

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. 04-80

DOMINIC CURRY,

Claimant–Respondent,

v.

M.C. DEAN AND ZURICH AMERICAN INSURANCE COMPANY,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. 02-390, OWC No. 575210

Jamie L. DeSisto, Esquire, for the Petitioner

Ryan J. Foran, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, 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

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.

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 21, 2004, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary total disability from January 12, 2002 through the date of the formal hearing and continuing, accrued interest thereon, and payment of causally related medical expenses. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, in its initial Application for Review and supporting memorandum (AFR), Petitioner alleges as error that (1) the evidence presented by Respondent failed to establish the nature and extent of his disability by substantial evidence under *Dunston v. District of Columbia Dep't. of Employment Servs.*, 509 A.2d 109 (1999), and the ALJ failed to fully consider the issue of the nature and extent of disability by failing to address Petitioner's evidence of Respondent's alleged failure to accept suitable alternative employment. In a Supplemental AFR and memoranda, Petitioner repeats these complaints of error and expands them to specifically argue that the ALJ should have rejected, as incredible, the testimony of Respondent at the Formal Hearing, should have rejected as unsupported by the facts the opinion of Respondent's treating physician, and that the ALJ failed to fully consider the relevant standards for nature and extent of disability established in *Logan v. District of Columbia Dep't. of Employment Servs.*, 805 A.2d 237 (2002).

Respondent opposes the appeal, asserting in its initial Opposition to Application for Review and supporting memorandum (Opposition) and again in a supplemental opposition and memorandum, that the Compensation Order is, in all respects, supported by substantial evidence and 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 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.

Turning to the case under review herein, Petitioner first alleges that the Respondent's case failed to meet the *Dunston* standard, because (a) Respondent's testimony was not credible for a variety of

reasons, (b) the treating physician's opinion should be rejected because it is premised upon erroneous information concerning whether light duty work had been made available, and (c) the additional reason that there were no "objective" indicia of continuing injury in the medical records beyond March 22, 2002, rendering the treating physician's opinion as to total disability thereafter doubly dubious.

These complaints are all, to one degree or another, complaints about the weight that the ALJ accorded to the testimony and medical records and reports. As such, they fail as adequate grounds for reversal, in that credibility determinations are solely within the province of the ALJ, and will not be disturbed on appeal. In the Compensation Order, the ALJ identified the substantive testimony of Respondent upon which he relied and the medical opinion which he found persuasive to support the claim that Respondent could not return to his previous employment, and our review of the record corroborates that the testimony and records are as described by the ALJ. See, Compensation Order 3 – 8. Accordingly, the determination is supported by substantial evidence and must be affirmed.

Petitioner's second prong of attack is that the ALJ failed to fully consider the legal requirements of nature and extent analysis because the ALJ failed to consider evidence that Petitioner offered, EE 2, of the availability of a modified position within Respondent's physical capacity, thereby failing to fully apply the law as set forth in *Logan*. Petitioner argues that this failure requires reversal of the Compensation Order and denial of the claim for temporary total disability benefits.

At first blush, Petitioner's argument appears to be well founded, given the following paragraph, found at page 9 of the Compensation Order:

Having reached the determination the claimant is temporarily and totally disabled from working from September 21, 2001 to the present and continuing, it is unnecessary to address the remaining issue.

Had the ALJ merely determined that Respondent was unable to return to his pre-injury job and then failed to consider evidence proffered by Petitioner of allegedly suitable alternative employment being offered to Respondent, there would indeed have been an improper and inadequate consideration of the issue of the nature and extent of disability under *Logan*. However, despite this troubling phraseology, review of the Compensation Order reveals that the ALJ actually did consider the proffered evidence, and rejected the evidence of "employability", for legally justifiable reasons. Among other places, this consideration and rejection is apparent on page 8, where the ALJ wrote as follows:

The evidence of record reflects that the claimant was 21 years of age at the time of his work related injury with the employer. There is no evidence in the record regarding claimant's educational background. It is therefore unclear whether the claimant would have been capable of performing the job duties [included in CE 2, the document upon which Petitioner relies to support the claim that suitable alternative light duty employment was available] consisting of filing of paperwork, computer work and warehouse duties, as described in employer's light duty apprentice electrician position. Additionally, the evidence is also unclear whether claimant was capable of the physical requirements of that position of standing,

sitting, walking, and driving up to two hours at a time given his testimony and medical evidence reflecting the claimant experienced an increase in his symptoms of back and leg pain with numbness and tingling with such activities.

This clearly demonstrates that the ALJ considered and rejected Petitioner's allegation that it had offered Respondent suitable alternative modified light duty employment within Respondent's capacities, considering the factors which have been established in *Logan* and the cases cited therein. Accordingly, the ALJ was not in error.

CONCLUSION

The Compensation Order of May 21, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of May 21, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

April 20, 2006
DATE