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. 05-224

JERMAINE JOHNSON,

Claimant – Respondent,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL,

Self-Insured Employer – Petitioner.

Appeal from an Order of
Administrative Law Judge David L. Boddie
OHA No. 03-541B, OWC No. 581489

Jeffrey W. Ochsman, Esq., for the Petitioner

Matthew Peffer, Esq., for the Respondent

Before E. COOPER BROWN, *Acting Administrative Appeals Judge*, SHARMAN J. MONROE, *Administrative Appeals Judge* and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

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 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. §§

BACKGROUND

This appeal follows the issuance of an 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 Order, which was filed on March 2, 2005 the Administrative Law Judge (ALJ) dismissed the Employer-Petitioner's Application for Formal Hearing seeking a modification of a December 18, 2003 Compensation Order awarding temporary total disability benefits. The Self-Insured Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Order is not supported by substantial evidence in the record and is contrary to the law.

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 § 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. 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, the Petitioner alleges that the ALJ imposed a higher standard of proof upon it for seeking a modification than required under the law of this jurisdiction. Specifically, the Petitioner avers that pursuant D.C. Official Code § 32-1524 and *Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 835 (D.C. 1998), a party seeking a review of a compensation case must make a threshold showing that there is reason to believe a change of conditions has occurred concerning the fact or degree of disability. The Petitioner, citing *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225 (D.C. 1997) and *Walden v. District of Columbia Department of Employment Services*, 759 A.2d 186 (D.C. 2000), states that the court has interpreted this showing as a "modest threshold burden", requiring some affirmative evidence of a change in condition, but not a consideration of the credibility of the evidence. The

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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."

Petitioner maintains that when the ALJ rejected its evidentiary proffer of a change in condition, the ALJ improperly weighed its medical evidence against the opinion of the treating physician.

In her response, the Claimant-Respondent (Respondent) asserts that the law contemplates a preliminary examination of the evidence before a full evidentiary hearing is held. She maintains that the ALJ examined the evidence in its entirety as required and determined that the Petitioner's evidence was not sufficient to show a change of condition. The Respondent maintains that the ALJ's determination is supported by substantial evidence in the record.

In *Snipes v. D.C. Department of Employment Services*, 542 A.2d 832 (D.C. 1988), the Court of Appeals held that in order to obtain an evidentiary hearing on a modification petition under D.C. Official Code § 32-1524, a claimant must make a threshold showing that "there is reason to believe that a change in conditions has occurred." 542 A.2d at 835. In *Washington Metropolitan Area Transit Authority v. D.C. Department of Employment Services*, 703 A.2d 1225 (D.C. 1997) (*Anderson*), the Court of Appeals clarified its holding in *Snipes*, stating: "In *Snipes*, this court upheld, as a reasonable interpretation of the Act, the agency's two-step procedure requiring (1) a determination that there is reason to believe that a change in the claimant's condition has occurred, and (2) an evidentiary hearing if that test is met. The initial determination requires a preliminary examination of the evidence which will be submitted at the evidentiary hearing." *Anderson*, 703 A.2d at 1228 (citations omitted).

The "reason to believe" standard required by the first step requires an affirmative factual showing by the moving party, short of full proof, that a change of conditions has occurred. Contemplated, the Court has explained, is a preliminary examination *of the moving party's evidence* in support of the claim of a change of conditions. *Anderson* at 1229-1230; *Snipes* at 834, n.4, 835. Moreover, the determination of whether or not there is reason to believe a change of condition has occurred, thereby meeting the preliminary "*Snipes*" test, "must be predicated on record evidence." *Anderson*, at 1230. *See* D.C. Official Code § 32-1524(b) (requiring a review ordered pursuant to the "reason to believe" provision of subsection (a) to be limited to "new evidence").

Consistent with the foregoing, the Director held in *Blanken v. Fred F. Blanken & Co.*, Dir.Dkt.No. 99-14, H&AS No. 97-163A, OWC No. 500285 (December 10, 2003), that, regardless of whether the nonmoving party requests such an examination, an ALJ must conduct a preliminary examination *of the moving party's evidence* to determine whether, *based upon the evidence submitted*, there is reason to believe a change of condition has occurred prior to conducting a full evidentiary hearing on the merits under D.C. Official Code § 32-1524.

Therefore, it is clear that the preliminary examination (the "*Snipes"* hearing) of the moving party's evidence must be conducted *on the record* and that after conducting the preliminary review, an ALJ must issue findings of fact and conclusions of law on whether the proffered evidence meets the "reason to believe" standard. A preliminary hearing on the record not only provides a transcript, but also allows the formal submission of the proffered evidence, thus creating a record for appellate purposes. Without a record with formal exhibits and findings of fact and conclusions of law, an appellate body, whether the CRB or the court, is unable to

conduct a review to determine whether the decision denying a request for modification is supported by substantial evidence and in accordance with the law.

From a review of the Order, it appears that the ALJ attempted to conduct a *Snipes* preliminary review of the evidence via a telephonic conference with parties. However, a telephonic conference does not comport with the requirements of a preliminary examination under D.C. Official Code § 32-1524. There is no transcript of the conference. The medical reports that the Petitioner is relying on to support its assertion of a change in condition were not admitted into evidence and made part of the record. The Order that issued did not contain findings of fact and conclusions of law on whether the evidence the Petitioner is relying upon meets the "reason to believe" standard. Consequently, the Panel is unable to review the merits of the Order on appeal. The Panel is unable to assess the arguments of the parties for and against the request for modification and to review the proffered medical reports. Without an evidentiary record and appropriate findings, the Panel cannot determine whether the Order is supported by substantial evidence and is in accordance with the law. Therefore, this matter must be remanded for further proceedings.

On remand, the ALJ is to be mindful of the "reason to believe" standard of D.C. Official Code § 32-1524. This standard requires an affirmative factual showing that a change has occurred, but does not require full proof of a change of condition. *See Anderson* at 1230. Therefore, the moving party must merely present evidence that, if credited, could establish a change of condition. At this juncture, however, it is not appropriate to weigh the evidence presented by the moving party against that of the nonmoving party and decide which parties' evidence is more persuasive on the issue of a change of condition warranting a modification of a prior award. Instead, a *Snipes* preliminary hearing contemplates the introduction and assessment of the moving party's evidence only. *See Snipes* at 834, n. 4.

CONCLUSION

In the absence of an evidentiary record, the Panel is unable to determine whether the Order of the ALJ denying the modification is based upon substantial evidence in the record. The ALJ's determination, without having examined the Petitioner's evidence in support of its request for modification on the record, does not comport with the requirements of a *Snipes* preliminary hearing.

ORDER

The Order of March 2, 2005 is hereby VACATED AND REMANDED for further consideration consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD

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SHARMAN J. MONROE
Administrative Appeals Judge

June 9, 2005
DATE