

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. 03-34

JOSE GARCIA,

Claimant – Petitioner,

v.

SIBLEY MEMORIAL HOSPITAL,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA No. 00-235C, OWC No. 541932

Ivan Waldman, Esquire for the Petitioner

D. Stephenson Schwinn, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY AND SHARMAN J. MONROE, *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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹ Pursuant

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. Workers' Compensation Administrative Reform

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, which was filed on March 20, 2003, the Administrative Law Judge (ALJ), concluded that Claimant – Petitioner (Petitioner) did not sustain permanent partial disability to his lower extremities as a result of the work injury.

As grounds for this appeal, Petitioner alleges that the decision is contrary to the Director's previous findings of fact and conclusions of law. Employer responds asserting that the ALJ correctly concluded that Petitioner failed to meet his burden of proving the nature and extent of the alleged disability as the ALJ found Petitioner's testimony concerning his disabling leg pain not to be credible. In a supplemental filing, Respondent moved to strike Petitioner's Application for Review asserting it is untimely filed.²

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.

The procedural history of this case must first be summarized at this juncture. In a Compensation Order issued on August 2, 2002, Petitioner was denied permanent partial disability benefits to his lower extremities because the ALJ did not accept Petitioner as a credible source with respect to the nature of his leg problems, thus the ALJ rejected the opinions of his treating physician which were based upon Petitioner's complaints. Following Petitioner's appeal to the Director of the Department of Employment Services (the Director), the Director issued a Decision and Remand

and Anti-Fraud Amendment Act of 2004.

2. In that Petitioner's request for review was received by the Director's office on March 14, 2003, Petitioner's appeal was deemed to be timely and Respondent's Motion to strike Petitioner's Application for Review is hereby dismissed.

Order of the Director on February 11, 2003. In that order the Director concluded the ALJ's credibility findings were not supported by substantial evidence, therefore his determination that Petitioner did not sustain a permanent partial disability to his legs as a result of his work-related injury is not supported by substantial evidence. The Director reversed the Compensation Order and remanded the matter to the ALJ to make findings of fact and conclusions of law on the nature and extent of Petitioner's disability, if any, and whether he is entitled to reasonably related medical expenses and accrued interest on benefits.

On remand the ALJ denied Petitioner's benefits again concluding:

. . . the treating physician expressed an opinion which was based upon and dependent upon the description by the [Petitioner] of his physical symptoms, which I conclude is not credible, and therefore his opinion is fatally flawed and [petitioner] has as a result failed to meet his burden of demonstrating by producing (sic) 'substantial credible evidence that he or she has a disability entitling [him] to the requested level of benefits' under *Dunston*³, *supra*. I therefore find that claimant has failed to establish that he has sustained any permanent partial disability for loss of industrial use of either leg.

Compensation Order, at 5.

The ALJ explained in his discussion that Petitioner described the location of the pain that he claimed was disabling him at the formal hearing, physically pointing to the front of his legs and not the rear of as he described to his treating physician, Dr. Lopez for two years. The ALJ included that Petitioner's testimony and demonstration at the Formal Hearing "witnessed by the undersigned, described by the undersigned on the record, which description was not observed by the Director nor mentioned in his Decision were completely at a variance with the medical record developed in support of his claim. Claimant may just as well have pointed to his nose". CO at 4.

It is well settled in this jurisdiction, when faced with contradictory testimony, the ALJ evaluates the credibility and demeanor of witness and draws conclusions based on that evaluation. Moreover, as the Court of Appeals has emphasized, it is widely accepted that when a fact finder's conclusions are based on credibility findings those conclusions are entitled to great weight. *Dell v. Department of Employment Services* 499 A.2d 102(D.C. 1985).⁴ The Panel finds the ALJ's determination to be based solely on the credibility of the Petitioner who appeared and testified before the ALJ and given the deference accorded the fact finder's credibility findings, *Dell, supra*, the Panel finds no error on the ALJ's part for rejecting the opinion of the treating physician because it was based on Petitioner's inconsistent account of his alleged pain and symptoms.

³ See *Dunston v. Department of Employment Services*, 509 A.2d 109 (D.C. App. 1986).

⁴ In a more recent decision, the Court of Appeals has relied on language used by the Superior Court of New Jersey in the matter of *Ferdinand v. Agricultural Insurance Co.*, 22 N.J. 482, 126 A.2d 323 (N.J. 1956), "Where men [or women] of reason and fairness may entertain differing views as the truth or the testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the trier of fact. See *Georgetown University v. District of Columbia Department of Employment Services*, 862 A.2d 387 (D.C. 2004).

CONCLUSION

The ALJ's conclusion that Petitioner did not sustain permanent partial disability to his lower extremities as a result of the work injury is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order issued on March 10, 2003 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

May 1, 2006

DATE