

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. 02-87

MICHAEL PLUNKETT,
Claimant - Petitioner

v.

SCIENCE APPLICATION INTERNATIONAL AND AIG CLAIMS SERVICES, INC.,

Employer/Carrier - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
AHD/OHA No. 02-192, OWC No. 541211

Eric M. May, Esquire for the Petitioner

Howard P. Miller, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

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 3, 2002, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner) sustained a compensable accidental injury to his lower back and legs that would ordinarily entitle him to receive temporary total disability benefits from August 21, 2001, to the present and continuing. However, due to Petitioner's non-cooperation with examinations scheduled by Respondent, the ALJ determined Respondent's obligations to compensate Petitioner commenced as of December 19, 2001 but with a credit due for payments made between May 24, 2001, and August 21, 2001. Petitioner's request for further surgical intervention was found to be neither reasonable nor necessary and he was not entitled to an award of penalties in accordance with D.C. Official Code § 32-1528.

As grounds for this appeal, Petitioner alleges the Administrative Law Judge's decision as it pertains to the denial of Petitioner's request for surgery and bad faith sanctions is not in supported by substantial evidence and should therefore be reversed. Petitioner has not challenged the ALJ's order to suspend his benefits.

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. 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.

Addressing the surgery issue first, Petitioner has asserted in his Application for Review, that the weight of the evidence supports the recommendation of his treating physician, Dr. Robert M.

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.

Gorsen, that surgery was not only reasonable but medically necessary. Specifically, Petitioner challenges the ALJ's reliance on the IME opinion of Dr. Steven Hughes asserting that because he agreed Petitioner remained disabled, there is nothing to support Dr. Hughes' rejections of Dr. Gorsen's opinion.

Respondent asserts Petitioner's credibility was at issue due to his non-cooperation and reported abuse of narcotics and Dr. Gorsen's opinion was based in large part on claimant's subjective complaints. Respondent asserts, therefore, the ALJ provided a well-reasoned decision as to why the treating physician's opinion was rejected.

Following a thorough review of the evidence of record, particularly the evidence submitted on Petitioner's behalf, the Panel is in agreement with the ALJ's determination that Petitioner has not met his burden of establishing the requested surgery was reasonable and necessary under the Act. In so concluding, the Panel notes that the ALJ's characterization of Dr. Gorsen's opinion as being "tentative", CO at 8, is supported by substantial evidence and further conclude Dr. Gorsen has never provided any opinion that the surgery, he discussed as a possible treatment option with Petitioner on March 20, 2001 and again on October 23, 2001, was in fact a necessary procedure at that time.

Dr. Gorsen's office note of March 20, 2001 follows:

The patient returns to the office with some continued pain in his back with some intermittent spasm in his leg, which he says occurs about three times a day, for about a half an hour each time. He continues with pain management in terms of medication. He continues to complain of some burning in his feet. We have given him a prescription for Neurontin 300 mg PO TID. We have also given him another prescription for physical therapy to include heat, ultra sound, electrical stimulation and massage. We have discussed the possibility of fusion with him which would most likely be from L4 to S1, although a new scan would be necessary prior to such a procedure. **We have told him that we do not know for certain that such a procedure would work for him.** Certainly we would approach this issue if all else fails. In the meantime he will continue with pain management. We have also suggested the possibility of an evaluation by a physiatrist.

(emphasis added) CE 2 at 1.

Dr. Gorsen did not see Petitioner again until August 22, 2001 at which time he suggested Petitioner have an MRI and possibly another CT scan. Dr. Gorsen indicated Petitioner should return to his office once the MRI is obtained and he would examine the new MRI scan and proceed from there. CE 2 at 3.

Petitioner returned to Dr. Gorsen on October 23, 2001 with the results of the October 10, 2001 MRI. In the only other office visit report of record and the only other time he mentions surgery with Petitioner, Dr. Gorsen reports:

The patient returns to the office with his most recent MRI scans of his back. He continues to have pain in his back and radiating into both his right and left leg. He states that his left leg still has a greater tendency to give out on him. His most recent scans suggest some scarring on the left side at L5-S1 with some foraminal stenosis on the left side. He also has a central disc herniation at L4-5 which may be even a little more prominent than on his previous studies. This central disc could be the cause of his back pain and bilateral leg pain with some component being from the scarring at L5-S1. At this juncture we will order a CT scan of his back to look at his facet joints to see if there are any instability issues. If not, we might then consider the possibility of once again lysing scar tissue at L5-S1 on the left side with a possible left L4-5 discectomy. This may or may not include a fusion from L4 to the sacrum. This will be determined after reviewing his CT scan. The patient understands this, but knows that he is not getting back with time. We will proceed in this fashion.

Without an unequivocal opinion that a certain surgical procedure is necessary in his opinion for the treatment of either Petitioner's subjective or objective findings, the Panel is unable to ascertain how the ALJ could have interpreted the treating physician's statements as an opinion that surgery was indeed a necessary treatment option as of October 2001.

Assuming *arguendo* that Dr. Gorsen had prepared a narrative report or provided deposition testimony to the extent that he was convinced surgery was necessary, the Panel also finds the ALJ's credibility assessment as reason to reject the treating physician's opinion is in this instance, sufficient reason to uphold the ALJ's denial of authorization for surgery. The Court of Appeals has addressed an ALJ's decision to credit the independent medical examiner's opinion over the treating physician and concluded that because the ALJ's credibility determination in favor of the IME physician was supported by substantial evidence, the Director of this agency exceeded his permissible scope of review by disregarding the credibility determination and added that "A hearing officer's decisions are especially weighty when they involve credibility determinations" *Marriott International v. Dist. of Columbia Dept. of Employment Servs.*, 834 A2d. 882 (D.C.App. 2003)

Moving to Petitioner's appeal of the ALJ's bad faith penalty denial, Petitioner asserts the ALJ held, that in order to impose bad faith sanctions, malice or bad faith motivating the employer to suspend benefits must be shown, and, that this is not the law in the District of Columbia. Respondent replies "adamantly" contending that they did not act in bad faith as they had no choice but to terminate temporary total disability benefits as there was absolutely no cooperation from Petitioner, and they in fact paid benefits for four months while the Petitioner continually missed appointments and failed to cooperate with any recommended testing.

In *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B (April 28, 2005) (*Bivens*), the Board recently adopted the three prong test utilized in *Robinson v. Brooks Hair Design*, OWC No. 220370, OHA No. 92-481 (March 2, 1994)², to establish a *prima facie* showing of bad faith in contravention of the Act which is:

² See also *Telisa Settles v. Payless Shoe Stores*, Dir. Dkt. No. 99-75, OHA No. 97-96A, OWC 503532 (March 8, 2000).

- (1) entitlement to a benefit
- (2) knowledge by the employer of a claim to the entitlement, and
- (3) failure to provide the benefit or to controvert the claimed entitlement with a reasonable time.

Once the claimant has made this showing, the burden shifts to the employer to produce evidence indicating a good faith basis for not paying the benefits. Upon such production by the employer, the claimant has the additional burden of proving that said evidence is pre-textual.

Bivens at 5. Turning to the specifics of the case under review, the ALJ found that the *prima facie* case had been made, and as part of that determination, the ALJ found that Petitioner had claimed and was entitled to temporary total disability. The ALJ also found that Respondent had not filed a notice of controversion. CO at 9. The ALJ, therefore, correctly shifted the burden to employer pursuant to *Bivens* to provide a reason for non-payment of benefits.

The ALJ accepted Respondent's explanation or "stance" that as of December 19, 2001, it was still justified in withholding payment due to Petitioner's failure to fully participate in the functional capacity evaluation (FCE) claimant attended on December 19, 2001 as a good faith proffer, noting that "for it is not whether the position taken by employer was correct or not, but whether it was reasonable". The ALJ correctly returned the burden to Petitioner, and found he did not present any evidence of malice or bad faith motivating Respondent in its decision to suspend his benefits. In the ALJ's words, "Claimant simply maintains there is no evidence Respondent made its decision in good faith".

To the extent that the ALJ also chose to write that Petitioner failed to produce "evidence of malice or bad faith which motivated employer" as opposed to characterizing the failure as being a failure to demonstrate "pretext", this usage by the ALJ, is not in the Panel's opinion, of any consequence as the record contains no evidence nor does Petitioner cite to any evidence in his appeal of any pretext on the part of employer. To the contrary, the Panel agrees that it is permissible for the ALJ to conclude that, in continuing with its suspension of Petitioner's benefits, Respondent was relying on a good faith interpretation of their rights, or duty to pay, under the Act. The Panel is further of the opinion that the fact finder in assessing the validity of Respondent's reasons for determining whether the reasons are pre-textual retains the same discretion as the fact finder has in assessing credibility at the Formal Hearings. The fact finder is clearly in a better position having assessed the parties' demeanor as the circumstances of the case are presented to him or her.³ In the instant case, Petitioner's previous failure to attend three scheduled FCE's adds significant reason to Respondent's assessment of their rights under the Act.

Based upon the foregoing, we conclude the denial of the claim for bad faith penalties is supported by substantial evidence in the record and is in accordance with the law.

³ See *Georgetown University v. Dept. of Employment Servs.*, 862 A.2d 387 (2004).

CONCLUSION

The Order of October 3, 2002 denying Petitioner's request for surgery and bad faith penalties pursuant to §32-1528 is supported by substantial evidence and in accordance with the law.

ORDER

The Compensation Order issued on October 3, 2002 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD

LINDA F. JORY
Administrative Appeals Judge

June 14, 2005

DATE