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. 05-231

ANTONIO THOMPSON,

Claimant - Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA No. 99-217E; OWC No. 533461

Antonio L. Thompson, *Pro se*

Alan D. Sundburg, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE , *Administrative Appeals Judges* and FLOYD LEWIS, *Acting Administrative Appeals Judge.*

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 March 31, 2005, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner)'s request for a modification of a prior order should be denied as he failed to meet the filing requirements of D.C. Official Code § 32-1524(a).

As grounds for this appeal, Petitioner alleges the Administrative Law Judge's decision is not in accordance with the law and should therefore be reversed citing D. C. Official Code§ 32-1505(b).

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. App. 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.

Petitioner asserts in his Application for Review, "In accordance with the Act § 32-1505(b), an injured employee shall have up to 3 years after termination of non scheduled benefits to reopen his or her case due to change in condition." According to Petitioner, it has not been over 3 years since the termination of non-scheduled benefits by employer, "therefore, this case, if closed is hereby requested to be reopened". Petitioner also asserts that without a full evidentiary hearing on his questions, the process seems to be the unjust and possibly unconstitutional.

Self-Insured Respondent (Respondent) has responded asserting that the ALJ properly concluded Petitioner's request for modification of the existing Compensation Order was untimely and that

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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.

the ALJ's decision is in accordance with the evidence presented and the law and must be affirmed.

Petitioner has also detailed various problems he has had with this agency and the handling of his claim by various offices of the agency in his Application for Review. Certain discussions Petitioner has provided in his Application are difficult to frame into cogent legal argument for which a remedy exists under the Workers Compensation Act. Nevertheless, so as not to ignore any of Petitioner's complaint, the Panel has identified the following assertions Petitioner purports to be in error.

1. The ALJ incorrectly styled the Pre-Conference hearing held January 18, 2005 as a full evidentiary hearing.
2. Respondent has already been found to have acted in bad faith concerning this claim. The Petitioner's repeated requests for action in penalizing the Respondent have gone unanswered.
3. An example of unfairness could be the .25 a mile travel expenses payable to the injured party to go to medical-related appointments.
4. Petitioner provided medical records that supported his claim that injuries and loss of wages were related to his injuries of May 8, 2001. The Honorable Judge Jeffrey P. Russell, who is also an ex WMATA employee and who personally and professionally knew at least one witness involved in the claim, incorrectly stated in his Compensation Order, dated February 12, 2003, he could not entertain wage loss from and after July 3, 2001 because issues were under review by the Director.
5. Evidence of Record proves that the Petitioner requested a modification of a Compensation Order which is evident by the Joint Pre-Hearing Statement undated. Claimant's request for Modification of Award was within the one year time limit deadline for consideration. WMATA was compensating Petitioner in accordance with the Compensation Order dated May 8, 2001 at the time of Judge Russell's Compensation Order dated February 12, 2003.
6. The December 23, 2004 meeting was, according to Petitioner, a Pre-Conference Hearing and not a full evidentiary hearing and had a full evidentiary hearing been held more evidence would have been introduced.
7. Respondent is in contempt of the May 8, 2001 Compensation Order and Petitioner demands present and continuing benefits in accordance with the May 8, 2001 Compensation Order which Petitioner asserts is still in effect.
8. The ALJ erred by not admitting Petitioner's Exhibit No. 1 at the January 18, 2005 proceeding.
9. The Act allows the February 12, 2003 Compensation Order to be modified because the one-year limitation period for modifying workers' compensation would not bar Petitioner's claim for a schedule payment of permanent disability benefits and/or all benefits allowable where the issue of permanency was not considered in his prior compensation claim and/or claims or awards for temporary total disability.

The Panel must remind Petitioner at this juncture that its scope of review is limited only to those issues which were before the ALJ at the AHD level during the January 18, 2005 proceeding. Review of the March 31, 2005 Compensation Order reveals that the ALJ did not reach the

modification issue of whether there has been a change in the fact of degree of claimant's disability since the February 12, 2003 Compensation Order, as Petitioner's request for a modification was found to be untimely under the Act. The un-timeliness of Petitioner's request precluded the ALJ from examining the evidence to determine whether there was a reason to believe a change of conditions had occurred pursuant to *Snipes v. District of Columbia Department of Employment Services*, 542 A. 2d. 832 (D.C. 1988).

With regards to Petitioner's item no. 1 on appeal, the Panel finds no error with the ALJ calling the January 18, 2005 proceeding a full evidentiary hearing. Once a Compensation Order has been issued, the right to an evidentiary hearing on a request for modification is triggered only where there has been a threshold showing that there is "reason to believe that a change of conditions has occurred". *See Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225, 1227 (D.C. App. 1997) (hereinafter, *Anderson*)(citing *Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (D.C. 1988) (hereinafter, *Snipes*). In order to prevail, the moving party must present sufficient evidence to prove that a change of condition has occurred. This change of condition must be either a function of claimant's physical condition, or a change in his disability which has occurred since the date of the previous Formal Hearing. *See Snipes*, 542 A.2d 832 (1988); D.C. Official Code §32-1524. A preliminary hearing (or *Snipes* hearing) is held to allow the moving party the opportunity to present evidence to establish there is a reason to believe a change has occurred. If the moving party meets its threshold evidentiary burden, the ALJ will either schedule another Formal Hearing or proceed by turning the preliminary hearing into an actual hearing. *See Johnson v. Greater Southeast Community Hospital*, CRB No. 05-224, OHA No. 03-541B (June 9, 2005)

In the instant matter, the ALJ was properly attempting to conduct a "*Snipes*" hearing, creating a record, as well as, accepting evidence. However, when the ALJ determined the Petitioner's request for the *Snipes* determination was untimely, he found no reason to continue taking evidence or testimony as the change of condition question would be moot. Thus, while the ALJ mischaracterized the *Snipes* hearing that was properly held on January 18, 2005 as a "full evidentiary hearing", the label or mislabel is harmless error.

The Panel additionally rejects Petitioner's argument that this claim should be allowed to go forward, relying on the provisions of D. C. Official Code §32-1505(b), which applies to voluntary payments of compensation by employer and not to compensation paid pursuant to an award or a Compensation Order, and states in part that "An injured employee shall have up to 3 years after termination of nonscheduled benefits to re-open his or her case due to changes in conditions." In the Petitioner's case, his receipt of compensation benefits arose as the result of a Compensation Order or an award, and a review of said order can only come about pursuant to D. C. Code Official Code § 32-1524 entitled Modification of Awards. 32-1524. *See Sodexho Marriott Corp. v. Dist. of Columbia Dept. of Employment Servs*., 858 A.2d 452 (D.C. 2004) (D.C. Official Code § 32-1524 requires an existing Compensation Order before a modification may be requested and granted). Accordingly §32-1505 does not apply to the instant matter and Petitioner does not have three years after termination of non scheduled benefits to reopen his or her case due to change in condition. Instead, as the ALJ properly stated Petitioner had only one

year after the date of the last payment of compensation or at any time prior to one year after the rejection of a claim unless the claim was for scheduled benefits pursuant to § 32-1508(3)(v).

The ALJ recited the procedural history of the instant matter and concluded that the date of rejection of Petitioner's claim would be the starting point of the one year statute of limitations and that the Director's decision of May 30, 2003 which rejected Petitioner's appeal as un-timely was the date the proceedings on his appeal came to a close. The ALJ stated Petitioner had until May 29, 2004 to file a request to review the February 12, 2003 Compensation Order in order to seek a modification based upon a change in conditions. The Panel finds, however that the date claimant's claim was rejected for purposes of starting the one year statute of limitations is the date of the Compensation Order which denied or terminated Petitioner's benefits which was February 12, 2003. Thus, Petitioner should have filed his request to review the February 12, 2003 Compensation Order in order to seek a modification based upon a change in conditions by February 12, 2004. This error is harmless inasmuch the ALJ found, and it was not disputed by Petitioner, that the request for a modification was filed with AHD on October 28, 2004 which is still an untimely request pursuant to § 32-1524(a). Accordingly, the Panel finds the ALJ's determination that claimant's request to modify the February 12, 2003 was untimely is in accordance with the law.

With regard to Petitioner's remaining allegations, respondent asserts only some are related to the Compensation Order at issue, particularly Petitioner's attack on the merits of the February 12, 2003 Compensation Order; the Decision of the Director on Petitioner's appeal of that Order; and the reimbursement rate for medical visit mileage set forth by the Office of Workers' Compensation. Employer argues and the Panel is in accord that these contentions are not properly before this forum and need not be further addressed. The appeal of the merits of the February 12, 2003 Compensation Order was dismissed as untimely and arguments concerning the Compensation Order cannot be addressed; arguments addressing the merits of the Decision of the Director are to be made to the D.C. Court of Appeals pursuant to D.C. Official Code §32-1522 (b)(2); and the issue of the reimbursement rate for mileage was not before the ALJ in the January 18, 2005 proceeding.

Lastly, with regard to Petitioner's assertion that the ALJ erred by not admitting Petitioner's Exhibit No. 1, the hearing transcript from the January 18, 2005 proceeding was thoroughly reviewed. Review of the transcript reveals that CE 1 was described by Petitioner for the record as a "statement dated October 5, 2004 written by my psychiatrist, Dr. Ranville S. Clark, M.D.". HT at 10. The record also reveals that CE 1 was admitted into the record without objection from employer and that Petitioner offered no other exhibits at any time during the course of the hearing. HT at 11. Attached to his Application for Review, the Panel does note claimant has attached eight exhibits and exhibit no. 1 is a hand written note from Dr. Clark. As there is no indication in the hearing transcript that Petitioner submitted into evidence this particular letter or the other exhibits at the January 18, 2005 proceeding, and the Panel cannot review evidence that was not before the ALJ, we must respectfully reject Petitioner's assertion that the ALJ did accept his one exhibit at the formal hearing.

CONCLUSION

The Order of March 31, 2005 denying Claimant-Petitioner's claim for relief, as Petitioner's request for a modification pursuant to § 32-1524 was not timely filed, is in accordance with the law.

ORDER

The Compensation Order issued on March 31, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

June 14, 2005
DATE