

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. 07-147

JESSE WILSON,

Claimant – Petitioner,

v.

D.C. DEPARTMENT OF PUBLIC WORKS,

Self-Insured Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney
AHD No. PBL 96-039A, DCP No. DPW001096

Jesse Wilson, *Pro Se*

Thelma C. Brown, Esq., for the Respondent

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

SHARMAN J. MONROE, *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 250.2, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 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 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 (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

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 July 27, 2007, the Administrative Law Judge (ALJ) denied the Claimant-Petitioner's (Petitioner) claim for disability compensation benefits. The Petitioner now seeks review of that Compensation Order.

In his appeal, the Petitioner asserts that the decision below is not just and requests a hearing. The Respondent timely filed an opposition.

ANALYSIS

As an initial matter, the standard 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 §§ 1-623.28(a) and 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 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, the Petitioner alleges that the ALJ's decision is not just, and very unfair. The Petitioner asserts that the ALJ who wrote the decision below is not the same ALJ who conducted the formal hearing in his case and that he should have another hearing.

Before addressing the Petitioner's allegations that the Compensation Order is not just, the Panel will address the Petitioner's request for another hearing. A review of the official AHD file reveals that on January 18, 2007, Interim Chief ALJ Mallett issued an Order to Show Cause to the parties informing them that ALJ Cummins, who conducted the formal hearing, was no longer on staff. The Order also directed the parties to tell why the Petitioner's case should not be reassigned to a second ALJ to write a decision based upon the record made before ALJ Cummins. The Order further warned that failure to respond within the specified time of fifteen calendar days would result in a reassignment. A review of the AHD file failed to reveal a

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.

response from either the Petitioner or the Respondent. Given that the parties were duly informed of the potential reassignment of this case and that neither party filed any objections, the Panel can find nothing legally improper in the reassignment of this matter to ALJ Carney. The Petitioner's request for a second hearing before AHD is denied.

Assuming *arguendo* that the request is for a hearing before the CRB, the Petitioner's request is again denied. Neither the Act nor the implementing regulations permit the CRB to conduct formal hearings on the merits of a case. See D.C. Official Code § 32-1521.01. The CRB is only empowered to review a decision issued by AHD for legal sufficiency and to either affirm, reverse or remand that decision.² See D.C. Official Code § 32-1521.01 (d); 7 DCMR § 266.2; n.1, *supra*. Indeed, the regulations at 7 DCMR § 266.1 specifically prohibit the CRB from engaging in a *de novo*³ proceeding or an unrestricted review of a case brought before it and limits its review to the record made before AHD. Although the regulations permit the CRB to have the parties present oral argument with respect to a pending appeal, the decision to have oral arguments presented rests solely with the CRB. See 7 DCMR § 262.4. The Panel, in exercising its discretion, determines that the instant case does not require oral argument in that the issue presented for resolution is neither complex nor novel.

The record in this case was reviewed in its entirety. The Panel determines that the ALJ's factual findings are supported by substantial evidence on the record as a whole, and are conclusive, and that the ALJ's legal conclusions are in accordance with the law. See *Marriott Int'l.*, *supra*; D.C. Government Comprehensive Merit Personnel Act, of 1978, as amended, D.C. Official Code § 1-623.28(a).

The ALJ properly applied the law in this jurisdiction with respect to the proof required to be presented by each party on a request to restore, or reinstate, disability compensation benefits. The Respondent presented the medical opinions of three (3) physicians that the Petitioner was able to return to work. Although not presented by the Petitioner, the ALJ also considered the medical opinions of Dr. Pano Lapbropoulos, the treating physician. The ALJ correctly noted that while there is a treating physician preference in this jurisdiction, the preference is not absolute and the opinion of the treating physician can be rejected for compelling and specified reasons. See D.C. Official Code § 1-623.23(a)(4). Herein, the ALJ rejected Dr. Lapbropoulos' opinion because it was dated 1995 and, thus, stale, or not current. On review of the record, the Panel discerns no reason to overturn the ALJ's rejection of the treating physician's opinion.

The Respondent also presented evidence of a labor market survey done by a vocational rehabilitation service, evidence of scheduling the Petitioner for interviews and medical opinions that the positions identified for the Petitioner through the labor market survey were within the Petitioner's physical abilities. The Petitioner's evidence, in response thereto, consisted of his testimony that he was unable to secure work because of his criminal record, not his work injury. As the ALJ stated:

² The CRB is also empowered to act in a similar manner with respect to final decisions issued by OWC. See 7 DCMR § 250.2.

³ The word "de novo" is a legal term meaning to start over again.

Disability, as used in the context of this Act, is an economic determination. It attempts to resolve whether or not a specific work injury, sustained by an employee, is the cause of that employee not being able to work.

Compensation Order at p. 9.

The Panel is aware that during the hearing the ALJ who conducted the proceeding remarked, "...we all know that that injury is permanent" and characterizes it, given the record medical evidence, as a harmless overstatement. The Panel also determines that the ALJ writing the decision stated inaccurately that the Petitioner provided no medical reason for his inability to work since the Petitioner testified as to why he is unable to work. Nevertheless, regardless of the overstatement and the inaccuracy, the ALJ's conclusion that the medical evidence of the Respondent outweighed the medical evidence of the Petitioner is still accurate and legally correct. Further, it is obvious from a reading of the Compensation Order that despite the inaccuracy, the ALJ who wrote the decision was aware of the statements made during the formal hearing, in that he quoted it in the footnote, and he properly weighed the medical evidence, as well as the vocational evidence, in concluding that the Petitioner could return to work.

CONCLUSION

The Compensation Order of July 27, 2007 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of July 27, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

October 12, 2007
DATE