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
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CRB (Dir.Dkt.) No. 04-014

JOAO GOMES,

Claimant – Petitioner,

v.

FORT MYER CONSTRUCTION CORPORATION AND ROYAL AND SUNALLIANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA/AHD No. 01-118B, OWC No. 557145

Salvatore J. Zambri, Esquire, for the Petitioner

Gerard J. Emig, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE 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).[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 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 to 1-643.7 (2005), including responsibility for

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 December 31, 2003, the Administrative Law Judge (ALJ) granted Petitioner's claim for temporary total disability benefits from April 1, 2002 through May 2, 2003, and denied the claim for such benefits thereafter and continuing, as well as the claim authorization for surgery on the knee and surgery on the spine. Petitioner now seeks review of that Compensation Order. Respondent did not contest the award of such benefits as was made in the Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ was bound by the terms of a prior stipulation between the parties and that, by the terms of that stipulation, Respondent is obligated to pay the requested benefits and provide the requested medical care.[2] Petitioner argues further that the decision denying benefits beyond May 2, 2003 is unsupported by substantial evidence.[3]

ANALYSIS

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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. 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 Int'l. v. District of Columbia 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, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

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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.

[2] In discussing this stipulation, Petitioner repeatedly refers to this agency as "the Commission". We note that the adjudication and administration of the Act are within the jurisdiction of DOES, by way of the Office of Workers' Compensation and the Office of Hearings and Adjudication; there is no workers' compensation commission in the District of Columbia.

[3] Petitioner also characterizes the decision of the ALJ as being "erroneous", and as being contrary to "substantial evidence". We note that these characterizations misstate the manner in which we are constrained to proceed; we are obligated to determine whether the ALJ's decision is supported by substantial evidence (regardless of whether there is also substantial evidence to support a contrary decision) and whether the decision is a proper application of the law, given the factual findings.

Preliminarily, we note that that portion of the Compensation Order which granted temporary total disability benefits from April 1, 2002 through May 2, 2003 was not appealed by Respondent and therefore is affirmed.

Turning to the case under review herein, from the Memorandum in Support of the Application for Review (Memorandum), it appears that the heart of Petitioner's complaint about the decision of the ALJ is that the ALJ "ignored the substantial evidence [consisting of the opinion of Petitioner's treating physician, Dr. Lopez, which opinion is said to be supported by a discogram] and instead relied upon the opinions of Dr. Hughes [Respondent's independent medical evaluator (IME)] which were based upon two isolated visits with Claimant." Memorandum, paragraph 16. Petitioner criticizes the ALJ because of certain particularlized reasons asserted by Petitioner which call into question the weight that Petitioner believes should have been accorded to the IME opinion, *vis a vis* the opinion of the treating physician.

We note that the bulk of Petitioner's memorandum and AFR are concerned with assertions and argument to the effect that Petitioner's evidence at the formal hearing was more credible, more reliable and more convincing than Respondent's evidence. In connection with this approach, Petitioner suggests that the positive discogram somehow makes the ALJ's decision deficient as a matter of law. We remind Petitioner that our function is not to try this case anew, and consistent with that principle, Petitioner's task on appeal is not to convince us that the ALJ should have ruled differently, but rather, that the ALJ's fact finding was unsupported by substantial evidence, or that the facts as found do not lead to the legal conclusions arrived at by the ALJ. Nothing that we have seen in this record establishes, as a matter of irresistible fact or logic, that a "discogram" is a perfectly reliable and conclusively determinative diagnostic test, and that Dr. Lopez's reliance thereon is perforce beyond questioning. Indeed, we have nothing before us that describes what a "discogram" is, how it is performed, what constitutes a positive result, whether a positive result is a matter of subjective analysis by the administering physician, whether a discogram is an accepted diagnostic tool for this alleged type of anatomical injury in the medical community, etc. We have been directed to nothing which would permit us to accept Petitioner's implied assertion that the ALJ's view that such a test is not an "objective" one is clearly erroneous. Similarly, Petitioner refers to the "severe" nature of his injuries, the "powerful" qualities of his prescribed medications, and makes numerous other non-record based allusions. We presume that Petitioner had every opportunity to present these arguments to the ALJ, and that, in ruling as he did, the ALJ declined to accept them, relying instead upon his first-hand assessment of Petitioner at the formal hearing and in the videotape evidence presented there (the first of which neither is unavailable to us on appeal, and with the latter being subject to deference to the fact finder), and the medical reports of the IME physician.

The most compelling argument that Petitioner presents of which we take cognizance is that the treating physician's opinion in this and all cases is to be accorded an initial preference, and that where the opinion of an IME physician is accepted in opposition to that of a treating physician, the ALJ must acknowledge the difference of opinion, and explain why it was resolved adversely to the treating physician, and the reasons given must be "persuasive". *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

Review of the Compensation Order reveals the following reasons enunciated by the ALJ for rejecting Dr. Lopez's opinion that Petitioner requires fusion surgery in his back: Dr. Lopez's opinion is based upon the assumption that Petitioner has a herniated disk, an assumption that the ALJ rejects as being not demonstrated by objective medical testing; Dr. Hughes's opinion, following two IMEs and review of the same test results as reviewed by Dr. Lopez, that Petitioner had sustained and recovered from nothing more that a back and knee strain, taking into account what Dr. Hughes described as "symptom magnification", and that any ongoing symptoms are related to pre-existing degenerative conditions; credibility concerns relating not only to symptom magnification, but complaining of "pain shooting into his stomach" at the formal hearing, despite the lack of any medical documentation of such complaints; and the lack of atrophy or neurological abnormality. Beyond this, the ALJ reviewed and relied upon videotape evidence which he described as demonstrating Petitioner's ability to ambulate without restriction or notable pain, and to get into, out of and operate a motor vehicle without apparent difficulty, which he obviously felt cast Petitioner's medical evidence into question, as well as his testimony concerning the level or existence of debilitating symptoms. We also note that the ALJ based his decision, at least in part, upon a finding that "Claimant's complaints of low back and knee pain are subjective and exaggerated" (Compensation Order, page 2), which finding is in the nature of a credibility determination, and area in which the ALJ is given special deference.

There is, however, one aspect of this analysis that is problematic. In denying the claim, the ALJ wrote the following:

> Thus, because Dr. Lopez' opinion that claimant had a herniated disc at L5-S1 remains unsupported by any objective tests, and his finding that claimant was unfit for any work from July 19, 2001, it cannot be accorded a significant weight.

Compensation Order, page 5. How this statement squares with the ALJ's earlier acknowledgment that in "consultations of August 3, 2000 and September 28, 2000 [Dr. Lopez] noted [an] annular tear as revealed by claimant's lumbar spine MRI" (Compensation Order, page 3 – 4) is not apparent. While the record does not appear to contain the report of the MRI, Dr. Lopez's reference to the annular tear is contained in CE 1, in his September 28, 2000 report, and it appears that the ALJ accepted the existence of such a physical finding, by making the preceding reference. Further, the ALJ makes an apparent and possibly significant error, where he attributes a lumbar spine CT scan report to Drs. James Cooper and Richard Haak; the CT scan was actually performed by Dr. Carlos Artiles on June 28, 2001, and it appears to confirm rather than refute the existence of an annular tear at L5-S1. The ALJ appears to have confused the discogram report authored by Drs. Haak and Cooper for the CT scan report, both of which procedures were performed at Inova Alexandria Hospital on June 28, 2001. CE 1, as referenced. This confusion is apparent from the ALJ's having written that "It is noteworthy that the CT scan disclosed no evidence of herniation at L5-S1, and [the] radiologists, James M. Cooper, M.D. and Richard Haak, M.D. concluded that claimant's vertebrae at L3-L4 and L4-L5 'levels did not demonstrate pain consistent with patient's classic complaint'". Compensation Order, page 5.

This fundamental misreading of the record requires that the matter be remanded to the ALJ for further consideration of the evidence. We also note that Dr. Hughes never mentions the

discogram report or the CT scan report in his IME reports, and that he explicitly states "none" when identifying "Review of Diagnostic Studies" in his May 2003 IME report. We instruct the ALJ to consider whether the failure to discuss or even acknowledge these findings in any way effects the weight to be accorded his opinions.

Regarding the issues raised concerning the Stipulation entered into between the parties and bearing a notation of "approval" by a claims examiner in OWC dated May 1, 2001, to the extent that such a document has any legal force or effect, review of its terms reveals that Respondent agreed therein (1) to accept as compensable a claim for a work related injury to Petitioner's right knee and back occurring on July 1, 2000; (2) to pay one half of a claim for accrued claimed temporary total disability; (3) to pay additional temporary total disability for an unspecified period following approval of the Stipulation; (4) to authorize additional medical testing by Dr. Lopez, in the nature of an arthroscope of the right knee and a discogram of the lumbar spine; and (5) to pay one half of Petitioner's attorneys fee earned in connection with the past disability benefits agreed to be paid in the Stipulation. In addition, the parties agreed that Petitioner and Respondent would ultimately treat any permanent partial impairment to Petitioner's right knee which is or may be attributable to the July 1, 2000 injury, or to injuries incurred by Petitioner on August 18, 1997, June 18, 1999, or February 21, 2000 while employed by Respondent as a claim for permanent partial disability from the July 1, 2000 injury only.[4]

None of the issues covered by the Stipulation have any impact upon the benefits sought at the formal hearing giving rise to the Compensation Order under review in these proceedings. Specifically, the Stipulation does not prohibit, and therefore permits Respondent's ceasing to pay ongoing temporary total disability benefits, and does not specify provision of any medical care beyond the discogram and arthroscopic examination[5] of the right knee.

CONCLUSION

The Compensation Order of December 31, 2003 is based at least in part upon a clear error in the ALJ's reading of the record, and is therefore not supported by substantial evidence.

[4] We are not presented with any issue concerning, and thus do not consider or decide, whether the Stipulation constitutes an agreement by Respondent to accept as compensable any permanent partial disability that is ultimately determined to exist in Petitioner's right knee, from whatever source, industrial or otherwise, or whether such an agreement is enforceable under the Act, either independently or as a compensation order.

[5] We note that there is no claim by Petitioner in the Application for Review, the Memorandum, or in the supplemental memorandum, that any of the requested medical care under review herein was the same medical care agreed to be provided in the stipulation. Dr. Hughes's IME (EE 1) report of January 23, 2002 includes reference to an arthroscopic incision on Petitioner's right knee, suggestive that the agreed upon examination had been performed.

ORDER

The Compensation Order of December 31, 2003 is hereby affirmed in part and reversed in part and remanded with instructions that the ALJ reconsider the denial of disability benefits and to review the record in light of the errors noted in the preceding Decision and Order, and address the issue of whether the failure of the IME physician to note the existence and results of the diagnostic CT scan, discogram and lumbar MRI studies performed in any way effects the weight to be accorded the opinion of the IME physician, and to the extent that the ALJ again rejects the opinions of the treating physician and accepts the opinions of the IME physician, the reasons for said determinations are to be stated.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

August 23, 2005
DATE