

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB (Dir.Dkt.) No. 05-259

JUNI BROWNE, SR.,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. 05-218, OWC No. 604606

Heather C. Leslie, Esquire, for the Petitioner

David J. Jacobs, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for 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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia

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 August 4, 2005, the Administrative Law Judge (ALJ) granted a claim requesting provision of medical care in the nature of authorization for an MRI of the right knee, but denied the claim for temporary total disability from August 24, 2004 through October 3, 2004, and from November 12, 2004 through March 17, 2005, requested by Petitioner. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the denial of the claim for temporary total disability is unsupported by substantial evidence and is not in accordance with the law, in that Petitioner alleges on appeal that his treating physician's opinion that Petitioner was totally disabled from his pre-injury employment during the periods covered by the claim for temporary total disability benefits should have resulted in an award of those benefits, because Respondent's independent medical evaluation (IME) evidence was explicitly rejected by the ALJ, rendering Petitioner's treating physician's opinion unopposed.

Respondent did not respond to or otherwise participate in this appeal.

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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 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's decision that the denial of the claim for temporary total disability is unsupported by substantial evidence and is not in accordance with the law, in that Petitioner alleges on appeal that his treating physician's opinion that Petitioner was totally disabled from his pre-injury employment during the periods covered by the claim for temporary total disability benefits should have resulted in an award of those

benefits, because Respondent's independent medical evaluation (IME) evidence was explicitly rejected by the ALJ, rendering Petitioner's treating physician's opinion unopposed. In support of this argument, Petitioner cites the following paragraph from the Compensation Order:

Upon review and consideration of the medical evidence in the record, I accord the greater weight to Claimant's evidence in support of his claim over that of employer's [sic]. I find the medical opinions of the treating physician the more persuasive based upon his having seen and examined the Claimant on several occasions and because his opinions are based upon objective diagnostic testing correlated with examinations. Those diagnostic tests coupled with Claimant's testimony support the finding that Claimant's complaint of knee pain continued unchanged from the date treatment started to the date of the hearing.

Memorandum of Points and Authorities in Support of Application for Review (Petitioner's Memorandum), page 4, quoting Compensation Order, page 7.

We note that the ALJ could have denied this claim based upon the opinions expressed by Dr. Robert Gordon, Respondent's IME physician, who expressed the opinion that Petitioner's injuries "consisted of nothing more than contusions and strains and that [he] had the physical capacity to resume any type of work that he was doing prior to the date of injury" (Compensation Order, page 3), which opinion was arguably corroborated by the fact that, as the ALJ found, Petitioner did in fact return to work in March 2005 without being released to such a return by his treating physician (Compensation Order, page 3). Such a denial would have been supportable by substantial evidence. However, as noted above, this the ALJ specifically and explicitly did not do.

Rather, the ALJ accepted the medical opinions of the treating physician in preference to the IME opinions, a decision consistent with the long established principle in this jurisdiction favoring such treating physician opinion as a general matter, and a decision was inarguably within the ALJ's discretion. See, *Short v. District of Columbia Dept. of Employment Serv's.*, 723 A. 2d 845 (1998). And, although the ALJ acknowledged that such opinion could be disregarded, and conflicting or opposing opinion accepted in its stead, if there are "persuasive reasons for doing so" and those reasons given in the Compensation Order (see, *Whittaker v. District of Columbia Dept. of Employment Serv's.*, 688 A.2d 844 (D.C. 1995), he did not elect to take this route. Rather, the ALJ denied the claim for temporary total disability from August 26, 2004 to October 3, 2004, for the following reasons:

For the initial period that Claimant seeks wage loss benefits, August 26, 2004 to October 3, 2004, there is no medical evidence from either party. ... During this period, Claimant testified that after seeing his personal care physician and being provided with pain medication, he deemed himself injured and did not return to work. While there is evidence in the record that he was not paid by [Respondent] during this period, there is no evidence that [Respondent] demanded that he return to work or that he submit to a medical examination to determine his capacity to return to work

The only evidence in the record is that of the [Petitioner] and while he is deemed to be a credible witness, his testimony alone does not constitute substantial evidence on the issue of his ability to work during the aforementioned period. [Petitioner's] testimony was devoid of any mention of how and to what extent he was incapacitated from performing his normal work duties as a bus operator. [Petitioner] provided no testimonial or documentary evidence to show how the injuries he sustained restricted his capacity to perform any of his regular activities, either at home or on the job. Claimant merely testified that he considered himself injured and therefore did not return to work. [Petitioner] has the burden to show that his injuries prevented him from performing certain functions and that some or all of those functions were integral to his being able to do his job as a bus operator. However, [Petitioner] made no such showing and thus failed to meet his burden of proof by substantial record evidence.

Compensation Order, page 6. What this fails to consider is that, despite this supposed lack of evidence concerning the “functions” that are “integral” to the job as a bus operator is that the ALJ, in making his findings of fact, took “judicial” notice² that “in operating a bus an individual is physically required to ... some standing and walking [sic] and use of [sic] the right leg to depress the accelerator and brake.” Compensation Order, page 2. The taking of this administrative notice has not been challenged by Respondent, and we do not see any error in its being taken in this case. Thus, the fact that Petitioner is required to walk, stand, and use his right leg (frequently, repeatedly and no doubt throughout the course of a presumed eight hour work day) to depress an accelerator and brake, coupled with the “credible” testimony that he deemed himself injured and unable to work, supplies “substantial evidence” in support of the claim for this period, given that the ALJ found that the work injury included injury to the right knee. Bearing in mind that “substantial evidence” is such evidence as a reasonable person might accept to support a particular conclusion (*Marriott Int'l., supra*), these facts are such that a reasonable person might base a conclusion that Petitioner was unable to perform his regular bus operator duties, due to knee pain, during this period, thereon. In addition, the record contains the opinion of his treating physician, Dr. Meyer, that Petitioner's condition as it existed when Petitioner commenced treatment with him on October 4, 2003 included “right knee pain”, and he was “not fit for working duty as a bus operator”. This evidence is further support that Petitioner's evidence for this period of disability is such that a reasonable person might conclude that from the date of the accident to the time that Petitioner first saw Dr. Meyer, he was unfit to work as a bus operator. Thus, the evidence presented by Petitioner and which the ALJ accepted (1) in preference to the opposing evidence contained in Respondent's IME report, and (2) as “credible”, meets the “substantial evidence” requirement in *Dunston v. Dist. of Columbia Dep't. of Employment Serv's.*, 509 A.2d 109 (D.C. 1986).

For the second period, the evidence in support of the claim is even greater than for the initial period, because not only did , as the ALJ found, Petitioner's “complaint of right knee pain continue[...] unchanged ... to the date of the hearing” (Compensation Order, page 7), but Dr. Meyer noted “after each examination that [Petitioner] is not fit to work as a bus operator because of his knee pain”. Compensation Order, page 6.

² “Administrative notice” would have been a more apt term.

The reason given by the ALJ for denying the claim for both periods is the lack of a specifically stated “reason” why Petitioner could not, either in his own opinion or in the opinion of his doctor, perform his job as a bus driver. However, as noted above, the fact that (1) the injury involved right knee pain, (2) that in Petitioner’s own opinion, expressed in his credible testimony and having knowledge of the requirements of a bus operator by virtue of his being one, the knee pain prevented him from meeting those requirements, and (3) this view was shared by his treating physician who likewise had knowledge of Petitioner’s employment as a bus operator,³ are in any reasonable estimation sufficient to support the claims.

We hold, therefore, that the ALJ’s conclusion that Petitioner had failed to meet his burden under *Dunston, supra*, is not in accordance with the law.

CONCLUSION

The finding that Petitioner had failed to produce substantial evidence in support of the claimed disability as contained in the Compensation Order of August 4, 2005 is not in accordance with the law.

ORDER

The Compensation Order of August 4, 2005, is hereby affirmed in part and reversed in part. The award of causally related medical care, including the authorization for the MRI, is affirmed. The denial of temporary total disability for the two periods claimed is reversed, and the claims therefore are hereby granted.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 16, 2005
DATE

³ We note that the same basis for permitting the ALJ to take administrative notice of the duties of a bus operator operates to permit the inference that the doctor was likewise aware, at least generally, that operating a bus requires frequent and repeated use of the right leg, including the right knee, throughout a work day.