

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. 00-65

MICHAEL CATHER,

Claimant – Petitioner,

v.

U.S. ELEVATOR AND RELIANCE INSURANCE CO.,

Employer/Carrier – Respondent.

Upon Remand from the D.C. Court of Appeals, No. 01-AAA-259
Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 96-395B, OWC No. 253603

David Schloss, Esq., for Petitioner

Alex Grant, Esq., for Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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 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

The Claimant-Petitioner (hereinafter, Petitioner) worked for the Employer-Respondent (Respondent) as an elevator mechanic. On June 16, 1993, he fell approximately thirty feet while performing his duties and injured his left shoulder. Following the injury, the Petitioner received temporary total disability benefits until he commenced full-time employment in a light-duty capacity with Goodwill Industries on July 26, 1996. On July 12, 1997, the Petitioner voluntarily stopped working for Goodwill Industries. He has not returned to work in any capacity since then.

On September 24, 1999, a Compensation Order was issued in this matter awarding the Petitioner permanent partial disability benefits, it having been determined that the Petitioner was not totally disabled. The then-presiding Hearings Examiner also found that the Petitioner had voluntarily limited his income by resigning from his modified duty position with Goodwill Industries, a job that the Petitioner was found to still be physically capable of performing. *See Cather v. U.S. Elevator*, OHA No. 96-395A, OWC No. 253603 (September 24, 1999). The decision was not appealed.

The Petitioner subsequently filed a request to modify the original Compensation Order, pursuant to D.C. Code § 36-324 (a) (since recodified to D.C. Official Code § 32-1524 (a)), alleging a change of conditions both physically and economically since the date of the original Compensation Order. The Administrative Law Judge (ALJ) conducted a formal hearing and, in a Compensation Order issued September 11, 2000, found that the Petitioner had failed to establish a change in his physical condition and thus was not entitled to a modification of the previously-issued Compensation Order. The Compensation Order stated that the evidence presented by the Petitioner failed to establish a change of condition warranting the requested modification. Furthermore, the ALJ found that because the Petitioner voluntarily limited his income, by resigning from Goodwill Industries, he was also required to show a change in vocational abilities. *See Cather v. U.S. Elevator*, OHA No. 96-395B, OWC No. 253603 (September 11, 2000). The Petitioner appealed the ALJ's determination to the Director of DOES. The Director concurred in the finding that the Petitioner had failed to prove a change of physical condition, and affirmed the ALJ's denial of the Petitioner's request for a change in his disability status. *See Cather v. U.S. Elevator*, Dir. Dkt. No. 00-65, OHA No. 96-395B, OWC No. 253603 (February 14, 2001).

The Petitioner appealed the Director's Decision to the D.C. Court of Appeals, claiming that he had provided evidence of a change of physical, as well as economic, conditions sufficient to prove his qualification for total disability. After a review of the record, the Court found the agency's interpretation of D.C. Official Code § 32-1524(a) allowing modification of a prior compensation order if there was a change in physical condition or economic condition to be reasonable. The Court affirmed the agency's determination that there was no change in the Petitioner's physical condition sufficient to warrant a modification in his disability from partial to total. However, the Court held, the Director had failed to address the question of whether the Petitioner had, nevertheless, presented sufficient evidence of total disability based on a change in the Petitioner's economic conditions. Therefore, the Court remanded this matter for a

determination of whether the Petitioner met his burden of proof of a change of economic condition. *See Cather v. D.C. Department of Employment Services*, 808 A.2d 766 (D.C. 2002).

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. Official Code §32-1501 *et seq.*, at §32-1522(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 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 issue under review herein, as previously noted the D.C. Court of Appeals remanded this matter for a determination of whether the Petitioner had met his burden of proving a change in his economic conditions. The Court understood the Petitioner's appeal as arguing that he had presented sufficient evidence of total disability based on a change of economic condition, which burden of proof had been met, the Petitioner argued, because "(1) the job that had been found for him, linen assistant at Goodwill Industries, no longer existed, and (2) he was willing to work." 808 A.2d at 769. In determining whether Claimant had thus met his burden of proof, the Court directed that, "the Director should consider, *inter alia*, the effect that Cather's voluntary resignation from Goodwill Industries had on his changed economic condition and whether, given that decision to voluntarily limit his income, the evidence presented was nevertheless sufficient to shift the burden to the [Employer] to prove employability." *Cather*, 808 A.2d at 770.

While an employer has a duty to attempt to return an injured employee to either his usual or suitable alternative employment, an injured employee has a duty to accept such employment. Where an injured employee refuses to return to his usual employment or fails to accept suitable alternative employment, the injured employee will be held to have limited his income in contravention of the Act and his workers' compensation benefits will be reduced accordingly. *See Gray v. Washington Times Newspaper*, Dir.Dkt.No. 00-54, OHA No. 00-244, OWC No. 543461 (February 19, 2002); D.C. Official Code § 32-1508 (5).

It is undisputed that the Petitioner voluntarily limited his income by resigning from his modified duty position with Goodwill Industries.² In order to cure his prior actions and be

² As noted, *supra*, the Compensation Order issued September 24, 1999, in which this determination was made by the then-presiding ALJ, was not appealed.

restored to the level of disability benefits the Petitioner seeks, he must put forth an affirmative effort to alter or fix the circumstances that resulted in his voluntary limitation of income or otherwise demonstrate a willingness to cooperate in employment efforts. *See Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027, 1031 & n.4 (D.C., 1986); *Washington Metropolitan Area Transit Authority v. D.C. Department of Employment Services*, 703 A.2d 1225, 1231 (D.C. 1997) (hereinafter *Anderson*). The initial focus is necessarily on the behavior of the Petitioner giving rise to his voluntary limitation of income, and not the behavior of the employer. “[U]ntil the party seeking modification of the prior order shows a change of circumstances related to his voluntary limitation of income as determined by the prior order, the employer has no burden to make any showing with respect to its efforts to secure his cooperation to avoid modification.” *Anderson*, 703 A.2d at 1231 n.9.

As previously noted, the Petitioner initially argues that he has experienced a change in his economic circumstances because the modified duty position he resigned from at Goodwill Industries no longer exists. We are not persuaded. If the position at Goodwill Industries had been eliminated *while the Petitioner occupied the position*, the Petitioner’s argument would have merit. However, when the position at Goodwill Industries was eliminated, the Petitioner was not in the position; thus the fact of the position’s elimination *alone* will not support the Petitioner’s claim of a change in his economic condition. *More must be shown*.

In the instant case, the “more” that the Petitioner points to is the assertion that he is now willing to return to work. A careful examination of the evidentiary record with regard to the Petitioner’s assertion reveals that in response to questioning by his counsel at the time of the Formal Hearing, the Petitioner testified that he wanted to work. Hearing Transcript, at 40. Beyond that, there is nothing. Of particular note, there is no evidence of record that the Petitioner ever conveyed to Employer (either directly or indirectly) his willingness to return to work, whether to modified duty or otherwise. Consequently, we find the Petitioner’s self-serving statement that he now wants to work, made for the first time on the witness stand, insufficient to support a finding that the Petitioner has met his burden of establishing a change of economic conditions. The Petitioner having failed to meet his burden of proof of a change in economic condition, no obligation falls to the Respondent to prove job availability.³

³ With regard to resolution of this matter, the Panel determines that a remand to the Administrative Hearings Division is not warranted. Where there is a lack of record evidence to establish that a burden of proof is satisfied, no purpose is served by remanding the case to the hearing examiner for further findings. *St. Clair v. D.C. Department of Employment Services*, 658 A.2d 1040, 1044 (D.C. 1995). *See also, Teal v. D.C. Department of Employment Services*, 580 A.2d 647, 650 (D.C. 1990).

CONCLUSION

The Petitioner failed to present sufficient evidence of total disability based on a change in the Petitioner's economic condition. The Petitioner, having thus failed to meet his burden of proof of a change of economic condition, no obligation falls to the Respondent to prove job availability.

ORDER

The Petitioner's claim for relief based upon a change in economic conditions is DENIED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

December 30, 2005
DATE