

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. 07-088

JOHN HILLIARD,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA/AHD No. PBL 06-034B, DCP Nos. 761011-002-1999-0014

Jerome F. Clair, Esquire, for Claimant-Petitioner

Andrea G. Comentale¹, Esquire, for Employer-Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *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 § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).²

¹ Ms. Comentale has represented Respondent in this appeal, with whom Linda Singer, Esquire, Attorney General for the District of Columbia, and Frank McDougald, Jr., Esquire, were on brief.

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 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

BACKGROUND

This appeal follows the issuance of a Compensation Order by the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order (the Compensation Order), which was filed on March 13, 2007, the Administrative Law Judge (ALJ) denied the claim of Petitioner for temporary total disability benefits from the date that said benefits were terminated, April 18, 2006, to the date of the formal hearing and continuing thereafter.

Petitioner's Petition for Review requests the Compensation Order's denial of those benefits be reversed and the matter be remanded to AHD for further consideration, including consideration of an additional medical record or report authored by Petitioner's treating physician, Dr. Kevin McGovern. The basis of this request is that, according to Petitioner, the rejection by the ALJ of the treating physician's opinion was based upon an incomplete record, rendering that rejection inconsistent with the treating physician preference rule in this jurisdiction.

Respondent opposes this appeal on the grounds that (1) Petitioner's request for further consideration amounts to a motion to re-open the record, which in this case Respondent asserts ought be denied as being without adequate basis, and (2) the decision of the ALJ was supported by substantial evidence and must be affirmed.

Because we agree with both arguments of Respondent, and find that the Compensation Order is supported by substantial evidence in the record and is in accordance with the law, we affirm the Compensation Order.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et 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.

Turning to the case under review herein, Petitioner alleges that the decision of the ALJ is not in accordance with the law, because, in Petitioner's view, the ALJ rejected the opinion of a treating physician, Dr. Kevin McGovern, to the effect that Petitioner is permanently totally disabled, and that

1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

that rejection was not in conformance with the treating physician's preference rule in this jurisdiction, because Petitioner asserts that it was based upon an incomplete record. That is, Petitioner asserts that the ALJ's rejection of that opinion was premised solely upon the ALJ's belief that "Dr. McGovern's opinion [is] not supported by ... an x-ray examination". Application for Review, Memorandum in Support of Application, page 3. Petitioner asserts that Dr. McGovern did, indeed, base his opinion at least in part upon an x-ray report which is dated February 7, 2006, but which was not offered or admitted into evidence at the formal hearing.

In support of his Application for Review, Petitioner has attached the referenced x-ray report. We note, however, that Petitioner has filed no formal motion to re-open the record to receive the proffered exhibit. See 7 DCMR § 264.1 *et seq.* While we will deem the contents of the Application for Review to include such a motion, we note that no attempt has been made to explain the absence of the report from the record; we note that it predates the single medical report from Dr. McGovern that Petitioner did offer and which was admitted, being a report dated April 4, 2006; and, we note that that report in evidence does not make any mention of the results of the proffered study, and contains no indicia that it was of any significance to Dr. McGovern or constituted a basis for any of the views expressed in that report, despite the fact that he was presumably aware of it (having authored the proffered exhibit himself).

Petitioner has failed to demonstrate that the proffered exhibit is material or of any significant relevance to the opinion of Dr. McGovern or the decision of the ALJ in this case. Petitioner has failed to allege, let alone demonstrate, that the proffered exhibit was not available to be offered at the time of the formal hearing, or given any reason as to why it could not have been offered at that time for the ALJ's consideration. Petitioner has failed to make the necessary threshold showings in support of a request to re-open the record, and that request is therefore denied. See, 7 DCMR 264.1 (a) and (b).

With respect to the argument that the ALJ failed to give adequate weight to the opinion expressed by Dr. McGovern, we note that the ALJ was fully aware of the existence of the treating physician's rule and its requirements, and that the ALJ expressed the reasons for his rejection of that opinion. Among the reasons given were that the record contains but that single report from the doctor, which does not describe the course of care prior to that report, and therefore fails to establish the extent of the treatment rendered by the doctor to Petitioner; the statement of total incapacity is contrary to Petitioner's own testimony that Petitioner walks up to two hours daily, and more to the point, is contrary to the evidence presented by Respondent to the effect that Petitioner was in fact employed in some capacity for a limousine company, for a significant period of time, a fact that Petitioner denied and which denial the ALJ found not to be credible; and that the opinion is in conflict with multiple independent medical examiner's (IME's) opinions. The ALJ's determination as to Petitioner's lack of credibility (and thus the reliability of his subjective complaints, both at the hearing and to his doctor) is also explained, including not only his demeanor and combativeness, but also by reference to identifiable untruths relating to the previously discussed and documented (see, EE 4) post-injury employment. As has long been held, such determinations are uniquely the province of the finder of fact who is in the best position to assess credibility. See, *Dell v. Dist. Of Columbia Dep't of Employment Serv's*, 499 A.2d 102 (D.C. 1985). The ALJ also expressly

identified the medical evidence that he did accept, including the IME report of Dr. Siddappa Nagabhushan dated March 1, 2006, in which, following a review of the medical records and a physical examination of the patient, he concluded that Petitioner's diagnoses were "healed sprained cervical spine", "healed sprained lower back" and a "healed contusion of the right hip", while there were "no abnormalities" of the right knee noted. EE 2. This evidence is substantial evidence supporting the ALJ's conclusion that Petitioner's work related injuries have resolved.

In summary, the ALJ adequately explained his reasons for accepting Respondent's medical evidence in preference to Petitioner's; those reasons are supported by substantial evidence and included adequately persuasive grounds for the decision of the ALJ. The decision is therefore in accordance with the law.

CONCLUSION

The Compensation Order of March 13, 2007 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of March 13, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 7, 2007
DATE