

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-068

DWAYNE KYLE,
Claimant-Respondent,

v.

SAFEWAY STORES, INC.,
and SAFEWAY RISK MANAGEMENT,
Employer/Insurer-Petitioner.

Appeal from an April 25, 2014 Compensation Order by
Administrative Law Judge Gerald D. Roberson
OHA/AHD No. 12-116C, OWC No. 685101

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 OCT 22 PM 12 44

William H. Schladt for Employer/Insurer-Petitioner
Matthew J. Peffer for Claimant-Respondent

Before, JEFFREY P. RUSSELL, HEATHER C. LESLIE, and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL on behalf of the Compensation Review Board.

DECISION AND ORDER

BACKGROUND¹

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order which was filed on April 25, 2014, the Administrative Law Judge (ALJ) denied Petitioner's request for modification of a prior Compensation Order issued June 9, 2012, in which Mr. Kyle was found

¹ The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

to be temporarily totally disabled from his job as a stocker, and that he had not voluntarily limited his income by failing to perform a modified position which primarily involved having Mr. Kyle removing sales signs and other paper tickets from store shelves.

In the prior Compensation Order, it was found that the position required Mr. Kyle walk throughout his shift, and to bend to pull tickets and tabs from the lower shelves, which activities were found to be outside his physical capacities.

Subsequent to the issuance of that Compensation Order, Employer offered another modified position, involving much the same duties, but providing Mr. Kyle with a motorized cart. Mr. Kyle returned to this position and performed it for two hours and then left, claiming the motorized cart position was beyond his capacity as well. This led Employer to seek modification of the prior Compensation Order, asserting that the offer of a new position, and the results of an intervening Independent Medical Evaluation, coupled with the fact that Mr. Kyle had been involved in a subsequent motor vehicle accident, amounted to a change of conditions regarding the fact or degree of Mr. Kyle's disability,² and arguing further that the intervening automobile accident had supplanted the work injury as the cause of any ongoing disability.

The ALJ denied modification, finding that the current condition of Mr. Kyle's back is medically causally related to the work injury, and that Employer had failed to meet its burden of demonstrating a change of condition warranting a modification of Mr. Kyle's disability status. It is that Compensation Order that is before us in this review.

ANALYSIS

Although "medical causal relationship" was identified as an issue to be resolved, and the ALJ resolved that issue in Mr. Kyle's favor, Employer does not contest that finding in this appeal. Employer's arguments all relate in one way or another to the nature and extent of Mr. Kyle's disability in the context of the prior Compensation Order finding Mr. Kyle to have been temporarily totally disabled, a finding based largely upon the prior ALJ's determination that a modified job offered to Mr. Kyle was not suitable alternative employment.

Employer first argues that the ALJ "erred by relying upon the June 29, 2012 Compensation Order and the old medical records as evidence of Claimant's current medical restrictions". However, what Employer means by "relying upon" the prior Compensation Order and medical records is not at all clear. Specifically, Employer complains that "the ALJ found that Claimant's physical restrictions had not changed since no treating physician or IME doctor has since indicated that Claimant can return to his pre-injury employment".

Employer does not cite to where in the Compensation Order the ALJ made such an analysis. The closest we can come to finding such a statement is on page 8, where the ALJ wrote:

² D.C. Code §32-1524 governs modification proceedings. Subsection (b) provides that "A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which addresses the alleged change of conditions".

Following the Compensation Order, Claimant's medical restrictions did not change. The record does not any evidence from a treating physician or an IME doctor indicating Claimant could perform his pre-injury employment. In fact, Dr. Tepper [an IME physician] released Claimant to sedentary employment on October 13, 2013. EE 1, p.5. Additionally, Dr. Cohen [a treating physician] stated Claimant was still awaiting approval of epidurals on December 20, 2012, and placed Claimant on a no work status. CE 2, p.16. Dr. Cohen continued Claimant's no work restriction on August 29, 2013. CE 2, p.4. As such, the record establishes Claimant continues to have residuals precluding a return to his pre-injury employment.

Compensation Order, pp. 8-9.

In this context, it is evident that the ALJ's conclusion that Mr. Kyle's "physical restrictions did not change" is *not* premised upon his inability to return to the pre-injury job, but rather the reverse is true: the ALJ concluded that Mr. Kyle could not return to work because his physical limitations had not changed sufficient to return to his pre-injury employment, and then proceeded to consider whether the offer of a return to work in a motorized cart constituted an offer of suitable alternative or modified employment, and concluded that it did not. There is nothing in this analysis that is legally faulty. And we note that the statutory proscription upon relying upon *evidence* from the prior hearing to reach a conclusion vis-à-vis a change in conditions does not preclude an ALJ's acceptance of facts found in the prior proceeding concerning a claimant's degree of disability.

The specific job that was offered is described as follows:

You will work in a motorized cart to check out of date tags, do sweep logs and safety observations, and perform any other duties that fall within your restrictions.

Compensation Order, p. 9, citing CE 7.

The ALJ went on to cite Mr. Kyle's testimony that he "had difficulty performing the task of taking down dated price tags from the motorized cart [because] he was cramped in the little cart and his legs are long [and] when you hit the throttle ... it jerks pulling you and jerks when you let go the throttle [and that he could not reach the top shelf sitting in the cart [and] reaching the bottom shelf required you have knee pads." Compensation Order, pp. 9 – 10, citing HT p. 56.

After reviewing this evidence, the ALJ compared the job offer forming the basis of Employer's modification request to the requirements of the job the prior ALJ found had been offered in the order sought to be modified, and concluded:

The job offer of October 30, 2013 appears to be remarkably similar to the prior job of October 2011, and contained the same shortcomings identified in the prior Compensation Order. While the October 30, 2013 job offer does not explain how Claimant was to perform the task of pulling the dated tags, Claimant would

obviously have to bend or stoop to reach the bottom shelves. While Employer provided a motorized cart due to Claimant's perceived problems of sanding or walking, the introduction of the use of a cart to perform the task of pulling tags off the shelf did not cure any defect in the suitability of the assignment. In fact, the cart required Claimant to work in an awkward posture which directly contravenes the restriction imposed by Dr. Levitt [an IME physician referred to in the prior Compensation Order].

Compensation Order, at p. 10.

In short, what the ALJ did was review Employer's evidence of a change in conditions warranting a change in the fact or degree of Mr. Kyle's disability since the prior Compensation Order and concluded that the only change, an offer to perform the job previously deemed unsuitable, did not render it suitable by merely providing a motorized cart to perform the job. While as a broad principle the consideration of whether there has been a change in disability status is limited to evidence arising subsequent to the initial determination of disability, the specifics of the prior disability are of necessity relevant for assessing whether there has been a change.

Employer does not dispute that the record contains the evidence cited by the ALJ concerning the nature of the new job offered, not does it dispute that the record contains evidence that the newly offered job is not suitable given Mr. Kyle's current capacity as described by Mr. Kyle and his treating physicians. Employer's third argument, that being that there is no evidence that the job in the cart required him to stoop or bend, is related. However, it is undisputed that the job offer was to perform essentially the same tasks, and it is reasonable to infer that the tasks required bending, reaching and stooping. Those matters being undisputed or subject to reasonable inference from the record evidence, it necessarily follows that the ALJ's finding that there has not been a change in the fact or degree of Mr. Kyle's disability is supported by substantial evidence and is in accordance with the law.

Employer's second argument is that the ALJ failed to reconcile the contents of a surveillance video of Mr. Kyle showing him engaged in certain physical activities with Mr. Kyle's protestations concerning the requirements of the alternative job offered to him.

The ALJ found the following regarding the surveillance:

Surveillance, conducted on May 22, 2013, depicted Claimant walking approximately one mile, and bending three times. The videotape also showed Claimant carrying bags of groceries.

Compensation Order, p. 4.

Employer does not dispute the accuracy of the ALJ's description of the videotape. Nothing in that description appears to be in conflict with the ALJ's findings that the proffered job required bending

frequently and working in a cramped, awkward position in a herky-jerky motorized cart. It is not incumbent upon an ALJ to inventory all the evidence and identify why any particular part of the record was or was not persuasive. Here, the ALJ accurately recites the nature of the evidence proffered in the videotape, and nothing in that description is facially inconsistent with the reasons the ALJ found the proffered job was not suitable. Accordingly, it is not error for the ALJ to say no more about it than he did.

CONCLUSION AND ORDER

The ALJ's determination that Employer has failed to meet its burden of demonstrating a change in conditions warranting a modification of the prior Compensation Order is supported by substantial evidence and is in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

October 22, 2014
DATE