

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-184

SAUNDRA TAYLOR,
Claimant–Petitioner,

v.

VERIZON COMMUNICATIONS, INC.,
Self-Insured Employer–Respondent.

Appeal from an October 25, 2012 Order on Remand of
Administrative Law Judge Leslie A. Meek
AHD No. 03-216E, OWC No. 571165

Saundra Taylor, *pro se* Petitioner
Curtis B. Hane, Esquire, for the Respondent

Before JEFFREY P. RUSSELL and MELISSA LIN JONES, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

A formal hearing was held on October 1, 2009 before Administrative Law Judge (ALJ) Joan Knight. At that hearing, Ms. Taylor sought an award of permanent total disability, and causally related medical care. In a Compensation Order issued August 6, 2010, ALJ Knight denied the claim for relief, finding that the alleged cause of the claimed disability, an alleged brain injury, was not causally related to the work injury that Ms. Taylor had sustained August 24, 2001. Ms. Taylor appealed the Compensation Order to the CRB, which affirmed the denial of the claims in a Decision and Order issued January 14, 2011.

Ms. Taylor filed a new Application for Formal Hearing on March 8, 2011. The matter was assigned to ALJ Leslie Meek, who conducted a *Snipes*¹ hearing on June 16, 2011, at which time Ms. Taylor

¹ Under *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988), where a party seeks a modification of a Compensation Order, prior to that party being entitled to a formal hearing, a preliminary review of the evidence should be undertaken to determine whether there is reason to believe that there has been a change of conditions effecting the fact or degree of disability or the amount of compensation to which a claimant is entitled.

made an oral presentation and submitted 57 documentary exhibits. The following day, ALJ Meek issued an Order in which she held that Ms. Taylor had failed to adduce sufficient evidence to establish that there is reason to believe that there has been a change of conditions subsequent to the prior formal hearing affecting the fact or degree of disability or the amount of compensation to which Ms. Taylor is entitled. Consistent with that finding, ALJ Meek dismissed the AFH.

Ms. Taylor appealed the Order on July 15, 2011 by filing a Memorandum of Points and Authorities in Support of Petition for Review with the CRB. Verizon opposed the appeal.

On October 25, 2012, the CRB issued a Decision and Remand Order, which contained the following:

The issues to be decided in a *Snipes* proceeding are whether a party can produce “some evidence of (1) a change in the fact or degree of the claimant’s disability, and (2) some initial work-related injury that caused the previous disability.” *Short v. DOES*, 723 A.2d 845 (D.C. 1998). The operative period upon which such an inquiry would focus in this case is the time between the prior formal hearing, October 1, 2009, and the *Snipes* hearing, June 16, 2011.

Review of the 57 exhibits submitted by Ms. Taylor reveals that at least six of them are medical records generated during that time span: CE 14 (an MRI taken May 13, 2011), 15 (an MRI report dated October 20, 2010), 16, 17 (medical reports from Dr. Mouchir Harb dated April 18, 2011 and November 2, 2010), 20 (a medical report from Dr. William Garmoe dated November 24, 2010), and 21 (a medical report from Dr. Arthur Becker dated April 5, 2011) [footnote omitted].

The Order dismissing the appeal is a page and a half in length. The majority of the Order consists of recitation of the standards to be adhered to when determining whether a party has adduced a sufficient quantum of evidence under *Snipes* and its progeny to warrant a formal hearing.

The entire substantive portion of the Order reads as follows:

On June 16, 2011, a hearing was convened in this matter and a *Snipes* hearing was conducted. Upon review of the evidence admitted into evidence, and the argument presented, I find claimant has filed the instant request for modification in a timely manner. I also find, however, that Claimant failed to proffer sufficient, credible evidence to support a reason to believe that since the date of the previous Compensation Order, a change has occurred which raises issues concerning the fact, degree or extent of her disability.

Order, unnumbered page 2. No aspect of the facts of this case appears in the Order. There is no discussion concerning what degree of disability Ms. Taylor experienced at the time of the prior formal hearing (the Order erroneously identifies the date of the Compensation Order as the time from which a change in conditions is being assessed; it is the date of the prior formal hearing), and no discussion of what the

evidence presented by Ms. Taylor (a) consisted of or (b) purported to demonstrate *vis a vis* her condition. There is no identification in the Order of what Ms. Taylor claims with respect to her condition now as opposed to the time of the prior formal hearing.

At the time of the *Snipes* hearing, Ms. Taylor referred to and alleged that comparison of various MRIs demonstrate that her physical condition has deteriorated, and that a new test, called a fiber tracking test, confirms the existence of a traumatic brain injury. In response to the ALJ's questions concerning which exhibits in her package support her claim that there has been a change in conditions, Ms. Taylor identifies CE 14, 15 (HT 37), 16 (HT 38), a fiber tracking test, which is CE 15 (HT 40; HT 56 - 58), and CE 13, a report of unknown date by a Dr. Bracharon. At HT 53 - 54, Ms. Taylor appears to be suggesting that Dr. Harb's reports from the prior hearing are in some manner different from his newer reports. None of these reports upon which Ms. Taylor relied are addressed in the Order.

In the recent case of *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), the District of Columbia Court of Appeal made clear that the reasons for an ALJ's decision must be set out in the operative order with some degree of specificity. In that decision overturning a CRB affirmance of an ALJ's determination of the extent of disability a claimant had sustained under the schedule, the court wrote:

The court is charged, by statute, "to hold unlawful and set aside" an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510 (a)(3)(A). That determination cannot be made unless the court has a basis for evaluating the agency's exercise of discretion, and we require that it be provided, for otherwise, we risk "invit[ing] the exercise of [administrative] impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.'" CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 139, 141 (1921). Discretion without a criteria for its exercise is authorization of arbitrariness." (*James*) *Johnson v. United States*, 398 A.2d 354, 366 (D.C. 1979) (quoting *Brown v. Allen*, 344 U.S. 443, 496, 73 S. Ct. 397, 97 L. Ed. 469 (1953)).

Here, because the ALJ did not explain her reasoning in arriving at a disability award of 7%, we are unable to meaningfully review the decision to determine whether it is based on substantial evidence, applying proper legal principles.

Jones, *supra*, at 1221.

One can not tell from the Order under review why the ALJ ruled as she did, because there is nothing therein that explains her decision in anything other than conclusory terms. Without an explanation we are unable to carry out our review obligation of determining whether the decision was supported by substantial evidence. We have no choice but to remand for further consideration and discussion from the ALJ

concerning the basis of her decision.

Taylor v. Verizon, CRB No. 11-062 (June 25, 2012), page 2 – 4.

On October 25, 2012, the ALJ issued an Order on Remand in response to the Decision and Remand Order. It is that Order on Remand that is now before us for review².

While this appeal was still under consideration, Ms. Taylor filed a Motion For A Stay of Application for Review, the grounds for which appear primarily related to her action in the Superior Court for the District of Columbia. The exact nature of the Superior Court action is not clear to us from the motion, but it is implied therein that it is premised upon either the factual background underpinning the claims for benefits under the Act, the manner in which the claim has been adjudicated by this Agency, the manner in which it has been defended by the Employer, questions of jurisdiction over some or all the claims before us, or some combination of these. In any event, we are not persuaded that a stay is necessary or proper, and the motion is denied.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, at § 32-1521.01 (d)(2)(A), (the Act), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The issues to be decided in a *Snipes* proceeding are whether a party can produce “some evidence of (1) a change in the fact or degree of the claimant’s disability, and (2) some initial work-related injury that caused the previous disability.” *Short v. DOES*, 723 A.2d 845 (D.C. 1998). The operative period upon which such an inquiry would focus in this case is the time between the prior formal hearing, October 1, 2009, and the *Snipes* hearing, June 16, 2011.

In the Decision and Remand Order, the CRB wrote:

Review of the 57 exhibits submitted by Ms. Taylor reveals that at least six of them are medical records generated during that time span: CE 14 (an MRI taken May 13, 2011), 15 (an MRI report dated October 20, 2010), 16, 17 (medical reports from Dr. Mouchir Harb dated April 18, 2011 and November 2, 2010), 20 (a medical report

² Although Respondent filed an Opposition to the Application for Review, it was neither timely nor accompanied by a Motion to Enlarge Time. Neither the Opposition nor the response filed thereto have been considered.

from Dr. William Garmoe dated November 24, 2010), and 21 (a medical report from Dr. Arthur Becker dated April 5, 2011).

The following is the substantitive portion of the Order on Remand that addresses the CRB's concerns about the specific reasons for the ALJ's determination that the identified exhibits do not meet the *Snipes* burden of producing "some evidence" of a change of conditions effecting the fact or degree of disability, or the level of compensation to which a claimant is entitled:

Claimant was given ample opportunity to verbally direct this Tribunal to the evidence that would support a reason to believe a change in her condition has occurred. Claimant was unable to do so.

Upon review of the evidence submitted by Claimant, it became clear that said evidence consisted primarily of documents that preceded the August 6, 2010 Compensation Order. It was also evident that the "new" medical reports submitted by Claimant merely reasserted medical conclusions that were previously rejected in the August 6, 2010 Compensation Order.

In all the documents submitted by Claimant, there was one document found to be new and eligible for consideration regarding the reason to believe that there has been a change of condition. CE 13 is a new functional capacity evaluation (FCE) dated May 20, 2011. When this document is compared with an older FCE conducted on March 30, 2009, it shows Claimant working abilities improved. However, this document fails to show that her condition has changed in such a way that now renders her current medical condition causally related to the work injury

The remainder of Claimant's evidence is rejected as it is merely a reassertion of the medical reports and conclusions previously rejected [in the April 16, 2010 Compensation Order]. Claimant's right to an evidentiary hearing has not been triggered as Claimant has failed to show there is a reason to believe that a change in her condition has occurred.

Order on Remand, page 5 – 6.

In the Decision and Remand Order, the CRB had specifically noted that "In response to the ALJ's questions [at the formal hearing] concerning which exhibits in her package support her claim that there has been a change in conditions, Ms. Taylor identifies CE 14, 15 (HT 37), 16 (HT 38), a fiber tracking test, which is CE 15 (HT 40; HT 56 - 58), and CE 13, a report of unknown date by a Dr. Bracharon. At HT 53 - 54, Ms. Taylor appears to be suggesting that Dr. Harb's reports from the prior hearing are in some manner different from his newer reports."

In these passages, the CRB identified numerous specific exhibits that Ms. Taylor had pointed to as demonstrating a change in her condition meeting the *Snipes* standard. The ALJ only addressed one of them, CE 13. We find no error in her concluding that CE 13 is inadequate to meet the *Snipes* burden.

The ALJ found the claimant's evidence was insufficient because the documents "consisted primarily of documents that preceded the August 6, 2010 Compensation Order" or because they "merely reasserted medical conclusions that were previously rejected. None of the other three exhibits that the CRB instructed the ALJ to analyze (CE 14, 15 and 16) preceded the August 6, 2010 CO. It may well be that the other documents "merely reassert [...] the medical reports and conclusions previously rejected". However, their contents are not described or discussed and are not correlated in any fashion to any previously considered and rejected evidence. While it is well settled that there is no requirement for an ALJ to inventory the evidence in a case, there is a requirement to acknowledge and address evidence that is presented in direct support of or in opposition to a claim. See, *Kyle v. Safeway Stores, Inc.*, CRB No. 12-117, AHD No. 12-116, OWC No. 685101 (October 9, 2012), *Green v. Palomar Hotel*, CRB No. 11-065, AHD No. 10-582, OWC Nos. 673571 and 673273 (November 10, 2011).

Accordingly, the ALJ failed to completely carry out the directive of the CRB to address the specific evidentiary submissions in anything other than conclusory terms. Accordingly, we again remand the matter so as to permit the ALJ to review, identify and discuss in specific terms what these remaining exhibits contain, and how they are mere reassertions as opposed to new findings.

As before therefore, one can not tell from the Order on Remand why the ALJ ruled as she did, because there is nothing therein that explains her decision in anything other than conclusory terms for any of the remaining evidentiary submissions upon which Ms. Taylor relies. So again, we are unable to carry out our review obligation of determining whether the decision was supported by substantial evidence. We have no choice but to remand for further consideration and discussion from the ALJ concerning the basis of her decision.

CONCLUSION

The Order on Remand of October 25, 2012 dismissing the Application for Formal Hearing insufficiently complete to permit review for legal sufficiency.

ORDER

The Order on Remand is vacated, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 18, 2013
DATE