOT most accurately describes the at-injury job; however, it may not be relied upon to determine that no DOT description accurately describes the job, and that, consequently, the strength category must be determined without regard to the DOT); *Delores A. Williams*, 45 Van Natta 517 (1993).

² The record does not contain a document that would constitute a "specific job analysis," as described in OAR 436-120-0410(6) (a "job analysis" is a "detailed description of the physical and other demands of a job based on direct observation of the job."). Consequently, our analysis is limited to OAR 436-035-0012(9)(A) and (C).

Here, claimant argues that the DOT codes used in the Notice of Closure and Order on Reconsideration do not accurately describe his job. (*See* Exs. 42-2, 46-3). Instead, he asserts that the employer's job description, as supplemented by his affidavit, should be used to establish a BFC of "Very Heavy." (Exs. 44, 44A). Because the parties have not agreed that the job description submitted by claimant is an "accurate representation of the physical requirements, as well as the tasks and duties, of the worker's regular job-at-injury," it does not meet the qualifications of OAR 436-035-0012(9)(a)(C).³

In any event, although claimant, in his affidavit, agrees that the employer's job description "is accurate about many of the job functions," he also disputes the specificity of the job description, particularly the lifting requirements. (Ex. 44-1-2). Therefore, consistent with the rationale expressed in the above cases, we consider his affidavit to the extent that it may be relevant for determining what DOT description applies.⁴ For the following reasons, we find that claimant's affidavit establishes a BFC of "Medium," based on a combination of DOT codes. OAR 436-035-0012(9)(a)(A).

Claimant agreed that the employer's job description for a "Line Cook" was accurate about many of his job functions. (Ex. 44-1). According to that job description, his duties included preparing sandwiches, pastas, pizzas, and grill items, as well as cleaning his work area and completing dishwashing duties. (Exs. 44-3, 44A). He also lifted full kegs of beer, which weighed over 100 pounds, and carried loads of dirty dishes that weighed about 60 pounds. (Ex. 44-1, -2). Finally, claimant stated that he lifted buckets of French fries and full containers of pickles and of peppers that weighed 55-60 pounds, as well as two containers of fryer oil at the same time that weighed 35 pounds each. (*Id.*)

Some of claimant's job duties are accurately described in the DOT codes used by the ARU (*i.e.*, "Cook, Specialty (hotel & rest)" (DOT # 313.361-026), and "Cook, Short Order (hotel & rest)" (DOT # 313.374-014), which have strength categories of "Medium." (*See* Ex. 46-3). However, claimant's description of lifting full kegs of beer is similar to that summarized in DOT # 312.687-010 ("Bartender Helper" (hotel & rest)), which includes replacing beer kegs with full

³ This same reasoning applies to the "Regular Job Description" submitted by SAIF. Because the parties did not agree that it was an accurate representation of claimant's job, that description also does not meet the requirements of OAR 436-035-0012(9)(a)(C). (Ex. A).

⁴ Again, as noted above, there is no evidence of a "specific job analysis" in the record. *See* OAR 436-120-0410(6).

ones and has a strength category of “Medium.” Furthermore, DOT # 317.687-101 (“Cook Helper” (hotel & rest)) and DOT # 318.687-010 (“Kitchen Helper” (hotel & rest)) include cleaning dishes and carrying trays of food and have strength categories of “Medium.” Finally, DOT # 526.685-014 (“Cook, fry, deep fat” (can & preserv.; hotel & rest)) pertains to frying meat and vegetables and again has a strength category of “Medium.”

Accordingly, claimant’s affidavit supports a conclusion that his BFC is established by a combination of DOT codes, as described above, all of which have strength categories of “Medium.” OAR 436-035-0012(8)(h), (9)(a)(A). Therefore, claimant’s BFC is “Medium.”⁵

Based on the foregoing reasons, we are unable to conclude that claimant has met his burden of establishing error in the reconsideration process. *Callow*, 171 Or App at 183-84. Consequently, we affirm.

ORDER

The ALJ’s order dated July 28, 2014 is affirmed.

Entered at Salem, Oregon on July 7, 2015

⁵ Claimant’s affidavit also stated that he would push a service cart weighing up to 300 pounds, and pull a hand truck with three 55-pound buckets. (Ex. 44-2). However, the Director’s rules refer to “lifting/carrying” limitations as the strength criteria for purposes of determining BFC. *See* OAR 436-035-0012(8)(c) through (k), (9). Consequently, the “pushing” or “pulling” requirements of his job are not dispositive in determining claimant’s BFC. *See Kiltow*, 64 Van Natta at 1144 n 7.

Member Lanning dissenting in part.

I concur with the majority's determination of claimant's whole person impairment. However, I disagree with the majority's reasoning regarding claimant's base functional capacity (BFC). Because I would find that he has established that his BFC is "Very Heavy," I respectfully dissent.

Here, the record contains an employer-generated job description for a "Line Cook," providing a "Description of the Position," "Requirements of the Job," and "Essential Functions of the Job." (Exs. 44-3, 44A). Yet, the employer's job description did not include lifting/strength requirements. (*Id.*) In his affidavit, claimant agreed that the employer's job description was accurate about many of the job functions, but stated that it was not very specific, particularly about the weight of objects he lifted and carried. (Ex. 44-1).

According to his affidavit, claimant lifted full kegs of beer, which weighed over 100 pounds. (Ex. 44-1). He also carried loads of dirty dishes that weighed about 60 pounds. (Ex. 44-2). Finally, claimant attested that he lifted buckets of French fries and full containers of pickles of peppers that weighed 55-60 pounds, as well as two containers of fryer oil at the same time that weighed 35 pounds each. (*Id.*)

Claimant's affidavit is uncontroverted. In light of his agreement about the accuracy of many of the job functions listed in the employer's job description, I consider his specific descriptions about the objects that he lifted and carried to be "corroborative" of that job description. (Exs. 44, 44A). Moreover, the DOT codes cited by the majority simply note a strength category of "Medium" and do not include the specific lifting and carrying requirements of claimant's job, unlike his affidavit.

Based on the foregoing reasons, and particularly considering claimant's affidavit that he lifted full kegs of beer weighing over 100 pounds, I am persuaded that claimant's BFC is "Very Heavy." OAR 436-035-0012(8)(k). Because the majority concludes otherwise, I respectfully dissent in part.