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. 05-267

BADEBANA ATCHOLE,

Claimant – Petitioner

v.

IRON OFFICE SOLUTIONS, INC. AND LIBERTY MUTUAL INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA No. 05-077, OWC No. 602691

Heather Leslie, Esquire, for the Petitioner

Christopher R. Costabile, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and JEFFREY P. RUSSELL, *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 July 25, 2005, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) was temporarily and partially disabled from August 2, 2003 to January 21, 2004, and that Petitioner's average weekly was $959.51. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the decision is arbitrary, capricious, unsupported by substantial evidence and is not in accordance with the law.

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. District of Columbia Department of Employment Services*, 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 his average weekly wage is $1,517.80 and that his temporary partial disability did not end until March 18, 2004 and not January 21, 2004, as the ALJ concluded. Employer-Respondent (Respondent) counters by arguing that the ALJ's determination of Petitioner's average weekly wage is reasonable and should not be disturbed and that the ALJ's conclusion on the duration of Petitioner's temporary partial disability also should be affirmed.

In the instant matter, Petitioner suffered an accidental work injury while working for Respondent on April 18, 2002. At that time he was also working at a second job with the United States Post Office and he voluntarily resigned from his second job at the Post Office after working there from April 6, 2002 through April 24, 2002. Thus, Petitioner was employed with the Post Office approximately 12 days in the 26 weeks preceding the work accident with Respondent and he actually worked and earned wages in that second job for 5 days. Petitioner was released to return to light duty work with Respondent in August of 2002, he was off again for about a month and then he returned to work on a light duty basis in September of 2002.

Petitioner worked light duty with Respondent until March 2004, when he returned to full duty work without restrictions.

Petitioner argues that his average weekly wage and compensation rate should be determined based upon stacking his wages from his job with Respondent (average weekly wage of $ 950.58) plus his job with the Post Office (average weekly wage of $567.22) under D.C. Official Code § 32-1511(a)(4), for a total of $1,517.50. The ALJ rejected Petitioner's argument and concluded that Petitioner's average weekly wage should be based upon his total wages earned with Respondent in the 26 weeks prior to the work injury, stacked with his total wages earned in his second job, both divided by 26. Thus, the ALJ found that without evidence of any earnings from the Post Office except for the limited period before the work accident, it would be unreasonable to award Petitioner the benefit of more earnings in calculating the average weekly wage.

In doing so, the ALJ quoted District of Columbia Court of Appeals language in *George Hyman Construction Company v. Dist. of Columbia Dep't. of Employment Servs.*, 497 A.2d 103, 108 (D.C. 1985), in which the Court upheld the agency decision to base the claimant's average weekly wage upon the actual weeks worked when the claimant had worked less than the statutory period (then 13 weeks) for determining the average weekly wage. The Court referred to an earlier agency decision in which this approach was used, *Savoy v. Vienna Equipment Co.*, H&AS No. 83-39, OWC No. 0002330 (July 21, 1983), noting:

> In *Savoy*, DOES in effect, placed upon the employer the burden of establishing that no work or less work would have been available to "other employees in a similar occupation" . . . Upon the employer's failure to carry that burden DOES assumed that Savoy would have worked during the entire 13-week period at the same rate or in the same pattern that he worked during the period of 7 weeks that spanned his actual employment. Conversely, if Savoy wished to establish an average weekly wage greater than that, he had the burden to submit evidence concerning how much work was available to similar employees during the 13-week period. We view the *Savoy* approach as reasonable and approve its application here. *Id.*

After reviewing the record in this case, considering that Petitioner did not prove any earnings at the Post Office other than for a short period of time immediately preceding the work accident, this Panel can find no reason to disturb the ALJ's determination on Petitioner's average weekly wage under D.C. Official Code § 32-1511(a)(4). Thus, the conclusion that it world be unreasonable to base Petitioner's average weekly wage on anything more than Petitioner's documented earnings history of his primary job and 5 days of earnings in his secondary job at the Post Office should not be disturbed.

Petitioner also argues that that the ALJ's reason for rejecting the opinion of Petitioner's treating physicians, Drs. John Byrne and his partner, Scott Edwards, on the issue of temporary total disability is insufficient as a matter of law. In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Dep't. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dep't. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992).

Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers' compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the testimony of the treating physician. *Canlas v. Dep't. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995).

In this instant matter, the ALJ concluded that Petitioner was temporarily and partially disabled from August 2, 2003 until January 21, 2004, whereas Petitioner argues that he was disabled until March 18, 2004. In ruling on this issue, the ALJ accorded more weight and relied on the opinion of Dr. Kevin Hanley, Respondent's physician, who opined that Petitioner had reached maximum medical improvement and was able to return to full duty work, without restrictions, in January of 2004.

The ALJ specifically noted that Petitioner received no medical treatment from his treating physicians between October of 2002 and March 4, 2004, when he was examined by Dr. Edwards. Thus, when Dr. Hanley examined Petitioner on January 21, 2004, it had been approximately a year and a half since his treating physicians had seen him. The ALJ stated:

> Given the substantial period of time between the claimant's last two physicians visits without his seeking any treatment, and noting that on last visit of March 18, 2004, the employer's IME was during the interim and during the time when benefits are being claimed, I find that the claimant had reached maximum medical improvement as of the date of employer's IME examination and evaluation. I therefore find that the claimant was temporarily and partially disabled from August 2, 2003 until January 21, 2004.

Compensation Order at 9.

The CRB, in great detail, has reiterated how it is quite proper to reject the opinion of the treating physician if persuasive reasons are given to accept a conflicting medical opinion submitted by an employer. *Taylor v. Verizon Communications, Inc.*, CRB No. 05-232, OHA No. 03-216B, OWC No. 571165 (June 16, 2005). After reviewing the record, it is clear that the ALJ detailed the reasons for rejecting the opinion of Petitioner's treating physicians, in favor of the views of Dr. Hanley. As a result, there is no reason to disturb the ALJ's determination on this issue.

Accordingly, the ALJ's conclusion that Petitioner was temporarily partially disabled from August 2, 2003 until January 21, 2004 and that his average weekly wage is $959.51 is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of July 25, 2005 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of July 25, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS
Administrative Appeals Judge

January 30, 2006
DATE