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
(202) 673-6402-Fax

CRB (Dir.Dkt.) No. 05-03

ANGELIA HENDERSON,

Claimant–Petitioner

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,

Employer–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
AHD No. PBL 01-015B, DCP No. 005054

Angelia Henderson, *pro se*[1]

Turna Lewis, Esquire, for Employer-Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Acting Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Acting Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to 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), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[2]

[1] Although represented by counsel at the formal hearing, Claimant-Petitioner discharged her attorney from further representation of her in this case by letter filed with the agency on November 22, 2004.

[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, 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

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on February 13, 2003, the Administrative Law Judge (ALJ) upheld the termination of disability compensation benefits by Employer-Respondent, based upon a finding that, although Claimant-Petitioner had demonstrated that she had sustained an accidental injury arising out of and occurring in the course of her employment with Employer-Respondent, Employer-Respondent had met its burden of demonstrating by substantial persuasive medical evidence that Claimant-Petitioner's injury had ceased to be disabling due to a change in her medical condition from the time of the initial award of benefits by Employer and its third party administrator (TPA).

Claimant-Petitioner filed an Application for Review (AFR) and Memorandum of Points and Authorities in Support of the Application for Review. The AFR itself assigns no specific error in the Compensation Order. The Memorandum, however, contains the following assignment of alleged error:

> OHA erred as a matter of law affirming the D[isabilty] C[ompensation] P[rogram] denial of compensation benefits where Claimant maintains a 10 lb lifting restriction, her usual pre-injury employment requires she lift more than 10 lbs, and the record is without evidence of suitable alternative employment.

Memorandum, page 3. It further requests that the Compensation Order be reversed and the claim for relief be granted. *Id.*

Employer-Respondent filed no response to the AFR, and has not participated in this appeal.

ANALYSIS

As an initial matter, the scope 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. Official Code §32-1501 *et seq.*, at §32-1522(d)(2)(A), *and* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et*

---

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 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.

seq., at § 1-623.28 (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.

The record in this case[3] reveals that, while Employer-Respondent initially accepted Claimant-Petitioner's claim of having sustained a disabling bilateral wrist and hand injury while working as a corrections officer, and provided a period of disability and medical care, it subsequently reconsidered that decision based upon two independent medical evaluations (IMEs) in which both IME physicians opined that her complaints were not work-related, and at least one of whom additionally felt Claimant-Petitioner could return to work without restriction. EE 1, Final Order of Denial, June 20, 2000.

It is a well established rule that, under the Act, once the third party administrator (TPA) for District of Columbia accepts a disability compensation claim and pays benefits in connection with that claim, any subsequent modification of those benefits in the nature of a reduction or termination must be supported by "persuasive medical evidence". *Chase,* ECAB No. 82-9 (July 9, 1992); *Mitchell,* ECAB No. 82-28 (May 28, 1983); and *Stokes,* ECAB No. 82-33 (June 8, 1983). In addition, ECAB has held the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *Robinson,* ECAB No. 90-15 (September 16, 1992).[4]

Turning to the case under review herein, Claimant-Petitioner alleges that the ALJ erred because Claimant is laboring under a 10 pound lifting restriction, which restriction is said to be inconsistent with her pre-injury duties, and that, absent a showing of the availability of suitable alternative employment, she remains disabled. Claimant-Petitioner's submissions cite no specific source in the evidentiary record supporting the supposed lifting restriction, or the supposed requirement of her pre-injury job.

Review of the record reveals no evidence that Claimant-Petitioner's job duties require that she lift more than 10 pounds. During the formal hearing, Claimant-Petitioner was never asked

[3] The record in this case consists of the hearing transcript (HT), Claimant-Petitioner exhibits (CE) 1, and Employer-Respondent's exhibits (EE) 1 – 11. Although HT and the Compensation Order refer only to EE 1 – 10, Employer-Respondent submitted an IME report from Dr. Jeffrey Lovallo post-hearing, pursuant to leave granted to do so by the ALJ at the formal hearing. Although no mention is made of having received the report post-hearing, the ALJ referred explicitly to the report in the Compensation Order in footnote 2. This reference is therefore deemed an admission by the ALJ of the report of Dr. Lovallo, dated February 15, 2001, into the record, and the exhibit is hereby denominated EE 11.

[4] Although ECAB was abolished by legislation in 1998, ECAB's rulings in past disability cases remain persuasive authority.

and she never volunteered any information regarding the specific weight lifting requirements of her position.

Further, review of Claimant-Petitioner's medical exhibits reveals that upon her discharge from further care by her treating physiatrist, she was given no specific restrictions on her activity. *See*, CE 1, Report of Dr. Frederick W. Gooding, February 29, 2000, "Final Evaluation". Indeed, in none of Dr. Gooding's reports can one find a specific weight restriction being mentioned or imposed. CE 1, *passim*.

In the Compensation Order, although the ALJ ultimately determined that the TPA's termination of benefits based upon there being no work injury *ab initio* was erroneous, he did accept the TPA's termination of benefits because "[o]n this record, and in the absence of objective evidence supporting continuing disability arising from a work related injury, I am persuaded employer has met its burden of proof of a change of condition, and claimant has failed to refute the lack of evidence of a continuing work related disability." Compensation Order, page 10.

In doing so, the ALJ posited the existence of a difference of opinion between Claimant-Petitioner's treating physician, Dr. Gooding, who expressed the view that Claimant-Petitioner "will never be able to competently perform the activities of a correctional officer again" (EE 1, Report of September 25, 1997), and those of the IME physicians, Drs. Richard W. Barth (to the effect that Claimant-Petitioner "may return to work without restriction" and "should seek treatment outside the Workers' Compensation system", Report of April 5, 2000, EE 3), Melinda Gardner (stating that Claimant-Petitioner "should try to be returned to the work force as soon as possible if vocational rehabilitation can be offered", EE 2, Report of May 30, 2000), and Jeffrey Lovallo (to the effect that Claimant-Petitioner's "complaints appear to be functional, psychiatric and/or malingering", that "all treatment be discontinued" and that "she be returned to work immediately in some sort of light duty position" and that "when she does return to work she be placed in a job […] which initially does not involve contact with inmates", EE 11, Report of February 15, 2001).

In evaluating the medical opinions in this case, the ALJ properly noted that there is a preference in this jurisdiction in workers' compensation cases for the opinions of a treating physician over that of an IME physician, and recognized that in order to reject a treating physician's opinion and accept an IME opinion instead, the ALJ must give "persuasive reasons for doing so". *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. App. 1992). The ALJ then proceeded to explain why he rejected Dr. Goodings views: as a physiatrist, Dr. Gooding's credentials were not deemed equal to those of the IME physicians, with Drs. Barth, Gardner and Lovallo all being orthopaedic surgeons; Dr. Barth's "protracted course of treatment" was carried out without there being "objective medical tests" documenting an injury; imprecision "concerning his medical assessment of any permanent disability"; and lack of clarity in the record concerning the basis for his belief that Claimant-Petitioner is in need of additional medical care. As reasons for accepting the IME opinions, the ALJ alluded to: the IME physicians "all" "commented emphatically about claimant's unwillingness to cooperate during the physical exam portion of the IME", and noting "blatant" unwillingness to cooperate" with Dr. Lovallo's examination; Dr. Barth's assertion that if

Claimant-Petitioner truly was as limited as she demonstrated in her exam she "would be unable to dress herself or perform even minimal hygiene"; and, the lack of objective confirmation of any abnormalities.

Regarding the reasons given for rejecting Dr. Gooding's opinions, it must be noted that it is not self-evident that a physiatrist is any less qualified to express a medical opinion concerning functional capacity than is an orthopaedic surgeon, and the referenced "imprecision" relating to a failure to render an opinion as to the degree of medical impairment suffered by Claimant-Petitioner, on this record appears to be a function of his not having been requested to render such an opinion by anyone connected to the case. He expresses no "imprecise" opinion on the subject at any point in this record. Thus, the only one of the three reasons cited by the ALJ for rejecting his opinion that can be viewed as reasonably "persuasive" and which is supported by the record is the lack of objective tests documenting an ongoing anatomical abnormality.

Regarding the reasons for accepting the IME opinions, it is simply unsupported by the record to assert that "all" the IME physicians commented about Claimant-Petitioner's "unwillingness to cooperate". There is no mention of any lack of cooperation in the report authored by Dr. Gardner, and the ALJ's characterizations of the level of comment by the other two physicians, "emphatic", and the characterization of Claimant-Petitioner's lack of cooperation with Dr. Lovallo as being "blatant", whether fair or not, add little to consideration of whether the IME opinions ought to be preferred to that of the treating physician.

Also, it is noted that only one such IME opinion, that of Dr. Barth, supports the ALJ's determination that the denial of benefits ought to be upheld. Both Drs. Gardner and Lovallo qualify their remarks concerning returning to work with express limitations; neither posits that, as of the date of their respective evaluations, Claimant-Petitioner could return to work without restriction. And, as Claimant-Petitioner notes, there is no evidence of an offer of modified duty by Employer-Respondent.

Lastly, although there is no established rule to the effect that an ALJ must accept "all or nothing" in a particular report or opinion, in this case the vast majority of the IME reports' substantiative opinions address lack of causation (which opinions the ALJ rejected) and disagreement with respect to diagnoses, and the opinions regarding work capacity are notably brief, and as discussed, inconsistent.

Although it is possible for the ALJ to base his decision upon the specific opinion of an IME physician in preference to a treating physician, from this Compensation Order and on this record it is not at all clear upon which opinion or opinions from which such physician or physicians the ALJ relied, and for what conclusions.

Further, the Compensation Order contains the statement that the ALJ is "persuaded claimant can still perform many if not most of the regular duties and responsibilities of a correctional officer". This statement is problematic in multiple ways. First, there are no findings of fact concerning what those duties are, and there are no findings of fact concerning what Claimant-Petitioner's capabilities are. Second, whether Claimant-Petitioner can perform "many if not most" of the duties of her pre-injury employment appears to be the wrong legal standard. The

issue in a disability compensation claim is whether an injured worker can return to his or her pre-injury job without restriction, or alternatively whether a modified or suitable alternative position is available. *See, Logan v. District of Columbia Dep't. of Employment Services*, 805 A.2d 237 (D.C. App. 2002).

The Compensation Order needs clarification, and may require additional fact finding, to address these issues.

CONCLUSION

The Compensation Order is affirmed in part and remanded to the Administrative Hearings Division for further proceedings with instructions that on remand the ALJ make specific findings of fact and conclusions of law concerning the physical requirements of Claimant-Petitioner's pre-injury job and concerning Claimant-Petitioner's capacity to return to said pre-injury job, with said findings to be made based upon specifically identified record evidence, and to apply those facts concerning physical capacity to the applicable legal standard governing disability under the Act, consistent with this Decision and Order.

ORDER

The finding that in the Compensation Order of February 13, 2003, that Claimant-Petitioner sustained an accidental injury arising out of and in the course of her employment with Employer-Respondent is affirmed. The matter is remanded to the Administrative Hearings Division, with instructions that on remand the ALJ make specific findings of fact and conclusions of law concerning the physical requirements of Claimant-Petitioner's pre-injury job and concerning Claimant-Petitioner's capacity to return to said pre-injury job, with said findings to be made, for specifically identified reasons, and to apply those facts concerning physical capacity to the applicable legal standard defining disability under the Act, consistent with this Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:

_____

JEFFREY P. RUSSELL
Acting Administrative Appeals Judge

March 23, 2005
DATE