

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. 08-026

HERBERT WILLIAMS,

Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION,

Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. PBL 07-029, PBL/DCP Nos. 761013-0001-2005-0007

Gail L. Elkins, Esquire, for the Petitioner

Harold L. Levi, Esquire, for the Respondent

Before: JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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).¹

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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October

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, 2007, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Respondent's) claim for temporary total disability benefits and causally related medical care for injuries sustained to the left arm and hand, and the left knee and leg, found to be related to an agreed upon work related injury having been sustained on April 19, 2005. Petitioner now seeks review of that Compensation Order by filing an Application for Review on October 29, 2007, with supporting memorandum filed November 13, 2007.

As grounds for this appeal, Petitioner alleges as error that (1) although Petitioner contested the causal relationship of the left hand and arm condition to the work injury, which condition Petitioner never accepted as compensable and never paid benefits in connection therewith, the ALJ found a causal relationship to exist without sufficient evidence and failed to impose the proper legal burden of proof upon Respondent to show such a relationship, (2) the ALJ's finding that Respondent has sustained a meniscal tear in the left knee is unsupported by substantial evidence, and (3) the ALJ erred in not "remanding" the matter "to ORM/DCP" for additional medical evaluation.

Respondent opposes the appeal, arguing that the facts as found by the ALJ are supported by substantial evidence and the conclusions based thereon, and the benefits awarded, are in accordance with the law.

Because the factual finding that Respondent suffers from a meniscal tear in the left knee is supported by substantial evidence, it is affirmed. Because Petitioner has presented no argument in opposition to the award of temporary total disability benefits relating to the left knee condition, the award of said benefits is affirmed. Because the ALJ failed to properly address the issue of a causal relationship between the left hand/arm condition and the work injury, the award of medical benefits in connection with that condition is not supported by substantial evidence and is reversed, and the matter is remanded to AHD for further consideration of that issue based upon the record.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is

1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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, 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 first complains that the award of benefits, in the nature of medical benefits, for the left hand and arm, is not in accordance with the law, because Petitioner asserts that it never accepted that aspect of the claim as compensable, has never provided benefits in connection therewith, and thus the ALJ's application of the burden of proof standards set forth in *Toomer v. District of Columbia Department of Corrections*, CRB No. 05-202, OHA/AHD No. PBL 98-048A, DCP No. LT5-DOC001603 (May 2, 2005)² was erroneous and improperly relieved Respondent of the burden of proving by a preponderance of the evidence that the condition is causally related to the work injury, and instead placed upon Petitioner the obligation to demonstrate a change of conditions warranting a modification of a prior award.

Review of the preliminary discussion held on the record at the time of the formal hearing reveals that the issues were identified with less than ideal precision. At HT 7, the ALJ states "Counsel, it is my understanding both from the pre-hearing order and from our discussion prior to going on the record that the issues to be resolved at hearing today are causal relationship to current condition and whether Claimant's benefits have been properly terminated by Employer, which essentially is nature and extent. Is that correct ... ?", to which both counsel responded affirmatively and without further comment, until HT 14 where, in her opening statement, Petitioner's counsel stated "From Employer's perspective, Your Honor, this is a claim for restoration of medical benefits. Claimant has alleged that on April 19, 2005, he fell and injured his left knee. He has also claimed that he injured his left hand. However, the record will show that Claimant did not seek treatment for his left hand until well after the reported injury. So, it's our position that the left hand is not related."

The description of the issues by the ALJ is problematic in several respects. First, what the "current condition" that is at issue is not described, despite there being three identified areas of claimed injury, i.e., the left hand and arm, the right arm, and the left knee and leg. Second, the statement describing something as being "essentially nature and extent" is vague and confusing. One can not discern whether the ALJ was including all that preceded it (i.e., "causal relationship to current condition and whether Claimant's benefits have been properly terminated by Employer"), or merely the segment of that language immediately preceding "essentially" (i.e., "whether Claimant's benefits have been properly terminated by Employer") as being "essentially nature and extent". Lastly, "nature and extent" of disability, on the one hand, and the existence of a medical causal

² *Toomer* established that the CRB would continue to apply the longstanding rule previously enunciated by the now abolished Employee's Compensation Appeals Board (ECAB) in *Chase v. District of Columbia Department of Human Services*, ECAB No. 82-9 (July 9, 1992), and later adopted by the Director of the Department of Employment Services (DOES) in *Jones v. District of Columbia Department of Corrections*, Dir. Dkt. No. 07-99, OHA No. PBL 97-14, ODC No. 312082 (December 19, 2000), among other cases. Under that rule, once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the burden of proof which normally rests with a claimant to establish a causal relationship between a condition and the claimant's employment is shifted to the employer to demonstrate a change of conditions has occurred sufficient to terminate or otherwise reduce those benefits.

relationship between a claimed disability and a work injury on the other, are two distinct, separate issues, which are not “essentially” the same thing.

However, when read together with the comments of Petitioner’s counsel as described in the opening statement, it is apparent that at least Petitioner assumed that the causal relationship of the claimed left arm and hand condition to the work injury was an issue to be resolved, and that it was basing its defense to that issue upon the fact that at the time the claim was accepted, it was unaware of any claim that the injury involved left hand and arm complaints, and that they never paid benefits based upon such a condition.

The record in this case contains the notice sent by Petitioner to Respondent on December 22, 2005, in which the first substantive sentence reads “Your Disability Compensation Claim is hereby ACCEPTED”, immediately following which appears the sentence “As a Facility Manager, you were visiting a site in response to a request from citizens for Cleanup. While walking, you tripped on vines and fell. As a result, you injured your left knee.” EE 4A. This document represents the “acceptance” of the claim, and that acceptance is clearly limited to the injured left knee.

While it is true that the telephone report of accidental injury in the record contains reference to a right arm injury³, it does not contain any reference to a left arm or hand injury. See EE 1 A.⁴ The claim acceptance having within it reference only to an injury to the left knee⁵, the record contains no evidence that we have seen that would support a foundation for application of the *Toomer* standard to injuries claimed beyond those described as being accepted in the notice that exists for the purpose of advising as to what claim has been accepted. Thus, the ALJ’s application of that standard does improperly provide Respondent with the benefit of a presumed relationship between the work injury and the claimed condition, which presumption does not exist under the public sector Act.

Because the ALJ improperly applied the *Toomer* standard to a claim that the record fails to demonstrate has been previously accepted and resulted in payment of benefits, that portion of the Compensation Order awarding benefits for injuries to the left arm and hand is not in accordance with the law, and must be reversed. On remand, the ALJ is to consider the claim for injuries to the left hand and arm without reference to any need to on the part of Respondent to demonstrate a

³ The ALJ’s reliance upon reference to an arm injury in concluding that the left arm injury had been reported initially is, on this record and without more explanation in the Compensation Order, clearly erroneous, in that the document submitted by the creator and custodian of that report, EE 1A, contains reference only to a right arm injury. See footnote 4, *post*.

⁴ The copy of this exhibit submitted by Respondent appears to have a line through “right”, with a superscripted handwritten “L” above it. These alterations are not evident in the copy submitted by Petitioner at the hearing, and the source of the alterations existing in Respondent’s exhibit is nowhere explained in the record or discussed in the Compensation Order.

⁵ We hasten to note that this decision should not be read to mean that, in all cases and in every instance, the description of the injury contained in notices such as that in the record in this case is dispositive on the issue of whether a claim for a particular injury has been accepted. Other factors could lead to a conclusion that such an acceptance has occurred, such as payment of medical bills or wage loss benefits that are demonstrably attributable solely to an injury not specifically listed in a notice of claim acceptance. However, we have seen no such evidence in this record, and Respondent points us to none.

change in condition, or any of the other requirements for modification of accepted awards as set forth in D.C. Code § 1-623.24 (4), in that said section applies only where an award is sought to be modified, and does not apply in the absence of an award.

Regarding the second contention of error, Petitioner's own argument demonstrates why the ALJ's decision regarding the existence of a meniscal tear must be upheld. Petitioner writes "Of the 4 medical personnel whose reports or opinions are of record, only Dr. Azer [a treating physician] opined definitively that Claimant sustained a left meniscal tear". Memorandum of Points and Authorities in Support of Application for Review, page 7. That is enough to sustain the factual finding, despite Petitioner's arguments that the other evidence outweighed that finding. The weight to be accorded conflicting evidence is a matter that is within the sound discretion of the ALJ, and will not be disturbed by us on appeal, even where we might have reached a contrary conclusion.

Lastly, regarding Petitioner's suggestion that "at the very least" the ALJ should have "remanded" the matter to DCP for further medical evaluation, we do not understand by what authority an ALJ in DOES could "remand" a matter to another governmental agency with instructions directing that it take specific actions relating to the administration of a claim. DOES's role in this and all cases under the Act is adjudicatory only, and is merely to ascertain the rights of the parties with respect to claims for benefits; we have no authority beyond that, and specifically we have no authority to find anything beyond whether on a given record a claimant is entitled to receive specific claimed benefits.

CONCLUSION

The Compensation Order of September 27, 2007 is supported by substantial evidence in the record and is in accordance with the law, to the extent that the ALJ found that Respondent has sustained a meniscal tear to the left knee and is entitled to medical benefits in connection therewith. The Compensation Order of September 27, 2007 is not supported by substantial evidence in the record and is not in accordance with the law, to the extent that the ALJ placed the burden upon Petitioner to demonstrate entitlement, under D.C. Code § 1-623.24 (4), to modification of an award for benefits relating to injuries to Respondent's left hand and arm, in the absence of any such award having been previously made and in the absence of benefits having previously been paid in connection therewith.

ORDER

The Compensation Order of September 27, 2007 is affirmed to the extent that it found that Respondent has sustained a left meniscal tear and awarded benefits therefore; and is reversed and remanded for further consideration consistent with the foregoing Decision and Remand Order regarding the claim for injuries to the left hand and arm.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 13, 2007
DATE