CRB No. 03-62

MORTEZA KASHANY, Claimant-Petitioner

v.

PUROFIRST OF METROPOLITAN WASHINGTON AND CGU INSURANCE COMPANY,

Employer/Carrier–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 01-082B, OWC No. 549973

Morteza Kashany, *pro se*[1]

Anthony Dwyer, Esquire, for the Employer-Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges*

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of the Compensation 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).[2]

[1] Although represented at the Formal Hearing, Claimant-Petitioner filed an Application for Review (AFH), in the form of a letter dated April 25, 2003 and received by the agency on April 30, 2003, without benefit of counsel. No attorney has entered an appearance on Claimant-Petitioner's behalf.

[2] 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

BACKGROUND

This appeal follows the issuance of a Compensation Order from the former Office of Hearings and Adjudication of the District of Columbia Department of Employment Services, currently 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, 2003, the Administrative Law Judge (ALJ) granted Claimant-Petitioner's claim for temporary total disability from November 19, 1999 through "April of 2000", denied Claimant-Petitioner's claim for wage loss benefits thereafter, and denied Claimant-Petitioner's claim for statutory penalties for retaliatory discharge pursuant to D.C. Official Code §32-1542. In the Order contained within the Compensation Order, the ALJ did not address the claim raised for causally related medical care specifically. That failure to be addressed, coupled with the finding contained within the Compensation Order that the requested medical care is not causally related to the work injury at issue in those proceedings is deemed a denial of that care for the purposes of this review. Claimant-Petitioner now seeks review of that Compensation Order.

Claimant-Petitioner's AFR was made in the form of a letter, which reads in its substantiative entirety, as follows:

> I would like to appeal the decision of the Formal Hearing dated: Feb/21/2003, and file an application for review with the Director, Department of Employment Services.

A notice of Application for Review was mailed by the agency on May 7, 2003 to Claimant-Petitioner and counsel who represented Employer-Respondent at the Formal Hearing. No memorandum of points and authorities was filed with the AFR, nor subsequently. No motion to file any such memorandum out of time was filed. No opposition to the AFR was filed by Employer-Respondent.

On February 14, 2004, the CRB was constituted pursuant to a Directive of the Director of the Department of Employment Services, Directive No. 05-01 issued February 5, 2005. This appeal was transferred by that authority to the CRB for resolution.

ANALYSIS

As an initial matter, the standard 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*, District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522 (d)(2)(A); and 7 DCMR Part 100, §101, *et seq.* "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 standard of review, the CRB and this panel are bound to uphold a Compensation Order that is

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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.

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, supra*, 834 A.2d, at 885.

In this case, Claimant-Petitioner has identified no alleged error by the ALJ, neither in making findings of fact without supporting substantial evidence, nor in applying those facts to the Act.

Review of the Compensation Order reveals that the three claims for relief requested by Claimant-Petitioner at the formal hearing which were not granted were for (1) wage loss benefits from and after "April of 2000", (2) causally related medical care, and (3) penalties for retaliatory discharge. They will therefore be considered as the issues on appeal.

Regarding the first and second issues, after according Claimant-Petitioner the benefit of the presumption that the claimed periods of disability and alleged ongoing symptoms are causally related to the work injury that was found to have occurred, the ALJ went on to find that Employer-Respondent had overcome that presumption by presenting the IME report of Dr. Robert O. Gordon, an orthopaedic surgeon who examined Claimant-Petitioner at Employer-Respondent's request for the purpose of an independent medical evaluation (IME) on February 2, 2003.[3] On his examination, and following a review of the medical records of Dr. Ramin Jebraili, Claimant-Petitioner's initial treating orthopaedic surgeon, and reports of the MRI scans performed on Claimant-Petitioner's back, Dr. Gordon concluded that Claimant-Petitioner had sustained a muscle strain in the work injury, and found that the work-related injury had resolved without residual impairment within six weeks of occurrence. He opined further that Claimant-Petitioner appeared to be exaggerating his current symptoms, and that any such current symptoms were related to the preexistent congenital conditions demonstrated in the MRI scans, and not to the work injury, from which he has "completely recovered". RX 1, Compensation Order, page 7.

The burden placed upon Employer-Respondent upon Claimant-Petitioner's invoking the presumption, under *Whittaker v. District of Columbia Department of Employment Services*, 531 A.2d 844 (D.C. 1995), is to produce substantial evidence to the contrary. *See also*, S*partin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990), and, *Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor (Reynolds)*, 852 A.2d 909 (D.C. App. 2004). Substantial evidence is such evidence as a reasonable person might accept as supporting a given proposition. *Marriott Int'l., supra*. We discern no error in accepting that Dr. Gordon's report was sufficient to meet that burden, meeting as it does the criteria established Reynolds: it is an opinion by a qualified orthopaedic surgeon following a physical examination of the patient and review of pertinent medical records and studies, which unequivocally asserts that the work-related injury had resolved completely. This finding set the stage for the ALJ's proceeding to evaluate the evidence with Claimant-Petitioner bearing the burden of proof by a preponderance of the evidence.

In undertaking that task, the ALJ decided to accept Dr. Gordon's opinion on the ultimate issue, in that the ALJ concluded that it was consistent with the opinion of Dr. Jebraili, who examined Claimant-Petitioner on December 20, 1999, four weeks post-injury, and determined that, despite

[3] The ALJ erroneously noted the date of the IME as having been February 3, 2002. Compensation Order, page 7. The error is of no great significance, in that Dr. Gordon's opinion appears to based upon having diagnosed a preexistent congenital condition, which in his view was documented by the objective radiographic studies around the time of the injury, and his extrapolating further that Claimant-Petitioner's work injury was a muscular strain, which would have resolved within six weeks, and hence would have exhibited no signs upon evaluation even had it occurred in February 2002.

the abnormalities revealed in the MRI scans, Claimant-Petitioner's condition had improved to the point that he could return to work without any restrictions. CX 1; Compensation Order, page 8. Although this conclusion is at odds with the opinions of several subsequent treating physicians, whose opinions are to be accorded great weight under the Act, the ALJ gave rational, reasonable, and cogent reasons for their rejection. For example, regarding the opinion of Dr. Montague Blundon, the ALJ felt that the lack of contemporaneousness between the injury and Dr. Blundon's involvement, and the doctor's reliance upon Claimant-Petitioner's denial of a preexistent back condition, diminished the weight to which they should be accorded. Regarding Dr. Ronald Uscinski, a neurologist consulted to explore the possibility of surgical intervention, the ALJ rejected his assertion of a relationship between the alleged symptoms and the work injury, because Dr. Uscinski's involvement in the case was limited solely to exploring the possibility of surgical intervention, and because there is no indication that Dr. Uscinski was aware that Claimant-Petitioner had returned to work as a truck driver for many months, work which by Claimant-Petitioner's testimonial admission aggravated his back pain. Further, the ALJ reasoned that Dr. Jebraili, also a treating physician, and Dr. Gordon held opinions that were consistent with one another, with Dr. Jebraili having had the benefit of examining Claimant-Petitioner nearest the time of the resolution of the injury. Compensation Order, page 8.

Although upon independent review of the medical record, a reasonable case could be made for accepting Claimant-Petitioner's assertion of a causal relationship between the present complaints and the work injury, the ALJ reached a contrary conclusion, and under the statutory, Court established and regulatory mandates concerning the proper standard of review, we perceive no error in the ALJ's determination that, in accordance with the opinion of Dr. Gordon, Claimant-Petitioner's work-related injury was a simple muscular strain which resolved no later than six weeks after the November 19, 1999 incident. By implication, Employer-Respondent was under no continuing liability for the claimed sequelae, medical or economic, upon resolution of the work related injury without residuals. The denial of those benefits was therefore properly within the ALJ's authority. [4]

Regarding the third issue, the Hearing Transcript (HT) contains Claimant-Petitioner’s testimony concerning the circumstances surrounding his termination. Generally speaking, Claimant-Petitioner testified that a week after the accident, which the ALJ found occurred when Claimant-Petitioner was lifting heavy objects while clearing out debris from a fire damaged house, Claimant-Petitioner attempted to return to work. According to that testimony, Claimant-Petitioner’s supervisor advised him that the work appeared to the supervisor to be to strenuous for Claimant-Petitioner, an observation that is not surprising given that Claimant-Petitioner had sustained the injury while performing normal routine aspects of his job, and which did not, according to Claimant-Petitioner’s description, result from anything out of the ordinary. When Claimant-Petitioner protested the termination, the supervisor directed him to the human resources department, and advised him to file for workers’ compensation benefits. See, HT 30.

The ALJ found this scenario to be the facts surrounding the termination. That finding, based as it is upon Claimant-Petitioner’s own testimony, is based upon substantial evidence. It was Employer, not Claimant-Petitioner, who initiated the process of pursuing the workers’ compensation claim. Claimant-Petitioner has offered no evidence that the termination was for any cause other than Employer-Respondent’s determining that Claimant-Petitioner was not physically capable of performing his job without risk of injury. As such, the ALJ’s determination that

[4] The question of the propriety of the award for wage loss disability benefits thereafter and until Claimant-Petitioner returned to work in April of 2000 as a truck driver, is not before us, in that Employer-Respondent has not filed a cross-application for review nor otherwise participated in this appeal.

Claimant-Petitioner had failed to demonstrate *animus* is correct. Absent evidence of such a motive, properly described by the ALJ as requiring "a desire to intimidate, harass or punish" a worker for pursuit of a workers' compensation claim, Claimant-Petitioner's evidence falls short of the required showing. In so concluding, the ALJ properly referenced *Abramson Assoc.'s, Inc. v. D.C. Dept. Of Employment Services*, 596 A.2d 549, citing *Lyles v. D.C. Dept. Of Employment Services*, 572 A.2d 81 (D.C. App. 1990) which requires that:

> employer's decision to terminate claimant's employment was motivated by 'animus' towards the claimant which resulted wholly or in part from claimant's pursuit of a workers' compensation claim. The 'animus' requirement is satisfied where claimant offers proof that employer's decision was motivated, wholly or in part, by a desire or intent to intimidate, harass, or punish the claimant for pursuit of a workers' compensation claim. *Lyles v. W.M.A.T.A.*, H&AS No. 83-46, OWC No. 004258, decided February 29, 1989.

The ALJ's findings as to the circumstances surrounding the termination are supported by substantial evidence, and the law was properly applied in denying the claim for retaliatory discharge.

CONCLUSION

The denials of Claimant-Petitioner's claims contained in the Compensation Order of March 31, 2003 are supported by substantial evidence in the record and are in accordance with the law.

ORDER

The Compensation Order of March 31, 2003 is hereby affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

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DATE