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
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CRB No. 08-036

SUSAN DAMEGREENE,

Claimant – Respondent

v

AMERICAN RED CROSS,

Self-Insured Employer – Petitioner.

Appeal from an Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. 97-411F, OWC No. 532972

Robert C. Baker, Esquire for the Petitioner

Benjamin T. Boscolo, Esquire for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS AND SHARMAN J. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *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).[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 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, 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. 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.

BACKGROUND

This appeal follows the issuance of an 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 Order, which was filed on October 10, 2007, the Administrative Law Judge (ALJ) denied the request by Employer-Petitioner (Petitioner) for a formal hearing. On November 8, 2007, Petitioner appealed that Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

ANALYSIS

As an initial matter, the scope 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 §32-1522(d)(2). "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 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.

Petitioner filed an Application for a Formal Hearing on March 23, 2007. Since two prior Compensation Orders had been issued in this matter, the ALJ issued a Notice of *Snipes* Hearing to give the parties the chance to demonstrate the reason to believe that a change of condition concerning the fact or degree of disability or the amount of compensation payable had occurred. The ALJ dismissed Petitioner's Application for Formal Hearing and Petitioner appealed the dismissal to the CRB.

On August 31, 2007, the CRB vacated the ALJ's April 4, 2007 Dismissal Order and remanded the matter for the ALJ to apply the proper test to initially determine whether , based upon Petitioner's evidence, there existed a reason to believe a change of condition had occurred under D.C. Official Code § 32-1524(a), concerning Claimant-Respondent (Respondent), such that the ALJ should conduct a full formal evidentiary hearing.

In the instant matter, after reviewing the all of the evidence presented, the ALJ concluded that that there was no evidence, which if credited, that could establish changed conditions and denied Petitioner's request on the merits. Petitioner contends that the ALJ erred in finding that Respondent was working full time and in finding that vocational rehabilitation designed to return

Respondent to employment at a wage close as possible to the wage she earned at the time of the injury was not appropriate if an employee is working full time in suitable alternative employment.

In resolving this issue, the ALJ correctly noted, citing *WMATA v. Dist. of Columbia Dept. of Employment Servs.*, 703 A.2d 1225 (D.C. 1997) and *Snipes v. Dist. of Columbia Dep't. of Employment Servs.*, 542 A.2d 832 (D.C. 1988), that after a Compensation Order had been issued, the right to an evidentiary hearing to modify that Compensation Order is triggered only after there has been a threshold showing that there exists a reason to believe a change of condition has occurred. The moving party, to prevail, must present sufficient evidence to prove there is a reason to believe that a change of condition has occurred concerning the fact or degree of compensation or the amount of compensation payable.

The ALJ stressed that this standard does not restrict the analysis to whether there has been a reason to believe that there has been a change in the medical condition, as in the instant matter the parties conceded that there had been no change in Respondent's medical condition. However, in this matter, Petitioner contended that there was reason to believe that there had been a change in condition, as Respondent had failed to cooperate with vocational rehabilitation and had limited her income by failing to accept appropriate part- time light duty employment. Thus, the ALJ recognized that the failure to cooperate with vocational rehabilitation can be a reason to believe a sufficient change in condition would require a formal hearing for modification of a previously issued Compensation Order.

In ultimately rejecting Petitioner's argument, the ALJ, while recognizing when a claimant is working part-time, vocational rehabilitation may be appropriate to try to return that claimant to the wages that the employee earned before the injury, emphasized that when Petitioner offered Respondent the job in this case, Respondent was already working full-time in her self-employment position as owner/operator of Bipster, Inc. On this point the ALJ noted:

> The undersigned, however, is not aware of any provision in the Act or of any case law that permits an employer to impose vocational rehabilitation on a Claimant who is already working <u>full time</u> in suitable alternative employment. . .
>
> . . . at the time of the rejection, Claimant was working full-time. In a letter dated October 31, 2006 Claimant clearly states;
>
>> I work 40-60 hours per week, which is more than full time in my current job and have done so for close to three years.
>>
>> When I spoke to you last summer, I was ill and working 20-30 hours per week. However, except for those few weeks and for the surgery I had this July were I was out for 5 days, I am in the office more than full time. (EE2).

Order at 3.

Moreover, as to the concern that Petitioner raises on appeal that Respondent possibly was not working full time, the ALJ referred to Petitioner's own brief on this point:

> In addition at pages 2-3 of Employer Carrier's Brief in Support of Entitlement to Evidentiary hearing, Employer/Carrier similarly states:
>
> > [w]hen claimant was offered a job with Expeditor [*sic*] that paid $9.00 an hour for part time hours, she declined the job indicating that she was already working 40-50 hours per week. She testified at her deposition that she had been working a minimum of 40 hours per week since 2004.

Id.

Furthermore, the ALJ added:

> The undersigned simply is unwilling to overlook the fact that Claimant was working full time in a business she has cultivated for more that a decade under Employer's watchful eye at the time that she "rejected an offer of suitable alternative part-time employment intended not to replace Respondent's self-employment but to supplement the income Respondent derived through her self-employment" as represented by Employer to the CRB. . .
>
> . . . the undersigned will not impose upon the Act an opportunity for employers to attempt to force a claimant to work more than full time in order to compound wages to create income at a wage as close as possible to the wage earned at the time of the injury. To do so is directly contrary to the humanitarian purposes of the Act.

Id at 3-4..

This Panel notes that the ALJ clearly indicated that based on the arguments presented at the *Snipes* hearing and all of the evidence of record, that Petitioner was not entitled to a formal hearing on the merits. The ALJ found, based on the evidence of record, that Respondent was working full time and that the Act's obligation to pursue suitable employment did not require Respondent to engage in greater than full time employment and there was no voluntary limitation of income by Respondent by rejecting that offer of employment.

We do not agree with the ALJ's suggestion that an employer is always precluded from imposing vocational rehabilitation on a claimant who is already working full time. However, we do agree that vocational rehabilitation may not be appropriate under the facts of this case, as it has previously been determined in the existing Compensation Order that "it is clear that claimant has had reactions from external irritants or toxins which she alone has handled by prevention and the only way she can work in an office environment is if she is the manager/owner etc., and is free to control the environment." *See DameGreene v. American Red Cross*, OHA No. 97-411E, OWC No. 53272 (July 2, 2004).

Petitioner has not asserted either to the CRB or to the ALJ that its vocational rehabilitation efforts have uncovered such a unique working environment. Therefore, this Panel concludes that the ALJ properly determined that Petitioner did not present evidence which would lead the ALJ to find that there is reason to believe a change in condition exists.

CONCLUSION

The Order of October 10, 2007 is supported by substantial evidence and is in accordance with the law.

ORDER

The Order of October 10, 2007, is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS
Administrative Appeals Judge

January 17, 2008
DATE