

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-046

**BARBARA ALLEN-WHITE,
Claimant-Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION,
Employer-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUN 24 PM 1 11

Appeal from a February 27, 2015 Compensation Order
by Administrative Law Judge Fred Carney
AHD PBL No. 14-037, DCP No. 0468-WC-09-0501656

Wendell C. Robinson for the Petitioner¹
Lindsay M. Neinast for the Respondent

Before HEATHER C. LESLIE, LINDA F. JORY, and Jeffrey P. Russell, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 6, 2009, Claimant was employed as a crossing guard. On that date she sustained an injury to her back and neck after slipping and falling on ice. Claimant sought medical care immediately afterwards and notified her supervisor. Claimant was awarded wage loss benefits and medical benefits for injuries to her head, neck, back, right arm and right elbow.

Claimant ultimately came under the care of Dr. David King and Dr. Charles Mosee, a neurologist. A February 25, 2010 MRI examination of Claimant’s back revealed degenerative arthritis with facet arthropathy and mild bulging at L4-5 and L5-S1.

¹Claimant was represented by Wendell Robinson, Esquire, at the Formal Hearing. On March 27, 2015, Mr. Robinson filed an appeal, captioned “Points and Authorities” with the Compensation Review Board. Subsequently, on April 14, 2015, Claimant, without the assistance of counsel submitted for filing a binder of documents titled “Application for Review” along with a memorandum of points and authorities. Attached to this application were several medical reports not submitted at the hearing. This additional filing will be addressed below.

Claimant underwent an additional medical evaluation (AME) on August 22, 2013 with Dr. Jason Brokaw. Dr. Brokaw took a history of the injury from Claimant, reviewed medical records, and performed a physical examination. Dr. Brokaw opined Claimant required no further treatment for her work related injury and that Claimant could return to work full time, full duty without restrictions. Claimant's benefits were terminated pursuant to this AME. After a reconsideration upheld the termination of Claimant's benefits, Claimant applied for a Formal Hearing.

A full evidentiary hearing occurred on November 13, 2014. Claimant sought restoration of temporary total disability benefits and medical benefits. Claimant did not submit any medical evidence and relied solely on her testimony at the Formal Hearing. Hearing transcript at 9. A Compensation Order (CO) was issued on February 27, 2015, denying Claimant's claim for relief.

Claimant appealed. Claimant argues that as the Employer failed to refute her testimony that her physicians were still treating her for her work injury and told her that she could not return to work, the ALJ's conclusion is in error. Employer opposes, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, 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 on Remand 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is 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.

ANALYSIS

Preliminarily, we address Claimant's April 14, 2015 submission of medical reports not submitted at the Formal Hearing. Employer opposed this submission, arguing that Claimant had failed to submit a Motion to Re-Open the Record or proffer any reason why the medical documents should be admitted, relying on *Edwards v. DC Department of Youth and Rehabilitation Services*, CRB No. 08-106, AHD No. PBL 07-007 (November 4, 2009). We agree with Employer.

In *Edwards*, the CRB stated:

It is well settled in this jurisdiction that reopening of the evidentiary record for the receipt of additional evidence is only appropriate upon a showing of unusual circumstances, and then only if it is determined that the evidence is material and relevant. *Woodfork v. WMATA*, CRB No. 09-033, AHD No. 08-344, (April 13,

2009) quoting *Young v. D.C. Dept. of Employment Services*, 681 A.2d 451, 456 (D.C. 1996).

Edwards, supra at 4.

Furthermore, 7 DCMR § 264, Submission of Additional Evidence, states:

264.1 Where a party requests leave to adduce additional evidence the party must establish:

(a) that the additional evidence is material, and

(b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issued the compensation order from which appeal was taken).

264.2 Where a party satisfies the requirements of subsections 264.1(a) and (b), the Review Panel to which the appeal is assigned, at its sole discretion, may remand the case to Administrative Hearings Division or the Office of Workers' Compensation for such further proceedings as the presiding Administrative Law Judge or claims examiner deems necessary.

Claimant makes various assertions in her memorandum including that all pertinent medical reports have not been fully considered in the CO. However, Claimant does not outline any unusual circumstances or reasonable grounds as to why any medical exhibits were not submitted on her behalf at the Formal Hearing. As the Employer states, "Claimant opted to introduce no medical documents as exhibits" and instead relied solely upon her testimony. Employer's argument at 3. A review of the hearing transcript supports this assertion. Claimant's additional exhibits will not be considered.

Claimant, through counsel, argues that the ALJ erred when rejecting Claimant's un-refuted testimony. Specifically, Claimant argues:

Claimant testified, during the hearing, that her doctors: Dr. Rothstein, from George Washington University, Medical Faculty Associates, and Dr. King categorically told her that she was still being treated, for injuries related to her fall, and according to her, she was told that she could not return to work. The Government failed to present testimony to refute the Claimant's testimony that her doctors told her that she could not return to work. The trial court abused its discretion when it refused to consider that un-refuted testimony.

Claimant's argument at 2.

We cannot agree with Claimant's argument as it is clear the ALJ did consider Claimant's testimony. As the CO states:

As an initial matter I find Claimant's testimony incredible based on Claimant's appearance and demeanor at the formal hearing, it's lack of responsiveness to direct questions and it's inconsistency with the credible evidence of record.

CO at 2.

The ALJ considered the testimony of Claimant and found her to be an incredible witness. In argument, Claimant does not acknowledge this or appeal this finding.

Moreover, after having found the Employer to have presented evidence to support a change in condition, the burden shifted to Claimant to produce reliable and relevant evidence that her condition had not changed to warrant a termination of benefits. *See Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD PBL 14-004 (November 12, 2014). If Claimant satisfied this burden, then the evidence would be weighed to determine whether employer met its burden of proving by a preponderance of the evidence that Claimant's benefits should be modified or terminated.

The ALJ determined that Claimant had failed in its burden. Specifically,

On her behalf Claimant introduced no exhibits in evidence. Claimant testified that she worked for Employer as a crossing guard. (HT 76) On January 6, 2009, Claimant testified there was a snow and ice storm. She was at work when she slipped on ice and fell on her back. Claimant testified she initially felt injury to her back and head. (HT 78) Claimant testified after the work injury she was taken to the emergency room at Providence Hospital. (HT 109) She further testified she came under the care of Dr. Mazique who treated her complaints of headaches and back pain with medication. She testified she continued treatment under Dr. Mazique until he died. (HT 110) She could not testify as to his treatment. She testified that after Dr. Mazique passed she started receiving treatment from Dr. King general practitioner who referred her to a neurologist. (HT 112) She reported the incident to her supervisor and on direct she was receiving treatment for her disability from Dr. King as of the formal hearing and he has not released her to return to work. (HT 89) She further testified that she was seen by Dr. Brokaw on August 22, 2013 and that Dr. Brokaw told her she read Dr. King's report yet Dr. Brokaw still opined she could return to work. Claimant testified the examination only lasted 25 minutes. Claimant testified she has had physical therapy but she didn't specify when and how many sessions of physical therapy she attended. On cross examination Claimant testified that as a crossing guard she has to walk and stand for prolonged periods of time.(HT 102) When asked what her hours were she testified that she works from 8:00 AM to 10:00 AM and from 12:00 PM to 01:00 PM and then from 3:00 to 4:00 PM. (HT 102) Claimant

testified she takes medication for pain and muscle relaxers three times a day but she could not remember the names of any of her medicines.

Of the medical evidence and all the evidence of record I find the additional medical evaluation of Dr. Brokaw the most cogent. Dr. Brokaw gave a complete description of the results of his face to face conversation with Claimant on August 22, 2013. He noted Claimant's responses to his questions. Dr. Brokaw physically examined Claimant and noted her reactions to his slightest touch. Dr. Brokaw based his opinion that Claimant's work related injury had completely resolved and that she was able to return to work on his examination of Claimant, Claimant's medical history and the objective tests in her medical history such as x-rays taken the date of injury and recent MRI reports. Claimant introduced no reports to corroborate her testimony and bolster her position that she has a continuing disability as a result of the work injury. Claimant testified she has headaches and body aches and that she has good days and bad days with more bad than good. However, Claimant did not offer any [sic] adminicular evidence to support a finding that she is totally disabled.

Therefore, it is determined that Claimant is not a credible witness based on her vague responses to direct questions, her unwillingness to be candid and responsive to questions about her treatment.

Claimant's testimony was inconsistent with the documented evidence of record, i.e., the reports of Dr. Brokaw which I found credible. Since Claimant's testimony is not found to be credible it cannot be said that it is reliable. Claimant has the burden under the MAHONEY test to present reliable and relevant evidence that she continues to be disabled. She has failed to do so. Therefore the analysis stops here, there is no weighing of the evidence and Employer prevails.

CO at 6-7.

What the Claimant is asking us to do is to reweigh the evidence in her favor, a task we cannot do. Claimant chose to only present her testimony when attempting to have her disability benefits reinstated, testimony that was deemed incredible. Claimant did not submit any other evidence, including medical documentation, in support of her claim for relief. Without more, the ALJ correctly determined Claimant failed in her burden of proof. As the District of Columbia Court of Appeals has stated, "in some cases, rather, the weakness of the proponent's proof... may be enough to defeat a claim." *Golding-Alleyne v. DOES*, 980 A.2d 1209, (D.C. 2009).

CONCLUSION AND ORDER

The February 27, 2015 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

Administrative Appeals Judge

June 24, 2015

DATE