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. 06-35

RICKEY TOOMER,

Claimant–Petitioner,

v.

D.C. DEPARTMENT OF CORRECTIONS,

Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
OHA/AHD No. PBL 98-048A, DCP No. LT5-DOC001603

Harold Levi, Esquire, for the Petitioner

Gail L. Davis, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005),

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 on Remand, which was filed on February 16, 2006, the Administrative Law Judge (ALJ) denied the relief requested by Petitioner at a formal hearing which occurred on August 6, 2003, which relief had previously been denied in a prior Recommended Compensation Order, issued by a prior ALJ, and which prior denial was the subject of an appeal, partial reversal and remand to AHD by this body. Petitioner now seeks review of that Compensation Order on Remand.

As grounds for this appeal, Petitioner alleges as error that the ALJ's decision is not supported by substantial evidence, and must be reversed. [2]

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. *See,* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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 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.

Although this case is procedurally complicated, there is no need here to recount its long and tortuous path, other than to say that the history as described by the ALJ in the Compensation Order on Remand under review herein is accurate in all relevant respects, and that the recitation thereof makes abundantly clear that the ALJ was fully familiar with that history.

---

and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] To the extent that Petitioner's appeal includes complaints that evidence other than the opinion of Dr. Ammerman supports her claim (see, Application for Review), those matters were not before the ALJ, except to the extent that the record medical evidence related to or was relevant to the weight to be given to the opinion of Dr. Ammerman was considered in that context. We declined to entertain re-litigation of those issues in the prior appellate review (see, Decision and Remand Order, page 4) and we again so decline.

The only aspect of that procedural history that is relevant to our review is that the Compensation Order on Remand under review at this time was issued as a result of a prior Decision and Remand Order from this body, CRB (designated by 7 DCMR 250.1, *supra*, footnote 1, as the "Board", referred to by the Director as "Compensation Review Board" [or, CRB] in Administrative Policy Issuance No. 05-01, *supra*, footnote 1, and referred to in the Compensation Order on Remand as "CORB"). In that prior Decision and Remand Order, an earlier Compensation Order issued by a prior ALJ in AHD, who has since left the agency, was affirmed in part and reversed and remanded in part to AHD, for further consideration. That reversal and remand was discussed in the prior Decision and Remand Order as follows:

> In his decision, the ALJ stated,
>
> > "[n]owhere in the three documents presented by claimant does the medical specialist [Dr. Ammerman] causally connect claimant's physical impairments to his employment duties as a lead correctional officer. Claimant's myriad health conditions, including his degenerative conditions to the lumbar and cervical spine, are simply unrelated to his employment duties."
>
> Recommended Decision on Remand at p. 8.
>
> The ALJ then rejected Dr. Ammerman's opinion and denied the Claimant-Petitioner's request to reinstate benefits. This rejection, however, cannot stand because it is contradicted by the record evidence. A review of the record shows that in his July 26, 2002, [sic] Dr. Ammerman opined that the Claimant-Petitioner "appears to have pre-existent lumbar disc disease, which appears to have been aggravated by the 7/2/97 incident, as well as cervical symptoms." Claimant Exhibit No. 8. Indeed, the ALJ summarized Dr. Ammerman's opinion on the Claimant-Petitioner's physical condition as "appearance of pre-existent lumbar disc disease, which appears to have been aggravated by the July 2, 1997 work related injury". Recommended Decision on Remand at p.8 Because of this contradiction within the decision itself, the panel is unable to determine whether the decision is based upon substantial evidence. The matter must be remanded to the ALJ for reconciliation of his contradictory statement's concerning Dr. Ammerman's opinion [footnote omitted].

Decision and Remand Order, CRB, May 2, 2005, pages 4 – 5. By the time of the issuance of that Decision and Remand Order, however, Judge Middleton had retired from the agency, and the matter was therefore assigned to a new ALJ for further action in conformance with the Decision and Remand Order. On February 13, 2006, the new ALJ issued a Compensation Order on Remand, which is the order under review herein. In that Compensation Order on Remand, the new ALJ reviewed the entire record of proceedings that had been conducted in connection with the prior ALJ's decision, in order that she might consider the opinion of Dr. Ammerman[3] as directed by

[3] We note that there is no assertion or argument on appeal that Dr. Ammerman was a treating physician within the ambit of the "treating physician's preference" which is part the evidentiary evaluation scheme under the Act. Rather, as Petitioner states in his Application for Review, Dr. Ammerman performed an independent medical evaluation. See,

CRB. In so doing, the new ALJ decided to reject the opinion as evidence establishing that Petitioner's current disability is causally related to the work injury, and she gave as reasons for that rejection (1) her view that the expressions of opinion in Dr. Ammerman's reports were couched in the term "appears", a less than definitive usage suggesting a less than definitive opinion, (2) her view that Dr. Ammerman did not state that his apprehended aggravation of pre-existent degenerative problems was continuing and contributory to the current complaints, (3) her interpretation that the characterizations of an "aggravation" were susceptible to being viewed as being more aptly viewed as Dr. Ammerman's describing claimant's own history of aggravation (as opposed to being Dr. Ammerman's medical opinion that such aggravation had occurred from a medical perspective), and (4) her determination that the record did not contain evidence that Dr. Ammerman was aware of "significant non-work related events that occurred [subsequent to the work injury] [including] Claimant's recurrence of tuberculosis and a stroke, both of which resulted in physical impairments … Dr. Ammerman does not discuss Claimant's intervening non-work related conditions, and does not distinguish the residual impact of these events from Claimant's physical limitations." Compensation Order on Remand, pages 6 – 7.

These reasons, which are supported by substantial evidence in the record, are sufficient to justify the ALJ's decision to reject the opinion of Dr. Ammerman as being controlling on the question presented, that being whether Petitioner's disability at the time of the formal hearing was causally related to the work injury. The ALJ fully, properly and with adequate reasons and justification carried out the directive of the CRB in its Decision and Remand Order. Accordingly, her Compensation Order on Remand must be affirmed.

CONCLUSION

The Compensation Order on Remand of February 16, 2006 is supported by substantial evidence in the record and is in accordance with the law.

Claimant's Application for Review of Compensation Order on Remand and Memorandum in Support Thereof, page 1 – 2. Accordingly, there is no need to consider whether the rejected opinion is entitled to the "great weight" normally accorded such treating physician opinion. See, *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

ORDER

The Compensation Order on Remand of February 16, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

_____

JEFFREY P. RUSSELL
Administrative Appeals Judge

_____May 2, 2006_____
DATE