

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 15-110**

**LUIS ALVAREZ,  
Claimant-Respondent**

v.

**RESTAURANT ASSOCIATES and  
GALLAGHER BASSETT SERVICES,  
Employer/Third-Party Administrator-Petitioner.**

Appeal from a June 10, 2015 Compensation Order on Remand by  
Administrative Law Judge Linda F. Jory  
AHD No. 10-343D, OWC No. 662108

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 NOV 5 AM 11 39

John R. Noble for Claimant  
Anthony J. Zaccagnini for Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The facts and procedural history are set out in *Alvarez v. Restaurant Associates*, CRB No. 14-126, AHD No. 10-343D (March 9, 2015)(hereinafter DRO):

On June 25, 2009 while working as a dishwasher for Restaurant Associates (“RA”), Mr. Luis Alvarez slipped and struck his left knee. RA voluntarily paid temporary total disability benefits from July 7, 2009 to February 10, 2010, but a dispute arose over Mr. Alvarez’s entitlement to temporary total disability benefits after February 10, 2010.

On September 17, 2012, the parties proceeded to a formal hearing. An administrative law judge (“ALJ”) ruled that Mr. Alvarez’s pain management

treatment was medically causally related to his compensable injury and that he was entitled to ongoing temporary total disability benefits and authorization for pain management. *Alvarez v. Restaurant Associates Corporation*, AHD No. 10-343B, OWC No. 662108 (November 11, 2012).

RA appealed the November 11, 2012 Compensation Order to the Compensation Review Board (“CRB”). The CRB affirmed the ALJ’s conclusion that Mr. Alvarez’s left knee condition and post-traumatic arthritis and his corresponding need for pain management and light duty were medically causally related to his work-related injury; the CRB reversed the portion of the Compensation Order concluding that Mr. Alvarez did not voluntarily limit his income in February 2010. *Alvarez v. Restaurant Associates Corporation*, CRB No. 12-190, AHD No. 10-343B, OWC No. 662108 (August 14, 2013).

On remand, the ALJ determined Mr. Alvarez had voluntarily limited his income from February 18, 2010 to February 23, 2010; the ALJ granted Mr. Alvarez temporary total disability benefits for the closed period of February 11, 2010 to February 17, 2010 and for February 24, 2010 and continuing. *Alvarez v. Restaurant Associates Corporation*, AHD No. 10-343B, OWC No. 662108 (September 30, 2013). The CRB affirmed the September 30, 2013 Compensation Order. *Alvarez v. Restaurant Associates Corporation*, CRB No. 13-133, AHD No. 10-343B, OWC No. 662108 (January 24, 2014).

The parties proceeded to a second formal hearing on September 16, 2014 to assess Mr. Alvarez’s entitlement to ongoing wage loss benefits and medical benefits. The ALJ denied the claim for relief. *Alvarez v. Restaurant Associates*, AHD No. 10-343D, OWC No. 662108 (October 14, 2014).

Claimant appealed the October 14, 2014 Compensation Order denying the claim for relief. In the DRO quoted above, the CRB determined that as Employer was under an order to pay disability benefits, Employer was asking for a modification of the prior order at the formal hearing on September 16, 2014. As Employer was asking for a modification, the burden of proof rested with the Employer. The CRB concluded the ALJ erred in placing the burden of proof on Claimant and thus vacated the Compensation Order. The CRB remanded the case as it was concluded:

Because the ALJ applied the wrong burden of proof in a case for modification of a prior Compensation Order, the October 14, 2014 Compensation Order is not in accordance with the law and is VACATED. On remand, the ALJ shall address Mr. Alvarez’s entitlement to wage loss benefits and medical benefits. The remaining issues are moot.

DRO at 7.

A Compensation Order on Remand (COR) was issued on June 10, 2015 which denied Employer’s request for a modification, finding that Employer had not proven by a preponderance

of the evidence that there had been a change in Claimant's condition since the prior formal hearing.

Employer appealed. Employer argues the ALJ erred in concluding Employer had not met its burden of proof to show Claimant's condition had changed since the last hearing. Claimant opposes the appeal, stating the COR was correct and should be affirmed.

#### STANDARD OF REVIEW

The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

#### ANALYSIS

As the ALJ and Employer in argument acknowledge,

It is well established in this jurisdiction that once a compensation order has been issued, the right to an evidentiary hearing is triggered only where there has been a threshold showing that there is "reason to believe that a change of conditions has occurred". *See Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225 (D.C. App. 1997) (hereinafter, *Anderson*),(citing *Sylvia Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (D.C. 1988) (hereinafter, *Snipes*). In order to prevail, the moving party must present sufficient evidence to prove that a change of condition has occurred. This change of condition must be either a function of claimant's physical condition, or a change in his disability which has occurred since the date of the previous Formal Hearing. *See Snipes, supra*, 542 A.2d 832 (1988); D.C. Code § 32-1524.

COR at 5. (Footnote omitted.)

Employer argues the ALJ erred in concluding Employer had not met its burden of proof to show Claimant's condition had changed since the last hearing, summarizing selected evidence submitted at the 2012 formal hearing and the 2014 formal hearing. Employer argues that the ALJ relied simply on the statement by Dr. Johnson in his April 2, 2014 report and deposition that Claimant's condition remained "clinically the same." Employer's argument at 6. Employer argues that Dr. Johnson's one statement alone is not sufficient to defeat Employer's case and that the medical evidence as a whole supports a finding that Claimant's condition has been

improving, pointing this panel to Dr. Johnson's March 16, 2012 IME which Employer states the ALJ completely ignored.

The ALJ held:

On April 7, 2011, Dr. Johnson wrote:

The patient's subjective complaints are out of proportion to the objective findings. There is little in the way of any objective abnormality that would substantiate the severity of his objective complaints or that would corroborate his weakness, pain, and inability to return to his normal work activities. X-rays are normal. Physical examination is normal and there are only subjective findings with exaggeration in my opinion. The patient's injury of September 25, 2009 resulted in tears of the medial and lateral menisci. There was no abnormality of the patella and now the patient complains of patellar pain (with no abnormality on MRI scan). The treatment thus far up to my last examination has been appropriate and necessary. It was reasonable, in my opinion, for Dr. Siekanowicz to try an injection in the knee, but this did not help. A work hardening program also was appropriate in my opinion, which also has not helped. I see no objective criteria on my examination today or in the objective evidence in the record to preclude him any further from the performance of his normal work activities as a dishwasher. He can be considered to have reached maximum medical improvement.

According to the AMA Guides to the Evaluation for Permanent Impairment, Fourth Edition, the patient has an impairment rating of 10% of the lower extremity according to Table 64, page 85, in the above mentioned manual, which relates to partial meniscectomies both medially and laterally. This impairment rating takes into account such factors as pain, loss of function, loss of endurance, atrophy, and weakness.

No additional treatment is required. He states through the interpreter that he was working in construction before the injury, but at the time of the injury he was working as a dishwasher. I believe that he is able to return to his normal work activities that he enjoyed at the time of his injury of June 25, 2009.

EE 5 at 3.

Dr. Johnson was of the opinion in 2011 that Claimant had reached MMI; had 10% impairment rating to the left extremity; was able to return to work as a dishwasher and his subjective complaints are out of proportion to the objective findings. The

undersigned cannot ascertain what has changed in Dr. Johnson's opinion in 2013 or 2014. To the contrary, Dr. Johnson conceded in his reports and at his deposition that Claimant's examination, clinically, has been essentially the same.

Counsel for Employer asked Dr. Johnson at his deposition:

Q. And yet, Mr. Alvarez's pain complaints were still significant when you saw him in April of 2013?

A. Exactly. And they were unchanged from the first time I saw him, in fact.

Q. Did you have the opportunity to assess whether or not it was appropriate for him to be treating for pain with pain medications on an ongoing basis?

A. Well, I examined him multiple times over the ensuing five years following his injury, and his examination, clinically, has been essentially the same. I mean there's been no effusion.

EE 4 at 12,13 and 16.

Employer also submits the reports and deposition testimony of Dr. Kalmat of PMI. Dr. Kalmat testified that he prescribed Tramadol, a narcotic, for claimant's pain but that claimant tested negative for narcotics and he subsequently had to discharged him from his care. Dr. Kalmat explained that claimant told him he took the Tramadol every day so Dr. Kalmat expected to see evidence of the Tramadol in claimant's urine test. Dr. Kalmat would not testify that he discharged claimant because he thought claimant was selling the Tramadol as opposed to taking it himself. Nevertheless, Dr. Kalmat's discharge and deposition testimony does not aid Employer in establishing there has been a change in claimant's condition.

Based on review of the April 7, 2011 report of Dr. Johnson, compared with his recent reports the undersigned concludes employer has not established by a preponderance of evidence that there has been a change in Claimant's condition since the prior hearing.

COR at 7-8.

We cannot agree with Employer that the ALJ only took into consideration the April 2011 IME report and ignored the March 2012 IME.<sup>1</sup> The ALJ took into consideration the April 7, 2011 IME report, Dr. Johnson's recent reports, the deposition of Dr. Johnson, and Dr. Kalmat when

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<sup>1</sup> We are also mindful that an ALJ "is not required to inventory the evidence and explain in detail why a particular part of it is accepted or rejected." *Landesburg v. DOES*, 794 A.2d 607 (D.C. 2002), at 616, n. 7, quoting *Sturgis v. DOES*, 629 A.2d 547 (D.C. 1993), at 555.

coming to her conclusion that Employer had failed to satisfy its burden, that of a preponderance of the evidence, that Claimant had a change of condition to warrant a modification of the prior Compensation Order. We affirm this conclusion.

In argument, what Employer is requesting this panel to do is to reweigh the evidence in its favor, a task we cannot do. As stated above, the CRB must affirm 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 this panel might have reached a contrary conclusion.

#### **CONCLUSION AND ORDER**

The June 10, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

*So ordered.*