

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. 08-069

DENICE LUCKETT-MARTIN,

Claimant – Petitioner

v.

D.C. DEPARTMENT OF MOTOR VEHICLES,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. PBL 07-080, DCP No. 761019-0001-2007-0001

Richard Link, Esq., for the Petitioner

Andrea Comentale, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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 § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), by which 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 Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*

OVERVIEW

On December 11, 2007, the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES) issued a Compensation Order in this case. In the Compensation Order, the Administrative Law Judge (ALJ) denied the Claimant-Petitioner's (Petitioner) request for temporary partial disability benefits continuing from March 22, 2007 and for the payment of causally related medical expenses.¹ The ALJ found the Petitioner's current complaints of fibromyalgia and migraine headaches pre-existed her December 12, 2002 work injury, were not aggravated by her work injury and prevented her from working full-time before her injury. Consequently, the ALJ found the Petitioner's inability to work full-time and to work only part-time was not medically causally related to her December 12, 2002 work injury.

On January 7, 2008, the Petitioner filed an Application for Review with the Compensation Review Board (CRB) appealing the Compensation Order. In her Application, the Petitioner asserts the ALJ's reasons for rejecting the treating physician's opinion are not based upon the record. The Petitioner maintains the treating physician, Dr. Hampton Jackson, knew she was working part-time, about her work background and about her pre-existing condition when he opined she could work part-time. The Petitioner further maintains Dr. Robert Collins, the independent medical examiner, also opined she could return to work after March 12, 2007 although her condition was "guarded" which means he realized she could not perform full time work. On January 16, 2008, the Petitioner filed a request for leave to submit additional medical reports relating her injuries "since the issuance of the decision".

On January 30, 2008, the Self-Insured Employer-Respondent (Respondent) filed a Response.² The Respondent asserts that the Petitioner, in her appeal, does "nothing more than assert numerous reasons why the ALJ might have ruled differently". See Respondent's Response In Opposition to Petitioner's Application for Review at p. 2. The Respondent maintains the Petitioner failed to present reliable and credible evidence establishing an inability to work since March 22, 2007.

On February 25, 2008, the Petitioner filed a Supplement to the Application for Review with six (6) medical reports attached thereto. Again, the Petitioner asserts the medical reports relate to her injury "since the issuance of the decision". The reports are from Drs. Leonid Selya, Hampton Jackson, Jon Peters and G. Hudson Drakes and are dated between June 7, 2007 and February 13, 2008.

On March 7, 2008, the Respondent filed a Response to the Supplement to the Application for Review. The Respondent argues Petitioner's request to submit additional medical reports does not comply with 7 DCMR § 7-264 or the law as stated in *McManus v. Department of*

¹ The ALJ noted there was no evidence of outstanding medical bills, and, therefore, the question of payment of medical expenses was not ripe for adjudication.

² The Respondent's January 22, 2008 request for an extension of time to file the Opposition was granted and the Respondent was ordered to file the Opposition by January 30, 2008.

Corrections, Dir. Dkt. No. 09-03 (August 25, 2003) because the Petitioner failed to articulate a reason why the 2007 reports of Drs. Selya and Jackson were not produced at the November 6, 2007 formal hearing. Further, the Respondent asserts the 2008 reports did not exist at the time of the hearing and cannot be considered on appeal as the Panel's scope of review is limited to the evidence in the record.

On March 19, 2008, the Petitioner filed a Reply. Therein, the Petitioner asserts the medical reports are probative of her medical condition. Further, the Petitioner asserts "the treating health care providers had not provided all medical records to undersigned counsel (and/or to [claimant]) prior to the hearing date" and at the formal hearing "counsel made a request that the claimant be permitted to submit Dr. Selya's reports as they had not been received before the hearing date." The Petitioner argues despite the circumstances, the ALJ denied the request. The Petitioner did not address the reports dated after the formal hearing.

ISSUES

The issues on appeal are:

1. Whether the Petitioner's request to supplement the record should be granted, and
2. Whether the December 11, 2007 Compensation Order is supported by substantial evidence and is in accordance with the law.

STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

As an initial matter, the standard 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. D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, et seq. at § 1-623.28(a). 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. App. 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. *Marriott*, 834 A.2d at 885.

Where a party files a request to supplement the record after a compensation order is issued but before the Director issues an appellate decision, the Director, now the CRB, is obligated by statute to consider, whether the proffered evidence is material and whether there are reasonable grounds for failing to adduce such evidence in the initial hearing. *See Bennett v. D.C. Department of Employment Services*, 629 A.2d 28, 30 (D.C. 1993).

7 DCMR § 264.1 states:

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 . . .

7 DCMR § 266.1 states:

The Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, and is limited in its review to the record on appeal.

ANALYSIS

Before the merits of this appeal can be addressed, the Petitioner's request to supplement the record with additional medical reports must be addressed. The Petitioner requests leave to submit into evidence the following reports relating to her condition "since the issuance of the decision":

1. Dr. Hampton Jackson's June 7, 2007 and December 14, 2007 reports;
2. Dr. Leonid Selya March 29, 2007 and May 22, 2007 reports;
3. Dr. G. Hudson Drakes' January 25, 2008 report; and
4. Dr. Jon Peters' February 13, 2008 report.

At the outset, the Panel's review of the record reveals Dr. Hampton's June 7, 2007 medical report was admitted into evidence as part of Claimant Exhibit No. 6. Because the report is already part of the record, the Petitioner's current request with respect to the report is moot.

The Petitioner asserts she informed the ALJ that all the medical records had not been received from the physicians and requested additional time to submit them, but the ALJ denied the request.

The Panel reviewed the transcript of the November 6, 2007 formal hearing. At the hearing, the Petitioner indeed told the ALJ of her problem in getting medical reports from Dr. Selya and requested the record be kept open so the reports could be submitted at a later time. While the ALJ declined to leave the record open, the ALJ told the Petitioner she may make a post-hearing motion to submit the reports once they were received. *See* Hearing Transcript (HT) at p. 12.

The Panel determines the March 29, 2007 and May 22, 2007 reports of Dr. Selya are material to the question of medical causal relationship and the Petitioner presented reasonable grounds for not submitting the reports into evidence before the ALJ. Moreover and more importantly, the Petitioner advised before the ALJ that, despite her attempts, all the medical records had not been received from her physicians and she requested the record be left open to allow her to submit the

reports in to evidence when they were received.³ *See* HT at p. 12. The Panel assumes the reports were in existence at the time of the formal hearing and reasonable attempts were made to secure them prior to the hearing because the Petitioner made the request to keep the record open for the reports at the hearing. The Panel further assumes the reports were not received until after the Compensation Order was issued because the Petitioner did not file a motion to re-open the record before the ALJ issued the Compensation Order. Therefore, the Panel concludes the proffered records existed prior to the formal hearing, but were obtained after the Compensation Order issued despite reasonable timely efforts to obtain them prior to the formal hearing and the ALJ should consider these two medical reports. A remand is necessary.

With respect to the December 14, 2007 of Dr. Jackson, the January 25, 2008 report of Dr. Drakes and the February 13, 2008 report of Dr. Peters, the Panel determines these reports are also material to the question of medical causal relationship. However, the Petitioner did not proffer reasonable grounds for failing to present the reports at the November 6, 2007 formal hearing. Given these reports post-date the formal hearing, the Panel presumes, in the absence of evidence to the contrary, that to the extent they reflect evidence in some fundamental way different from or in conflict with the evidence on the Petitioner's medical condition presented at the formal hearing, the reports should more appropriately be considered, if at all, in a modification proceeding under D.C. Official Code § 32-1524. The Panel denies the request to admit these reports for the ALJ's review and consideration.⁴

CONCLUSION

The Petitioner's request to supplement the record is granted, in part, and this matter is remanded. Consequently, the merits of the Petitioner's will not be addressed at this time.

³ The Panel is not, in any way, suggesting the ALJ committed reversible error in not leaving the record open. An ALJ has wide discretion in conducting a formal hearing to answer the issues presented for resolution and the ALJ in this instance properly exercised adjudicatory discretion. *See* D.C. Official Code § 2-509(b); 7 DCMR § 221.3 and § 223 *et seq.*

⁴ The Panel notes it is precluded from considering these reports per 7 DCMR § 266.1 because the reports were not admitted into evidence at the formal hearing.

ORDER

The Compensation Order of December 11, 2007 is remanded for the ALJ to consider the March 29, 2007 and May 22, 2007 reports of Dr. Selya.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

May 22, 2008
DATE