

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. 07-162

HORACE HENSLEY,

Claimant–Petitioner,

v.

CHEECHI & COMPANY AND ATLANTIC MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. 92-359H, OWC No. 115568

Horace Hensley, *pro se* Petitioner

Alan M. Carlo, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

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 §§ 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).¹

¹Pursuant 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

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 August 31, 2007, the Administrative Law Judge (ALJ) denied Petitioner's claim for awards under the schedule for permanent partial disability to both legs and both arms. Petitioner filed an Application for Review (AFR) on September 27, 2007² seeking review of that Compensation Order.

Because the submission of Petitioner is somewhat disjointed, is broken into a series of declarative statements, punctuated with quotations from exhibits, prior Compensation Orders (some of which are final, others of which are currently in one stage or another of appellate review) and statutory, regulatory and decisional sources of greater or lesser relevance, it is difficult to discern precisely what specific legal or factual errors he asserts are contained in the Compensation Order under review. However, close reading of the submission suggests that Petitioner's complaints can be characterized as follows:

1. The denial of the awards under the schedule was based upon a finding by the ALJ that the complaints and conditions in those extremities are not causally related to the work injury. Such a finding is contrary to the law of this case under principals of *res judicata*, was made without giving due deference to the presumption under *Whitaker v. District of Columbia Department of Employment Services*, 531 A.2d 844 (1995), that a disability is causally related to the work injury, and is unsupported by substantial evidence.
2. The ALJ failed to address a request for recalculation of his average weekly wage for compensation purposes. That failure to address said claim constitutes a failure of the Compensation Order to be supported by substantial evidence; the failure to recalculate the average weekly wage as requested is alleged to be contrary to law.
3. The ALJ failed to address a claim or claims for outstanding medical bills, which failure, as with the claim for recalculation of average weekly wage, renders the Compensation Order unsupported by substantial evidence.
4. The ALJ committed reversible error by admitting into evidence and considering the contents of videotaped surveillance of Petitioner's activities which Respondent argued was rebuttal or impeachment evidence.
5. The ALJ's failure to consider a post-hearing submission of records relating to a Social Security Administration disability award was erroneously based upon the ALJ's belief that Petitioner was capable of presenting said evidence at the formal hearing yet failed to do so. In fact, Petitioner was so medicated at that time that he was unable to adequately represent himself, and the evidence should be admitted.

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.

² On September 12, 2007, Petitioner filed a letter entitled "Request for Extension of Time for Submission of Application for Review", seeking an unspecified extension of time within which to file the AFR, for medical reasons related to surgery undertaken on August 23, 2007 requiring a one night hospital stay with discharge on August 24, 2007. Given that Petitioner subsequently filed a timely AFR, the requests made in that letter are denied as moot.

6. The ALJ was wrong to analyze this case under the framework of a modification request and considering whether there has been a change of conditions since the prior Compensation Orders, warranting a review pursuant to *Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (1988) to determine whether there is some evidence of such a change, and was wrong in concluding that there was no such evidence of such a change.

Respondent opposes this appeal, arguing that the issue of causal relationship of the extremity conditions and disabilities have not previously been litigated, and asserting Respondent's "contention" that "the difficulty with the extremities is the natural progression of Claimant's underlying disease separate and apart from the accidental injury"; that receipt of the videotaped evidence was proper and that assertions by Petitioner that the tape had not been provided to Petitioner by Respondent are demonstrably untrue; that the ALJ's application of the *Snipes* framework was proper in this case; and that the denial of the concurrent claim for both permanent total disability benefits for wage loss and permanent partial disability benefits under the schedule was proper under *Sullivan v. Boatman & Magnani*, CRB No. 03-074, OHA No. 90-597E, OWC No. 088187 (August 31, 2005), because they extremity disabilities, if any, are not distinct and separable from the disabilities wrought by the non-schedule disability upon which the wage loss award was made.

Because the case does not involve a claim for modification of a prior Compensation Order, but is instead a claim for additional benefits for a different class of disability and for medical care rendered subsequent to any prior Compensation Order, this case has no *Snipes* component, and any appeal premised upon any aspect of the Compensation Order which itself concerned such a potential modification is denied, there being no harm in the ALJ finding that the test in *Snipes* had not been met.

Because the ALJ was correct in declining to reconsider the average weekly wage for compensation purposes, in that the Act already accommodates the concerns expressed by Petitioner about the effects of inflation upon recipients of such compensation by providing for supplemental allowances for recipients of wage loss compensation for permanent total disability, the denial of such a recalculation is affirmed.

Because the videotaped evidence received into the record was neither improperly received nor was it considered or referred to in any way by the ALJ in reaching her decision, the appeal based upon its submission is denied and the acceptance thereof into the record is affirmed.

Because the evidence proffered in connection with the Social Security disability claim is irrelevant to any issue before the ALJ, its exclusion from the record is affirmed.

Because the causal relationship of the worsening of Petitioner's underlying medical condition to the work injury has previously been established in the Compensation Order of October 20, 1987, finding that the working conditions leading up to the injury constituted an "exacerbation" of the pre-existing longstanding disease process which had theretofore not become disabling, in the Compensation Order of April 30, 1993 specifically rejecting Respondent's contention that the worsening of Petitioner's condition was not causally related to the work injury and specifically

finding that that issue was precluded from further litigation by *res judicata*, and in the Compensation Order of April 15, 1999, finding Respondent liable for medical care and related expenses related to continued intervening worsening, which orders have all become final and none of which are pending appeal, Respondent's "contention" that "the difficulty with the extremities is the natural progression of Claimant's underlying disease separate and apart from the accidental injury" is rejected; because it appears that the Compensation Order may have been based in part upon a finding that there is no such causal relationship, and because the ALJ did not adequately analyze the claim for schedule awards under the test enunciated in *Sullivan, supra*, the denial of an award for disability to the extremities, or any of them, is reversed, and the matter is remanded for further consideration based upon the record.

Because Petitioner included a claim for specific medical care and provided sufficient evidence from which the ALJ could have determined whether such care was incurred, and upon what dates, the failure to grant or deny the request for such care is unsupported by substantial evidence, and the denial is therefore reversed and the matter remanded for further consideration based upon the record.

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 Dep't. of Employment Serv's.*, 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.

Turning to the case under review herein, we will address the identified issues in the order that they are identified in the Background portion of this Decision and Remand Order, *ante*.

- I. Because the case does not involve a claim for modification of a prior Compensation Order, but is instead a claim for additional benefits for a different class of disability and for medical care rendered subsequent to any prior Compensation Order, this case has no *Snipes* component, and any appeal premised upon any aspect of the Compensation Order which itself concerned such a potential modification is denied, there being no harm in the ALJ finding that the test in *Snipes* had not been met.

Petitioner complains that the ALJ either improperly subjected this claim to analysis under *Snipes, supra*, or having properly decided to analyze the case under *Snipes*, conducted that analysis in a faulty manner.

Respondent asserts that the ALJ properly analyzed the case as a Snipe modification request, and properly performed the analysis in concluding that there had been no change in Petitioner's condition subsequent to the prior relevant Compensation Order.

This is not a claim for a worsening of condition that would result in an increase in the wage loss benefits to which Petitioner might be entitled, for the simple reason that since the Compensation Order of April 13, 1993, Petitioner has been adjudged permanently and totally disabled, and is consequently receiving the maximum amount of wage loss benefits to which he could possibly be entitled.

Rather, this is a claim, raised by Petitioner for the first time that we are aware, for schedule awards under the Act, a claim not based upon a specific allegation that his condition has deteriorated, but rather upon a claim that in addition to the class of benefits to which he is already entitled, he is also entitled to additional benefits of a different class for which he has made no prior claim and for which he has received no prior award (or denial). Accordingly, the entire discussion of Snipes and modification, in the Compensation Order, in the AFR and in the response, is beside the point and irrelevant. The ALJ's inclusion of such analysis had no bearing on any aspect of the outcome of this Compensation Order, and any discussion of the issue and conclusion based thereon is, if erroneous, harmless.

- II. Because the ALJ was correct in declining to reconsider the average weekly wage for compensation purposes, in that the Act already accommodates the concerns expressed by Petitioner about the effects of inflation upon recipients of such compensation by providing for supplemental allowances for recipients of wage loss compensation for permanent total disability, the denial of such a recalculation is affirmed.

Petitioner sought to have the ALJ recalculate his average weekly wage, thereby presumably increasing the compensation rate at which his current and claimed additional benefits are to be paid. He relies upon principals of "fairness" generally, and the case of *United Parcel Service v. District of Columbia Dep't of Employment Services and Randy Brent, Intervenor*, 834 A.2d 868 (2003) (*Brent*) specifically. He asserts that more than 21 years have passed since his average weekly wage was established, and that since he is only now seeking adjudication of entitlement to permanent partial disability benefits under the schedule, a recalculation is in order.

The ALJ properly ruled that average weekly wage determinations are determined with reference to the date of injury, and remain fixed throughout the course of a claim; they are not determined based upon the date that a claim is made or the date that a particular class of benefits is sought.

Petitioner's reliance upon *Brent* is misplaced; that case deals with whether wages lost during a strike are to be included in the wage calculation computation process, and stands for the proposition that a method that more accurately establishes the true average weekly wage of an injured worker at the time of injury is more fair and preferable to one which artificially decreases the wage figure due to an anomalous event such as a strike occurring during the period normally used to calculate the average weekly wage.

Further, by enacting the supplemental allowance provisions found in D. C. Code §32-1506, the legislature has spoken with respect to how and when changes in prevailing wages will impact benefit rates under the Act. We can not substitute Petitioner's preference for that of the legislature.

- III. Because the videotaped evidence received into the record was neither improperly received nor was it considered or referred to in any way by the ALJ in reaching her decision, the appeal based upon its submission is denied and the acceptance thereof into the record is affirmed; Because the evidence proffered in connection with the Social Security disability claim is irrelevant to any issue before the ALJ, its exclusion from the record is affirmed.

The two evidentiary issues raised in connection with this appeal can be disposed of summarily: regardless of whether the videotaped evidence should or should not have been admitted into evidence, the ALJ did not refer to the contents of the tape at any time in the Compensation Order, and Petitioner has failed to demonstrate that the admission of the tape in any way effected the outcome of the case, or had the potential to do so. Further, the decision to admit or exclude evidence is ordinarily within the sound discretion of the ALJ, and absent an abuse of that discretion, which has not been shown in this instance, we will not intervene.

Similarly, Petitioner has failed to argue or assert what relevance the Social Security disability claim records could possibly have had in this case, and we fail to see any such relevance ourselves.

- IV. Because the causal relationship of the worsening of Petitioner's underlying medical condition to the work injury has previously been established as the law of this case and because it appears that the Compensation Order may have been based in part upon a finding that there is no such causal relationship, and because the ALJ did not adequately analyze the claim for schedule awards under the test enunciated in *Sullivan, supra*, the denial of an award for disability to the extremities, or any of them, is reversed, and the matter is remanded for further consideration based upon the record.

The ALJ's decision and finding that Petitioner is not entitled to a schedule award for any of the dysfunctions alleged to be experienced in the four extremities is premised upon a finding that "[a]ny impairment Claimant experiences in his arms and legs is wholly dependent upon the effect of his AS [ankylosing spondylitis] on non-schedule body part(s); any such impairment does not have a distinct, separate and identifiable functional impact on schedule members. As such, even assuming *arguendo* all of Claimant's current disabilities are as a result of the work-related event, Claimant is not entitled to receive permanent total disability benefits simultaneously with permanent partial disability benefits." Compensation Order, page 8 – 9.

The ALJ clearly intended to apply the rule enunciated by the CRB in *Sullivan v. Boatman & Magnani, supra*, which she in fact previously cited and from which she quoted. Unfortunately, however, the ALJ appears to misapprehend the manner in which that rule applies to this case.

First, the AS condition and all its effects, by virtue of two prior orders which have long since become final, are now compensable as part of this claim. Respondent's arguments that the condition has some independent deteriorating component unrelated to the work injury has now

been rejected at least twice by this agency, in the Compensation Orders of October 20, 1987 and April 30, 1993, and by implication in a third Compensation Order issued April 15, 1999. We are concerned that the “*arguendo*” assumption betrays a doubt about whether this is indeed the law of the case, which we point out it most assuredly is.

Second, we do not understand what the ALJ means when she writes that Petitioner’s arm and leg impairments (if any there be) are “wholly dependent upon the effect of his AS on non-schedule body parts”. If the ALJ meant that the AS has its physical manifestations solely in the neck and spine, and it is the manifestation in the neck and spine that impairs arm and leg function, then the ALJ is wrong as a matter of law to determine that the arm and/or leg impairment is not compensable by virtue of the fact that the physical abnormalities are solely in the neck or spine. Analogizing to arthritic degeneration aggravated by a work injury, bone spurs impinging on nerves in the neck resulting in arm weakness or limitations on arm motion may result in a separate and distinct disability from that associated with the neck pain and neck limitations of motion that those same spurs might cause. In such a scenario, a claimant could be entitled to wage loss benefits if the neck pain and neck range of motion limitation prevents him or her from working, and still also be entitled to a schedule award for the loss of industrial use of the arm, despite the fact that there is no identifiable anatomical or systemic abnormality in the arm itself; that is the essence of *Kovac*, *Morrison* and *Sullivan*. It is the functional impact upon the schedule member and not the situs of the inciting agent of that impact that is to be considered.

On remand, the ALJ must make findings of fact as to whether there is any such impact upon arm and leg function, and if there is, the ALJ must analyze that impact to determine whether, under *Kovac* and *Sullivan*, Petitioner has sustained a schedule disability or disabilities.

- V. Because Petitioner included a claim for medical care and provided sufficient evidence from which the ALJ could have determined whether such care was incurred, and upon what dates, the failure to grant or deny the request for such care is unsupported by substantial evidence, and the denial is therefore reversed and the matter remanded for further consideration based upon the record.

Although not specifically articulated by medical care provider or service in stating his claim for relief, Petitioner did seek “payment of all causally-related medical expenses” in his opening remarks at the formal hearing. See, HT 8 – 9. Further, Petitioner submitted a letter dated March 21, 2005 from “Civista Health” purporting to document the provision of massage therapy to Petitioner, as well as Civista’s failed attempts to obtain payment for those services from Respondent. Further, Petitioner submitted a listing by date and billing amount of the massage services in question, titled C4. These materials render the ALJ’s footnoted denial, on page 5 in footnote 11, of the claim for these services unsustainable. That is, if these materials represent claims for medical services that are not the subject of one of the matters currently pending appeal, and if there is no issue as to reasonableness and necessity or causal relationship, Petitioner appears to have presented sufficient evidence to support the claim for these services. If, on the other hand, these services are the subject of some other order currently pending appeal, or if there is some issue relating to reasonableness and necessity, the ALJ should deny the claim pending resolution of the appealed of the other order, or completion of utilization review, whichever may be appropriate. See, *Gonzalez v. UNICCO*,

CRB No. 07-137, OWC No. C2005-604331 (September 20, 2007). Lastly if these services are contested by Respondent on some other grounds, those grounds need to be identified and considered by the ALJ, based upon the record.

CONCLUSION

The Compensation Order of August 31, 2007 is supported in part by substantial evidence and is in part in accordance with the law, and is unsupported in part and not in accordance with the law in part, as discussed in the foregoing Decision and Remand Order.

ORDER

The Compensation Order of August 31, 2007 is affirmed as set forth in parts I, II and III, *ante*, and is reversed and remanded for further consideration as set forth in parts IV and V, *ante*.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

November 20, 2007
DATE