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 No. 07-72

JULIUS SAVAGE,

Claimant – Petitioner

v.

GIANT FOOD AND MAC RISK MANAGEMENT.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
AHD No. 04-253A, OWC No. 593603

George E. Swegman, Esquire for the Petitioner

Kevin E. O'Neil, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

FLOYD LEWIS, *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]

[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 D.C. 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. Code Ann. §§ 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. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 February 28, 2007, the Administrative Law Judge (ALJ) denied the claim for temporary total disability benefits by Claimant-Petitioner (Petitioner), but awarded Petitioner payment of causally related medical expenses. Petitioner now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

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. D.C. Official Code §32-1522(d)(2). "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 scope 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 Compensation Order is erroneous and should be reversed, as Petitioner contends that the ALJ's decision with respect to his ability to perform his employment is not supported by substantial evidence and is not in accordance with the law. Petitioner argues that the ALJ erred with respect to the findings concerning the nature and extent of Petitioner's disability. Respondent counters that that there was substantial evidence to support the decision that Petitioner was not entitled to temporary total disability benefits and the Compensation Order should be affirmed.

In the instant matter, the ALJ concluded that Petitioner's left knee condition was medically causally related to his work related injury of April 24, 2003. However, since the ALJ determined that Petitioner was capable of performing his post-injury employment, Petitioner was not entitled to wage loss benefits. In reaching this conclusion, the ALJ determined that the medical evidence of Petitioner's treating physician, Dr. Easton Manderson did not provide any specific physical restrictions that would prevent Petitioner from performing his post-injury employment, while noting that Respondent's physician, Dr. Robert Gordon, opined that Petitioner was capable of performing his job duties without restrictions.

Petitioner specifically has problems with the fact that the ALJ felt that while Dr. Manderson ordered that Petitioner remain off from work, the ALJ criticized Dr. Manderson's disability certificates since no physical restrictions were listed by checking off boxes concerning standing, sitting, etc. Petitioner argues that Dr. Manderson never stated that Petitioner was disabled under the Act, but the physician opined that Petitioner could not return to work at his regular position and Petitioner was only medically disabled from returning to his position for the time being.

After noting that there is no statutory presumption afforded to the nature and extent of Petitioner's disability and that Petitioner had the burden of proving that he was entitled to the benefits he requested, the ALJ stated:

> It is also a well-entrenched proposition in this jurisdiction that disability is an economic concept, dependent on the realities of the market place. A claimant must initially demonstrate that he is suffering from the residuals of a work-related injury that prevents said claimant from returning to his usual employment. Where shown, the burden of production is thereby shifted to employer to demonstrate the availability of suitable employment given a claimant's age, transferable skills, physical capabilities, educational background and geographic location. *The Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 37, 40 (D.C. 1996); *Also see Ann O. Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027 (D.C. 1986).

Compensation Order at 9.

The ALJ then emphasized the problems with the reports and disability certificates issued by Dr. Manderson, Petitioner's treating physician:

> In attempting to restrict claimant's duties, the two disability certificates issued by Dr. Manderson merely advised him to refrain from working but, glaring left blank the portion in which various physical restrictions, such as not no prolonged standing or sitting, etc., are enumerated and could have been checked-off. Dr. Manderson's blanket assertion that claimant was incapable of returning to his post-injury employment falters, because whether claimant is disabled is not a medical, but a legal determination. *See The Washington Post, supra*. As stated above, disability is an economic concept to be decided by the trier of fact herein. As such, "disability is a term of art distinct from the medical concept of disabilitly, which refers to physical incapacitation.

Id.

While Petitioner seems to assert that the ALJ erred by focusing on what the ALJ viewed as deficiencies in Dr. Manderson's disability slips and Petitioner argues that a disability slip is not required to prove disability, it must be emphasized that the burden was on Petitioner to prove that he was entitled to the benefits that he requested. After reviewing the evidence of record, the ALJ

concluded that Petitioner failed to meet that burden and prove disability. The ALJ found that Petitioner's evidence failed to provide exactly why Petitioner remained disabled from performing his duties when he had been performing them for two years and failed to describe what exactly Petitioner was or was not capable of performing.

Moreover, Petitioner himself testified that he was able to return to work, did so for two years and he described the modifications that were made to his job that allowed him to continue working. In addition, Petitioner testified that he felt that he could do his job, but that he was only following Dr. Manderson's instructions by not working and if his injury was not a work-related injury, he felt that he would still be working. At the formal hearing, Petitioner was questioned by counsel for Respondent about earlier comments that he made:

> Q The same problems you are having with your knee, if that had happened to you at home, I asked you, would you be working right now, and you said yes.
>
> A Actually, I have, when I think when I answered your question was if Dr. Manderson hadn't taken me off, I would still be maintained working.
>
> Q Okay. In fact that I believe, what you also said, you said you were just following your doctor's orders.
>
> A. Yes.
>
> Q. But you felt that you could be working.
>
> A Yes, I did.

Hearing transcript at 37.

After reviewing the record as a whole, this Panel concludes that there is more than ample evidence in the record to support the ALJ's decision that Petitioner is capable of performing his post-injury employment. The ALJ correctly acknowledges the treating physician preference in the workers' compensation cases. However, in this matter, the ALJ clearly established satisfactory reasons for rejecting the opinion of Dr. Manderson on the nature and extent of Petitioner's disability.

As mentioned by Petitioner on page 7 of his Memorandum, this Panel recognizes that Dr. Manderson expressed some concerns over the effects of the knee injury on Petitioner's physical capacity. Dr. Manderson stated that fluid on the knee can be painful, and can make walking "difficult." However, in that testimony, the only "prohibited" activity is climbing stairs, an activity for which there is no evidence that Petitioner's continued employment, as modified, requires. In addition, the concerns expressed about the effects of hypothetically ingested "strong medicine" are addressed by the ALJ, as the ALJ describes Petitioner's own decision to self-medicate using over the counter medications, deciding that he did not wish to risk the potentially adverse effects of the "strong medicine," which Dr. Manderson referred to.

Moreover, most importantly, it appears that while Dr. Manderson's concerns are understandable, they are based upon an assumption that Petitioner is required to perform these specific activities to remain employed. However, as the ALJ found, such an assumption is contrary to Petitioner's own testimony that he has been able to modify and perform his job. Accordingly, after a complete review of the record, the ALJ's conclusion that Petitioner is not entitled to temporary total disability benefits is supported by substantial evidence, is in accordance with the law and should not be disturbed.

CONCLUSION

The Compensation Order of February 28, 2007 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of February 28, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

_____

FLOYD LEWIS
Administrative Appeals Judge

June 21, 2007
DATE