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. 09-033

FLOYD C. WOODFORK,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Employer/Carrier–Respondent,

Appeal from a Compensation Order of
Administrative Law Judge Gerald D. Roberson
AHD No. 08-344, OWC No. 640037

George E. Swegman, Esquire, for the Petitioner

Mark H. Dho, Esquire, for the Respondent

Before AMELIA G. GOVAN, MELISSA LIN KLEMENS, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.[1]

AMELIA G. GOVAN, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 250, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Administrative Law Judges Klemens and Govan are appointed by the Director of DOES as Interim Board Members pursuant to DOES Administrative Issuances No. 09-02 (December 8, 2008) and 09-03 (January 29, 2009), respectively, in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

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). The Administrative Law Judge (ALJ) issued a Compensation Order on November 26, 2008, denying Petitioner's claim for payment of medical expenses related to bilateral knee surgery. The ground for the denial of benefits was the conclusion of the ALJ that the need for the proposed bilateral knee surgery is not medically causally related to Petitioner's June 12, 2007 work injury.

Petitioner filed an Application for Review (AFR) on December 22, 2008, seeking review of the Compensation Order. As grounds for this appeal, Petitioner alleges a medical report from his treating physician, Dr. Gaertner, was improperly excluded from consideration by the ALJ. Accordingly, Petitioner asks that the matter be reversed and remanded for consideration of Dr. Gaertner's October 3, 2008 report.

Respondent opposes this appeal, and asks that the November 26, 2008 Compensation Order be affirmed. Its position is that the ALJ properly denied Petitioner's request to submit Dr. Gaertner's October 3, 2008 report, and that there is ample record evidence to support the findings and decision below.

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 International v. District of Columbia Department of Employment Services*, 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.

In the subject Compensation Order, the ALJ specifically notes that "Dr. Gaertner failed to provide an opinion to address the issues of arising out of and medical causal relationship". *See* Compensation Order, p. 8. Petitioner alleges that the ALJ improperly excluded the October 3, 2008 report of Dr. Gaertner, and that the resulting determination is not based upon substantial record evidence. The parties do not disagree that the ALJ reached an appropriate conclusion based upon the evidence of record; "[t]he Administrative Law Judge's error occurred at the outset of the formal hearing proceedings and led inexorably to the finding ultimately reached which, based on the

evidence on the record, while arguably wrong, is not unreasonable ("based on the record evidence" is the crucial modifier). Petitioner, however, contends that Compensation Order should be remanded "for consideration of all relevant evidence offered at the hearing in this matter."

Review of the record indicates Respondent filed an Application for Formal Hearing which resulted in the issuance of a Scheduling Order. Pursuant to the July 11, 2008 Scheduling Order, "all documentary exhibits . . . . shall be served upon the opposing party, and submitted to AHD on or before September 10, 2008." Petitioner did file some exhibits timely, but the next day, Petitioner filed a letter submission requesting "the claimant be given leave to supplement his Exhibit 1, the medical records from Dr. Richard Geartner if additional **treatment notes** are received between this date and the formal hearing." (Emphases added.) At the start of the formal hearing, Petitioner requested leave to submit additional reports from Dr. Geartner.

When the formal hearing convened on October 7, 2008, Petitioner's counsel requested that the record be held open until the close of business that day for submission of a medical report by Dr. Gaertner. Hearing Transcript (HT) at 7. The employer objected to the request on the record as (1) being untimely pursuant to the Scheduling Order, and (2) being cumulative to the record already established by the Exhibits submitted by both parties. Citing the untimely character of the request, the ALJ denied Petitioner's request for leave to submit the additional report. Following the hearing, claimant submitted a letter dated September 11, 2008 with an attached medical response from Dr. Gaertner dated October 3, 2008.

Petitioner now asserts Dr. Gaertner's October 3, 2008 report was not available at the time exhibits were filed. Chronology bears out that a report purportedly generated on October 3, 2008 was not available on September 10, 2008; however, we take issue with the characterization of the October 3, 2008 report. This report is NOT updated treatment notes; it is an expert witness report that could have been and should have been obtained in time to comply with the Scheduling Order.

Mr. Swegman mischaracterizes the facts a bit when he says he "offered" the report at the hearing. The transcript reveals that he did not. Rather, he asked that the record be kept open to submit the report "by close of business". As such, he was not actually offering a report at the hearing; rather, he was asking that the record be left open to receive the report later. That is a matter to be left to the discretion of the ALJ, in the nature of a motion to adduce additional evidence, which should be decided based upon existing standards of relevance, materiality, and "unusual circumstances".

Petitioner filed a letter requesting leave to supplement his exhibits on September 11 (one day after exhibits were due) - that request did not include the supplemental exhibits, and the report in question did not exist at that time. The request to supplement was renewed at the formal hearing on October 7- the supplemental exhibits were not offered at that time. It was not until well after the formal hearing had been held that the supplemental exhibit was actually submitted. Following the October 7, 2008 formal hearing, Petitioner submitted Dr. Gaertner's October 3, 2008 medical report.

Petitioner acknowledges that "ordinary treatment notes from treating physicians rarely directly and specifically address legal issues of causation or disability as clearly as we in the legal community would like." If this is the case, then it is the role of the advocate to make sure the evidence needed

to succeed has been obtained, and obtained timely. Nonetheless (as Dr. Gaertner's report indicates), Petitioner did not request the report until October 1, 2008- well after the exhibit deadline in the Scheduling Order. [2]

Petitioner's renewed request to submit Dr. Gaertner's report post-hearing is an issue which must be addressed separately, as there is a specific test for post-hearing submissions. That test answers the core question of whether there exists some reason why the substance of the evidence could not have been produced at that time. If no such reason is given, denial of the request is proper. *See*, *Briscoe v. Pepco*, CRB No. 07-102, AHD No. 06-313, OWC No. 615289 (June 19, 2007).

As this Board has stated:

> . . . the mere fact that a report is not written prior to the date of a formal hearing is not sufficient, in a practical or legal sense, to justify reopening a record after a formal hearing, absent some showing that due to some unusual circumstance the relevant, non-duplicative substance of the evidence could not have been obtained prior to the formal hearing, with reasonable diligence on the part of counsel. These proceedings are for workers' compensation benefits allegedly due based primarily upon a claimant's medical condition and its effect upon a claimant's physical capacity for work. Counsel are well aware of this, and are under an obligation to seek and obtain such information that counsel believes is relevant to the inquiry in a timely fashion. *Grant v. National Associates*, CRB No. 08-139, AHD No. 05-254A, OWC No. 606489 and 607735 (June 26, 2008)

Thus, the mere fact that a new medical report is generated after the close of the record does not *ipso facto* render that report a proper subject for a reopened record, for the very reasons given by the ALJ in the instant case. Any such reopening necessarily would require, as a matter of fundamental fairness, that the employer be given a further opportunity to have the new evidence reviewed by its own independent medical experts (IME) for comment, and possibly even require additional IME physical examinations. If the newly obtained evidence represents evidence of something new or different about the claimant's condition as compared to the condition at the time of the formal hearing, then as the ALJ noted, it supports a request for a modification by resort to statutorily created avenues expressly fashioned to cover that circumstance; if not, the new evidence is presumably merely duplicative and redundant. *See, Cunningham v. Safeway*, CRB No. 08-218, AHD No. 08-233, OWC No. 646143 (November 7, 2008).

The Court of Appeals has required reopening of the evidentiary record for the receipt of additional evidence during the period between the formal hearing and issuance of the compensation order only upon a showing of unusual circumstances, and then only if it is determined that the evidence is material and relevant. *Young v. D.C. Dept. of Employment Services*, 681 A.2d 451, 456 (D.C. 1996). *See also, Jones v. D.C. Dept. of Employment Services, 584 A.2d 17, 19* (D.C. 1990). Therein, the Court affirmed the Director's interpretation of section 32-1520(c) and the regulation as requiring "a two-step" process. First, there must be the showing of unusual circumstances, and only then can the hearing be reopened for [the receipt of] material and relevant evidence. While the term "unusual circumstances" has not been explicitly construed, the purpose underlying the applicable test was

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[2] "Pursuant to your request of October 1, 2008, concerning a medical update report on your client and my patient, Floyd Woodfork, please review the enclosed." Claimant's AFR, Attachment 3.

articulated in *Young*, i.e. "to prevent a hearing from being reopened simply for the purpose of introducing new or additional evidence when that evidence could have reasonably been presented at the hearing."681 A.2d at 456. Thus the test becomes "whether 'reasonable grounds existed for not introducing [the evidence] at the initial hearing' and whether the evidence is material, i.e. whether it relates to the original claim for compensation." *Bennett v. D.C. Dept. of Employment Services, 629 A.2d 28, 30* (D.C. 1993)*, citing King v. D.C. Dept. of Employment Services, 560 A.2d 1067, 1073* (D.C. 1989)."

As the District of Columbia Court of Appeals has made clear, in non-administrative proceedings, all parties must take the necessary steps to complete discovery and prepare for trial within the time limits established by the scheduling order, which may not be modified except by leave of court upon a showing of good cause. *Dada v. Children's National Medical Center*, 715 A.2d 904 (D.C. 1998). Of course, in an administrative proceeding adjudicating a workers' compensation case, the presiding ALJ has broad discretion to determine all questions on procedure and evidence. See D.C. Official Code §§ 32-1525(a), 2-509; 7 DCMR §§ 221.3, 223.3.

Most recently, the Court of Appeals has upheld an ALJ's exclusion of medical evidence which was not timely filed pursuant to a Scheduling Order. *Ned Sinkavitch v. DOES (& Cardinal Construction)*, DCCA No. 07-AA-950, CRB No. 07-121 (November 3, 2008). There, the Court held that under circumstances in which (1) the party seeking to submit the exhibits had been issued, and failed to respond to, a show cause order granting a grace period for submission and (2) the ALJ allowed each party to depose a doctor of its choice, and indicated she would consider the opinions reflected in those depositions, it was "not persuaded that the ALJ committed error by excluding the exhibits".

As noted in *Geddie v. District of Columbia Department of Child and Family Services*, CRB No. 08-175, AHD No. PBL 07-074A, DCP No. 760006-0002-2005-0026 (September 11, 2008), although the ALJ is empowered to take affirmative steps to see to the acquisition of necessary evidence to make appropriate awards, taking such steps is not mandatory, and is at the discretion of the ALJ. *See Geddie*, p. 4. In the instant matter, the ALJ's denial of Petitioner's Motion was neither arbitrary nor capricious; rather, it was absolutely consistent with the Scheduling Order which governed the proceedings.

In the case at bar, this Panel finds no fault with the ALJ's decision to exclude Dr. Gaertner's October 3, 2008 medical opinion. Said decision concerns actions connected with the formal hearing processes before AHD. The record before us includes no indication that the Petitioner renewed the Motion for admission of the report prior to convention of the Formal Hearing, or moved for an extension of time to submit the report thereafter. This Board is empowered only to review the merits of a compensation order issued by AHD; it is inappropriate to review discretionary rulings regarding admission of evidence, especially when such rulings are consistent with the procedural strictures developed by AHD. *See Dada, supra*; *Sinkavitch, supra*; *Hensley v. Cheechi & Company*, CRB (Dir.Dkt.) No. 04-67, OHA No. 92-359B, OWC No. 115568 (August 17, 2006); 7DCMR §§118.2, 251.2, 266.2.

In this case, the ALJ explicitly asserted the absence of a record opinion, from the treating physician, addressing the issues of arising out of and medical causal relationship. Petitioner contends the excluded opinion of Dr. Graetner fully addresses those issues. However, exclusion of that opinion

was not an abuse of discretion. Accordingly, the finding that no such opinion exists is accurately supported by substantial evidence, rendering the conclusion in accordance with the law. There is ample specific, credible record evidence to support the decision to deny the requested surgery.

CONCLUSION

The conclusion of law and ruling in the Compensation Order that Petitioner's condition is not causally related to the work injury is in accordance with the law. Denial of the Motion for admission of Dr. Gaertner's October 3, 2008 medical report was not reversible error. The determination that there is no record medical opinion from the treating physician to address the issue of medical causal relationship is supported by substantial evidence, and is upheld.

ORDER

The denial of the claim for payment of medical expenses is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

/s/______________________________
AMELIA G. GOVAN
Administrative Appeals Judge

April 13, 2009__________________
DATE