

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 No. 08-139

ANDREA L. GRANT,

Claimant–Petitioner,

v.

NATIONAL ASSOCIATES AND LIBERTY MUTUAL INSURANCE,

Employer/Carrier–Respondent National Associates (NAI)

And

ALION SCIENCE AND TECHNOLOGY AND CHUBB INSURANCE GROUP (ALION),

Employer/Carrier-Respondent Alion.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Henry W. McCoy
AHD No. 05-254A, OWC No. 606489 and 607735

Heather C. Leslie, Esquire, for the Petitioner

Thomas E. Dempsey, Esquire, for the Respondent NAI

Robert C. Baker, Esquire, for Respondent Alion

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges*.

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

DECISION AND REMAND 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 § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW

This appeal follows the issuance of a Compensation Order on Remand, 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 on Remand, which was filed on March 13, 2008, (CO 2) the Administrative Law Judge (ALJ) denied Petitioner's Motion to Reopen the Record, which motion had been made following a formal hearing but prior to the issuance of a prior Compensation Order of October 30, 2007 (CO 1), but which CO 1 was issued without the ALJ having considered and ruled upon said motion. CO 1 had been appealed to the CRB, which issued a Decision and Remand Order, directing the ALJ to consider and rule upon said motion, and if necessary, make additional findings of fact and conclusions of law in the event that the motion was granted and the new evidence warranted a new or different outcome.

In CO 2, which is under review herein, in addition to denying the motion, the ALJ also granted causally related medical benefits and parts of the temporary total disability sought to be awarded against Respondent Alion, and denied all remaining claims for temporary total disability benefits against Respondent Alion and against Respondent NAI, by incorporating into CO 2 the findings of facts and conclusions of law, as well as the verbatim Order, that had been contained in the prior Compensation Order, CO 1.

As grounds for this appeal, Petitioner alleges as error that the ALJ's denial of the Motion to Reopen the Record was not in accordance with the law, and that the denial of benefits was likewise erroneous for the same reasons she raised in the previous appeal, to wit, that the denial of benefits is not supported by substantial evidence and is not in accordance with the law, because the facts as Petitioner views them compel a finding that she was unable to work because of her work related injury during the periods for which temporary total disability was denied.¹

Respondent Alion (Respondent) opposes this appeal, arguing that the denials of benefits are supported by substantial evidence and are in accordance with the law. Respondent NAI did not file anything in response to this appeal.

Because the ALJ properly considered whether there had been an adequate legal showing of reasonable grounds for not producing, at the time of the hearing, the substantive evidence that the

¹ Petitioner's memorandum in support of this appeal is lacking in clarity as to which work injury she maintains is responsible for her inability to work., and nowhere in that memorandum does she identify against which employer she seeks an award . The total disability portion of the claim for relief begins April 4, 2004. It appears to be undisputed that Petitioner, while initially suffering a carpal tunnel injury with NAI on August 19, 2001, for which she was treated by Dr. Rida Azer and released without restrictions to full duty status on January 2, 2002, and that despite this release, she never returned to work for NAI. See, CO 1, page 3; Petitioner's Memorandum, page 2. The ALJ found that Petitioner became aware of the relationship between her employment with NAI and the carpal tunnel syndrome at a hospital emergency room on August 19, 2001, and although she reported it to a supervisor, she did not file a claim within a year of that date. CO 1, page 3 – 4. The ALJ failed to make any specific pronouncement beyond this finding with respect to any claim against NAI. However, given that Petitioner does not contest the facts that the ALJ found relative to the date of the injury sustained and the failure to file a claim within a year of the date of injury, we take this appeal to be related solely to the claims against Alion, with Petitioner abandoning any claim against NAI by failing to appeal these findings.

additional records sought to be introduced purportedly would demonstrate, we affirm the denial of the Motion to Reopen the Record.

Because the ALJ findings that Petitioner had failed to demonstrate that her work related injury has caused a wage loss either during the time she was employed for a period of time in excess of five months, at a rate of pay in excess of her pre-injury average weekly wage, by Augmentation, Inc., in a position that was consistent with her medically imposed physical restrictions, or following her termination from that position due to absenteeism, are supported by substantial evidence and are in accordance with the law, we affirm the denial of temporary total disability from and after October 1, 2005.

Because the ALJ failed to make sufficient findings of fact concerning the physical and other requirements of a position at TW Escorts, and concerning the rate of pay that said position would have yielded had Petitioner accepted the position, the denial of benefits based upon voluntary limitation of income during the period December 30, 2004 until October 1, 2005 is reversed, and the matter remanded to AHD for further findings of fact and conclusions of law consistent with this Decision and Remand Order.

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 Department of Employment Services*, 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.

Regarding the Motion to Reopen the Record, we have reviewed the analysis of the ALJ and affirm his decision as being in accordance with the law, for the reasons he described and stated therein. We agree that the mere fact that a report is not written prior to the date of a formal hearing is not sufficient, in a practical or legal sense, to justify reopening a record after a formal hearing, absent some showing that due to some unusual circumstance the relevant, non-duplicative substance of the evidence could not have been obtained prior to the formal hearing, with reasonable diligence on the part of counsel. These proceedings are for workers' compensation benefits allegedly due based primarily upon a claimant's medical condition and its effect upon a claimant's physical capacity for work. Counsel are well aware of this, and are under an obligation to seek and obtain such information that counsel believes is relevant to the inquiry in a timely fashion. The mere fact that a new medical report is generated after the close of the record does not *ipso facto* render that report a proper subject for a reopened record, for the very reasons given by the ALJ. Any such reopening

necessarily would require, as a matter of fundamental fairness, that the employer be given a further opportunity to have the new evidence reviewed by its own independent medical experts (IME) for comment, and possibly even require additional IME physical examinations. If the newly obtained evidence represents evidence of something new or different about the claimant's condition as compared to the condition at the time of the formal hearing, then as the ALJ noted, it supports a request for a modification by resort to statutorily created avenues expressly fashioned to cover that circumstance; if not, the new evidence is presumably merely duplicative and redundant.

This agency is tasked to hear and resolve a great number of contested claims for benefits under this Act, as well as the public sector workers' compensation act, and while the statutorily denominated deadlines are not always met, the agency is obligated to take seriously the mandate to dispose of these claims as quickly and fairly as possible, consistent with available resources. Permitting open ended reopenings of the record merely because a new medical record has come into existence, due to the fact that a claimant is obtaining ongoing treatment while a case is under consideration, presents an untenable barrier to expeditious resolution of these claims, particularly in light of the availability of modification proceedings.

Regarding the nature and extent of disability claim, it appears that the ALJ found that Petitioner was working light or "modified" duty upon returning to work on June 22, 2004, following surgery upon her injured wrist performed April 20, 2004. The ALJ found that Petitioner continued in this "light duty" capacity until December 29, 2004. At that point Petitioner's employment with Respondent terminated due to the end of Respondent's contract with a third party client, the General Services Administration (GSA).

While properly recognizing that his task required a preliminary determination as to whether the injury sustained prevented Petitioner from performing her pre-injury job, the ALJ never directly or explicitly described what that job entailed. Rather, the ALJ described Petitioner's job with NAI, as requiring "answering phones, filing, typing, xeroxing, faxing, distributing supplies, and other office tasks [with physical demands which] included walking, standing, sitting, pushing buttons, typing, lifting and carrying", (CO 2, page 2) and then described her position with Respondent as being "almost the same" as the NAI job (CO 2, page 3). Nowhere does the ALJ describe in what particulars the jobs were different, nor is there any discussion concerning whether those differences are relevant in considering whether Petitioner's post-surgical capacities were such that she was limited in performing her pre-injury duties.

Further, the ALJ does not describe in what fashion the return to work following the surgery was "light", as opposed to some presumably "heavier" duty that was required pre-injury. What is apparent from the CO 2, however, is that at the time Petitioner's employment with Respondent ended Petitioner had not returned to her pre-injury physical duties.

For the period from December 30, 2004 until October 1, 2005, on which date the ALJ found that Petitioner commenced employment with a company called "Augmentation, Inc.", the ALJ denied Petitioner's claim for temporary total disability, because he found Petitioner had voluntarily limited

her income, because she declined to accept a position with a company called "TW Escorts"², a job to which she was referred by Respondent but which the ALJ found Petitioner declined because Petitioner claimed that the medications she was taking made her "drowsy, delirious and delusional", a reason that the ALJ rejected as being unsupported by adequate evidence, including a lack of any evidence suggesting that Petitioner's prescribed medications would cause such effects. CO 2, page 9. The ALJ's reasons for finding that Petitioner had declined the position are supported by substantial evidence and are affirmed. However, completely denying benefits based upon a voluntary limitation of income theory, on these facts and without more, is not in accordance with the law.

The ALJ made no finding regarding what wages the TW Escorts position would have paid, nor did he make any findings as to what if any physical requirements the job had. Given that the Act contemplates a reduction in benefits (not their termination or suspension) when an injured worker declines an offer of suitable alternative employment, the ALJ's complete denial of benefits does not comport with the law. In the absence of a finding that a specific job constitutes "suitable employment", there is no reduction in benefits for failure to accept such a position. While it may be that actual performance of a particular job is sufficient to demonstrate its suitability (as will be seen with respect to the employment with Augmentation, Inc.), in this instance there was no such performance. In proper circumstances a claimant's temporary total disability benefits might be subject to suspension for non-cooperation with vocational rehabilitation efforts, but in this case such evidence is not what the ALJ relied upon. Suffice it to say that in order for there to be a reduction in benefits based upon a finding of a voluntary limitation of income, there must at a minimum be a finding that a specific job has been offered, at a specific wage, and a finding that the job was declined despite its being within the physical and occupational capacities of the claimant. This case lacks such findings, and therefore the denial is unsupported by substantial evidence.

The ALJ then found that Petitioner had returned to work with a company called "Augmentation, Inc." on October 1, 2005, and continued to work in that position without any wage loss until March 6, 2006, the day prior to the formal hearing. The consequent denial of temporary total disability benefits for this period of time is clearly proper, given that there was no loss of wages during that time.

For the period thereafter, the ALJ denied continuing benefits because Petitioner "has not demonstrated that she is unable to work at her usual employment at either the light duty prescribed by her treating physician, or full-duty as demonstrating [sic] by working for Augmentation, Inc." CO 2, page 9 – 10.

The ALJ explained the denial as being based upon Petitioner's failure to demonstrate that her leaving the employ of Augmentation, Inc.³, was in any way connected to her work related injuries and their concomitant limits on her physical capacity. Although the ALJ does not initially couch his

² Although not specifically described in CO 1 or CO 2, Petitioner testified that the job entailed escorting contractors working on classified government projects, while the contractors were moving about within restricted areas in government facilities.

³ We maintain the title used by the ALJ, but note that in the transcript the company appears to be referred to as "Augmentation FIMA" (HT 46 – 47) and given that it appeared to be a disaster related employment, probably involving the Federal Emergency Management Agency, or FEMA.

decision in these terms, it is apparent that he denied this portion of the claim because he implicitly found Petitioner's work at Augmentation, Inc., to be suitable alternative employment, i.e., within her physical and occupational capacity, and in which employment she suffered no wage loss. He wrote "in that Claimant was working full-duty and in the absence of any evidence that she ceased to work due to any disability [which we take to mean injury or physical incapacity], she has not demonstrated that she is totally disabled. While she testified that she was let go because of absenteeism, there is no testimony as to why she was absent from work; nor did she testify that any pain in her wrists and hands prevented her from performing her job and/or caused her to be absent repeatedly from work", and then concluding that "the record evidence is such that Claimant has demonstrated the ability to work and the ability to find suitable employment." CO 2, page 10.

While it might have been better practice for the ALJ to have been more explicit in describing the work at Augmentation, Inc., we can not say that such a failure amounts to reversible error, given that he does make clear enough that Petitioner's having been so engaged for something in excess of five months, and being terminated for reasons not described at the hearing beyond mere "absenteeism", permits a reasonable inference that the work was suitable alternative employment, requiring Petitioner to demonstrate in some positive way that her termination is a result of her work related condition. This is particularly so where, as the ALJ noted, the position was "within the restrictions imposed" by her treating physician, a fact that Petitioner herself admitted (HT 46), and paid \$15.00 per hour for a 40 hour week (*id.*), which far exceeds the stipulated pre-injury average weekly wage of \$437.00.

Accordingly the denial of temporary total disability benefits from and after March 6, 2007 is supported by substantial evidence and is in accordance with the law.

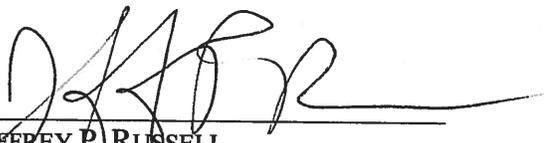
CONCLUSION

The denial of the Motion to Reopen the Record contained in the Compensation Order on Remand of March 13, 2008 is supported by substantial evidence, is not arbitrary or capricious, and is in accordance with the law. The denial of temporary total disability benefits from and after October 1, 2005 is supported by substantial evidence and is in accordance with the law. The denial of temporary total disability benefits between from December 30, 2004 until October 1, 2005 based upon a finding of voluntary limitation of income is not supported by substantial evidence and is not in accordance with the law.

ORDER

The denials of the Motion to Reopen the Record, and the denials of the claims for temporary total disability benefits from and after October 1, 2005, contained in the Compensation Order on Remand of March 13, 2008, are affirmed. The denial of temporary total disability benefits between from December 30, 2004 until October 1, 2005 based upon a finding of voluntary limitation of income is reversed, and the matter is remanded to AHD for further consideration of that claim, including such further findings of fact and conclusions of law as are required, consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

June 26, 2008
DATE