GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-021

ROSA GASTON-JENKINS,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
Employer–Petitioner.

Appeal from a January 31, 2013 Compensation Order on Remand of
Administrative Law Judge Amelia G. Govan
AHD No. PBL 11-049, DCP No. 7610190001200600005

Andrea G. Comentale, Esquire, for the Petitioner
Rosa Gaston-Jenkins, *pro se* Respondent

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

Rosa Gaston-Jenkins is employed as a legal documents examiner for the Employer, the District of Columbia Department of Motor Vehicles. She was exposed to environmental irritants, including formaldehyde, vermin infestation and mold, which caused her to seek medical care for respiratory distress from Dr. Anita Clayton, commencing August 2006. Employer accepted Ms. Gaston-Jenkins claim for work-related disability compensation, provided medical care and various periods of temporary total disability benefits.

Employer subsequently had Ms. Gaston-Jenkins evaluated by Dr. Ira Tauber and by Dr. Ross Myerson, for the purpose of Additional Medical Evaluations (AME). In his July 11, 2011 AME, Dr. Myerson opined that Ms. Gaston-Jenkins's "current medical treatment plan is of questionable benefit given the subjective nature of her complaints", that those current complaints are "unrelated to the claim of July 31, 2006", that she "should be able to work at full duty" and was "at maximum medical improvement." See, EE 2, July 11, 2011 report of Dr. Myerson. Dr. Tauber issued a similar report in January 22, 2008, opining that Ms. Gaston-Jenkins's complaints were unrelated to the

work exposure, but suggesting that additional medical testing (a CAT scan) might be considered (later performed on October 3, 2008). See, EE 3.

As a result of these AME, Employer filed a Notice of Determination indicating that no further medical care would be provided for the respiratory condition. Ms. Gaston-Jenkins sought restoration of medical care, along with other relief (in the form a lump sum payment), at a formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES). The ALJ issued a Compensation Order on May 25, 2012, denying the lump sum payment, but granting continuing medical care.

Ms. Gaston-Jenkins appealed the Compensation Order denying the lump sum payment to the Compensation Review Board (CRB), which affirmed the denial, but vacated the award of medical care, assigning as error the manner in which the ALJ assessed the evidence and allocated the burden of proof. The matter was remanded for further consideration.

On January 31, 2013, the ALJ issued a Compensation Order on Remand, again denying the lump sum payment, and again awarding continuing medical benefits. Employer appealed, to which appeal Ms. Gaston-Jenkins filed a response. In it, she asserts that (1) she never agreed to Employer's motion for additional time to file its Memorandum of Points and Authorities in connection with its Application for Review; (2) the process and procedure is very stressful (whether she refers to the claims process, the adjudicatory process, or something else is not clear); (3) she has a right to work in a safe work place; (4) Employer has advised her that they will not provide the medical care referred to in the prior Compensation Order because the matter is on appeal; and (5) she has never been granted any money, but has been granted "just medical I can not use".

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Act), at § 1-623.28 (a), the "Public Sector Workers' Compensation Act" (the Act) and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to 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.

DISCUSSION AND ANALYSIS

The original Compensation Order was remanded for further consideration, with instructions that the ALJ apply the appropriate burden of proof, placing the burden upon the Employer to establish that a change of conditions warranting discontinuation of medical benefits has occurred, and if that showing is made, shifting the burden to Ms. Gaston-Jenkins to demonstrate entitlement to the care by presenting "reliable, relevant and substantial evidence" of the continuing need. The Decision and

Remand Order also contained the further instruction that the ALJ not give mandatory application to a treating physician preference in weighing competing medical opinions, which now is repealed.

In the Compensation Order on Remand, the ALJ acknowledged the explicit instructions and carried them out, implicitly if not altogether explicitly. In the Analysis of the Compensation Order on Remand, the ALJ first made direct reference to the AME reports from Drs. Ira Tauber and Ross Myerson opining that Ms. Gaston-Jenkins was no longer in need of medical care for her respiratory problems, then identified Ms. Gaston-Jenkins's testimony concerning the continuation of those problems and the "most recent" of the reports of Dr. Anita Clayton opining as to the ongoing need for such medical care.

The ALJ analyzed the employer's AME and concluded

> I did not find Dr. Tauber's or Dr.Myerson's opinions to be persuasive regarding change of condition, medical causation or nature and extent.

Therefore, the ALJ determined that the employer had not met its burden of producing evidence that demonstrates a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated.

The ALJ should have stopped there. As we said in our previous Decision and Remand Order:

> The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright.

Because DCP failed to sustain its initial burden, there was no need for the ALJ to analyze claimant's testimony and evidence. Nonetheless, the ALJ discussed claimant's evidence and determined that the credible testimony of Ms. Gaston-Jenkins and the reports of Dr. Clayton outweighed the AME.

We reject Employer's argument that the ALJ failed to "adequately address" the AME. The ALJ noted that Dr. Myerson[1] had seen Ms. Gaston-Jenkins on but one occasion, and that his rejection of the ongoing complaints was premised in part upon the "subjective" nature of those complaints. However, the ALJ explicitly found that Ms. Gaston-Jenkins was a credible witness.

The ALJ's analysis of the claimant's evidence is but dicta in light of the explicit finding that the employer's AMEs were unpersuasive as to all critical issues, and is not a basis for remand.[2]

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[1] Although not explicitly noted as a ground for rejection of Dr. Tauber's opinion, the ALJ found in the Findings of fact only one examination by Dr. Tauber as well.

[2] The ALJ also used somewhat inaccurate language when she described the issue for determination as being "Entitlement to continuing medical benefits requires a determination that said benefits are reasonable and necessary to the course of Claimant's recovery from the workplace exposure."

With respect to the response filed by Ms. Gaston-Jenkins, it is difficult to glean her arguments, but they are not directly responsive the Employer's arguments, and address new or different issues not raised by in Employers Application for Review and Memorandum. However, regarding the five points raised by Ms. Gaston-Jenkins in her response, we note as follows for each:

(1) She never agreed to Employer's motion for additional time to file its memorandum of Points and Authorities in connection with its Application for Review.

The motion, which was granted administratively, is no longer pending before us. Further, given the outcome of this Decision and Order, it is now moot.

(2) The process and procedure is very stressful.

While the exact nature of the stress that she refers to is not clear, review of HT 11 – 13 suggests that Ms. Gaston-Jenkins had attempted to raise a claim for a stress related injury, but was advised by the ALJ that "the law had changed" rendering stress claims non-compensable. The ALJ also indicated that the change in the law may not have been the basis of any dispute between the parties about a stress claim, indicating that the basis may have been that there has been no claim presented to Employer for any such injury, and thus that there has been no Notice of Determination (NOD) issued on the matter. Such a state of affairs would deprive DOES and the ALJ of jurisdiction to consider a stress claim.

However, the parties took a recess, following which the issues were identified as being limited to ongoing medical care for the respiratory injury and a request for a "lump sum" payment. No further discussion concerning a stress related claim was had.

On this record, we are unable to entertain any issues related to such a claim; we have before us no claim form or other document seeking benefits for such an injury, and no NOD denying any such claim. We therefore lack jurisdiction to consider any issue related thereto.

(3) She has a right to work in a safe work place.

Ms. Gaston-Jenkins is correct to the extent that if she has sustained an injury arising out of her performance of her work duties, she is entitled to such benefits as the Act prescribes, in the manner prescribed.

(4) Employer has advised her that they will not provide the medical care referred to in the Compensation Order because the matter is on appeal.

The employer's Notice of Determination stated medical care was discontinued because the claimant was at maximum medical improvement, not because any of the AME stated treatment was not reasonable and necessary, issues resolved by Utilization Review.

Whether Employer is liable for any sort of sanction for not providing previously awarded but subsequently vacated medical care is not a matter for the CRB's consideration in the first instance, and must be presented to the hearings division as an initial matter. In other words, to the extent that this statement can be read as a request for the CRB to take some action against Employer for failure to provide medical care previously awarded, we have no jurisdiction to entertain such a request.

(5) She has never been granted any money, but has been granted "just medical I can not use".

The only monetary issues that have been presented to DOES in this litigation that have been identified on the record are Ms. Gaston-Jenkins's request for a lump sum payment. That request was denied in the first Compensation Order, which denial was affirmed by the CRB in the Decision and Remand Order. We have no basis to revisit the issue at present.

Accordingly, we find no error in the Compensation Order on Remand.

CONCLUSION

The award of ongoing medical care contained in the Compensation Order on Remand of January 31, 2013 is based upon substantial evidence and is in accordance with the law.

ORDER

The Compensation Order on Remand of January 31, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

April 24, 2013
DATE