

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



**(202) 671-1394-Voice**  
**(202) 673-6402-Fax**

**CRB No. 06-072**

**DAVID PHILIP BOELL,**

**Claimant–Respondent,**

**v.**

**UNITED PARCEL SERVICE AND LIBERTY MUTUAL INSURANCE COMPANY,**

**Employer/Carrier–Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Terri Thompson Mallett  
AHD No. 06-179, OWC No. 585999

Donald P. Maiberger, Esquire, for the Petitioner

Allen J. Lowe, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

**DECISION AND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup>

---

<sup>1</sup> Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

## BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on July 27, 2006, the Administrative Law Judge (ALJ) granted Respondent's claim for permanent partial disability benefits in the nature of a schedule award of 16% to his left leg and permanent partial wage loss benefits based upon a diminution in earnings found to be the result of Respondent's having obtained less strenuous employment at a lower wage. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error (1) that the award of wage loss benefits is unsupported by substantial evidence, because there was insufficient evidence to support the ALJ's finding that Respondent was unable to perform his pre-injury job, (2) the award of a schedule loss to Respondent's left leg is unsupported by substantial evidence because the medical opinion upon which the ALJ relied is premised upon Respondent's subjective complaints, which in Petitioner's view ought to be rejected as unreliable because they are in conflict with other record evidence, and (3) the Compensation Order is legally deficient because it fails to address arguments and case precedents that Petitioner claims must be addressed in order for the order to meet the requirements of the Administrative Procedure Act, found at D.C. Code § 2-501, *et seq.* (the APA).

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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 Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. District of Columbia Dep't of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning first to Petitioner's general challenge that the Compensation Order is deficient because it fails to address certain alleged facts and arguments allegedly raised by Petitioner, because it fails to address certain case precedents, we disagree.

First, Petitioner neither quotes from nor cites any section or provision of the APA applicable to the contentions raised on appeal in this case, or requiring the particular level of specificity alleged by

---

Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Petitioner to be required in issuing a Compensation Order. Our review of that act reveals no such provision.

Petitioner does, however, refer to three Court of Appeals decisions which it asserts the ALJ was under some obligation to specifically address, being *Franklin v. District of Columbia Dep't of Employment Servs.*, 709 A.2d 1175 (D.C. 1998), *Powers v. District of Columbia Dep't of Employment Serv's.*, 566 A.2d 1068 (D.C. 1989) and *Burge v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 661 (D.C. 2004) (only two of which, *Franklin* and *Powers*, were mentioned, and only very briefly, by Petitioner's counsel at the formal hearing. See, HT 129.) The obligation to cite and discuss those cases is, according to Petitioner, found in *Morrison v. District of Columbia Dep't of Employment Serv's.*, 834 A.2d 890 (D.C. 2003), a case that Petitioner summarizes as "finding that a decision cannot stand where the analysis and justification of the position is insufficiently clear to permit an affirmance and that the agency must address an issue submitted to it for resolution". Petitioner's Memorandum, page 18.

Putting aside for the moment whether *Morrison* does or does not stand for the stated proposition, it clearly is a decision that had nothing whatever to do with the sufficiency of a Compensation Order issued by an ALJ following a formal hearing. Rather, it dealt with the sufficiency of an agency order following an appeal of such a Compensation Order. As a general matter, *Morrison* dealt with whether the Court of Appeals had before it a decision or order from the agency which was sufficiently complete, in the sense that it addressed a specific argument raised by a party about a possible interpretation of the Act, to understand how the agency would interpret the Act in connection with a significant and potentially relevant context about which the agency had not previously announced a rule or interpretation. The Court wrote as follows:

Although this issue, framed in precisely the same words and with several pages of accompanying discussion, was squarely presented to the Director by Ms. Morrison in her application for review, it was simply not expressly addressed in the decision of the Director. Where an agency fails to address an issue presented to it, we generally "remand the case to [the Director] for a determination." *Branson v. District of Columbia Dep't of Employment Servs.*, 801 A.2d 975, 979 (D.C. 2002). And we have stated often that: "Ordinarily ... 'this court will not attempt to interpret the agency's statute until the agency itself has done so'. Instead, we will remand to permit the agency to engage in the analysis of the legislation it is charged with carrying out." *King v. District of Columbia Dep't of Employment Servs.*, 742 A.2d 460, 466 (D.C. 1999) (quoting *Wahlne v. District of Columbia Dep't of Employment Servs.*, 704 A.2d 1196, 1199 (D.C. 1997).

*Morrison*, at 898. This language (1) is not based upon and does not discuss the APA, (2) does not apply to the hearings process, and (3) does not assert that it is *required* that a decision be reversed or remanded in any situation, only that such a course is that "generally" taken by the Court where an agency's interpretation of a statute is unknown given a new or novel set of facts or circumstances. The rule is essentially a matter of the Court's deference to the Agency in taking an initial interpretive stance on a new question of law. It is not a rule that is intended to entitle a litigant to raise and then have addressed specifically, any issue that it seeks to have addressed in precisely the manner in which the litigant believes the issue ought to be addressed.

What is required of an ALJ is that he or she identify the legal issues raised by the parties, make findings of fact based upon the evidence of record relevant to those issues, and apply those facts to the law. While the findings must be based upon “substantial” evidence, the ALJ has broad discretion in deciding which evidence to accept. Subject to a very few rules, such as those dealing with the evaluation of medical opinion evidence where there is a conflict between the opinion of a treating physician and a non-treating physician, the ALJ is generally free to rely upon such evidence as the ALJ finds persuasive without the need to explain why other competing or possibly conflicting evidence was not accepted. While, in a perfect world, every ALJ would have the time and inclination to completely and fully explore every nuanced turn and take that the record could present on every conceivable question that could arise, the realities of limited time and resources, and the reasonable expectation of a timely decision, of the parties to the case under consideration and all the other parties to all the other cases awaiting hearings and decisions, allows no such luxury.

In this case, the ALJ addressed the question of whether Respondent was capable of returning to his pre-injury job, and found that he was not. She also was clearly aware of the fact that Respondent had returned to that job for a period of time before obtaining the lower paying, less physically demanding position that he held at the time of the formal hearing, and which lower pay is the basis for his ongoing wage loss claim. *See*, Compensation Order, pages 6 – 8.

The specific cases that Petitioner complains were ignored or otherwise not addressed by the ALJ were cases where an ALJ had found that a claimant had voluntarily quit the positions they held when injured to obtain higher wages (*Powers* and *Franklin*) or was found to have voluntarily retired from a career to seek a new career (*Burge*). Petitioner argues that the facts of this case are so similar to the facts in those cases, and particularly to those in *Burge*, that the ALJ was required to reach the same result, or explain why a different result is appropriate. However, the defining difference between this case and those is that the ALJ in this case determined that Respondent’s injury prevents him from being able to perform his pre-injury job, while in none of the three cases cited by Petitioner did the ALJ make such a finding. While we might have reached a different conclusion, our role is not to weight the evidence and re-evaluate whether the ALJ was right in this determination; rather, we are permitted and required only to determine whether the facts as found by the ALJ are supported by substantial evidence.

In this case, the ALJ relied upon the testimony of Respondent, at HT 27, a written job description, CE 14, and a medical opinion from his treating physician, CE 3. Petitioner does not challenge that Respondent’s testimony was that the pre-injury job was too taxing for him to continue to perform without his experiencing significant pain, that the job description accurately describes the pre-injury job’s physical requirements, or that the medical opinion of the treating physician supported Respondent’s testimony and recommended against him continuing to so perform. Rather, Petitioner argues that they should be rejected because the medical report was prepared after Respondent had already applied for the lower paying, less strenuous job, and the fact that Petitioner had returned to the pre-injury job for a significant period of time before applying for the new position.

These arguments are no doubt good reasons why an ALJ might have reached a contrary conclusion than did the ALJ in this case. They are, however, merely arguments relating to the weight that the

ALJ should have accorded the evidence. That question, the weight to which conflicting evidence is entitled, is fundamentally within the province of the ALJ, especially where, as here, the findings depend upon a credibility determination (Compensation Order, page 9); the medical opinion evidence has the additional merit of being entitled to the treating physician preference.

As to Petitioner's above quoted assertion relating to the holding in *Morrison*, it appears to us that "analysis and justification" for the decision in the Compensation Order under review is not "insufficiently clear"; on the contrary, the ALJ identified the evidence upon which her factual findings were based, identified cases relevant to the legal issues presented, and properly applied the facts as found to those issues under those cases.

Petitioner also argues that the Compensation Order is deficient because the ALJ failed to address the Petitioner's defense that Respondent had voluntarily limited his income, by accepting a lower paying position more to his personal liking rather than continuing to perform in his old, pre-injury job. Suffice it to say that the predicate requirement for such a defense in this case would be that Respondent is able to perform the pre-injury job. The ALJ found otherwise, that finding is supported by the substantial evidence discussed in the Compensation Order and above in this Decision and Order, and is in accordance with the law.

Lastly, Petitioner argues that the ALJ erred in awarding a 16% permanent partial disability to the left leg because, Petitioner asserts, the award was premised upon Petitioner's subjective complaints, which complaints ought to have been disregarded because, in Petitioner's view, the evidence that Respondent had returned to his pre-injury job "with no complaint and no attempt to obtain lighter duty work" and "he continued to perform the duties even after [his treating physician's] letter recommending that he obtain a different position" rendered the opinion untrustworthy. Petitioner's Memorandum, page 17.

As before, Petitioner's arguments are nothing more than suggestions as to why the evidence supporting the award ought to have, in Petitioner's view, been rejected. That is, the arguments are related to the weight of the evidence, which as we have stated, is squarely within the province of the ALJ, and is not for us to evaluate anew.

The Compensation Order was thorough, well reasoned, and addressed the issues that were required to be addressed. The findings of fact were based upon specifically identified record evidence and were consistent with that evidence. The legal conclusions flowed rationally therefrom.

#### CONCLUSION

The Compensation Order of July 27, 2006 is supported by substantial evidence in the record and is in accordance with the law.

**ORDER**

The Compensation Order of July 27, 2006 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

---

JEFFREY P. RUSSELL  
Administrative Appeals Judge

October 5, 2006 \_\_\_\_\_  
DATE