

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. 05-247

KENNETH ANDERSON,

Claimant – Respondent

v.

MAY DEPARTMENT STORES COMPANY,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 01-456B, OWC No. 565431

Michael S. Levin, Esquire, for the Petitioner

Paulette E. Chapman, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 June 9, 2005, the Administrative Law Judge (ALJ) concluded that Employer-Petitioner (Petitioner) did not produce substantial evidence that Claimant-Respondent (Respondent) had unreasonably failed to cooperate with vocational rehabilitation and otherwise voluntarily limited his income. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ failed to consider, discuss or rule on a critical issue raised by Petitioner. Respondent did not file a response or opposition to Petitioner's appeal.

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. D.C. Official Code §32-1522(d)(2). "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. App. 2003). Consistent with this scope 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 erroneous because the ALJ only focused on whether Respondent had failed to cooperate with vocational rehabilitation and whether Respondent voluntarily limited his income. In its appeal, Petitioner concedes that there is substantial evidence in the record to support the ALJ's conclusion that Respondent did not fail to cooperate with the efforts to return him to employment. However, Petitioner contends that the issue is not whether Respondent voluntarily limited his income, but whether suitable alternative employment exists within the area. Petitioner argues that the ALJ never discussed the testimony of one of its witnesses that there were various jobs currently available in the area for which Respondent was qualified and thus, the ALJ committed error by failing to rule on this point raised by Petitioner.

D.C. Official Code § 32-1507(d) provides that an employee's benefits may be suspended when that employee refuses to cooperate with vocational rehabilitation. After reviewing the record, the ALJ concluded Petitioner did not fail to cooperate with Petitioner's efforts to provide vocational rehabilitation. As to the argument raised by Petitioner on appeal, this Panel notes that

the ALL did in fact address the issue that there were employment positions available within Respondent's physical restrictions. The ALJ stated:

In support of its allegation of voluntary limitation of income by claimant, employer asserts there were jobs available within claimant's physical limitations, however, claimant remained uncooperative and dilatory in pursuing the available employment prospects. Employer maintains it periodically furnished leads to claimant who did not diligently pursue them, and therefore, claimant voluntarily limited his income. A careful scrutiny of the record, however, fails to show any evidence of claimant's outright refusal to accept a proffered employment that was consistent with his restrictions. Thus, employer's evidence, tending to establish claimant voluntarily limited his income, remains inconclusive.

Compensation Order at 7.

Moreover, this Panel must emphasize that the burden is on the employer to demonstrate the availability of a job that an employee is capable of performing. *Joyner v. Dist. of Columbia Dep't. of Employment Servs.*, 502 A.2d 1027, 1031, n.4 (D.C. 1986). As such, Petitioner is not able to shift its burden of production concerning the availability of suitable alternative employment to Respondent to warrant a finding that Respondent voluntarily limited his income. If in fact suitable employment opportunities were available within the area, it was Petitioner's responsibility to forward these leads to Respondent and arrange interviews, etc., in order to meet its burden of demonstrating the availability of jobs that Respondent is able to perform.

In the instant matter, the fact that Petitioner's witness testified that he had determined that there were jobs currently available in the area for which Respondent was qualified, by itself, does not shift the burden from Petitioner on this issue. Petitioner was required to make further efforts to provide Respondent with job alternatives within his established physical restrictions. It is settled that a labor market survey, standing alone, is not substantial evidence of job availability. *Whren v. Canteen, Inc.*, Dir. Dkt. No. 01-92, OHA No. 95-189B, (April 24, 2002); *Dew v. The Washington Home*, Dir. Dkt. No. 87-69 (May 15, 1989). Thus, Petitioner failed to meet its burden of production concerning job availability established by *Joyner*.

Accordingly, the ALJ's findings of fact and conclusions of law are supported by substantial evidence and are in accordance with the law.

CONCLUSION

The Compensation Order of June 9, 2005 which concluded that Petitioner did not produce substantial evidence that Respondent had unreasonably failed to cooperate with vocational rehabilitation and did not voluntarily limit his income, is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of June 9, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

September 20, 2005
DATE