

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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir. Dkt.) No. 04-037

DEBORAH COLEMAN,

Claimant–Petitioner,

v.

COMMUNITY ALLIANCE AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA/AHD No. 03-046A, OWC No. 574318

Matthew Peffer, Esquire, for the Petitioner

Douglas Seymour, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *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).¹

¹ 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 March 31, 2004, the Administrative Law Judge (ALJ) ruled that (1) a Compensation Order issued by the Office of Workers' Compensation is subject to modification by the Office of Hearings and Adjudication (formerly OHA, now the Administrative Hearings Division of the Office of Administrative Hearings, or OHA/AHD), (2) that Respondent had produced sufficient evidence under *Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (1988) to warrant a formal hearing on Respondent's Application for Formal Hearing (AFH) seeking modification of a prior Compensation Order, in the form of a Recommendation issued by OWC following an informal conference, which Recommendation was not rejected by either party nor appealed to OHA/AHD, thereby becoming final on July 15, 2003, and (3) that Respondent had established a change in condition since the informal conference warranting a modification of said prior Compensation Order/Recommendation. Accordingly, the ALJ granted the request for modification. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ improperly issued a Compensation Order because no formal hearing was held and no evidence was entered into the record, thereby rendering the Compensation Order unsupported by substantial evidence. Petitioner did not appeal the ALJ's determination that the OWC Compensation Order/Recommendation was subject to OHA/AHD jurisdiction for purposes of a modification request, and does not argue on appeal that said ruling was erroneous. Further, Petitioner does not address the specific contents of the record evidence, being Claimant's Exhibits 1 – 4 and Employer's Exhibits 1 – 2, and has made no argument that said record evidence is insufficient under *Snipes* to warrant a modification proceeding, or under *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998) and *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225 (D.C. 1997) to warrant a modification such as that granted by the ALJ herein. Thus, none of these issues is before us.

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 Int'l. v. Dist. 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 to the case under review herein, Petitioner alleges that the ALJ's decision is unsupported by substantial evidence and must therefore be reversed, because in Petitioner's words "the record will reflect that both parties did not put on any testimony nor any evidence into the record [sic] as no Formal Hearing was held" (Memorandum of Points and Authorities in Support of Application for Review, page 1), "the record is clear that no preliminary examination [under *Snipes, supra*] was held February 12, 2004 [and] that it is clear from the Court of Appeals and the Director [of the Department of Employment Services] in *Blanken [v. District of Columbia Department of Employment Services*, 825 A.2d 894 (D.C. 2004) and *Blanken v. Blanken*, Dir. Dkt. No. 99-14 (Director's Decision December 10, 2003)] that a preliminary examination of the evidence was to take place before February 12, 2004 before a full evidentiary hearing could and would be held" (Memorandum of Points and Authorities in Support of Application for Review, page 2).

In response and opposition to this appeal, Respondent correctly notes that, contrary to Petitioner's assertion, evidence was entered into the record on February 12, 2004, consisting of Claimant's Exhibits 1 – 4, and Employer's Exhibits 1 – 2. See, HT at 8 and 9. Respondent further argues that the ALJ's decision to grant the modification was supported by substantial evidence, specifically, the opinion of Respondent's independent medical examiner (IME) as contained in the two reports it submitted from Dr. Robert Collins, and that the ALJ's acceptance of these opinions in preference to the medical evidence submitted by Petitioner was adequately justified and explained by the ALJ, because the ALJ correctly noted in the Compensation Order that Petitioner's medical opinion evidence emanated from a non-physician, while the IME reports were authored by a physician.

Petitioner's argument that a *Snipes* proceeding must occur "before" the *date* of a formal hearing finds no support in either the Act or any of the cases cited. That such a review must take place in a proceeding separate from the formal hearing is likewise not mandated by the Act or case law. All that is required is that the ALJ make a preliminary review of the evidence proffered by the proponent of a modification request and reach a preliminary conclusion as to whether there is some evidence to believe that since the prior order, there has been a change of condition or conditions, either medical, vocational, or both, to warrant a change in the fact or degree of disability or the amount of compensation payable. The statute and case law are silent as to any specifics regarding the procedure to be employed in conducting this preliminary review.

However, a fundamental requirement must exist, by necessary implication, that the parties be advised prior to the commencement of a formal hearing as to whether such a preliminary showing has been made. This need not occur weeks or even days before the formal hearing, so long as the parties are on notice that a formal proceeding may occur following the announcement of the ruling on the preliminary showing. In this case, review of HT suggests that neither Petitioner nor Respondent assumed that the February 12, 2004 proceeding was anything other than merely a *Snipes* hearing. Although nothing in HT clarifies whether counsel for Respondent had any specific understanding on that question either way, it does appear that counsel for Petitioner viewed the proceeding as a *Snipes* hearing and a *Snipes* hearing only. See, HT 5 – 6; Counsel for Claimant/Petitioner: "Yes, Your Honor, as I understand, what is being heard here is a *Snipes*

hearing where employer has the burden to show a change of condition and has filed application of modification [sic] of the prior compensation order, so whether or not there has been a change of condition that warrants modification of the prior compensation order issued by the Office of Workers' Compensation, as I understand, for the sake of judicial economy, we will have a *Snipes*, a *Snipes* hearing for the record. I know that my objection will be denied by the judge, and there will be a *Snipes*."

From this, it is apparent that Petitioner's counsel was under the impression that he was about to participate in a *Snipes* proceeding, despite his objection to the proceeding, on the now-abandoned grounds that OHA/AHD lacked jurisdiction to consider a request for modification of the OWC issued compensation order. Although the ALJ went on to state that, "We will proceed with this hearing and make a determination whether or not a change in claimant's condition has occurred since the issuance of the final recommendation by the Office of Workers' Compensation, March 31, 2003", a statement which strictly speaking might be read to suggest that it was a merits hearing, and not a *Snipes* proceeding, that the ALJ intended to hold, it appears to us that the reference to making a "a determination as to whether or not a change in claimant's condition has occurred", rather than the more accurate statement that a determination as to whether "there is reason to believe that" such a change has occurred prior to considering whether such a change has, in fact, occurred is merely an inartful or incomplete shorthand phrasing, mimicking the inaccurate recitation by Petitioner's counsel quoted above of the nature of a *Snipes* inquiry. *See also*, HT 9; Petitioner's Counsel: "I will not be making an opening statement. As I understand, this is a *Snipes* hearing, and employer has the burden to show there has been a change in condition, they are under obligation to show a change in condition. I am not here to put on an opening statement." Then, following a summation of counsel's view of the shortcomings of Respondent's showing and re-iterating his objection to OHA/AHD jurisdiction to modify an OWC compensation order, counsel stated, "That is all I am going to say in this *Snipes* hearing, Your Honor." HT 15. And, following this, counsel stated "Number one, if the *Snipes* hearing is ruled on, I don't want to make the same arguments, I will put up a jurisdictional argument prospectively on formal hearing at the formal hearing, I don't want to make the same arguments" (HT 15) and "If Your Honor wants to know my objection to jurisdiction here, we can do that, assuming this record will be subsumed in the record of the formal hearing at a later date", to which the ALJ responded "Right". HT 17.

It is evident and apparent to us that Petitioner's counsel (who appeared without Petitioner present) assumed that the proceedings of February 12, 2004 were merely preliminary to a formal hearing to be conducted "at a later date." While the ALJ was not under any obligation to agree with Petitioner's counsel that the formal hearing must, of necessity, be held at some later date, we believe that fairness and due process required that, at a minimum, the ALJ should have advised Petitioner's counsel that he was operating under a misunderstanding of the true nature of the proceedings. Although the ALJ concluded by stating that, "I will first rule upon the propriety of jurisdiction, and then, I will rule on the merit of the case whether or not a change of condition, in claimant's condition has occurred. And having said that, I will conclude the hearing" (HT 24), this is, at best, an ambiguous announcement of the ALJ's intentions, containing again as it does that characterization of the issue which has previously been shown to have been used interchangeably (albeit, incorrectly) as describing the nature of a *Snipes* inquiry.

Neither of the parties nor the ALJ appeared to be unambiguously engaged in what is properly termed the merits inquiry; Petitioner's counsel appeared quite obviously not to be so engaged, and neither Respondent nor the ALJ sought to disabuse Petitioner of that notion. On this record, therefore, we conclude that the Compensation Order prematurely reached a decision on the ultimate merits issue, without first announcing or stating that the *Snipes* burden had been met.

While Petitioner has not characterized her appeal as one of lack of opportunity to be heard and to present her case, we view the objections as raised to fairly include the complaint that no formal hearing has yet been held on the merits of the application for modification of the prior compensation order, with which we agree.

CONCLUSION

The Compensation Order of March 31, 2004, is supported by substantial evidence and is in accordance with the law regarding OHA/AHD jurisdiction to consider requests for modification of compensation orders issued by OWC, and concerning the finding that Respondent has presented sufficient evidence under *Snipes* to warrant a formal hearing. The Compensation Order is not in accordance with the law in that it granted a modification request without conducting a formal hearing on the issue, of which the parties were apprised.

ORDER

The Compensation Order of is hereby AFFIRMED IN PART AND REVERSED IN PART. Those portions of the Compensation Order concerning OHA/AHD jurisdiction to modify compensation orders issued by OWC and concerning Respondent's having met its burden under *Snipes* are affirmed. The order modifying the prior compensation is reversed, and the matter is remanded with instructions that the ALJ conduct a formal hearing to determine whether there has in fact been a change of condition or conditions warranting said modification.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

September 6, 2006
DATE