

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. 05-09

ELEANOR M. NICHOLSON,

Claimant - Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 03-092A, OWC No. 579088

Matthew J. Peffer, Esquire for the Petitioner

Detria J. Liles, Esquire, for the Respondent

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and FLOYD LEWIS,
Acting ADMINISTRATIVE Appeals Judge.

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 § 32-1521.01 and § 32-1522 (2004), 7 DCMR § 230 (1994), 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 20024, Title J, the 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. Official Code §§ 1-623.1 to 1.643.7 (2005),

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

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 October 12, 2004, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner) had failed to establish any wage loss during the period of claimed disability and not entitled to any disability award under the Act and denied Petitioner's claim for relief. The ALJ further determined Respondent has not demonstrated with substantial evidence that Petitioner has failed to cooperate with Respondent's vocational rehabilitation efforts pursuant to D. C. Official Code §32-1507(d).

As grounds for this appeal, Petitioner alleges the Administrative Law Judge's conclusion that she has failed to establish a wage loss is not supported by any evidence and the decision is arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law. Respondent has filed an opposition to Petitioner's Application for Review asserting Petitioner has not met her burden of citing any evidence to establish she has not worked or suffered a wage loss. Respondent cross appeals asserting the ALJ erred in concluding that Petitioner's injuries prevented her from returning to her regular duties, specifically that the ALJ's conclusion was based upon erroneous fact-finding which in turn resulted in improper weighing of medical evidence. Respondent asserts therefore, the conclusion that Petitioner could not have performed the duties of a street supervisor is unreliable and not supported by substantial evidence.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, 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. D.C. Official Code § 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. App. 2003). Consistent with this scope of review, the CRB and this 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.

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.

Turning to the case under review, Petitioner asserts that the ALJ's finding that she "quit" in September 2003 and his statement that she testified she is currently employed in her usual position by the same employer and, "therefore, there is no assertion of any wage loss in her current employment" is clear legal error as there is no evidence anywhere in the record to support these findings. A review of the Compensation Order reveals the ALJ did make a finding that Petitioner resumed "her full duty work however, she later quit in September 2003". CO at 3. The ALJ however, in his discussion wrote "Claimant remained symptomatic in her July 9, 2003 follow-up and was advised by Dr. Dennis to keep her light duty work restrictions; and that in his September 2, 2003 follow-up examination, Dr. Dennis noted claimant had difficulty maintaining her work status since employer had not accommodated her in a light duty position.

As to the nature and extent of claimant's disability as of September 12, 2003, the ALJ weighed the opinions of both claimant's treating physicians, Dr. Dennis and Dr. James Tozzi against that of independent medical evaluator, Dr. Frank Nisenfeld, who was of the opinion claimant could return to her usual employment as a street supervisor. Applying the treating physician preference, the ALJ accorded more weight to Dr. Dennis and Dr. Tozzi and concluded claimant was able only to return to modified duty employment with the previous restrictions on reaching above shoulder level, lifting or carrying in excess of 15-20 pounds, sitting, standing or driving for more than 30 minutes. The ALJ further noted that that the testimony adduced at the formal hearing did not unequivocally disclose that any reasonable accommodation was made to claimant by employer by offering alternative light duty employment consistent with her March 17, 2003 restrictions. CO at 4, 5.

Although unclear to the reviewing panel from what source his information was derived, the ALJ wrote that the Petitioner "testified she is currently employed in her usual position by the same employer and there is no assertion of any wage loss in her current employment" and concluded "Accordingly, absent any economic loss, despite claimant's physical condition, she cannot recover temporary total disability benefits". CO at 5.

Respondent asserts that the ALJ did not assert Petitioner "quit" her employment with employer altogether but that she "quit" her attempted return to duty, and that her testimony failed to prove wage loss as a result. Noting that Respondent has not asserted that claimant was working in any capacity for the period of relief claimed, neither at the OHA level or on appeal, the Panel has thoroughly reviewed the transcript of the formal hearing for claimant's testimony that she was "currently employed in her usual position" at the time of the formal hearing.

Contrary to the ALJ's interpretation, the Panel has not located said testimony and concludes that the following testimony does not translate to testimony that she is currently employed in her usual position:

By Mr. Peffer (Q): Okay. Now you said you stopped working in September of 2003. Is that Correct?

By Petitioner (A): Yes.

Q. When you stopped working, did you have any communications with a supervisor or representative of Metro before you stopped work?

A. No.

Q. Did Dr. Dennis advise you to stop work?

A. Yes.

Q. And how did you do that, ma'am?

A. I called to him and explained to him the pain that I was in. And he told me not to go back to work, and to come in to see him.

Q. Okay did you go to into to see him?

A. The earliest appointment I could get was the 8th of October, and that's when I went to see him.

Q. And did Dr. Dennis provide you paperwork or a disability slip?

A. Yes.

Q. Ms. Nicholson, I am going to show you what's in Claimant's Exhibit packet No. 1. A disability slip dated October 8, 2003. Do you recognize that slip?

A. Uh-huh. That's what he gave me.

Q. When you say "he", you're referring to Dr. Dennis?

A. Dr. Dennis. Yes.

Q. Okay. Did you take that disability slip to Metro?

A. Yes. I faxed it down to the, oh gosh, I know I sent that to the worker's compensation office. That's what they always had me to do, to the lady that's handling my case.

Q. In Risk Management, the lady that's handling my case. I have her card with her fax number on it. And every time I go to the doctor, she has me to fax to her my paperwork, which is what I do.

Q. Is that Ms. Abba?

A. Yes.

Q. Okay. And you haven't returned to work since. Is that correct?

A. No.

HT at 41-43.

The Panel further notes the ALJ also asked Petitioner how long she stayed on the job once she went back to work in April 2003 to which she responded "From April 21st of 2003 to September 11th of 2003." HT at 37.

In light of the above and having reviewed the hearing transcript in its entirety, the Panel must agree with Petitioner that the ALJ manufactured evidence that Petitioner was working without wage loss as of September 2003. The Panel further rejects Respondent's assertion that Petitioner's testimony failed to prove a wage loss. Accordingly, the ALJ's conclusion "the proffered evidence fails to establish Petitioner's wage loss during the period claimed disability she is not entitled to any disability award under the Act" is not supported by substantial evidence and the Compensation Order is not in accordance with the law and must be reversed.

The Panel turns to Respondent's cross-appeal assertion that in concluding Petitioner's injuries prevented her from returning to her usual employment as a Street Supervisor, the ALJ "impliedly found the Street Supervisor's position currently demands physical activities which would violate Dr. Dennis' restrictions. And this implied finding is not supported by substantial evidence and is erroneous". The ALJ included in his findings, "in performing her tasks, claimant was required to bend stoop, lift reach overhead, and climb up the steps and bumpers of the bus. I find in snow season, claimant carried chains and sand bags weighing 25 lbs." CO at 2. This finding in the Panel's view is supported by claimant's testimony which the ALJ has not found to be incredible.

Respondent attempted to discredit Petitioner's testimony by adducing testimony from James Strader, assistant general superintendent and Petitioner's superintendent that duties once performed by street supervisors in 1999 when the injury occurred are now performed by mechanics. However, review of Strader's testimony under direct and cross examination reveal that Petitioner could still be required to perform activities which would exceed her physical capabilities. Specifically when asked under cross examination by Petitioner's counsel:

Q. If a call comes to a street supervisor that there is a loose mirror and the go to that vehicle you as a supervisor sir . . . would accept your employe[e] to not tighten that bolt and get that bus moving?

A. If they can tighten it, tighten it. Move the bus.

Q. All right. Why would she have shovels?

A. There are times in snow that you have to remove snow from a wheel---

Q. Right. So she's got to be able to shovel snow correct?

A. Yes.

HT at 108, 109.

Based on the foregoing testimony of record, the Panel concludes the ALJ's finding that Petitioner's actual job duties as a street supervisor exceed the restrictions she had at the time of the Formal Hearing and the ALJ's finding in that claimant was unable to perform her Street Supervisor's duties is supported by substantial evidence and affirmed.

CONCLUSION

The ALJ's conclusion that Petitioner sustained her burden of establishing she is unable to return to her usual employment from November 23, 2003 to the date of the formal hearing is supported by substantial evidence and in accordance with the law. The ALJ's conclusion that Petitioner failed to establish a wage loss during the period of claimed disability and is not entitled to any disability award under the Act is not supported by substantial evidence and not in accordance with the law.

ORDER

The Compensation Order issued on March 31, 2005 is hereby AFFIRMED IN PART AND REVERSED IN PART. That ALJ's conclusion that Petitioner was unable to return to her usual employment from November 23, 2003 is hereby AFFIRMED. The ALJ's conclusion Petitioner failed to establish a wage loss during the period of claimed and the denial of benefits is hereby REVERSED.

FOR THE COMPENSATION REVIEW BOARD

LINDA F. JORY
Administrative Appeals Judge

July 15, 2005
DATE