

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 No. 07-148

CHERYL FLUDD,

Claimant–Respondent,

v.

MELLON CONSTRUCTION COMPANY AND ACE USA INC.,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. 06-007A, OWC No. 610056

Joseph C. Tarpine, III, Esquire, for the Petitioner

Benjamin T. Boscolo, Esquire, for the Respondent¹

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *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).²

¹ Although Mr. Boscolo represented Respondent at the formal hearing, no response to this appeal has been filed.

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 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

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 July 9, 2007, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary total disability benefits from November 20, 2006 to the date of the formal hearing and continuing. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's decision is unsupported by substantial evidence, asserting that Respondent had failed to produce substantial credible evidence that she is unable to return to her pre-injury job as a secretary.

Because the ALJ based her decision upon the apparently uncontradicted testimony from Respondent that her pre-injury duties included significant overhead lifting and working with her arms above her shoulders, and that it involved lifting objects weighing up to 50 pounds,³ and because these requirements exceeded the limitations described by Petitioner's own independent medical examiner (IME), the ALJ's decision is supported by substantial evidence, and we affirm it.

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 International v. District of Columbia Dep't. of Employment Serv's.*, 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 is unsupported by substantial evidence. Specifically, Petitioner asserts that Respondent produced no medical

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 Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

³ Petitioner does refer to a written job description which does not contain reference to certain duties described by Respondent in her testimony. That testimony is uncontradicted in that no one was called by Petitioner to refute it. Further, the exhibit states that the job requires that the incumbent "Maintains and orders office supplies" and "Compiles data for reports", without describing how these tasks are to accomplished, and the document is silent with regard to what exertions these or any other tasks require.

evidence of her own which placed any physical restrictions upon her ability to perform her pre-injury job, a fact which the ALJ herself specifically noted in the Compensation Order. Petitioner goes on to assert that the only medical evidence describing any physical restrictions on Respondent's activities came from its IME physician, which again is true, and which the ALJ also noted. Petitioner then asserts that "the only limitation Dr. Collins places [sic] on Claimant is 'not lifting over 25 pounds' (See Exhibit 1)". Employer/Insurer's Memorandum in Support of Application for Review (Petitioner's Memorandum), page 3.

This assertion is not true, as is readily apparent upon review of the identified exhibit, which is in the record as CE 5 and EE 1, and is an addendum to the IME report. That addendum states "She can return to her full duty as a secretary/administrative assistant office work as she was doing, *with the exception* of not lifting over 25 pounds and not doing a lot of work above her shoulders" (emphasis added). And, despite Petitioner's assertion that "Claimant's job duties do not include lifting over 25 pounds" and that "in fact, as reflected in Claimant's job description, lifting is not a requirement of her job at all" (*id.*), the ALJ found otherwise, and in the Compensation Order she identified by transcript page precisely where in the record Respondent testified that her job did in fact have such requirements. Why Petitioner chooses to ignore these direct citations to the record we do not understand. However, their existence makes affirmance of this case a simple matter of reviewing the transcript and confirming that they contain the testimony as described by the ALJ, which we have done. And it does.

CONCLUSION

The Compensation Order of July 9, 2007 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of July 9, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

September 11, 2007
DATE