

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. 06-079

MAURICE SINCLAIR,

Claimant-Petitioner,

v.

PREMIUM DISTRIBUTORS AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 05-364, OWC No. 606018

Maurice Sinclair, *pro se* Petitioner¹

Curtis B. Hane, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

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

REMAND ORDER

This matter comes before the Compensation Review Board (CRB) on appeal by Claimant-Petitioner (Petitioner) of a Compensation Order issued August 30, 2006, in which Petitioner's claim for temporary total disability benefits from May 5, 2005 through the date of the formal hearing and continuing was denied, due to the finding by the Administrative Law Judge (ALJ) that Petitioner had voluntarily limited his income during that period by refusing suitable alternative modified employment within his physical capacity.

Among Petitioner's complaints in this appeal is the fact that, subsequent to the formal hearing which was conducted on September 27, 2005, Petitioner obtained an MRI study of his lumbar spine, which Petitioner asserts was recommended by Dr. Michael K. Kuo on June 6, 2005 but which had

¹ Petitioner was represented by Joseph H. Koonz, Jr., Esquire, at the formal hearing, but the appeal has been presented by Petitioner without counsel.

not been performed by the date of the formal hearing, due to Employer/Insurer's (Respondent's) declining to provide it. According to Petitioner's "Addendum to Memorandum of Points and Authorities I [sic] Support of Employee's Application for Review" (Petitioner's Addendum), the study revealed "L3-4 left foraminal disc herniation with mass effect upon adjacent nerve root." Petitioner's Addendum, page 2. The fact that Dr. Kuo recommended this study prior to the formal hearing is acknowledged by Respondent in its "Employer/Carrier's Memorandum of Points and Authorities in Opposition to Claimant's Application for Review" (Respondent's Memorandum), at page 4.²

Review of the Compensation Order reveals that, to a significant extent, the ALJ's decision to deny the claimed benefits was premised upon a lack of objective evidence demonstrating an identifiable anatomical pathology. This lack of evidence contributed to the ALJ's analysis with respect to rejection of treating physician opinion and a generally negative view of Petitioner's credibility.

Although not described as such by Petitioner in this appeal, we take his reliance upon this post-hearing medical evidence to constitute a Motion to Reopen the Record and to Submit Additional Evidence, a procedure that is provided for in 7 DCMR 264, "Submission of Additional Evidence". Under those regulations, in order to be permitted to reopen the record while a Compensation Order is before the CRB, a party must establish (a) that the evidence is material, and (b) that there existed reasonable grounds for the failure to adduce such evidence at the formal hearing. 7 DCMR 264.1 (a) and (b).³

In this case, the evidence is plainly material; it impacts directly upon a central pillar of the ALJ's decision, that being a lack of objective evidence of an anatomical injury, as described above. Further, the fact that the study, although recommended by a treating physician prior to the formal hearing, was not performed until after the formal hearing, and that the delay in obtaining the study was due to no fault, delay or failure of Petitioner, but rather was attributable to Respondent's declining to authorize same, persuades us that there are reasonable grounds for the failure to present the evidence at the formal hearing.

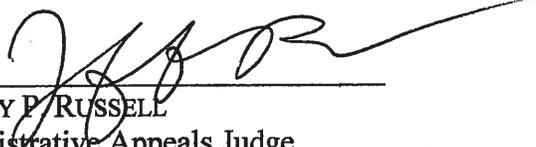
Accordingly, consistent with the foregoing discussion and with the recent decision of the District of Columbia Court of Appeals in *Darden v. District of Columbia Dep't. of Employment Serv's.*, No. 05-AA-365, 2006 D.C. App. LEXIS 624 (Decided November 22, 2006), we remand this matter to AHD for further proceedings as the ALJ deems necessary to consider the additional evidence described above. While such proceedings may or may not, at the ALJ's discretion, include additional testimonial presentation related to the new medical evidence, they should at a minimum provide Respondent with the opportunity to respond to the new evidence in reasonable fashion.

² Respondent asserts that the date of the recommendation for this study is July 20, 2005.

³ Respondent acknowledged the availability of such a procedure, and expressed no specific opposition to it being employed in this case. Respondent's Memorandum, page 7. However, Respondent asserts in that memorandum that the decision as to whether to reopen the record rests with the ALJ in AHD. To the extent that Respondent suggests that the ALJ has sole authority to consider such a request, we respectfully disagree, and point out that the regulation cited above grants the CRB the power to rule upon whether the evidence is material and whether the failure to produce such evidence at the formal hearing was reasonable. Upon the CRB's decision in that regard, the matter is to be remanded to the ALJ for consideration of the evidence, not for consideration as to whether to consider the evidence.

We express no view at this time concerning the other aspects of this appeal, because we wish to allow the ALJ to maintain the broadest discretion to revisit the case in light of this newly obtained evidence, and any rebuttal evidence presented by Respondent.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

December 7, 2006

DATE