

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 07-092

KEITH BOYD,

Claimant-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Joan E. Knight
AHD No. 05-465, OWC No. 583346

Sarah O. Rollman, Esquire, for the Petitioner

Craig Rosenstein, Esquire, for the Respondent

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

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

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 April 2, 2007, the Administrative Law Judge (ALJ) denied Employer-Petitioner's (Petitioner's) claim for a credit for temporary total disability benefits that it had voluntarily paid while Respondent was disabled from employment due to a stipulated worsening of condition to his left leg, which worsening required that Respondent undergo additional surgery, following which he experienced a stipulated increase in the nature and extent of permanent partial disability, from 15% to 20% of the left leg, and to which additional level of disability the parties have also stipulated. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the denial of the credit for payment of the temporary total disability benefits, which it characterizes in this appeal as having been made "in error", was not in accordance with the law, in light of the fact that Respondent had previously received a schedule award for the same injury to the left leg.

Respondent opposes this appeal, asserting that the denial of the claimed credit was proper, in that Respondent suffered a worsening of condition within a year of the prior schedule award, and that under D.C. Code § 32-1524, a modification of the schedule award may properly award additional temporary total disability benefits in addition to additional disability benefits under the schedule.

Because we agree that under the modification procedures contained in the Act a claimant may obtain additional temporary total disability benefits in the event of a compensable worsening of condition, we affirm the Compensation Order.

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.

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.

Turning to the case under review, we begin by noting that the Compensation Order considered this claim in the context of whether additional temporary total disability benefits may be awarded following the receipt of a schedule award, under the principles enunciated in *Smith v. District of Columbia Dep't of Employment Serv's.*, 548 A.2d 95 (D.C. 1988), and the companion cases consolidated for consideration in *Cherrydale Heating and Air Conditioning v. District of Columbia Dep't of Employment Serv's.*, 722 A.2d 31 (D.C. 1998). None of those cases dealt with a modification based upon a change of conditions occurring within a year of a schedule award, which is the nature of the facts as stipulated by the parties in this case.

We point out that the issues raised and contested in the above cited cases, and the cases discussed by the ALJ in her analysis of the issues, all dealt with whether, in light of the nature of the conditions causing the subsequent period of lost wages, the claims for additional benefits were compensable as exceptions to the general rule, established in *Smith*, that receipt of a schedule award extinguishes claims for additional temporary total disability benefits. As stated before, none dealt with a request for modification within a year of the initial schedule award having been paid. Our review of the case law from the Director, the CRB and the court reveals no prior instance in which this question has been decided, and the parties have directed us to no such case.

Thus, we first address whether there is a difference between the standards to be applied in considering a claim for additional temporary total disability benefits when the claim is premised upon a worsening of condition arising within a year of the initial award of a schedule loss, under D.C. Code § 32-1524, and a claim for additional temporary total disability benefits following a worsening of condition relating to a schedule injury, where the worsening occurred beyond the one year time within which the statute contemplates a modification of that award, that is, the *Cherrydale* scenario.

Although the case did not present the issue for resolution, we note that the court in *Cherrydale* recognized the distinction between the two scenarios, and the possibility that the cases could be treated differently depending upon interpretation of the statute, where it stated:

That is to say, under the Director's reading of the statute, a "deterioration" rather than a "flare-up" of the previous condition still would not permit resumption of temporary total disability benefits, but instead a possible increase in the schedule award – something for which Poole [the claimant in *Cherrydale*], as *Cherrydale Heating* points out, has not applied.

The Director's reasoning in the Poole case is not crystal clear, but we think *Cherrydale Heating* misreads it as equating Poole's change in condition with any form of "deterioration" (as distinct from "flare-up") justifying at most an increase in the previous schedule award. The hearing examiner framed the issue as "whether [Poole's] need to undergo surgery *and amputation* constitutes a worsening of condition such that he is entitled to the resumption of temporary total disability benefits" (emphasis added). The Director, reiterating that Poole's surgery had been to "amputate a further portion of his toe," ruled that Poole "would need some time [thereafter] to be once again at the stage of maximum medical improvement," and

thus was entitled to further temporary total disability benefits. The Director's decision is thus most naturally read as recognizing a narrow exception to the general rule for an extreme change of condition resulting in amputation or its functional equivalent. That reading both accords with a distinction recognized by other jurisdictions in this context, and explains the Director's refusal to award further temporary total disability benefits to Evans.

Cherrydale, supra, at 34 (footnote omitted, initial bracketing added, emphasis, parentheses and subsequent bracketed material in original). Thus, the court at least appears to have assumed that the Director in *Cherrydale* would have denied additional temporary total disability benefits even under a statutory modification for worsening, unless the worsening met the further requirements of being "an extreme change of condition resulting in amputation or its functional equivalent", and appears to have accepted that as a reasonable interpretation.

There is an alternative view, however, that should be considered. We note that it has never been decided whether a claimant in Poole's position in *Cherrydale* would have been entitled to seek and possibly obtain an additional award for the scheduled permanency to his left great toe, following the amputation. Arguably, for the same reasons that additional temporary total disability benefits were available, so too ought an additional permanency award. Given that the "extreme" nature of the changed condition warranted an exception to the temporary total disability rules, under what justification could an added permanency award be denied?

The answer to that question *may* be said to lie in the fact that the Act contemplates the situations within which an increase in a schedule award can be granted, and that provision requires that such an increase be sought and obtained within a year of the initial award. The provision could have but does not provide for an exception in "extreme" cases involving "amputation or its functional equivalent" or some other circumstance (indeed, as the court noted, the compensation statute in Pennsylvania does so explicitly for cases involving amputation), but did not, thus it seems that allowing for such additional claims for additional permanency is outside the statute. Yet this is a somewhat circular argument, given that the Act is equally silent on the specific issue of temporary total disability benefits being resumed following a schedule award, yet the Director and the court have ruled that the Act nonetheless permits the *Cherrydale* exception.

As we view the current state of the law, it is the extreme nature of the worsening change, and the fact of "amputation" or its "equivalent", that is the basis upon which the Director and the court in *Cherrydale* determined that an exception to the general rules was warranted. It is this and this alone that the Director and the court cite as the basis for the exception. There is nothing about this basis for the exception that would suggest that the exception should apply to one class of disability benefits, temporary total disability, but not another, permanent partial schedule benefits. Thus, we assume that, in a strict *Cherrydale* scenario, the entire question of the nature and extent of disability is subject to being re-opened, including whether as a result of the extreme worsening, there is an increased permanency. Given that it is already established, under *Cherrydale*, that the reopening covers temporary total disability benefits, we conclude that a claim for worsening brought under the statutory worsening provision likewise includes such a potential entitlement to temporary total disability benefits. In essence, we view *Cherrydale* as positing an exception to the one year statutory time limitation on seeking additional benefits under an award; we do not view it as

imposing any special limits on the type of disability benefits to which one may be entitled, should one show the requisite “extreme” change consisting of “amputation or its functional equivalent”.

Conversely, in this case, since the claim for worsening has been brought within the one year period following the initial schedule award, we need not look to *Cherrydale* or its progeny. D.C. Code § 32-1524 (a) provides that “at any time prior to 1 year from the date of last payment of compensation ... the Mayor may ... upon application of a party in interest, order a review of a compensation case ... where there is reason to believe that a change of conditions has occurred which raises issues concerning ...[t]he fact or degree of disability or the amount of compensation payable pursuant thereto.” It goes on to provide, in subsection (c), that “[u]pon completion of a review conducted pursuant to subsection (a) of this section, the Mayor shall issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation previously paid, or award compensation”.² *Cherrydale* establishes that upon a reopening for consideration of a worsening condition, the claimant may obtain an award that includes additional temporary total disability benefits. Thus, in this case, the reopening properly includes a claim for those benefits, for which Petitioner seeks a credit on the theory that they were paid in error. Because Respondent was entitled to them, however, it was not error for the ALJ to have denied the claimed credit.

CONCLUSION

The award of temporary total disability benefits, in the form of a denial of a credit to Petitioner in the amount of those benefits paid voluntarily during the stipulated period of temporary total disability, against an increase in the stipulated degree of permanent partial disability sustained due to worsening of the condition of Respondent’s left leg, contained in the Compensation Order of April 2, 2007, is supported by substantial evidence, in the nature of the stipulations of the parties, and is in accordance with the law as hereinbefore articulated.

² We point out that, had this been a case properly including a *Cherrydale* scenario, rather than a timely modification request under the Act, the ALJ erroneously placed the burden of demonstrating a *prima facie* case that “the nature of claimant’s condition was a foreseeable deterioration or consequence of the initial injury rather than the development of a worsening condition”. Compensation Order, page 5. Contrary to the ALJ’s assertion, the law places the burden upon a claimant to demonstrate entitlement to the level of benefits sought, by a preponderance of the evidence. See, *Dunston v. Dist. of Columbia Dept. of Employment Serv’s.*, 509 A.2d 109 (D.C. 1986). The District of Columbia Court of Appeals has recently reiterated this principal in *Washington Metropolitan Area Transit Authority v. Dist. of Columbia Dep’t. of Employment Serv’s. and Juni Brown, Intervenor*, DCCA No. 06-AA-27(Slip Op. June 14, 2007), (*Browne*) at 13 – 14. In addition, as a modification request, the burden is upon the party asserting the change in condition to demonstrate it. See, *Washington Metropolitan Area Transit Authority v. Dist. of Columbia Dept. of Employment Serv’s. and Leroy Anderson, Jr., Intervenor*, 703 A.2d 1225 (D.C. 1997) (*Anderson*). Further, were it not for the fact that this case represents a claim for increased benefits based upon a worsening of condition within one year of the initial award (an approved stipulation from the Office of Workers’ Compensation dated March 15, 2004, as set forth in footnote 4 of the Compensation Order), we do not agree with the ALJ’s conclusion that Respondent’s evidence supports an award of additional temporary total disability benefits under the narrow exception to *Smith, supra*, as expressed in *Cherrydale, supra*. This is because there is no evidence that the worsening in this case amounts to the extraordinary, unusual, and unexpected type of condition, which “results in amputation or its functional equivalent”, as required by the Director and which requirement was recognized as a reasonable one by the court in *Cherrydale*, at 34. Lastly, the failure to conduct a preliminary review of the evidence as required by *Snipes v. District of Columbia Dept. of Employment Serv’s.*, 542 A.2d 832 (D.C. 1988) case was harmless error, given the fact that the parties stipulated to a change in conditions warranting a change in the degree of disability, as well as to the extent of that that change.

ORDER

The award of temporary total disability benefits, in the form of a denial of a credit to Petitioner in the amount of those benefits paid voluntarily during the stipulated period of temporary total disability, against an increase in the stipulated degree of permanent partial disability sustained due to worsening of the condition of Respondent's left leg, contained in the Compensation Order of April 2, 2007, is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

June 21, 2007

DATE