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 No. 07- 154

DALE MCALISTER,

Claimant - Petitioner

v.

FLIPPO CONSTRUCTION COMPANY AND PMA INSURANCE CO.,

Employer/Carrier - Respondent

Appeal from a Compensation Order on Remand of
Administrative Law Judge Anan K. Verma
AHD No. 03-314, OWC No. 585987

Benjamin T. Boscolo, Esquire for the Petitioner

John P. Rufe, Esquire, for the Respondent

Before SHARMAN MONROE, LINDA F. JORY and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the 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 § 230 (1994), 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 20024, Title J, the 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. Official Code §§ 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.

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

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 July 30, 2007, the Administrative Law Judge (ALJ), concluded as he did in his initial Compensation Order that Petitioners' work injury arose out of and in the course of his employment; Petitioner met the required burden of producing sufficient evidence of his temporary total disability from January 8, 2003 to January 10, 2003; Petitioner is entitled to have an MRI of the lumbar spine; but that the evidence did not support Petitioner's continued entitlement to temporary partial disability benefits beginning June 16, 2003 as requested.

The Compensation Order on Remand (COOR) followed the issuance of the Decision and Order on Remand issued by the CRB on February 23, 2006, wherein the CRB concluded the Compensation Order was not supported by substantial evidence in the record; not in accordance with the law; and must be vacated and remanded for further findings of fact and conclusions of law. *See McAlister v. Flippo Construction Co*., CRB No. 04-64, OHA No. 03-314, OWC No. 585987 (February 23, 2006).

As grounds for this appeal, Petitioner alleges that the Compensation Order on Remand is unsupported by substantial evidence and misconstrues the applicable law in such a way to contravene the humanitarian requirements of the Act. To date, Employer-Respondent (Respondent) has not filed an opposition to the Application for Review.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 § 32-1521.01(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. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

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

Petitioner has already appealed the merits of the Compensation Order to the CRB, thus we shall address specifically what the prior panel directed the ALJ to do and if on remand, the ALJ followed the CRB's order and whether the ALJ's subsequent findings of fact and conclusions of law are supported by substantial evidence and in accordance with the law.

The prior panel specifically concluded that:

> Although the ALJ rejected the opinion of the treating physician because it was based upon the Petitioner's subjective complaints, the ALJ failed to find the Petitioner not credible. Thus, the ALJ's finding that the Petitioner was not disabled after January 10, 2003 is not supported by substantial evidence in the record. Likewise, the ALJ's subsequent finding that the wage loss the Petitioner suffered after January 10, 2003 was not a function of his employment is not supported by substantial evidence in the record.

The previous Panel further concluded the ALJ's finding that Petitioner's move to California was tantamount to a failure to accept employment commensurate with his abilities was not supported by substantial evidence in the record. Specifically the Panel concluded:

> …the ALJ did not make a finding as to the reason(s) for Petitioner's relocation to California or whether the Petitioner's continuing residence in California was reasonable if suitable alternative [employment] with the Respondent is available in the Washington, DC metropolitan area.

Review of the ALJ's analysis with regards to his rejection of the opinion of the treating physician, Dr. Fechter reveals the ALJ found there was no objective evidence to verify how Petitioner's low back symptoms bore upon his ability to perform the light duty desk job, therefore he could not "reconcile" this lack of evidence with Dr. Fechter's opinion that Petitioner was still unable to work. This Panel notes that Dr. Fechter also was in need of more objective evidence as he consistently and repeatedly noted Petitioner should have an MRI scan which the ALJ did acknowledge and authorized. The evidence does not indicate that Dr. Fechter was made aware of the physical requirements of the desk job. Nevertheless, Petitioner testified that he could not do the light duty desk job because sitting caused him pain in his back and leg. *See* HT at 46. This Panel must note that notwithstanding the prior Panel's conclusion that the ALJ had not made a credibility determination the ALJ again failed to do so on remand. In the face of the record medical and testimonial evidence, such an explicit finding is crucial. Where conflicting medical testimony exists, an agency must take into account the testimony of a treating physician, but "the hearing examiner, *as judge of the credibility of witnesses*, may reject the testimony of a treating physician and decide to credit the testimony of another physician when there is conflicting evidence."(italics added) *Clark v. District of Columbia Dep't of Employment Servs*, 772 A.2d 198, 202 (D.C. 2001) (citing *Canlas v. District of Columbia Dep't of Employment Servs., 723 A.2d 1210, 1211-12 (D.C. 1999))*. The proper judge of credibility is the ALJ and an appellate court cannot substitute its judgment as to credibility for that of the ALJ *See Lincoln Hockey v. District of Columbia Dep't of Employment, 831 A. 2d 913 (D.C. App 2003)(*citing

Short v. District of Columbia Dep't of Employment Servs., 723 A.2d 845, 851 (D.C. 1998)). Without more, this Panel concludes the ALJ's rejection of the treating physician's detailed progress notes and disability slips in favor of one handwritten report by employer's physician does not constitute substantial evidence.

As to the prior panel's conclusion that the ALJ did not make a finding as to the reason(s) for Petitioner's relocation to California and the ALJ's lengthy discussion and analysis of voluntary limitation of income and the Court of Appeals decision in *Joyner v. District of Columbia Dep't of Employment Servs., 502 A.2d 1027 (D.C. 1985)* the ALJ made a specific finding that "the proffered evidence discloses no compelling financial or health reasons necessitating claimant's relocation to California". COOR at 3. This Panel must note that neither Petitioner nor his counsel made a proffer at the Formal Hearing as to why Petitioner relocated to the state of California after the work injury other than Petitioner's testimony that he played basketball there in college. HT at 51.

Nevertheless a conclusion as to whether or not Petitioner voluntarily limited his income cannot be reached until the ALJ makes a finding that suitable alternative work was made available by employer which Petitioner unreasonably refused. Without a determination as to whether Petitioner's testimony that he left the light duty desk job and did not return because of pain was credible, a determination that employer provided suitable alternative employment which Petitioner refused cannot be made. In other words, if in fact the ALJ finds Petitioner's testimony that he could not work due to pain while sitting to be incredible in support of his finding that Petitioner abandoned his light duty desk job, and the ALJ determines that employer meets its burden of making suitable alternative work available to Petitioner in the jurisdiction where the injury occurred under *Joyner*[2] further discussion regarding the relocation to California irrelevant.

Based on the foregoing discussion, we must remand the matter again to the ALJ to reconsider the evidence of record, including the credibility of Petitioner's testimony and the suitability of the light duty desk job.

CONCLUSION

The Compensation Order on Remand is not supported by substantial evidence of record, and is not in accordance with the law.

[2] Suitable available work is work commensurate with the specific capabilities of the claimant, that is his age, background, employment history and experience, and intellectual and physical capacities. *See Joyner, supra* at 1032. We reiterate that the Court in *Joyner* found employers are not required to find suitable employment in multiple locations and *Joyner's* relative job market was the Washington, DC metropolitan area. *Id* at 1030.

ORDER

The Compensation Order on Remand is accordingly **REMANDED** to the ALJ to reconsider the evidence of record, including the credibility of Petitioner's testimony and the suitability of the light duty desk job.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

October 23, 2007
DATE