

**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 No. 07-06**

**GEORGE MERRIWEATHER,**

**Claimant –Petitioner**

**v.**

**BLIND INDUSTRIES & SERVICES AND HARTFORD INSURANCE, Co.,**

Employer/Carrier – Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
AHD No. 04-292, OWC No. 590501

Heather C. Leslie, Esquire for the Petitioner

Kathryn S. McAleer, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

FLOYD LEWIS, *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).<sup>1</sup>

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<sup>1</sup> 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 2004, Title J, the D.C. 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. Code Ann. §§ 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 and Anti-Fraud Amendment Act of 2004.

## BACKGROUND

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). In that Compensation Order, which was filed on September 27, 2006, the Administrative Law Judge (ALJ) denied the request for benefits by Claimant-Petitioner (Petitioner) concluding that there was no medical causal relationship between Petitioner's breathing problems and the conditions in the workplace of Employer-Respondent (Respondent). Petitioner now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

## 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. D.C. Official Code §32-1522(d)(2). "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 scope 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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is erroneous, contending that his disability is medically causally related to the accidental injury and that he is temporarily totally disabled. Respondent counters that the Compensation Order is in accordance with the law, there is substantial evidence to support the denial of Petitioner's claim and the Compensation Order should be affirmed.

In the instant matter, Petitioner began working as a stock clerk for Respondent in the Department of Interior, in January of 2003. Petitioner alleges that on March 4, 2003, he began to suffer from a cough, had trouble talking and at times, he felt as if he was choking. He continued to work, but he sought medical treatment from his physician and on July 12, 2003, Petitioner stopped working.

In support of his claim for relief, Petitioner testified that while working in this position for about two and a half months, he was required to dust, clean and empty dirty and moldy boxes. In addition to his testimony that he was required to go to the loading dock where there was smoke, he complained that there was construction throughout the building and there was poor ventilation in the building, which exacerbated his lung condition.

In support of his claim, Petitioner submitted the reports of his treating physician, Dr. Mark Rosen, who noted that Petitioner had coughing, dizziness and difficulty breathing, but who also stated that the cause of Petitioner's condition was unknown. Petitioner's exh. no. 3. It should be noted that the ALJ specifically found that Dr. Rosen's reports were of little or no probative legal value. Dr. Rosen referred Petitioner to Dr. Jay Weiner, a pulmonologist, who opined that Petitioner had mild chronic obstruction of the bronchial tubes and he could work as a stock clerk, as long as he was not exposed to any significant dust. As such, the ALJ found that Petitioner presented evidence sufficient to invoke the presumption of aggravation of his lung condition, evidenced by coughing, choking and an alleged exposure to smoke, dust and mold in Respondent's workplace.

To rebut Petitioner's claim, Respondent argued that there was no job-related event or ongoing condition that would have exacerbated Petitioner's pre-existing lung condition, as Respondent contended that Petitioner's two and a half month stay in the workplace did not expose him to the dust and mold, which would exacerbate his lung and pulmonary problems.

In addition, to medical evidence, Respondent presented the testimony of Mr. Juan Brock, Petitioner's supervisor, who indicated that the shipping boxes were new and in good condition, that the ventilation system, which was not near the supply store work area, emitted only cold air and that Petitioner was sent to the "fully covered" loading dock to retrieve supplies on only "one" occasion. He emphasized that none of the other workers in the supply store work area complained about the conditions. Mr. Brock also stated that the employees were exposed to no more than light dust and concerning asbestos, he referred to the Department of Interior's Office of Policy, Management and Budget testing, which found that "asbestos exposures to employees in the (DOI) cafeteria, patrons of the cafeteria or employees in the building . . . have been negligible." Hearing transcript at 78, 79, 91.

Moreover, Petitioner testified and the ALJ found, that during the first half of 2003, the bathroom in Petitioner's home was being renovated due to leakage seeping through the wall from the hallway next to his apartment. In order to carry out the repairs and renovations, there was drywall work done in Petitioner's apartment, in the adjacent hallway and in other parts of the building.

In support of its position, Respondent presented the independent medical examination report and deposition of Dr. Ross Myerson, who stated that there is no evidence that Petitioner's condition was work related or that he had experienced harmful exposures at work. Dr. Myerson emphasized that although Petitioner stopped working for Respondent in July of 2003, he continues to have respiratory complaints, noting that Petitioner has a long history of significant tobacco use and is exposed to second hand smoke at home, as his wife is a smoker.

In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Dep't. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dep't. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992). Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers' compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons

for rejecting the testimony of the treating physician. *Canlas v. Dep't. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995).

In his appeal, Petitioner argues that Dr. Myerson's report is inherently unreliable because Dr. Myerson testified that he did not know the exact levels of dust in Petitioner's workplace. However, as Respondent points out, none of the doctors were aware of the exact levels of dust in Petitioner's workplace and Respondent specifically noted that Dr. Myerson stated in his deposition that "every setting that you are in has dust in it, small particulate matter that come off of the things in the room . . . as opposed to . . . working in a sand pit or working in a manufacturing setting." Dr. Myerson agreed with Dr. Weiner that Petitioner was able to work as a stock clerk, but that he should not work in a workplace that is in a dusty environment. As Dr. Myerson stated, "Dust is ubiquitous. So the issue is should this man work in a dusty environment, a dusty trade." Respondent's exh. 3 at 50-51. Respondent points out that Petitioner did not work in a dusty environment, but in a supply store, located in a cafeteria.

Petitioner also alleges that Dr. Myerson's attribution of Petitioner's problems to his smoking is not reliable because Dr. Alan Schneider, on May 4, 2004, noted that Petitioner's current lung problems were new. However, as Respondent points out, Dr. Schneider's letter was written approximately ten months after Petitioner had ceased working for Respondent, and as such, Respondent argues that this letter does not establish a causal relationship and does render the assessment by Dr. Myerson unreliable. Moreover, as Respondent emphasizes, the assessment by Dr. Myerson is supported by the opinion of Dr. Weiner, who noted that Petitioner's exposure to second hand smoke at home is a cause of his problems.

In relying on Dr. Myerson's opinion, the ALJ quoted from Dr. Myerson's report:

He has a 55 year pack history of smoking and is currently exposed to 2<sup>nd</sup> hand smoke at home. . . There is no evidence in the medical records that this condition is work related or that he has experience (sic) deleterious respiratory exposures at work. He has a long history of significant tobacco abuse which is likely the major factor in his respiratory symptoms. His physician, Dr. Weiner, expressed in a report dated April 24, 2003 that he does believe [Petitioner] can work as a stock clerk. I agree with that assessment.

In ultimately relying on Dr. Myerson, the ALJ stated:

In the instant case, claimant offered an array of causes for his medical problems ranging from asbestos and dust through moldy, rotting boxes delivered by UPS to a rug being taken up in the DOI cafeteria. The result is that claimant's case is fraught with inconsistencies which are mirrored in the various opinions of his doctors. The one consistent thread which can be found in all the medical opinions in the record is that claimant can work as a stock clerk

. . . After careful review and consideration of his opinion as stated on the record, particularly as stated in detail in his deposition, I find Dr. Myerson's conclusions to be persuasive and supported by the record evidence as a whole.

Compensation Order at 8.

The CRB, in great detail, has reiterated how it is quite proper to reject the opinion of the treating physician if persuasive reasons are given to accept a conflicting medical opinion submitted by an employer. *Taylor v. Verizon Communications, Inc.*, CRB No. 05-232, OHA No. 03-216B, OWC No. 571165 (June 16, 2005). After reviewing the record, it is clear that the ALJ detailed the reasons for rejecting the opinion of Petitioner's treating physicians, in favor of the views of Dr. Myerson. As a result, there is no reason to disturb the ALJ's determination on this issue.

Accordingly, after a complete review of the evidence of record, this Panel can find no error in the conclusions reached by the ALJ in this matter, as they are supported by substantial evidence and are in accordance with the law.

#### CONCLUSION

The Compensation Order of September 27, 2006 is supported by substantial evidence in the record and is in accordance with the law

#### ORDER

The Compensation Order of September 27, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS  
Administrative Appeals Judge

January 31, 2007  
DATE