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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB (Dir.Dkt.) No. 05-242

LEROY BRIGGS, JR.,

Claimant–Respondent,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent,

AND

LEROY BRIGGS, JR.,

Claimant-Respondent,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
OHA/AHD No. 242, OWC Nos. 566349 and 590345

Douglas A. Datt, Esquire, for the Petitioner

Matthew J. Peffer, Esquire, for the Claimant-Respondent

Chanda W. Stepney, Esquire, for Employer/Carrier-Respondent

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 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]

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 May 12, 2005, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Claimant's) claim for temporary total disability and for causally related medical benefits against Petitioner, finding that the claimed disability was the result of a stipulated work injury sustained on July 28, 2003, while Claimant was employed by Petitioner. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's findings that Claimant's claimed disability is causally related to the July 28, 2003 work injury, that Claimant is disabled as alleged during the period claimed, and that Claimant's retirement from Petitioner's employment does not constitute the voluntary limitation of income by Claimant, are each unsupported by substantial evidence and are 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. *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

[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' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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.

Preliminarily, Claimant has filed a Motion to Dismiss Petitioner's Application for Review (AFR), alleging that the AFR was untimely filed. As grounds therefor, Claimant erroneously asserts that the AFR was filed on July 16, 2005; in fact it was filed on July 14, 2005, which date is arguably beyond the 30 days allowed under the Act.[2]

Petitioner filed a Motion for Leave to Consider Application for Review Timely Filed, to which was attached two affidavits, one from Petitioner's counsel's secretary, and the other from the manager of a courier company. The two affidavits assert that the courier company attempted to deliver the AFR to this office on July 13, 2005, and that when it appeared to the courier that he would be unable to get to the CRB offices before 5:00 p.m., he telephoned the CRB and spoke to the Clerk of the CRB, Gregory Lamb. In that conversation, according to the affidavits, Mr. Lamb advised the courier that he could deliver the AFR to the security guards located in the CRB building. The affidavits went on to assert that, upon arrival at the CRB offices at 6:05 p.m., the security guards refused to accept delivery of the AFR.

Neither of the other parties contest the allegations that the Clerk of the Board of the CRB advised the courier that the security guards at the building housing the CRB were authorized by the CRB to accept the AFR. The failure of the security guards to accept service of filing of the AFR notwithstanding, the representation of the apparently authorized member of the staff of the Board that filing could be made by leaving the AFR with the security guards prevented Petitioner or its courier from taking steps to insure that the AFR reached the Board on that day. Accordingly, we find that by attempting to file the AFR with the security guards, as instructed by the Clerk of the Board, on June 13, 2005, the AFR was constructively filed on that date, and it was therefore timely.[3]

Turning to the case under review herein, Petitioner alleges that the ALJ's findings that Claimant's claimed disability is causally related to the July 28, 2003 work injury, that Claimant is disabled as alleged during the period claimed, and that Claimant's retirement from Petitioner's

[2] In its "Motion to Strike [Claimant's Motion to Dismiss the AFR]", Petitioner asserts that recent amendments to the Act establishing this board changed the timeframe within which an AFR must be filed, by using the word "issuance" of the Compensation Order rather than the previously used "filed with the Mayor", as the starting point to compute the time within which an aggrieved party must file an AFR. We do not reach this argument in light of the granting of Petitioner's Motion for Leave to Consider Application for Review Timely Filed.

[3] On August 4, 2005, Respondent, District of Columbia Water and Sewer Authority and Liberty Mutual Insurance, filed an opposition to the AFR, and an unopposed Motion for Leave to File Is Opposition to Employer and Third Party Administrator's Application For Review Out of Time. In that motion Respondent asserted that both the AFR and the CRB Notice of filing of the AFR were mailed to a prior address for Respondent's counsel, and that it did not receive the AFR until July 27, 2005. The motion is granted.

employment does not constitute the voluntary limitation of income by Claimant, are each unsupported by substantial evidence and are not in accordance with the law.

Claimant did not file an Application for Review asserting any error in the ALJ having found that the claimed disability was causally related to the July 28, 2003 injury, as opposed to the stipulated prior injury of March 14, 2001, and in his response to the AFR, Claimant urges that the Compensation Order be affirmed in all respects. Specifically, Claimant has not challenged the failure of the ALJ to find that the complained of injuries were caused by the March 14, 2001 injury.

Petitioner, in its AFR, states that "The Administrative Law Judge erred in concluding that Dr. Goodman's [the physician who had performed an independent medical evaluation (IME) at Petitioner's request] opinions were insufficient to rebut the presumption afforded the claimant under the Act." Memorandum in Support of AFR, page 15. This is the sole legal error alleged in the AFR with respect to Petitioner's liability for the claimed injury.

In review of the record, however, we find nowhere in the two reports from Dr. Goodman any statement or suggestion that Claimant's conditions as of the date of the IME were not causally related to the July 28, 2003 work injury. In Petitioner's hearing exhibit 3, a report of Dr. Goodman's September 11, 2003 evaluation, the doctor notes a history of Claimant's "having been injured at work on July the 28th, 2003. He was opening a manhole cover when he began to experience immediate pain in his back and right lower extremity." Following a description of his findings on physical examination, Dr. Goodman wrote "His complaints are felt to be related to the above injury, aggravated by unrelated degenerative changes involving the lumbosacral spine region". Third Party Administrator's (TPA's) Exhibit (TPAX) 3. Although no mention is made in the September 15, 2003 IME report of the March 15, 2001 stipulated injury, said earlier injury is referenced in the April 14, 2004 addendum to that report, also contained in TPAX 3. In the addendum, Dr. Goodman writes that:

> It is apparent that Mr. Briggs has a chronic low back syndrome which reportedly began somewhere around March the 15th, 2001. He had lifted heavy equipment while at work at that time. … The problems that he had did persist with continued off and on pain in the back region. … Of significance, is that in a follow-up report from[treating physician] Dr. Chidambaram dated July the 18th, 2003, 10 days prior to his July the 28th injury of 2003, for which I evaluated him, he again persisted with the diagnosis of spinal canal stenosis at L4-5 and disc disease at L5-S1, with the plan to continue him on Motrin, as well as him being advised not to push, pull or lift. In her words, "pulling and pushing are not advisable". … It is my opinion that Leroy Briggs certainly re-injured himself on July the 28th, 2003 and that this is related to his reported disc disease and degenerative lumbosacral spine disease, as had been previously diagnosed by his treating neurologist. He had been given instructions from his physician regarding pushing, pulling and bending. However, he apparently did not follow those instructions, as had been advised. This injury of July the 28th, 2003 was as a result of these activities and related to his underlying degenerative disc and joint disease and herniated disc with spinal canal stenosis.

> As again, in addendum to my prior report, this more recent injury is, in fact, related to the lumbosacral spine problems as alluded to."

Petitioner contends that this evidence, along with the evidence that Petitioner received ongoing medical care, had walked with a limp, and complained of low back and leg pain at work throughout the period of time that Claimant returned to work between the stipulated injury dates, is sufficient to rebut the presumption that the complained of condition and alleged disability is related to the work injury of July 28, 2003.

We must reject the contention as being directly at odds with and contrary to the very IME evidence, quoted above, upon which Petitioner relies. Nothing could be more clear than that Dr. Goodman ascribes Claimant's ongoing problems to the aggravation of the previous "bad back" condition by work activities on July 28, 2003. Rather than rebut the relationship of the injury to the complained of condition, the IME report and addendum make reaching a conclusion of the existence of such a connection inescapable. As properly noted by the ALJ, the aggravation of pre-existing condition constitutes a work injury under the Act. *Harris v. District of Columbia Dep't. of Employment Serv's.*, 746 A.2d 297 (D.C. 2000). And, although he was clearly aware of the prior back injury, Dr. Goodman notably failed to ascribe the current condition to that earlier incident.

Although the ALJ never explicitly stated that the first injury had resolved without residuals, she did make clear that the disabling effects of that injury had, in her view, dissipated, and that the present disability is the result of the aggravation of Claimant's "underlying condition which resulted in new, debilitating symptoms". Compensation Order, page 4, fourth and fifth full paragraphs. That finding is clearly supportable by reference to the reports of Dr. Goodman cited above, and is therefore affirmed.

Regarding the contention that, by retiring, Claimant is voluntarily limiting his income and should therefore be denied ongoing benefits, the ALJ found that Claimant would not have retired if he continued to be physically able to perform his pre-injury job, or if suitable alternative employment or modified work within his capacity were available. This finding, too, is supported by the uncontradicted testimony to that effect given by Claimant at the formal hearing, and is therefore also supported by substantial evidence. The ALJ's determination that such an involuntary retirement does not preclude recovery for disability benefits is in accordance with the law. *Krause v. District of Columbia Dep't. of Employment Servs.*, 825 A.2d 934 (D.C. 2003).

CONCLUSION

The Compensation Order of May 12, 2005 is supported by substantial evidence in the record and is in accordance with the law, and is therefore affirmed.

ORDER

The Compensation Order of May 12, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

September 22, 2005
DATE