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
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CRB No. 06-60

LORITA ARTIS,

Claimant - Respondent

v.

D. C. DEPARTMENT OF HEALTH

EMPLOYER - PETITIONER

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD PBL No. 05-003, DCP No. LT4-Health00028

Andrea G. Comentale, Esquire, for the Petitioner

Ronnie Thaxton, Esquire, for the Respondent

Before LINDA F. JORY, and SHARMAN J. MONROE, and FLOYD LEWIS *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 §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §§ 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 and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order by an Administrative Law Judge (ALJ) of the Office of Hearings and Adjudication's Administrative Hearings Division (AHD). In that Compensation Order, (CO) which was filed on June 2, 2006, the ALJ, determined employer did not submit sufficiently persuasive evidence to support a termination of Respondent's disability benefits based upon a change of conditions to her right knee injury.

Employer-Petitioner, filed an Application for Review (AFR) of the June 2, 2006 Compensation Order, asserting the CO is not supported by substantial evidence and therefore should be reversed.

Claimant – Respondent, through the assistance of counsel, filed its response to the AFR on July 17, 2006, asserting the Compensation Order is supported by substantial evidence and should, therefore, be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.01, *et seq*., at §1-623.28 (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 scope of review, the CRB and the Panel are bound 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, in support of its allegation that the CO is not supported by substantial evidence, Petitioner asserts the February 25, 2002 IME report of Dr. Herbert Joseph is "current and fresh" and "probative and persuasive of a change in the medical status" and that Respondent has presented no credible evidence to refute Dr. Joseph's opinion that Petitioner can return to work without restrictions.

More specifically, Petitioner asserts that Dr. Joseph's opinion that Respondent is physically capable of performing "medium work" is consistent with is opinion that she can return to work without restrictions as Respondent's duties as a food service worker "constitutes" medium work.

Review of the Compensation Order, reveals the ALJ discredited Dr. Joseph's opinion that Respondent can return to work without restrictions as the ALJ found that statement to be inconsistent with Dr. Joseph's opinion on Respondent's actual physical capabilities (of carrying up to 50 pounds only 1-33 percent of an 8 hour work day and no lifting of more than 50 pounds). Relying on the treating physician's preference utilized in this jurisdiction[2], the ALJ accorded more weight to the opinions of Drs. Morao and Dawson, "[Respondent] should lift no more than 25 pounds" to be sufficient to find Respondent's right knee disability has not ceased or lessened. CO at 5.

Although not cited to in the ALJ's discussion, the Court of Appeals for the District of Columbia has addressed the question of whether a report of a treating physician should be rejected in favor of a more recently issued report by a non-treating physician based on what the Court described as a "faulty premise in disregarding the treating physician's opinion as stale"[3]. *See Shelda Kralick v. Dist. Of Columbia Dep't of Employment Services*, 842 A.2d 705 (February 26, 2004)(*Kralick*). In rejecting the argument that the treating physician rule should have been limited to cases under the private sector Act, the Court held "A claimant under the District of Columbia Government Comprehensive Merit Personnel Act (CMPA), D.C. Code An. §1-623.01 et. seq. (2001) was not to be treated any differently than a private sector claimant in this regard". *Kralick, supra* at 842, 853 and added that in fact OHA has applied that treating physician preference in CMPA cases, *citing Smallwood v. District of Columbia Dep't. of Mental Health*, 2003 DC Wrk. Comp. LEXIS 258, 16-17 (August 18, 2003); *Berryman-Turner v. Dist. of Columbia Dep't. of Corrections*, 2003 DC Wrk. Comp Lexis 322 (October 1, 2003).

The Panel concludes Petitioner has done nothing more than assert numerous reasons why the ALJ might have ruled differently, had the ALJ accepted Petitioner's views as to the weight accorded to the evidence presented. While it is true that there is other evidence in the record that could have supported a contrary result, we may not substitute our judgment for that of the ALJ, whose decision is clearly supported by substantial evidence and consistent with the weight afforded the opinion of the treating physician. *See Marriott*, 834 A.2d at 885; *Kralick, supra*.

CONCLUSION

The Compensation Order of June 2, 2006 is supported by substantial evidence and is in accordance with the law.

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[2] The ALJ *cited Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (December 31, 1986); *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998); and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C.App. 1992).

[3] *See generally, Toomer v. D.C. Dep't. of Corrs*., CRB No. 05-202, OHA No. PBL 98-048A, DCP No. LT5-DOCOO1603 (May 2. 2005); *Jones v. D.C. Dep't. of Corrs.*, Dir. Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC NO. 312082 (December 19, 2000; *Robinson v. D.C. Gen. Hosp*., ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997).

ORDER

The Compensation Order of June 2, 2006 is hereby AFFIRMED

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

September 6, 2006