

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. 07-060

GERMAINE WHITFIELD,

Claimant–Respondent,

v.

HOWARD UNIVERSITY HOSPITAL,

Self-Insured Employer–Petitioner,

And

GERMAINE WHITFIELD,

Claimant-Respondent,

v.

HADLEY MEMORIAL HOSPITAL

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA/AHD Nos. 03-309 and 03-291, OWC Nos. 584319 and 555289, Consolidated for formal
hearing by order of AHD/OHA

William H. Schladt, Esquire, for the Petitioner

Allen J. Lowe,¹ Esquire, for the Claimant-Respondent

Jeffrey W. Ochsman, Esquire, for Self-Insured Employer-Respondent

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

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

¹ Although Claimant-Respondent was previously represented by Neil Fagan, Mr. Lowe has replaced Mr. Fagan as counsel in these proceedings.

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).²

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand issued February 13, 2007, which resulted from a remand by CRB of a prior 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 prior Compensation Order, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Claimant's) claim against Self-Insured Employer-Petitioner (Petitioner), over the objection of Petitioner and its claim that liability for any benefits sought rests upon Self-Insured Employer-Respondent (Respondent) for temporary total disability benefits and causally related medical care. Petitioner sought review of that Compensation Order.

As grounds for that first appeal, Petitioner alleged as error that the finding that Claimant's current medical condition and the related claimed disability rests upon Petitioner was unsupported by substantial evidence in the record and was not in accordance with the Act. Petitioner further contended that the award of temporary total disability benefits was not in accordance with the law, in that Claimant had failed to produce sufficient evidence in rebuttal of Petitioner's showing of availability of suitable alternative employment under *Logan v. District of Columbia Dep't. of Employment Services*, 805 A.2d 237 (D.C. App. 2002).

Respondent opposed the prior appeal, asserting that the ALJ's decision in the Compensation Order, as it related to the assigning of responsibility for the claimed disability and medical care, was supported by substantial evidence and was in accordance with the law.

Claimant opposed the prior appeal, asserting that the Compensation Order was supported by substantial evidence and was in accordance with the law.

²Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, 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 Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Following consideration of the issues raised in the prior appeal, the CRB determined that there was in evidence a single medical report submitted by Petitioner which a reasonable person might accept as sufficient to establish that the complained of injury was not causally related to Claimant's employment with Petitioner, and that the ALJ's conclusion that the presumption of causation had not been rebutted was erroneous. Accordingly, the CRB concluded as follows:

The Compensation Order of October 14, 2003 is not in accordance with the law in that the ALJ failed to recognize that Petitioner had produced substantial evidence that the complained of injury and disability was not causally related to the second injury, which evidence, if accepted, would possibly obviate Petitioner's liability for the benefits sought and awarded.

Decision and Order, August 10, 2005, "Conclusion", page 8. The CRB then ordered as follows:

The Compensation Order of October 14, 2003 is affirmed in part and reversed in part, and is remanded with instructions that on remand, Petitioner's evidence and Respondent's evidence be weighed, without reference to any presumptions, and liability for the claimed relief be assigned in accordance with the aggravation rule, if appropriate, in light of the foregoing discussion.

Decision and Order, "Order", page 9. On remand, the ALJ reconsidered the evidence, and on February 13, 2007, issued a Compensation Order on Remand, in which the ALJ again reached the conclusion that the injury complained of by Claimant was the result of an aggravation of a prior injury, the prior injury having been sustained while Claimant was employed by Respondent, but the aggravation thereof having occurred while Claimant was employed by Petitioner.

On March 13, 2007, Petitioner filed an Application for Review of the Compensation Order on Remand, to which Claimant and Respondent both filed oppositions. In addition, Claimant filed an objection to Petitioner having attached to its memorandum in support of its Application for Review a Brief and accompanying Proposed Findings of Fact and Conclusions of Law, to which objection Petitioner filed a response.³

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

³ Petitioner also filed a Response to Claimant's Opposition to Application for Review, and a Response to the Opposition of Respondent to Petitioner's Application for Review. Because the CRB did not request these further submissions, and because such further submissions are, in the absence of such a request by the CRB, not authorized by the Act, we decline to consider them.

might accept to support a particular conclusion. *Marriott Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 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.

Before addressing the merits of the appeal, we first turn to the dispute relating to the Brief attached to Petitioner's Application for Review.

We have reviewed the Brief itself, and have concluded that it consists largely, if not entirely, of arguments relating to the weight that Petitioner believes should be attached to various evidentiary items, which subject is properly directed to the ALJ but is not a proper matter for CRB's consideration. Similarly, the Proposed Findings of Fact and Conclusions of Law is merely Petitioner's "wish list" of how it would have liked the ALJ to have ruled, and does not contain legal argument in a format that is relevant to our role in considering this appeal. Accordingly, we will not consider those items, and will limit our review of this case to the record evidence, the Compensation Order on Remand, the Application for Review and Memorandum of Points and Authorities in Support thereof, and the oppositions thereto filed by Claimant and Respondent.

Turning to the case under review herein, Petitioner's first complaint appears to be that, because the ALJ did not make specific reference to the contents of the aforementioned Brief and Proposed Findings of Fact and Conclusions of Law in the Compensation Order on Remand, the ALJ must have failed to review or consider them, and that such a failure constitutes reversible error as a matter of law.

First, Petitioner cites no authority for the remarkable proposition that a failure to discuss in detail each specific argument made by a party relative to the weight of any particular piece of evidence is error, and the even more remarkable proposition that such error is as a matter of law fatal to the vitality of the fact finding process. Second, our role in reviewing the Compensation Order on Remand is to determine whether the ALJ has carried out the directive in the Decision and Order, and to determine whether in doing so the ALJ's factual findings are based upon substantial evidence and if the legal conclusions based thereon are in accordance with the law. Except in certain limited instances, such as those dealing with the rejection of the opinion of a treating physician, there is no obligation for the ALJ to explain why a particular piece of evidence was or was not accepted; what is required is that the findings made are supported by substantial evidence, and it matters not whether there is additional substantial evidence that would support a contrary conclusion or factual finding. Lastly, we have no reason to believe that merely because an ALJ fails to mention specifically any particular argument that it was not considered, and we decline to make such an assumption.

Petitioner also alleges that the ALJ failed to carry out the mandate of the CRB's remand order, by not engaging in a discussion and analysis as to whether Claimant's condition is an aggravation of a prior injury (and hence assignable to Petitioner's employment) or merely a flare up of that prior injury (and hence remaining the obligation of the prior employer, Respondent herein). Petitioner asserts that it is "clear" from the contents of the CRB order that such an analysis is required.

Petitioner fails to cite anything in the CRB order that specifically directed that the ALJ address in those terms the nature of the claim before her. Review of the CRB order reveals, immediately after quoting from the single medical record supporting Petitioner's argument concerning the lack of a connection between the Claimant's employment with Petitioner and her current condition, the following discussion:

We cannot say that this passage is consistent with the conclusion that Dr. Jackson is not of the opinion that the second injury appeared to him to be transitory and short lived strain which has no impact upon the underlying cervical problems which predated the second injury and which did not aggravate that condition on a permanent basis, at least as of the time of the examination. Otherwise put, we do believe that a reasonable person might conclude, based upon that report, that the second injury eventually ceased to be of medical significance upon the resolution of the cervical strain caused in the second injury. It is, in other words, substantial evidence in opposition to the presumed relationship between the second injury and the complaints presented at the time of the formal hearing.

We do not mean to suggest that it is controlling, nor do we discount the possibility that upon further consideration of the record, the same ultimate conclusion could be reached. However, on this record, we do believe that Petitioner has overcome the presumption that the injury complained of at the time of the formal hearing was related second work incident.

This is a case in which the central issue between the parties is whether the second injury included within its effects an aggravation of the first injury such that the second injury contributes to the need for surgery and the claimed disability. Dr. Jackson's report can most easily be read to support a negative conclusion. As such, the evidence must be evaluated on the record as a whole.

Decision and Order, "Discussion". The CRB's order, taken together with the cited Discussion, required that the ALJ weigh the medical evidence without the benefit of a presumption that Claimant's employment with Petitioner is the cause of Claimant's disabling condition. While such consideration certainly could have been couched in terms of "flare up" versus aggravation, it need not be so parsed.

It is sufficient for the ALJ to have considered the evidence before her and to have reached a conclusion as to whether the current complaints are an aggravation by her employment with Petitioner of an earlier condition initially caused by Claimant's employment with Respondent, and this she did, in a detailed, methodical and logical manner, by first identifying the "four physicians who examined claimant after she sustained the 2002 injury and were asked or proffered their opinions with regard to the causal relationship between claimant's disability and the two work injuries" (Compensation Order on Remand, page 5), and analyzing each such opinion *seriatim*. At the conclusion of this review, the ALJ concluded that "Of the four examining physicians, only Dr. Hanley has provided an unequivocal opinion with regard to the cause of claimant's claimed disability" and that "Having examined claimant both before and after the July 20, 2002 injury, Dr.

Hanley is in the best position to render an opinion with respect to the causality of claimant's disability which he did without hesitation in his report of November 7, 2002 and in his addendum of January 9, 2003. Inasmuch as Dr. Hanley's credentials as an orthopaedic surgeon have not been questioned, Dr. Hanley's unequivocal opinion outweighs the remaining opinions of record. Accordingly, it is concluded that claimant's present disability is causally related to the aggravation of her pre-existing condition that occurred on July 20, 2002 while employed with [Petitioner] Howard." Compensation Order on Remand, page 6.

While Petitioner makes a cogent argument about the opinion of Dr. Hanley in the addendum cited by the ALJ, in which Dr. Hanley wrote that "one would conclude that the need for surgical intervention is due to her original injury of May 24, 2000, and that the most recent injury July 20, 2002 did not lead to additional disc herniation and, therefore, it is not a proximate cause for surgical intervention. It was the approximate [sic] cause, however, for her most recent flare up and need for temporary disability" (quoted in Petitioner's memorandum, page 6), we note that the ALJ was careful to state that her view of the evidence was that Dr. Hanley's opinion as to the cause of the claimed "disability", being the work injury sustained while employed by Respondent, was the most convincing. The ALJ acknowledged thereafter that the evidence demonstrated a condition caused by the prior injury, which is obviously the disc herniation discussed by Dr. Hanley in his addendum, that had caused Claimant and her physicians to consider surgery even prior to the work injury sustained while employed by Petitioner. However, the ALJ also made clear that Claimant had decided to proceed with the surgery only after the symptoms in her neck became worse as a result of the aggravation sustained while employed by Petitioner. Thus, Dr. Hanley's opinion, that the "cause" of the need for surgery is not the later aggravation is a semantic difference; that is, the ALJ determined, based upon Claimant's testimony, that the level of symptoms suffered prior to the aggravation was such that she could live without the surgery, but thereafter because of the aggravation, in Claimant's view, surgery was no longer "optional". Compensation Order on Remand, page 7. Thus, the "cause" of the need for surgery was found to be the combined effects of the pre-existing herniation and the increased symptoms caused by the aggravation.

Regarding Petitioner's other complaints about the ALJ's evaluation of the medical evidence, we note that they consist of arguments, some better than others, as to why the ALJ should have interpreted those reports differently than she did, or accorded them more weight than she did. These determinations as to the weight to be accorded competing evidence are for the ALJ and will not be disturbed by us.

We note, parenthetically, that the arguments relating to the opinions of Dr. Gordon are based upon the purported contents of a deposition that, as far as we can tell, was not offered into evidence at the formal hearing and was not admitted into the record during the remand proceedings. We have no motion to reopen the record before us, have been given no reason why the deposition testimony could not have been obtained prior to the formal hearing, and see no reference to any such motion having been made to the ALJ while the remand was pending. We will not consider its contents in this appeal.⁴

⁴ The deposition of Dr. Gordon taken in 2003 is in the record as ER 14; however, the deposition referred to by Petitioner was taken in 2006.

CONCLUSION

The Compensation Order on Remand of February 13, 2007 is supported by substantial evidence in the record, comports with the directive of the CRB in the Decision and Order of August 10, 2005, and is in accordance with the law.

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ORDER

The Compensation Order on Remand of February 13, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 4, 2007
DATE