

**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. 06-27**

**DANNY WEISS,**

**Claimant–Respondent,**

**v.**

**DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICE,**

**Employer–Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Fred D. Carney  
OHA/AHD No. PBL 04-031, ODC Nos. LT5-EMS000288

Robert Berkibile, Esquire, for Claimant-Respondent

Ross Buccholz, Esq., for Employer-Petitioner

Before JEFFREY P. RUSSELL, LINDA F. JORY, and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *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 § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).<sup>1</sup>

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<sup>1</sup> 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, 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. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, 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 a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on December 30, 2005, the Administrative Law Judge (ALJ) re-instated Respondent's temporary total disability benefits, which Petitioner had reduced to temporary partial disability benefits based upon an independent medical evaluation (IME) asserting that Respondent was capable of returning to suitable alternative employment, and a labor market study (LMS) asserting the existence of such available employment in the relevant labor market.

Petitioner's Petition for Review requests that the CRB reverse the Compensation Order and restate the decision of Petitioner to reduce Respondent's benefits from total to partial disability.

In the Petition for Review, Petitioner alleges that the ALJ committed reversible error by failing to consider the testimony of the vocational rehabilitation expert and the LMS that she had prepared. Respondent did not participate in this appeal.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. *See*, D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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, Petitioner alleges that the ALJ, in declining to consider the testimony of and the LMS produced by Debbie Moreau, a labor market expert retained by Petitioner to establish that Respondent had the capacity to work and earn wages. This argument is based upon the following passage in the Compensation Order:

Having found, based on the evidence of record, claimant is not capable of returning to work, there is no reason to weigh the evidence of available suitable employment.

Compensation Order (CO), page 10.

This statement follows a lengthy and detailed discussion by the ALJ of the medical evidence presented by the parties, which included reports from Respondents treating physicians, Dr. Jacobson and Dr. Moskovitz. In Dr. Jacobson's view, the ALJ note, Respondent "is in constant pain for which a significant amount of pain medication is being prescribed", including "high doses of narcotics" (CO, page 8). In the words of Dr. Moskovitz:

Mr. Weiss remains disabled from any form of gainful employment because the activities and postures that must be performed on demand cannot be maintained without production of pain and suffering. Mr. Weiss presently suffers chronic pain for which he takes opioids at doses that are incompatible with gainful employment. [His] present condition (multiple disc herniations, spinal stenosis, spondylolisthesis, spondylosis, chronic pain and opioids dependence) is a direct result of the physical impairment sustained in his work related injury and the complications of the treatment thereof (multiple spinal surgeries).

CO, page 8 – 9, report of Dr. Moskovitz, October 13, 2004.

The ALJ considered that evidence, as well as the testimony of Respondent, and concluded that:

The physical limitations render claimant incapable of performing simple tasks on a daily basis that would be expected in a work place. Therefore, claimant is physically incapable of tolerating common physical postures necessary to return to work due to pain. To help claimant tolerate this level of discomfort, he is being treated with high doses of narcotic medication.

CO, page 9.

While we do not quarrel with the ALJ's granting the opinions of these physicians great weight, the question of whether a given individual with certain physical limitations has the ability to work and earn wages is a vocational matter. The assertion by a physician that a patient is unable to work, without specific reference to a specific alternative job, is generally best viewed as an assertion that the individual is incapacitated from his usual (or pre-injury) job. And, where, as here, the physician has expressed detailed opinions concerning the capacity (or lack of capacity) to endure certain specific stresses or physical activities, those opinions can inform an ALJ's consideration of whether alternative positions identified by an employer can be considered suitable for that individual.

However, by declining to even consider the evidence proffered by Petitioner herein, the ALJ has made a factual conclusion that there can not possibly be any jobs which the Respondent could perform in the Washington, D.C. metropolitan area. As with all findings of fact, such a finding must be supported by substantial, relevant evidence, and such findings are subject to challenge by a proffer of substantial counter, relevant evidence. In this case Petitioner proffered the labor market evidence from Ms. Moreau to the effect that she had identified a number of potential employment opportunities in the relevant labor market that, in her expert opinion, were suitable available alternative employment within Respondent's physical capacity. While the ALJ was free to reject such opinion if he found it to be unconvincing for any number of a variety of reasons (including, but

not limited to, its being based upon erroneous or unsupported assumptions concerning Respondent's physical capacity or educational, technical or experiential qualifications, or the fact that the potential jobs identified are so few as to not reliably reflect the true state of the market for a person of Respondent's physical capacity and given his age, training, education, and experience), the ALJ was not free to ignore the evidence entirely.<sup>2</sup>

We express no opinion as to the outcome of any such consideration in this case. However, as a matter of procedural fairness, Petitioner was entitled to have its proffered vocational evidence considered. Accordingly, the Compensation Order's award of total disability benefits is vacated and the matter is remanded to AHD for further consideration consistent with the preceding discussion.

#### CONCLUSION

The Compensation Order of December 30, 2005, which denied Petitioner the opportunity to have relevant evidence concerning vocational capacity considered, is not in accordance with the law.

#### ORDER

The Compensation Order of December 30, 2005 is hereby VACATED and this case is REMANDED for further consideration of Petitioner's vocational evidence.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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March 9, 2006  
DATE

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<sup>2</sup> Further possible reasons for rejecting the claim that Petitioner, which in this case has actually paid total disability benefits for a substantial time, may reduce those benefits, is that the Employees' Compensation Appeals Board (ECAB) has held consistently once the TPA has accepted a claim of disability compensation, and has actually paid benefits, employer must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits. *Chase*, ECAB No. 82-9 (July 9, 1992); *Mitchell*, ECAB No. 82-28 (May 28, 1983); and *Stokes*, ECAB No. 82-33 (June 8, 1983). In addition, ECAB has held that the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *Robinson*, ECAB No. 90-15 (September 16, 1992). Further, in considering whether the Petitioner has met its burden, the ALJ may consider whether the identified positions in the LMS have been reviewed by a physician familiar with Respondent's physical capacity as discussed in *Queen*, ECAB No. 95-13 (August 23, 1996). While ECAB has been abolished, ECAB decisions have persuasive weight and these principles remains part of our analytical framework under the Act.