

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. 07-21

PAUL HARRIS,

Claimant – Petitioner

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL AND GALLAGHER BASSETT SERVICES,

Employer/Carrier - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
AHD Nos. 02-433A, OWC No. 578649

Paul Harris, *pro se* Petitioner¹

Jeffrey W. Ochsman, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN MONROE, and FLOYD LEWIS, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND REMAND 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)².

¹ Petitioner was represented at the November 7, 2006 Formal Hearing by Eric M. May, Esquire.

² 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), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C.

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, (CO) which was filed on November 28, 2006, the Administrative Law Judge (ALJ) concluded that the current condition of Petitioner's left shoulder (as well as his back) is not medically caused by his work related injury and Petitioner is no longer entitled to the receipt of temporary total disability benefits. *See Paul Harris v. Greater Southeast Community Hospital*, OHA No. 02-433A, OWC No. 578649 (November 28, 2006) (02-433A Comp Order).

The Petitioner filed an Application for Review (AFR) of the November 28, 2006 Compensation Order on December 26, 2006. On January 4, 2007, Petitioner filed his Memorandum of Points and Authorities and requested an extension of time in order to obtain legal counsel to follow the appeal process. On January 9, 2007, the CRB granted Petitioner's request allowing him fifteen calendar days to obtain legal counsel. Petitioner petitioned for an additional extension on January 22, 2007 which was again granted by the CRB on January 23, 2007. As of March 5, 2007, the CRB has not received notice from Petitioner or from newly retained counsel on his behalf.

Respondent has filed a response asserting the ALJ reached appropriate findings on the issue presented and that those findings of fact were based upon substantial evidence in the record.

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.

The Panel notes at the outset that at the time of the Formal Hearing held before the ALJ which resulted in the instant Compensation Order, employer was paying Petitioner temporary total disability benefits pursuant to an existing Compensation Order issued by AHD on May 14, 2001. *See Paul Harris v. Greater Southeast Community Hospital*, OHA No. 02-433, OWC No. 578649 (May 14, 2001) (02-433 Comp Order). In the 02-433 Compensation Order, the ALJ concluded

Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Petitioner's injuries to his left shoulder and back of November 15, 2004 arose out of and in the course of his employment and he has been temporarily and totally disabled from November 15, 2004 to the present and continuing. The Panel acknowledges that in reaching said Conclusion the ALJ found the

Petitioner's symptoms and complaints are consistent with the diagram of a possible rotator cuff tear of the left shoulder in addition to degenerative changes of the AC joint.

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 §32-1524¹.

The Court in *Anderson* provided:

In the context of workers' compensation law, the burden of showing a change of conditions has also been held to be on the party claiming the change whether a claimant or employer. 8 Larson, *Larson's Workers' Compensation Law*, §81.33 (c) at 15-1194.32. The burden may shift once the moving party establishes his case. 8 Larson, *supra*, §81.33 (c) at 15-1194.42. . . . Where the moving party fails to offer any evidence warranting a modification of the award, the non-moving party should prevail under this statute even if he produces no evidence at all. 8 Larson, *supra*, §81.33(c), at 15-1194.47.

As the Court of Appeals has instructed this agency in *Anderson*, consideration of the prior determination is necessarily taken into account in deciding whether, for modification purposes, a change has occurred. The moving party must first make a preliminary showing that there is reason to believe that a change of conditions has occurred which could result in a modification of the prior award. *Anderson*, 703 A.2d 1225 at 1229 (citing *Snipes, supra*). As also instructed in *Anderson*,

The "reason to believe" standard in D.C. Code §36-324(a)(1) (now cited as §32-1524(a)(1)) requires an affirmative factual showing that a change of conditions has occurred. *Snipes, supra*, 542 A.2d at 835. According to the language of the statute such a change must raise issues concerning "the fact or the degree of disability or the amount of compensation payable pursuant thereto.

¹A change of circumstances warranting modification of workers' compensation award pursuant to statute is not restricted to medical conditions. See *Washington Metropolitan Area Transit Authority v. District of Columbia Dept. of Employment Services*, 1997, 703 A.2d 1225, wherein the Court of Appeals found the lack of availability of employment suitable to claimant's condition as basis for change of circumstances warranting modification.

Upon such a preliminary showing, at what is commonly called a “*Snipes*” hearing, a Formal Hearing is required to consider the issue, following which the Act requires the issuance of a “new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation previously paid or award compensation².

The ALJ in the instant matter began her analysis of employer’s attempt to modify the existing compensation order by acknowledging that because Respondent had continued to pay temporary total disability benefits pursuant to the order, Respondent’s request for a modification was timely under the Act. §32-1524³.

The ALJ subsequently stated that the next issue to address was whether there has been a change in Petitioner’s circumstances that demonstrate a change in the degree of his disability or warrants a change in the amount of compensation he receives. *See* 02-433A at page 5. Although the ALJ never explains whether or not a *Snipes* hearing was in fact held, or if applicable, why a *Snipes* hearing was not held, the ALJ conceded that the burden of showing that a change of conditions has occurred rests with the Respondent (or as described in *Anderson*, the moving party)⁴.

As to what type of modification, Respondent is requesting, the ALJ explained:

[Respondent] has requested a termination or suspension of [Petitioner’s] benefits due to [Petitioner’s] alleged failure to cooperate and voluntary limitation of income (sic). [Respondent] primarily asserts that [Petitioner’s] changed conditions are due to his failure to cooperate with the efforts of Scott Severt, the vocational rehabilitation specialist it hired, to place him in a job. It is [Respondent’s] contention that but for [Petitioner’s] misleading information about his qualifications and means of contacting him, his unkept appearance, or poor affect and body language in meeting with employers, [Petitioner] could have been more successful in securing a position paying the same or more than his usual employment.

Instead of outlining what evidence Respondent has proffered in order to support its contention or what evidence the ALJ found supportive, the ALJ, before deciding whether Respondent has met its burden, states:

As with all income compensation claims, the claimant herein bears the burden of proof at all times. Where as here, the employer is moving for modification of a previous order, it carries a threshold burden of production regarding the occurrence of a change of conditions.

²See D.C. Code §32-1524(a), (a)(1) and (c).

³The ALJ refers to §36-324, the code section containing the modification requirements prior to the amendments which changed the code sections in 2004.

⁴The Panel is mindful that a separate *Snipes* hearing need not be conducted if the ALJ conducts a *Snipes* preliminary review of the moving parties’ evidence prior to conducting a Formal Hearing on the merits of the request for modification.

*citing Anderson, supra*⁵. Thus it appears that the ALJ began weighing the evidence before reaching a conclusion as to whether the moving party has met its burden and states that “In considering whether a change in conditions has occurred, only new evidence may be considered”, yet incorrectly citing §36-324(b), the code section of the Act before it was amended in 2004.

Nevertheless, the Panel cannot ascertain what evidence submitted by Respondent the ALJ relied upon to determine that Respondent has in fact met its threshold burden of production when she ultimately concludes “the requirements of *Snipes*, have been met therefore the instant case can now proceed to a determination on the merits”. 02-433A at 6. To the contrary, the ALJ has made no reference to any evidence submitted by Respondent that demonstrates the level of cooperation Petitioner demonstrated with regard to Respondent’s vocational efforts. Thus, the Panel is unable to conclude that the ALJ’s determination that Respondent met its initial *Snipes* burden is supported by the evidence of record, nor can the Panel conclude that the burden of production properly shifted to Petitioner or if the burden did properly shift to Petitioner.

The Panel must restate at this juncture that the instant Petitioner has no burden to re-establish that he is temporarily and totally disabled if he in fact has not requested a modification of the existing Compensation Order, which has already found him to be temporarily and totally disabled and this issue cannot be re-litigated short of a successful showing by Respondent that there is reason to believe that there has been a change in her disability status, per *Snipes*.

Based upon the foregoing, the Compensation Order in the instant matter must be vacated and the matter remanded to the AHD initially for a preliminary *Snipes* review of the evidence to determine if in fact there is reason to believe that a change of condition has occurred since the May 14, 2001 Compensation Order.

In the event the matter reaches a full evidentiary hearing on the status of Petitioner’s disability, based upon an alleged showing that there is reason to believe a change in conditions has occurred, the ALJ must determine if Petitioner has in fact voluntarily limited his income by refusing to cooperate with Respondent’s vocational rehabilitation efforts. See *Darden v. District of Columbia Department of Employment Services*, 911 A.2d 410 (December 12, 2006; *Epstein v. District of Columbia Department of Employment Services*, 850 A.2d 1140 (May 27, 2002).

CONCLUSION

The November 28, 2006 Compensation Order which terminated Petitioner’s temporary total disability benefits is not supported by substantial evidence in the record and is not in accordance with the law.

⁵ The Panel must remind the ALJ that the party who is not asserting a change of conditions should not be limited to newly acquired evidence in defending its position that a change has not occurred. See *Keith Bell v. Mt. Olivet Cemetery*, CRB Nos. 06-24, 06-25, AHD Nos.98-350C, 04-1550 (June 22, 2006), *citing Anderson, supra*.

ORDER

The November 28, 2006 Compensation Order is not in accordance with the law and is hereby *VACATED AND REMANDED* and the prior Compensation Order dated May 14, 2001 is hereby reinstated. On remand, the ALJ shall allow the moving party to first make a preliminary showing that there is reason to believe that a change of conditions has occurred pursuant to *Snipes supra*. If applicable, the ALJ shall proceed to a formal evidentiary hearing on the modification issue, pursuant to *Anderson; Snipes supra*.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

March 8, 2007
Date