

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. 08-060

LYLLIAM HERRERA,

Claimant – Respondent

v

NATIONAL ASSOCIATION OF MANUFACTURERS AND FEDERAL INSURANCE,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 07-321, OWC No. 625521

Robert C. Baker, Esquire for the Petitioner

Allen J. Lowe, Esquire for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

FLOYD LEWIS, *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, 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. 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.

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 Order, which was filed on November 23, 2007, the Administrative Law Judge (ALJ) awarded Claimant-Respondent (Respondent) temporary total disability benefits from January 10, 2007 to February 13, 2007 and May 13, 2007 to the present and continuing. On December 19, 2007, Employer-Petitioner (Petitioner) appealed that Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

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. D.C. Official Code §32-1522(d)(2). "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 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, Petitioner alleges that the ALJ erred by determining that Respondent did not voluntarily limit her income by refusing light duty work offered by Petitioner. Respondent counters that there is no evidence to support a conclusion that Respondent voluntarily limited her income, as she demonstrated that she was unable to perform the alternate employment which Petitioner provided for her.

At the hearing, the ALJ was faced with Petitioner's argument that Respondent voluntarily limited her income by not performing the duties of a verifier, the light duty alternative clerical position provided by Petitioner, after Respondent fell and injured her shoulder at work. After undergoing rotator cuff surgery, Respondent's physician released her to return to light duty work. In analyzing Petitioner's assertion, the ALJ referred to D.C. Official Code § 32-1508(5), which provides that an employee voluntarily limits his or her income if that employee fails to accept employment commensurate with their abilities. The ALJ ultimately concluded that Respondent did not voluntarily limit her income, since the verifier position that Petitioner provided was not commensurate with Respondent's abilities.

The ALJ specifically found that Respondent was a credible witness, noting that her testimony was consistent with and supported by evidence in the record. It is well settled that the credibility determinations of the fact-finder are entitled to great weight. *Dell v. Dep't. of Employment Servs.*, 499 A.2d 102, 106 (D.C. 1985).

Referring to Respondent's testimony at the hearing, the ALJ noted that she testified that she is from Nicaragua, where she received all of her education and has been in the United States for 29 years. She worked in a manual labor position as a function coordinator for Petitioner for 18 years, carrying food and cases of drinks; setting up audiovisual equipment; and, assembling and disassembling audiovisual equipment. In the new position as a verifier, Respondent stated that her training for this position was completely on the job, as she began working with the computer mouse on her first day in the position. Hearing transcript at 18,19, 22. The verifier position required Respondent to perform computer research on other companies, to perform data entry, to telephone companies to obtain and verify information and at times, to assist with other basic office duties. Petitioner's exh. no. 3.

The ALJ concluded:

Nothing in the Claimant's work history with Employer made the position of verifier commensurate with her abilities. The position may have been within her limitations, but it was not commensurate with her abilities. Abilities are those job skills that an employee has acquired working for an employer. Claimant has provided purely physical labor for Employer for over 18 years. To require a right-hand dominant employee to perform data entry with a mouse with an injured right shoulder where the IME has found that the rotator cuff tear surgery has failed does not provide Claimant light duty employment consistent with her limitations. Accordingly, the Claimant has not voluntarily limited her income.

Compensation Order at 4.

On appeal, Petitioner contends that Respondent was capable of performing the verifier job position that she was placed in when she was released to light duty. However, Respondent testified that when she tried to perform the work, her right arm was so painful that he could not move it and she returned to her physician who placed her on disability. Respondent again returned to try the verifier position, but was only able to work for a few hours before she reported the problems to her supervisor and again returned to her treating physician. She specifically emphasized that using the computer mouse caused pain in her right shoulder.

While Petitioner argues that the position was commensurate with her abilities, it must be emphasized that both Respondent's treating physician and Petitioner's physician opined that Respondent had an unsuccessful rotator cuff repair and the ALJ found that Respondent credibility testified that the duties of the verifier position caused her increased pain. Moreover, the ALJ specifically stressed that Respondent previously had only worked in manual labor positions and this

position was a clerical position requiring her to perform data entry, which was not commensurate with her abilities.

This Panel notes that it has been held that in analyzing such situations, “The degree of disability in any case cannot be considered by physical condition alone, but there must [also] be taken into consideration the injured [person’s] age, his industrial history, and the availability of the type of work which he can do.” *Washington Post v. Dist. of Columbia Dep’t. of Employment Servs.*, 675 A.2d 37, 40-41 (D.C. 1996) (quoting *American Mut. Ins. Co. v. Jones*, 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970)).

In *Joyner v. Dist. of Columbia Dep’t. of Employment Servs.*, 507 A.2d 1027, 1031 n.4 (D.C. 1986), the Court of Appeals emphasized that appropriate job availability should consider a person’s age, background and what that person physically and mentally is able to do after an injury, as a person’s vocational background must be considered in determining what jobs he or she is capable of performing.

This Panel can find no reason to disturb the ALJ’s determination that the verifier position was not commensurate with Respondent’s abilities. Accordingly, after a complete review of the record, the ALJ’s conclusion to award Respondent temporary total disability benefits for the periods requested and that Respondent had not voluntarily limited her income is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of November 23, 2007 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of November 23, 2007, is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

February 7, 2008
DATE