

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. 06-40

CLAUDIA D. JONES,

Claimant – Petitioner,

v.

POTOMAC JOB CORPS AND TRAVELERS/AETNA INSURANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge, Terri Thompson Mallett
CRB No. 05-25, OHA No. 98-192B, OWC No. 269942

Benjamin T. Boscolo, Esquire for the Respondent

Amy L. Epstein, Esquire for the Petitioner

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F. JORY and SHARMAN MONROE, *Administrative Appeals Judges*.

LINDA F. JORY, *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 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, 32-1522 (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. Official Code §§ 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

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 on Remand, which was filed on January 13, 2003, the Administrative Law Judge (ALJ), concluded Claimant-Petitioner (Petitioner) had unreasonably failed to cooperate with vocational rehabilitation services after June 26, 2001 and suspended Petitioner's benefits from June 26, 2001 to the present and continuing.

The Compensation Order on Remand followed a Decision and Remand Order issued by the Compensation Review Board (the CRB) on September 29, 2005. In that Decision and Remand Order, the CRB remanded the matter to AHD for further proceedings, if necessary, further findings of fact and conclusions of law applying the test enunciated in the CRB's decision in *Sullivan v. Boatman & Magnani*, CRB No. 03-74, OHA No. 90-597E (August 31, 2005) (*Sullivan*) to determine if Petitioner was entitled to a concurrent award of permanent total disability and schedule loss benefits.

The Petition for Review alleges as grounds for petitioner's appeal that the ALJ's decision contains two errors. First, the Order found as a Conclusion of Law that Petitioner, who had been adjudged permanently and totally disabled, may not receive a concurrent award for a schedule disability. Second, Petitioner asserts the ALJ neither conducted further proceedings nor offered the parties the opportunity to develop a record on the issue of whether Ms. Jones sustained a single disability or two separable and distinguishable disabilities as a result of the injury to her back, which petitioner asserts constitutes a due process denial to her.

Respondent has filed an opposition to the Application for Review, asserting Petitioner did have the opportunity to argue that a showing of two distinct injuries would entitle her to recover the relief she requested. Respondent further argues Petitioner had the opportunity to make a record to support her own contention that she suffered two injuries but was "dilatory" in doing so. Respondent alleges as a result, Petitioner's arguments are not sufficient to reverse the ALJ's Compensation Order on Remand.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record

and Anti-Fraud Amendment Act of 2004.

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 Panel finds Petitioner has a valid due process argument with regard to the ALJ's issuance of a Compensation Order on Remand without providing the parties an opportunity to submit their argument to the record regarding the *Sullivan* standard, notwithstanding the fact that the ALJ who wrote the Compensation Order on Remand was not the ALJ who agreed to decide the matter solely on briefs. While the Panel acknowledges the parties previously agreed to have the sole issue in this matter decided on briefs as opposed to an evidentiary hearing, the Panel agrees that given the instant Remand based upon a specific test which did not exist when this case was initially decided, the parties may decide that the testimony of claimant is necessary. Nevertheless, the administrative record does not reflect that an Order to Show Cause ever issued to allow any input from the parties with regard to the need for testimony or supplemental evidence or argument, nor does the file reflect that the parties were ever notified that the matter had been assigned to the ALJ for the decision on remand.

The Panel must note that the mere existence of a remand does not automatically require additional evidence be presented or that a new hearing be conducted.² However, not only was the matter assumed by an ALJ who did not decide the original matter, there is no indication that the new ALJ made any contact with the interested parties prior to evaluating the evidence based upon a legal standard that was not in place at the time the parties opted to waive their right to a full evidentiary hearing. Without hearing from the parties, in any fashion, the Panel agrees the ALJ has not adhered to the Remand order which specifically advises the parties and the ALJ that further proceedings, should be conducted if necessary to issue further findings of fact and conclusions of law applying the test enunciated in the CRB's decision in *Sullivan*. Thus, the panel concludes that at the very least, an Order to Show Cause should have been issued to allow the parties the opportunity to show why the matter could not be decided based on the existing record by a different ALJ as well as why the parties should be provided an opportunity to present legal argument with regard to the *Sullivan* test and, on the rare occasion, persuade the ALJ why additional evidence should be admitted.³

² The Panel notes that the Board has recently addressed an even broader due process argument with regard to the District of Columbia Administrative Procedure Act, D.C. Code (2006) (the APA) and the parties' rights after a Compensation Order is remanded to OHA/AHD in the matter of *Centorcelli v. American Red Cross*, CRB No. 06-042, AHD No. 99-127B, OWC No. 284070 (May 23, 2006). In *Centorcelli* the Petitioner argued that the Compensation Order on Remand following remand by the CRB was not issued in accordance with §2-509(d) of the APA and argued that the APA requires that in a contested case whenever the individual who is to render the final decision did not personally hear the evidence, no decision adverse to a party other than the District government shall be made until a proposed order of decision including Findings of Fact and Conclusions of Law has been served upon all parties and an opportunity has been afforded each party adversely affected to file exceptions and present argument to the individual who will actually issue the decision. The Panel concludes the APA's due process protection is no less applicable here where a new test has been defined by the Board.

As noted by the Panel in *Centorcelli*, the APA does not contain specific guidance concerning the process to be followed where the deciding body did not personally hear the evidence, however, the instant Panel concludes §2-509 of the APA can be met in most situations, short of a recommended final order, with a show cause order to simply let the parties be heard on the issue remanded for resolution.

³ As the Remand Order did not order that additional evidence be taken, the parties would still be required to establish (a) that the additional evidence is material and (b) that there existed reasonable grounds for failure to present evidence while the case was before the Administrative Hearings the Division pursuant to *King v. District of Columbia Department of Employment Services*, 560 A.2d 1067 (D.C. 1989); 7 D.C.M.R §264.1 and 264.2.

In so concluding, we reject Respondent's argument that Petitioner did have the opportunity and did in fact argue as part of the hearing process that a showing of two distinct injuries would entitle her to recover the relief she requested, as it's own speculation as to what it believes Petitioner's theory of recovery was before *Sullivan* issued. The Panel concludes *Sullivan* requires more specific fact finding to the extent that neither party could have been prepared to argue in their briefs in lieu of a formal hearing. Specifically, the Board in *Sullivan* found that an injured employee who is receiving a wage loss partial or total disability award may also receive a concurrent award for a schedule disability only if the wage loss disability is due to an injury to a non-schedule body part and there is also a distinct, separable and identifiable functional impact to a schedule body part sufficient to award under *Kovac v. Avis Leasing Corporation*, OHA No. 84-177, OWC No. 000792 (July 17, 1986).

In light of the foregoing disposition and remand of this appeal on due process grounds, the Panel does not address the issue raised by Petitioner's argument that the ALJ failed to properly apply the Board's holding in *Sullivan, supra*, to the facts of the instant case.

Accordingly, we have determined that the matter should be reversed and remanded to the ALJ for further consideration and proceedings consistent with the cited APA provisions to permit further proceedings including, but not limited to, an order to the parties to show cause why the matter cannot be decided based upon the existing record including the written legal argument.

CONCLUSION

The Compensation Order on Remand of February 6, 2006 was issued without procedural conformance with the requirements of D.C. Code §2-509(d)(2001 as amended) and the matter must be remanded to AHD to permit further proceedings as outlined in the discussion herein.

ORDER

The Compensation Order on Remand of February 6, 2006 is hereby **VACATED** and the matter is **REMANDED** to AHD for further proceedings consistent with the foregoing Decision and Order and the APA.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

June 8, 2006

DATE