

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. 08-052

CONSTANCE WARE,

Claimant – Respondent,

v.

D.C. DEPARTMENT OF CORRECTIONS,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. PBL 96-083B, DCP No. 761032-0001-1999-0003

Andrea Comentale, Esq., for the Petitioner

Harold Levi, for the Respondent

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

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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), by which 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 Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*

OVERVIEW

On November 6, 2007, the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES) issued a Compensation Order in this case. In the Compensation Order, the Administrative Law Judge (ALJ) granted the Claimant-Respondent's (Respondent) request for reinstatement of temporary total disability benefits continuing from January 12, 2007. In making the award, the ALJ found the Self-Insured Employer-Petitioner (Petitioner) failed to prove, by persuasive medical evidence, a change in the Respondent's condition to warrant a termination of her benefits.

On December 5, 2007, the Petitioner filed an Application for Review appealing the Compensation Order. As grounds for this appeal, the Petitioner asserts the ALJ improperly failed to consider the May 24, 2006 report of Dr. Robert Gordon, the independent medical examiner (IME). The Petitioner acknowledges Dr. Gordon stated the date of injury as October 31, 1989 when the correct date was October 3, 1989. However, the Petitioner argues the stated date was clearly a clerical error when read in conjunction with Dr. Gordon's February 3, 2003 IME report. Moreover, the Petitioner argues the ALJ acknowledged the possibility of a clerical error in the Compensation Order. Finally, the Petitioner asserts the ALJ's statement that its "Notice of Intent to Terminate Disability Compensation Benefits and Medical Treatment cites the same injury date in its notice as Dr. Gordon notes in his report" is not supported by the evidence. The Petitioner maintains the Notice cites the date of injury as October 3, 1989. *See* Memorandum of Points and Authorities in Support of Petitioner's Application for Review at p. 4. The Respondent filed an Opposition to the Petitioner's Application for Review.

After a review of the record, the Panel vacates and remands the Compensation Order.

ISSUE

The issue on appeal is whether the ALJ improperly failed to consider the May 24, 2006 report of Dr. Robert Gordon, the independent medical examiner (IME).

STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

As an initial matter, the standard 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. D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, et seq. at § 1-623.28(a). D.C. Official Code § 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. D. C. 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. *Marriott*, 834 A.2d at 885.

In this jurisdiction, once the government-employer accepts a claim of disability compensation and actually pays benefits, government-employer must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits. *See Toomer v. D.C. Department of Corrections*, CRB No. 05-202, OHA No. PBL 98-048A, DCP No. LT5-DOCOO1603 (May 2, 2005). The evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *See Robinson v. D. C. General Hospital*, ECAB No. 90-15 (September 16, 1992). The government-employer's burden is one of production and requires an evaluation of the evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the government-employer fails to sustain its burden, the injured worker prevails outright. *See Perry v. D.C. Department of Child and Family Services*, CRB No. 07-74, AHD PBL No. 06-038, DCP/ODC No. 761010-8-2003-3 (May 29, 2007).

ANALYSIS

In the instant case, the Petitioner accepted and paid the Respondent's claim for her October 3, 1989 work injury. Therefore, the Petitioner was required to produce probative medical evidence substantiating its termination of the Respondent's disability benefits. To sustain its burden, the Petitioner submitted the February 6, 2003 and the May 24, 2006 medical reports from Dr. Robert Gordon, the independent medical examiner (IME). The Petitioner relied primarily upon the May 24, 2006 IME report. As previously noted, the ALJ held the May 24th medical report did not support the Petitioner's termination of the Respondent's benefits because the report "addresses an injury that occurred on a date that is not at issue in this matter." *See Compensation Order at p. 3.*

In his February 6, 2003 report, Dr. Gordon indicated the Respondent's date of injury was October 3, 1989. In his May 24, 2006 report, Dr. Gordon indicated the Respondent's date of injury was October 31, 1989. However, as the Petitioner argues on appeal, when the two reports are read together, it is clear the stated date of October 31, 1989 in Dr. Gordon's second report was a clerical error. In his second report, Dr. Gordon referred back to his findings in the February 6, 2003 report wherein he indicated the date of injury was October 3, 1989. In his second report, Dr. Gordon referenced his February 6, 2003 examination of the Respondent, noted the report "is a matter of record", and concluded by stating, "[T]here is nothing in my examination of this patient . . . which changes any of the opinions that I rendered previously."

The ALJ acknowledged the possibility the injury date noted in Dr. Gordon's May 24, 2006 report might be a clerical error, but rejected that possibility because "employer's Notice of Intent to Terminate Disability Compensation Benefits and Medical Treatment cites the same injury date in its notice as Dr. Gordon notes in his report". The ALJ also pointed out the importance of assuring the termination notice provided the Respondent with accurate information. *See Compensation Order at p. 4.* While the body of the Notice of Intent quoted Dr. Gordon's May 24, 2006 report referencing the date of injury as October 31, 1989, the header of the Notice of

Intent clearly and correctly identified the Date of Injury as October 3, 1989. *See* Employer Exhibit No. 1 and Claimant Exhibit Nos. 7 & 8. Given the Respondent did not raise Dr. Gordon's erroneously cited injury date as an issue before AHD, and instead stipulated the injury date was October 3, 1989, it is clear that the Notice of Intent to Terminate conveyed to the Respondent the necessary information. From the Panel's review of the evidentiary record and pleadings before the ALJ, it is clear the Respondent was fully on notice as to the purpose and focus of the termination notice she received.

The Panel finds the Petitioner's arguments persuasive. The ALJ should have considered the May 24, 2006 IME report as part of the Petitioner's proof of a change in the Respondent's physical condition. Accordingly, this matter is remanded for the ALJ to consider Dr. Gordon's medical reports in determining whether the Respondent's disability benefits should be reinstated.¹

CONCLUSION

The Compensation Order of October 15, 2007 granting benefits to the Respondent is not supported by substantial evidence in the record and is not in accordance with the law. The ALJ improperly failed to consider the May 24, 2006 report of Dr. Robert Gordon, the independent medical examiner (IME).

ORDER

The Compensation Order of October 15, 2007 is VACATED AND REMANDED for the ALJ to consider Dr. Gordon's medical reports in determining whether the Respondent's disability benefits should be reinstated.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

April 30, 2008
DATE

¹ The Panel notes, as the Petitioner points out on appeal, the ALJ referred to the date of injury as October 3, 2004, which based upon a review of the entire Compensation Order, is a clerical error. *See* Compensation Order at p. 2.