

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. 04-88

DIONNE DAVIS,

Claimant - Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer – Respondent.

Appeal from an Order of
Administrative Law Judge Jeffrey P. Russell
AHD No. 04-052A, OWC No. Unknown

Steven H. Kaminski, Esquire for the Petitioner

Donna J. Henderson, Esquire for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

LINDA F. JORY, *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 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.

BACKGROUND

This appeal follows the issuance of an 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 Order which was filed on July 13, 2004, the Administrative Law Judge (ALJ), dismissed Application for Formal Hearing as the ALJ found Petitioner did not meet his burden of establishing a change in conditions since the March 30, 2004 Compensation Order (CO) issued.

Claimant-Petitioner's (Petitioner) Petition for Review alleges as grounds for its appeal that the ALJ made findings of fact and conclusions of law that did not rationally flow from the evidence presented at the preliminary "*Snipes*" hearing held on July 13, 2004. Respondent asserts in opposition to Petitioner's Application for Review that Petitioner "simply changed doctors shortly after the hearing in an effort to obtain a more credible medical opinion... nor was there any medical opinion that Petitioners' condition changed since the first formal hearing".

ANALYSIS

As an initial matter, the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations must affirm an Order issued by AHD or the Office of Workers Compensation (OWC) unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. CRB Rules of Practice and Procedure, Chapter 2, 7 D.C.M.R. §266.4; *see also* Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001). For reasons set forth below, the Panel finds the Order is in accordance with the law and neither arbitrary nor capricious and therefore must be affirmed.

In *Snipes v. D.C. Department of Employment Services*, 542 A.2d 832 (D.C. 1988) the Court of Appeals held that in order to obtain an evidentiary hearing on a modification petition under D.C. Official Code §32-1524, a claimant must make a threshold showing that since the date of the CO there is reason to believe that a change in conditions has occurred which raises issues concerning the fact or degree of disability or the amount of compensation payable pursuant thereto. *Snipes*, *supra* at 835. Upon a showing, a formal hearing is required to consider the issue, following which the Act requires the issuance of a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation previously paid; or award compensation. *See* D.C. Code §32-1524 (a)(1) and (c). The preliminary hearing mandated in *Snipes* has been called a *Snipes* hearing. *See Jermaine Johnson v. Greater Southeast Community Hospital*, CRB No. 05-224, OHA No. 03-541B, OWC No. 581489 (June 9, 2005).

At the outset, the Panel must note that the ALJ properly conducted a preliminary examination of the moving party's evidence "on the record" creating a record and after conducting a preliminary review of the evidence created issued findings of fact and conclusions of law on whether the proffered evidence meets the "reason to believe" standard. *See Johnson v. Greater Southeast*

Community Hospital, CRB 05-224, OHA No. 03-541B, OWC No. 581489 (June 9, 2006) *citing Snipes, supra*,

In support of Petitioner's primary argument that Petitioner presented new findings and diagnoses, Petitioner relies on the reports of Dr. Mark Cohen, specifically Dr. Cohen's findings of muscle spasms in the neck and back and an alleged herniated disc in her lumbar spine. The Panel agrees that Petitioner has in fact submitted "new findings and diagnoses" from a new physician who first examined Petitioner on March 5, 2004 approximately 3 weeks after the Formal Hearing was conducted on the nature and extent of Petitioner's disability. However, the Panel does not agree with Petitioner's assertion that Dr. Cohen found Petitioner had a herniated disc as the reports reveal that Dr. Cohen opined Petitioner had no disc herniation.

With regard to Petitioner's assertion that the finding of muscle spasms is a new diagnoses, the ALJ acknowledged Respondent's assertion that although Dr. Ajrawat did not describe findings of muscle spasm, he frequently gave Petitioner injections and then noted that they had alleviated the pain and spasms citing to Dr. Ajrawat's reports from the original record dated June 23, June 30, July 21, July 28, August 18, and December 2, 2003 reports.² The ALJ further noted that there are no new diagnostic studies evidencing any deterioration in Petitioner's human frame since the prior hearing and Petitioner has presented no medical opinion addressing the question of whether any anatomical change has arisen in the time since the prior hearing.

Respondent further asserts that if Petitioner is permitted to prevail in this matter, every claim for disability denied by OHA will be re-tried months later sometimes with a reiteration of the same symptoms in different verbiage, or by a different doctor. The Court of Appeals has acknowledged that the Act provides for re-examination of previously determined issues only upon a proper showing that a change of circumstances has occurred warranting a modification of the order. *See WMATA v. District of Columbia Dep't of Employment Servs*, 703 A.2d 1225 (November 26, 1997), *citing Oubre v. District of Columbia Dep't of Employment Servs.*, 630 A.2d 699, 704 (D.C. 1993).

Nevertheless, as Respondent asserted at the *Snipes* hearing, Petitioner did not proffer any opinion that Petitioner's condition has changed since the formal hearing or the compensation order (approximately 6 weeks later). The panel accordingly concludes the evidence does not support a finding that there is reason to believe that a change in conditions has occurred, which raises issues concerning the fact or degree of disability or the amount of compensation payable pursuant thereto.

CONCLUSION

The ALJ's Order Dismissing Petitioner's Application for Formal Hearing for failure to make a preliminary showing of a change in conditions is supported by the evidence of record; is neither arbitrary nor capricious; and in is in accordance with the law.

² Consideration of the prior determination is necessarily taken into account in deciding whether, for modification purposes, a change has occurred. *See Snipes v. D.C. Department of Employment Services, supra* at 835.

ORDER

The July 13, 2004 Order is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

July 26, 2006

Date