

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 (Dir.Dkt.) No. 04-44

ANTHONY GOODEN,

Claimant – Petitioner

v.

THE WASHINGTON POST,

Self-Insured Employer – Respondent

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
OHA No. 97-25A; OWC No. 279073

Jenifer S. Goolie, Esq., for the Petitioner¹

John F. Ward, Esq., for the Respondent

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

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the 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 At the hearing before OHA, the Claimant was represented by Michael Z.C. Okpala, Esq.

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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Code Ann. § 32-1521.01 (2005). 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. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Office of Hearings and Adjudication (OHA),³ District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on March 14, 2003, the Administrative Law Judge (ALJ) awarded permanent total disability benefits from February 9, 2001 to the present and continuing. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order. Prior to addressing the merits of the Petitioner's Application for Review, however, the Panel addressed the Employer-Respondent's (Respondent) allegation that the Application was untimely filed, thus depriving the Board of jurisdiction over the appeal. The Panel denied the Respondent's motion to dismiss in an Order dated March 29, 2005 and returned this case to the Review Panel for disposition on the merits in accordance with the dictates of the D.C. Workers' Compensation Act.⁴

As grounds for this appeal, the Petitioner alleges as error the effective date of his permanent total disability benefits, and the ALJ's denial of his April 2, 2003 request for reconsideration without a hearing.

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. 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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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.

In his appeal, the Petitioner asserts that the date from which the ALJ awarded his permanent total disability benefits was incorrect due to the ineffective assistance of his then counsel to

Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility for 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.

³ Pursuant to the Director's Directive, Administrative Policy Issuance 05-01, the functions of the Office of Hearings and Adjudication have recently been assigned to the Administrative Hearings Division (AHD). Throughout this decision, the new office names, CRB and AHD, will be used.

⁴ After reviewing the facts of this case and the current law, the Panel held that, in absence of the adoption of agency regulations addressing the matter, the timely filing of a motion for reconsideration with the AHD tolls the time for filing an Application for Review with the CRB.

submit the appropriate medical records showing that his permanent total benefits should have begun in 1997. The Petitioner advocates that his permanent total disability should begin in 1997, but does not cite any medical reports supporting his position.⁵ He also states that he was never advised that he filed pleadings in the incorrect office within the agency and that he detrimentally relied on statements from the agency. Finally, the Petitioner asserts that although he asked for a hearing on his request for reconsideration of the Compensation Order, the ALJ ruled on his request without a hearing, thus precluding him from presenting evidence to support his claim of an earlier date for beginning his permanent benefits and thereby, prejudicing his claim.

The Respondent counters by maintaining that the March 14, 2003 Compensation Order is supported by substantial evidence. The Respondent asserts that the Petitioner's primary treating physician was Dr. John M. Balbus and the ALJ's reliance on Dr. Balbus' February 9, 2001 opinion that the Petitioner's disability was permanent and total was consistent with the case law in this jurisdiction to give great weight to the opinion of the treating physician, absent persuasive reason to reject the same. Additionally, the Respondent maintains that Dr. Balbus' earlier opinion of December 3, 1997, that the Petitioner was unable to work at present, was not tantamount to a permanent total disability determination. The Respondent asserts that the Petitioner is apparently relying on the September 17, 1997 opinion of Dr. Babaka Arvanaghi of maximum medical improvement. The Respondent asserts that the opinion was not of the quantum of evidence necessary to overcome the opinions of Dr. Balbus and the other physicians who treated the Petitioner after 1997 because Dr. Arvanaghi's opinion was based on only a three-month period of treatment. As to ineffective assistance of counsel and not being informed of submitting filings to the incorrect office, the Respondent asserts that the Petitioner presented no evidence to support his allegations. Indeed, the Respondent avers that the Petitioner's prior counsel represented him since March 2000 and that counsel presented the 1997 reports of Dr. Arvanaghi into evidence at the formal hearing.⁶

Under the Act, to support a claim of permanent total disability, an injured worker must show that his condition has reached maximum medical improvement and that he is unable to return to work in his usual employment as a result of a work injury. Once the injured worker establishes this *prima facie* case of total disability, the burden shifts to the employer to present sufficient evidence of suitable job availability. If the employer meets its burden, the injured worker may refute the employer's evidence by challenging the legitimacy of the evidence of available employment or by demonstrating due diligence, but a lack of success in obtaining employment. See *Logan v. District of Columbia Department of Employment Services*, 805 A.2d 237, 242-244 (D.C., 2002).

⁵ In his appeal, the Petitioner did not provide a specific alternative date for beginning his permanent total disability benefits. Nevertheless, the Board notes the record shows that in his April 2, 2003 request for reconsideration submitted to the ALJ, the Petitioner stated he reached maximum medical improvement in June 1997 and his permanent total benefits should begin at that time. For purposes of clarity in this appeal, the Board will use June 1997 as the Petitioner's alternative date. This action, however, is not to be construed, in any manner, as a consideration of the merits of the Petitioner's request for reconsideration or of the ALJ's order denying that request.

⁶ A review of the record shows that, during the formal hearing, only the first page of Dr. Arvanaghi's June 12, 1997 report was submitted into evidence. The Petitioner's counsel later submitted the entire report at a later time but prior to the close of the record.

In determining that the Petitioner reached maximum medical improvement on February 9, 2001, the date which the Petitioner now challenges, the ALJ relied upon the last report of Dr. Balbus, the treating physician. Citing *Logan*, the ALJ buttressed her determination by stating when a claimant's physical condition has continued for a lengthy period and for an indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, the condition may be deemed permanent. The ALJ indicated that the Petitioner's work-related injury occurred in 1994 and that since then, he has had constant complaints of pain in his testicles and right low pain, and an onset of impotence and depression. The ALJ also indicated that the treating physicians offered no prognosis of improvement in the Petitioner's condition. The ALJ further buttressed her determination by stating that the February 9, 2001 report satisfied the Petitioner's additional burden of showing that he was unable to work in any other employment due to his injury. The ALJ then shifted the burden to the Respondent to show suitable alternative employment.

In this jurisdiction, there is a preference to give great weight to the opinion of the treating physician due to that physician's familiarity with the injured worker's physical condition and history of treatment. See *Lincoln Hockey, LLC v. District of Columbia Department of Employment Services*, 831 A.2d 913, 919 (D.C. 2003); *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). So strong is the preference that when an ALJ relies on the opinion of a treating physician to the detriment of conflicting evidence, the ALJ does not need to provide an explanation for not accepting the opinions of the other medical opinions of record. See *Metropolitan Poultry v. District of Columbia Department of Employment Services*, 706 A.2d 33, 35 (D.C. 1998). After reviewing this matter, the Panel determines that while the ALJ properly relied upon the opinion of Dr. Balbus, the treating physician, nevertheless, the ALJ's analysis of the evidence on the question of permanent total disability is not supported by substantial evidence, not in accordance with the law and therefore, must be reversed.

In reaching the decision below, the ALJ, citing *Crawford v. Charles H. Thompkins*, H&AS No. 84-240, OWC No. 012619 (1986) and *Fawley v. EGS Masonry, Inc.*, H&AS No. 84-296, OWC No. 0013335 (1986), applied the incorrect legal standard for establishing entitlement to permanent total disability. The ALJ stated that the Petitioner's burden was to show that his condition reached maximum medical improvement and that he was unable to return to work in his usual employment, *or any employment*, as a result of his work injury. However, pursuant to *Logan*, the Petitioner's initial burden was to show that his condition reached maximum medical improvement and that he was unable to return to work in his usual employment as a result of a work injury. The evidence shows that in his February 9, 2001 report, Dr. Balbus opined that the Petitioner was indefinitely incapable of holding any type of employment. Claimant Exhibit No. 2. However, the evidence also shows that earlier, in his September 22, 1997 report, Dr. Balbus opined that the Petitioner was "permanently disabled from his regular duties". Claimant Exhibit No. 2. With this report, the Petitioner met his initial burden, establishing that his condition reached maximum medical improvement effective September 22, 1997. In meeting his initial burden, *i.e.*, in establishing his *prima facie* case of total disability, the Petitioner was not required to show that he was unable to work in his usual employment *or any other employment* as a result of his work injury. By rejecting Dr. Balbus' December 3, 1997 opinion that the Petitioner was "unable to work at present", and accepting Dr. Balbus' February 9, 2001 opinion that the

Petitioner was “incapable of seeking and holding gainful employment”, the ALJ improperly placed the burden on the Petitioner to show that he was, despite due diligence, unable to work in any other employment before determining whether the Respondent met its burden of showing suitable job availability.

With respect to determining whether the Respondent met its burden of showing suitable job availability, the ALJ found, albeit at the wrong juncture of the analysis for an award of permanent total disability, that the Respondent failed to sustain its burden. After reviewing the evidence, the Panel decides this finding is supported by substantial evidence. The ALJ noted that while Dr. Richard Restak, the independent medical examiner, opined that the Petitioner’s testicular pain was “psychological in nature”, he also opined that the Petitioner was not employable as long as he was on a high dose of MS Contin. Employer Exhibit No. 1a. The ALJ rejected the videotape of the Petitioner, indicating that the activities shown (walking to and from his home carrying empty trash cans, picking up objects from his lawn, entering and exiting his car, and apparently skimming his backyard pool) were insufficient to counter the Petitioner’s evidence that his current complaints prevent him from engaging in gainful employment.

In accordance with *Logan*, since the Respondent did not sustain its burden, the Petitioner did not need to respond with a challenge to the legitimacy of the evidence of available employment or a showing, despite due diligence, of inability to work in any other employment. The Petitioner is entitled to an award of permanent total disability as the ALJ initially found. However, pursuant to *Logan*, the permanent total disability benefits are effective September 22, 1997, not February 9, 2001.

In its Opposition to the Petitioner’s appeal, the Respondent asserts that while the Petitioner alleged ineffective assistance of counsel and detrimental reliance on statements from the agency, the Petitioner did not present any evidence to support his allegations. The Panel agrees. Moreover, on this record, there is no evidence of conduct which was prejudicial to the Petitioner or which was arbitrary, capricious or an abuse of discretion.

In light of the foregoing disposition on the merits of the Petitioner’s appeal, the Panel declines to review the ALJ’s Order Denying the Claimant’s Motion for Reconsideration as the denial is now moot.

CONCLUSION

The Compensation Order dated March 14, 2003 finding that the Petitioner’s permanent total disability was effective on February 9, 2001 is not in accordance with the law and is reversed. The Petitioner is entitled to permanent total disability benefits effective September 22, 1997.

ORDER

The Compensation Order dated March 14, 2003 is REVERSED. The Respondent is hereby ORDERED to pay to the Petitioner permanent total disability benefits effective September 22, 1997.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

June 29, 2004
DATE