

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. 06-57

BETTY MURRAY,

Claimant – Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD PBL No. 06-018, DCP No. 760005-2004-0029

Frank McDougald, Jr., Esq., for the Petitioner

Betty Murray, for the Respondent, *Pro Se*

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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 (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

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 May 23, 2006, the Administrative Law Judge (ALJ) granted the request of the Claimant-Respondent (Respondent) to have her terminated temporary total disability benefits reinstated. The Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the decision below is not supported by substantial evidence and should be reversed.²

ANALYSIS

As an initial matter, the standard 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 §§ 1-623.28(a) and 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 Int’l. v. District of Columbia Department of Employment Services*, 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.

Turning to the case under review herein, the Petitioner alleges that the ALJ erred in not accepting the medical opinion of Dr. David Johnson, the independent medical examiner. The Petitioner maintains that Dr. Johnson’s opinion that the Respondent was capable of returning to work was “current and fresh” and “probative and persuasive of a change in [the] medical status” because Dr. Johnson not only reviewed medical reports but also conducted an examination of the Respondent.

As stated by the ALJ, the employer, herein the Petitioner, bears the burden of producing persuasive evidence sufficient to substantiate the modification or termination of disability benefits. The Petitioner’s stated reasons for terminating the Respondent’s benefits were: 1) the opinion of Dr. Johnson that the injuries which were sustained from the May 24, 2004 had

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.

² Along with its Petition for Review, the Petitioner filed an independent medical evaluation from Dr. David Johnson dated January 4, 2006. Pursuant to the regulations governing proceeding before the CRB, the CRB’s review of a case is limited to the record made before the AHD or the OWC. See 7 DCMR § 266.1. In this case, since Dr. Johnson’s report was entered into evidence at the formal hearing as Employer Exhibit No. 2, the Panel will consider it as part of its review of the records as a whole.

resolved and 2) the Respondent's failure to provide updated medical reports or a signed medical release.

After reviewing the medical evidence the Panel agrees that Dr. Johnson's opinion is not persuasive evidence sufficient to substantiate a termination of the Respondent's benefits. Although Dr. Johnson opined that the Respondent could return to full duty work without restrictions, Dr. Johnson prefaced his opinion by stating that since he did not have the records from the Washington Hospital Center emergency room, it was difficult to relate the Respondent's current back complaints with her work injury.³ He also indicated that in the cover letter for his examination, it was noted that the Respondent had "two damaged disks", but that "neither the patient's history nor record available for my review confirms such a diagnosis." He, nevertheless, reported that the Respondent complained of tingling in her right lower extremity. Dr. Johnson consequently opined that an MRI scan would be an appropriate test to work up the Respondent's complaints and stated that he would be happy to review additional evidence (especially an MRI scan) and then provide additional comments on the condition of the Respondent's back. *See* Employer Exhibit No. 2. While it thus might seemingly appear that Dr. Johnson's opinion could be relied upon to support termination of Respondent's disability benefits, nevertheless Dr. Johnson made it clear that his opinion was tentative to the extent that additional medical records and testing were required before a definitive opinion could be rendered. Thus, Dr. Johnson's opinion, as rendered, is not the persuasive medical evidence required in order to substantiate the modification or termination of benefits. *Chase*, ECAB No. 82-9 (July 9, 1992); *Mitchell*, ECAB No. 82-28 (May 28, 1983).⁴

With respect to the Respondent's failure to provide updated medical reports or a signed medical release, the Panel affirms the ALJ's ultimate determination, but on a different basis. In affirming the ALJ on this issue, the Panel is aware of the regulations found at 7 DCMR §§ 3100 to 3199. 7 DCMR §§ 3131.10 and 3131.12 require that an injured employee complete a Medical Authorization and Release of Confidential Information Form and submit proper medical documentation as requested to support an ongoing disability. 7 DCMR § 3131.13(c) indicates that an employee's failure to provide information may be considered in awarding or denying benefits. However, these provisions are applicable only to new claims. The Respondent's claim is not a new claim, but an existing claim.

The procedures for an existing claim are found at 7 DCMR § 3132. Pursuant to 7 DCMR § 3132.4, "employee and the treating physician shall provide copies of all employee's medical records regardless of the source of the record(s) . . .". 7 DCMR § 3132.6 lists several bases for

³ The Respondent injured her right knee, right side right arm and back when she fell at work on May 24, 2004. The ALJ accepted Dr. Johnson's opinion that the Respondent's head and knee disabilities had resolved as substantial persuasive evidence to warrant a termination of benefits for the aforesaid disabilities. *See* Compensation Order at pp. 4-5. After reviewing the medical evidence, the Panel agrees and will not disturb the ALJ's finding and conclusion as they relate to the nature and extent of the Respondent's head and knee disabilities.

⁴ While Petitioner might argue that Dr. Johnson's opinion was frustrated by the refusal and/or inability of Respondent to provide requested medical records, it is nevertheless Petitioner's burden to establish that the termination of disability benefits was warranted; thus Petitioner's obligation not only to secure for Dr. Johnson any additional medical records he felt were necessary, but also to secure the MRI scan that the doctor felt was particularly necessary.

an eligibility determination (ED) but does not list failure to provide information requested. However, 7 DCMR § 3132.6(j) states:

Any other ground demonstrating that the Act requires the employee's benefits to be modified, such as abandonment of the claim, retirement of the employee, or clear evidence that the employee has knowingly and willfully received benefits to which he or she was not entitled under the Act.

7 DCMR § 3132.8 further states:

A claim shall be deemed abandoned or subject to modification for non-cooperation when the employee fails to return required forms for an existing claim, the Program has made at least two (2) attempts to contact the employee and request such forms, and at least fourteen (14) calendar days prior to the issuance of the notice, the Program sends the employee a warning letter explaining why the Program believes the employee is not cooperating or has abandoned the claim, what the employee must do in order to comply, and describing the consequences of failing to cooperate or abandonment.

Herein, the Petitioner submitted into evidence two (2) letters addressed to the Respondent, the first is dated December 7, 2005 and the second is dated December 22, 2005, requesting a signed Medical Authorization and Release of Confidential Information form. The Respondent testified that she did not receive the letters and the ALJ did not find the Respondent's testimony incredible. Hearing Transcript (HT) at pp. 43-45. The Petitioner did not present any proof of mailing or any explanation of the internal mailing process. Absent such proof, it cannot be said that the Respondent was apprised of the consequences of not returning required forms. *See generally, Thomas v. Department of Employment Services*, 490 A.2d 1162 (D.C. 1985)(record evidence held insufficient to conclude that notices were mailed to employee where employee denies receiving notices and agency fails to present proof of mailing via either certification or a description of the agency's mailing procedures).

CONCLUSION

The Compensation Order of May 23, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of May 23, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE

Administrative Appeals Judge

July 28, 2006
DATE