

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 No. 07-78

JERMAINE JOHNSON,
Claimant - Petitioner

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL AND GALLAGHER BASSETT SERVICES, INC.,
Employer/Carrier - Respondent

Appeal from an Order of
Administrative Law Judge Anand K. Verma
AHD No. 03-541C, OWC No. 581489

Matthew Peffer, Esquire for the Petitioner

Alan D. Sundberg, Esquire for the Respondent

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

LINDA F. JORY, *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)¹.

¹Pursuant 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 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, 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 administrative appeals filed prior to October 1, 2004, the effective date of the D.C.

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 Order which was filed on March 8, 2007, the Administrative Law Judge (ALJ), granted Employer- Respondent's (Respondent) request to modify an existing Compensation Order under which it was paying temporary total disability benefits and granted Claimant – Petitioner's (Petitioner) request for payment of causally related medical expenses. The ALJ concluded however, that the reasonableness and necessity of the recommended sesamoidectomy could not be determined predicated on the evidence of record².

The Compensation Order followed a Decision and Remand Order issued by the Compensation Review Board (the CRB) on June 9, 2005. In that Decision and Order, the CRB vacated an Order issued on March 2, 2005 which dismissed Respondent's Application for Formal Hearing seeking a modification of a December 18, 2003 Compensation Order awarding temporary total disability benefits. See *Jermaine Johnson v. Greater Southeast Community Hospital*, CRB No. 05-224, AHD No. 03-541B, OWC No. 581498 (June 9, 2005)(*Johnson I*). The Panel in *Johnson I* concluded that because there was no evidentiary record, it was unable to determine whether the Order denying the modification was based upon substantial evidence in the record and that the ALJ's order did not comport with the requirements of *Snipes v. D.C. Department of Employment Services*, 542 A.2d 832 (D.C. 1988)(*Snipes*)^{3 4}.

As grounds for this appeal, in its Application for Review and supporting memorandum (AFR), Petitioner alleges as error that the ALJ failed to accord greater weight to the Petitioner's treating physician opinion with regard to her alleged ongoing disability. Respondent asserts in opposition to Petitioner's Application for Review that the ALJ's conclusion regarding Petitioner's ability to return to work is supported by substantial evidence and must be affirmed.

Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² As Respondent properly asserts Petitioner has not challenged the ALJ's conclusion that Respondent did in fact meet the threshold *Snipes* requirement, nor has Petitioner challenged the ALJ's determination that he could not make a determination with regard to the reasonableness and necessity of the requested surgical procedure. In light of the Board's determination that a question of authorization for medical treatment, "including disputes related to the reasonableness and necessity of medical procedures recommended or sought" requires an initial utilization review determination. *Gonzales v. Unico Service Co.*, CRB No. 07-005, AHD NO. 06-155, OWC 604331 (February 21, 2007), the ALJ was correct in refusing to address the issue.

³ *But see Probey v. T.A. Beach*, CRB No. 07-36, AHD No. 98-479A, OWC No. 269092 (May 16, 2007) wherein the Board pointed out that there is no requirement in the Act or case law that a *Snipes* review must take place separate from the formal hearing , as all that is required is that the ALJ make a preliminary review of the evidence proffered by the party making the modification request.

⁴ The matter was subsequently re-assigned to the instant ALJ who conducted the full evidentiary hearing pursuant to the Remand order

ANALYSIS

As an initial matter, the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations must affirm an Order issued by AHD or the Office of Workers Compensation (OWC) unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. CRB Rules of Practice and Procedure, Chapter 2, 7 D.C.M.R. §266.4; *see also* Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001). For reasons set forth below, the Panel finds the Order is in accordance with the law an neither arbitrary nor capricious and therefore must be affirmed.

In *Snipes v. D.C. Department of Employment Services*, 542 A.2d 832 (D.C. 1988) the Court of Appeals held that in order to obtain an evidentiary hearing on a modification petition under D.C. Official Code §32-1524, a claimant must make a threshold showing that since the date of the CO there is reason to believe that a change in conditions has occurred which raises issues concerning the fact or degree of disability or the amount of compensation payable pursuant thereto. *Snipes, supra* at 835. Upon a showing, a formal hearing is required to consider the issue, following which the Act requires the issuance of a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation previously paid; or award compensation. *See* D.C. Code §32-1524 (a)(1) and (c). The preliminary review mandated in *Snipes* has been called a *Snipes* review.

At the outset, the Panel must note that the ALJ properly conducted a preliminary examination of the moving party's evidence "on the record" creating a record and after conducting a preliminary review of the evidence, issued findings of fact and conclusions of law on whether the proffered evidence meets the "reason to believe" standard.

In support of Petitioner's primary argument, Petitioner asserts that the ALJ's finding that Dr. Roger Raiford's opinion that Petitioner was fully able to return to her pre-injury employment is "essentially" the same as the opinion of Dr. Mark S. Myerson, who examined Petitioner initially at her request and subsequently at Respondent's request, is not supported by the record "nor addressed by the ALJ in his Order.

Having reviewed the Compensation Order thoroughly, the Panel respectfully must reject Petitioner's assertion that the ALJ failed to address the similarities between Dr. Raiford's opinion and Dr. Myerson's. The Panel further disagrees that the ALJ's finding in this regard is not supported by substantial evidence in the record. To the contrary, the ALJ referred to Dr. Raiford's deposition testimony, EE 7 at 24-25 and at 43-44, and concluded that Dr. Raiford agreed with the findings of Dr. Myerson on the issue of Petitioner's ability to return to her pre-injury position as a medical billing clerk.

Review of Dr. Raiford's deposition testimony reveals that he provided the following testimony:

Q. Would you agree based on those findings of you and Dr. Myerson that she was capable of working with that diagnosis?

A. Yes.

Q. And that there was no other pathology or manifestations that prevented her from returning to gainful employment in some type of a desk job or office job, correct?

A. I don't see any contraindication to that.

Q. And you would agree with that there was no contraindication to her doing some type of desk job or office job correct?

EE 7 at 23. Dr. Raiford then discussed his disagreement with Dr. Myerson's opinion as to whether Petitioner's bursitis is related to the injury and under direct examination was returned to the nature and extent issue, as counsel for Respondent asked:

Q. Other than that, that you don't agree with the causal relation issue, you do agree that she could be back to work in her normal and usual occupation.

A. That's right.

EE 7 at 25. Counsel for Respondent repeated this line of questioning:

Q. And you would agree, though with his conclusions once again that she is capable of returning to her normal and usual occupation or any other occupation involving office or desk work, and there is nothing contraindicated in any of her physical conditions causally related to the injury that would prevent her from doing so.

A. I would agree with that, yes

Q. Is that within a reasonable degree of medical certainty, Doctor?

A. Yes

Q. And would that be your opinion today?

A. It would be.

EE-7 at 25 - 26

Based on Dr. Raiford's answers under oath to counsel's questions above, the Panel concludes that the ALJ's determination that Dr. Raiford agreed with Dr. Myerson that Petitioner can return to her pre-injury employment is supported by substantial evidence. With regard to Petitioner's primary assertion on appeal that the ALJ failed to afford greater weight to the treating physician's opinion, the Panel must first remind Petitioner, that the treating preference is generally applied when there are conflicting medical opinions especially when the conflicting

