

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 (Dir. Dkt.) No. 03-160

MARK TINORDI,

Claimant – Petitioner,

v.

WASHINGTON CAPITALS AND CHUBB INSURANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA No. 00-276A, OWC No. 538220

Benjamin T. Boscolo, Esquire, for the Petitioner

Stewart S. Mandela, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, LINDA F JORY and FLOYD LEWIS, *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

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 November 20, 2003, the Administrative Law Judge (ALJ) concluded that there had been a change in Claimant-Petitioner's (Petitioner's) condition since the issuance of a prior Compensation Order awarded Petitioner temporary total disability benefits, that Petitioner had ceased to be temporarily totally disabled, and had attained permanency with respect to his work injury resulting in a ratable medical impairment in the amount of 22% to his right foot as of December 30, 2002. Petitioner now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that ALJ's decision is unsupported 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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is erroneous because it compels Petitioner to accept benefits which he did not claim, allowed Employer-Respondent (Respondent) to make a claim for relief on behalf of Petitioner and as such, the Compensation Order's award of permanent partial disability benefits must be reversed. Petitioner also argues that the finding that Petitioner's disability is permanent is not supported by substantial evidence.

Respondent counters by contending that the ALJ's conclusion that a change of condition had occurred, that Petitioner had ceased to be temporarily totally disabled, had attained permanency

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.

with respect to his work injury and had a ratable medical impairment of 22% to his right foot, is fully supported by evidence in the record and is in accord with applicable law.

Petitioner injured his right ankle while he was employed as a professional hockey player. Pursuant to a Compensation Order issued January 24, 2001, he was awarded ongoing temporary total disability benefits. In the instant matter, the ALJ was faced with the issue of the nature and extent of Petitioner's disability, as both parties sought modification of that prior Compensation Order. Petitioner sought a determination that he was no longer temporarily totally disabled, having returned to suitable alternative employment on October 31, 2002, but that he nevertheless remained temporarily partially disabled since then. Respondent requested termination of ongoing temporary total wage loss benefits, and sought to have Petitioner adjudged to have sustained a 22% permanent partial disability of his right foot as of December 30, 2002.

On appeal to the CRB, Petitioner initially argues that the ALJ committed reversible error in awarding the modification Respondent sought (*i.e.* modification of the original wage loss award to a schedule award) because, in so doing the ALJ permitted Respondent to claim benefits on behalf of Petitioner without statutory authority, thus effectively bestowing upon Respondent a right not authorized under the D.C. Workers' Compensation Act. This argument must be rejected as it is clear that under D.C. Official Code § 32-1524 Respondent had the right to request the relief sought in its modification request,² which the ALJ was fully within his authority to award upon proof by Respondent that the asserted change of condition had occurred. *Washington Metropolitan Area Transit Authority v. Dist. of Columbia Dep't. of Employment Services*, 703 A.2d 1225 (D.C. 1997). Where such a showing is made, the ALJ is authorized to issue a new compensation order "which may terminate, continue, reinstate, increase, or decrease such compensation previously paid, or award compensation." D.C. Official Code § 32-1524(c). The fact that the nature of the award changes, as in the instant case, is of no consequence. As Professor Larson has explained:

The fact that the change necessitates making an award in an entirely different category, as when an original award was one of temporary benefits . . . and the award on reopening would be for total permanent disability, is no obstacle to reopening.

8 *Larson's Workers' Compensation Law* § 131.03[1][a]. See, e.g. *Smith v. D.C. Dep't. of Employment Services*, 548 A.2d 95 (D.C. 1988) (wherein the ALJ approved the claimant's receipt of a schedule award for permanent partial disability upon reaching maximum medical improvement subsequent to having received temporary total wage loss benefits).

Petitioner further challenges the modification of Petitioner's original wage loss award to that of a permanent partial schedule award by arguing on appeal that the ALJ's conclusion that Petitioner's disability is permanent is not supported by substantial evidence of record. As the ALJ correctly points out, the Court of Appeals in *Logan v. Dist. of Columbia Dep't. of*

² D.C. Official Code § 32-1524(a) permits either party to seek modification of a prior compensation order where there is reason to believe that a change in claimant's condition (either physically or economically) has occurred with respect to "the fact or the degree or disability or the amount of compensation payable pursuant thereto" or with respect to "the fact of eligibility or the amount of compensation payable pursuant to § 32-1509."

Employment Servs., 805 A.2d 237 (D.C. 2002), clearly described the meaning of “permanent” as it relates to an employee’s medical condition under the Act, indicating that maximum medical improvement is reached when a disability “has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.” 805 A.2d at 241. *See also, Smith, supra*, 548 A.2d at 98 n.7.

On this point, the ALJ stated:

It is evident that Claimant’s condition, under the *Logan* standard, is permanent. The available medical opinion is undisputed that Claimant is as recovered as he will ever be, that he faces no prospect of improvement or further healing with the passage of time, and that this condition has lasted a long time.

Compensation Order, at 5.

This Panel concludes that this finding by the ALJ is supported by substantial evidence of record. Dr. Mark Myerson, Respondent’s Independent Medical Evaluation physician, who examined Petitioner on several occasions, clearly stated that Petitioner’s ankle was not going to get better, no medication, therapy or exercise would make him better, and that he had thus reached maximum medical improvement. Dr. Myerson also opined that Petitioner had a ratable impairment of 22% to the ankle and that the ankle impairment is correctly viewed as a foot impairment and not a leg impairment. As the ALJ pointed out, Petitioner did not offer any specific rating in opposition to Dr. Myerson’s rating. Compensation Order at 3, n. 5.

Moreover, the ALJ explained that the conclusion that Petitioner’s condition is permanent is not premature simply because his condition is progressive and may reach an identifiable end point in which an ankle fusion is performed. As noted by the ALJ, this argument was rejected in *Safeway Stores v. Dist. of Columbia Dep’t. of Employment Servs.*, 806 A.2d 1214, 1221 (D.C. 2002), as the Court ruled that even the likelihood of a total knee replacement in the future would not prevent the attainment of permanency prior to such surgery, as long as the legal test is met. Furthermore, should Petitioner’s condition further deteriorate, as the Court of Appeals has noted there is nothing that prevents Petitioner from seeking a modification of the schedule award based on changed circumstances. *Smith, supra*, 548 A.2d at 102, n.20.

Accordingly, this Review Panel concludes that there is substantial evidence of record to support the ALJ’s conclusion that Petitioner has ceased to be temporarily totally disabled and that commencing December 20, 2002 his disability is permanent, having reached maximum medical improvement as of that date, with a permanent partial disability rating of 22% to the foot.

CONCLUSION

The Compensation Order of November 20, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of November 20, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

July 20, 2006
DATE