

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. 06-73

SHARON BADON,

Claimant – Petitioner

v.

COMCAST CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 06-045, OWC No. 615751

James E. Turner, Esq., for the Petitioner¹

Curtis B. Hane, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and
JEFFREY P. RUSSELL, *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).²

¹ At the formal hearing, the Petitioner was represented by Curtis Daniel Cannon.

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 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

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 July 25, 2006, the Administrative Law Judge (ALJ) granted the Claimant-Petitioner's (Petitioner) request for temporary total disability benefits from January 29, 2005 to August 3, 2005 but denied the balance of her request. On August 3, 2006, the ALJ issued an Errata correcting the dates for the award to July 29, 2005 to August 3, 2005. On August 22, 2006, the Petitioner filed an Application for Review seeking review of that Compensation Order.³

As grounds for this appeal, the Petitioner alleges as error that the decision is not supported by substantial evidence and not in accordance with the law. The Employer-Carrier-Respondent (Respondent) timely filed an Opposition.

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 § 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 adjudicating the nature and extent of disability as it was not at issue. The Petitioner argues that the Respondent stated on the record it was not contesting nature and extent and that the statement was a "judicial determination" having "conclusive force and effect of a stipulation". The Petitioner further argues that the Respondent's "judicial determination" relieved her of the

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

³ Along with her Application, the Petitioner submitted a copy of a March 16, 2006 letter from Dr. Leslie Fenton. Pursuant to 7 DCMR § 266.1, the CRB's appellate jurisdiction is limited to a review of the record made before AHD or OWC, as applicable. It is not empowered to conduct a *de novo* review of matters appealed to it. A review of the Compensation Order, specifically footnote 3, indicates that Dr. Fenton's letter was not submitted into evidence below and not considered by the ALJ. Thus, the letter will not be considered as part of this review.

burden of proving the nature and extent of her disability. As support for her position the Petitioner cites *Royall v. Weitzmann*, 125 A.2d 680 (D.C. 1956). In the alternative, the Petitioner asserts that if the ALJ's adjudication was proper, the ALJ erred in rejecting her medical evidence on disability given that the Respondent proffered no medical evidence contrary to her medical evidence.

The Respondent argues that the nature and extent of the Petitioner's disability not only was "expressly" raised at the formal hearing, but also was listed as a contested issue in the Stipulation Form and the Joint Pre-Hearing Statement. Further, the Respondent argues that the Petitioner's reliance on *Royall* is misplaced because in that case, the defense attorney made a statement to the court that he did not dispute certain facts at the beginning of the proceeding, whereas in this case, the Respondent's attorney's statement with respect to the nature and extent of disability was made at the end of the proceeding during closing argument and no prejudice inured to the Petitioner. The Respondent urges that, at best, the statement was argument and not a concession. With respect to the nature and extent of disability, the Respondent asserts that none of the Petitioner's medical evidence narrates "in any detail the infirmity that beset [Petitioner] and how it impacted on her ability to perform her usual customer service job." Employer/Carrier's Memorandum of Points and Authorities in Opposition to Claimant's Application for Review at p. 8 (quoting Compensation Order at p. 5). Finally, the Respondent asserts that the ALJ did not err in rejecting the Petitioner's medical evidence for the reasons indicated in the Compensation Order and relies upon *Mexicano v. D.C. Department of Employment Services*, 806 A.2d 198 (D.C. 2002) as support for its position.

A review of the record in the instant case shows that per the Joint Pre-Hearing Statement and Stipulation Form filed on December 6, 2006, the question of the nature and extent of the Petitioner's disability was contested.⁴ The record also shows that at the beginning of the hearing, the issues identified to be resolved were medical causal relationship of the Respondent's low back pain to the work injury and the nature and extent of the Petitioner's disability, if any. See Hearing Transcript (HT) at p. 5-6. Later, at the close of the evidence, the ALJ requested closing arguments from the parties. At the beginning of the Petitioner's closing argument, the ALJ interjected and the following conversation occurred:

Judge Verma: Let me ask you before you proceed, Mr. Hane.

Mr. Hane: Yes.

Judge Verma: If you were able to prevail on the causality, that it's not causally related nonetheless – correction. Once you're able to prevail, then, of course, we do not need to address the nature and extent?

Mr. Hane: That's correct.

Judge Verma: But in the event claimant gets the presumption that it's causally related, would you have any objection to paying the disability,

⁴ The Panel takes administrative notice of the contents of the official AHD file in this case.

whatever claimant is claiming for? Would you be willing to go along with the claimant or would you still contest the claim for relief as she has claimed?

Mr. Hane: If you find that it's causally related –

Judge Verma: Right.

Mr. Hane: I'm trying to think – yeah. I don't believe so. If you find that it is causally related, given the fact that Ms. Badon is back to work and given the credit for two days, I'm not really making a case for TT here. So if it is causally related, then yes.

HT at pp. 74-75.

After reviewing the record and case law, the Panel is persuaded by the Respondent's argument and determines that the ALJ did not err in deciding the nature and extent of the Petitioner's disability.

First, the Petitioner's reliance on *Royall* is misplaced. In *Royall*, the defendant appealed to the District of Columbia Court of Appeals (DCCA) arguing that the plaintiff did not present sufficient evidence to prove entitlement to a right of possession of land. As argued by the Respondent, the defendant's attorney made a statement to the court that he did not dispute certain facts *at the beginning of the proceeding*. In making the statement at the beginning, the DCCA ruled that the defendant "relieved" the plaintiff of the need to affirmatively and independently prove right to possession, which, without the concession, the plaintiff would have needed to prove. Indeed, the DCCA held that given the defense attorney's concession and stipulation, the plaintiff had established, without further action on the plaintiff's part, a *prima facie* case on the issue of possession. *See Royall* at 682. In the instant case, the Respondent's attorney's statement with respect to the nature and extent of disability was made *at the end of the proceeding*. The Petitioner, as well as the Respondent, had finished submitting evidence to support their respective positions on the issue of nature and extent. At that point in time, the Petitioner could neither be "relieved" of the need to affirmatively and independently prove the nature and extent of her disability nor lulled into believing that she did not need to so prove. In other words, the Petitioner was not prejudiced in presenting her case. There is, therefore, no need to characterize the Respondent's statement as "a ceremonial or judicial admission [which] is, in truth, a substitute for evidence in that it does away with the need for evidence" as was done in *Royall*. *See Royall* at 682. *Cf. Transportation Leasing Co. v. D.C. Department of Employment Services*, 690 A.2d 487 (D.C. 1997) (remand required where the prehearing conference order indicated claim was for "wage loss," and contained no language referring to a possible scheduled loss, and where nearly all the parties' argument and documentation dealt with the issue of a "wage loss" due to injury to the neck and spine, the petitioner was substantially prejudiced by the lack of notice that the ALJ would consider a scheduled loss, and remand was required).

Second, the proceedings before this agency are administrative in nature and the rules of procedure and practice used in the court system are not binding on the proceedings, but can be

used as guidelines. *See* 7 DCMR §§ 221.4, 261.4. Indeed, both the Act and the District of Columbia Administrative Procedures Act (DCAPA), which also governs administrative proceedings under the Act, give an ALJ broad discretion to determine all questions in adjudicating workers' compensation case. *See* D.C. Official Code § 2-509; 7 DCMR §§ 221.3, 223.3. This discretion, however, is not unfettered and must be rationally based and not capricious or arbitrary. A decision that reflects an abuse of discretion is a reversible error. *See generally Palmerton v. Parsons Corporation*, CRB No. 05-016, AHD No. 05-016, OWC No. 586530 (January 5, 2006) (ALJ's exclusion of the 17 hours of work from petitioner's fee petition on basis that the worked performed was for administrative tasks without further explanation was an abuse of the ALJ's discretion and reversible).

On review of the record in total, the Panel determines that the ALJ did not act arbitrarily or abuse his discretion in disregarding the Respondent's apparent post evidentiary concession and deciding the nature and extent of the Petitioner's disability. This is particularly so where, as here, there is substantial evidence in the record contrary to the Respondent's concession.

The ALJ correctly stated that the burden of proof with respect to the nature and extent of her disability rested with the Petitioner. *See Dunston v. D.C. Department of Employment Services*, 509 A.2d 109, 110 (D.C. 1986). The ALJ found that the Petitioner's supporting her wage loss because of total disability after discharge from the hospital on August 4, 2005 was unreliable. *See* Compensation Order at p. 3. On review, the Panel discerns substantial evidence of record to support this finding.

CONCLUSION

The Compensation Order of July 25, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of July 25, 2006 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

December 19, 2007
DATE