

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
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CRB No. 03-03

HERBERT KEYSER,

Claimant - Petitioner

v.

D. C. DEPARTMENT OF PUBLIC WORKS

Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA PBL No. 01-010, DCP No. 001948

Gerald C. Baker for the Petitioner

Gail L. Davis, Esquire, for the Respondent

Before LINDA F. JORY, and SHARMAN J. MONROE, *Administrative Appeals Judges* AND E. COOPER BROWN, *Chief Administrative Appeals Judge*.

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 §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) 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 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 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. Workers' Compensation

BACKGROUND

This appeal follows the issuance of a Final Compensation Order (FCO) by the Assistant Director for Labor Standards of DOES, approving and adopting a Recommended Decision on Remand from the former Office of Hearings and Adjudication (OHA). In that Recommended Decision on Remand, (the Decision) which was filed on February 13, 2003, the Administrative Law Judge (ALJ), upheld the Third Party Administrator's (TPA) reduction of Petitioner's wage loss benefits based upon its determination that he had a loss of wage earning capacity (LWEC) of \$206.80. The Decision on Remand followed an Opinion and Remand Order issued by the Director on May 28, 2002. Therein, the Director held the ALJ erroneously applied a "rationally based" standard for determining whether claimant had a LWEC. The June 8, 2001 Compensation Order was vacated and remanded to OHA for the issuance of another decision applying the correct legal standard.

Claimant-Petitioner through the assistance of counsel filed an Application for Review (AFR) of the February 13, 2003 Final Compensation Order on Remand requesting reinstatement of his wage loss benefits without the LWEC reduction.

Employer-Respondent filed its response to the AFR on April 11, 2003 asserting the Final Compensation Order on Remand is supported by substantial evidence and should, therefore, be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (the 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 scope of review, the CRB and the Panel are bound 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 asserts the labor market survey Respondent relied on to establish the availability of work within his restrictions, did not take into consideration Petitioner's age which was 81 at the time of the first Formal Hearing and presumably 85 presently. Petitioner also asserts that even if he is minimally physically capable,

Administrative Reform and Anti-Fraud Amendment Act of 2004.

he is without any current work skills, or computer/technological abilities and is not a viable candidate for any form of retraining.

In this jurisdiction, once the TPA pays disability benefits due to a work-related injury the TPA must present substantial and recent medical evidence to support a modification or termination of benefits. *See Toomer v. D.C. Dep't. of Corrs.*, CRB No. 05-202, OHA No. PBL 98-048A, DCP No. LT5-DOCOO1603 (May 2, 2005); *Jones v. D.C. Dep't. of Corrs.*, Dir. Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC NO. 312082 (December 19, 2000; *Robinson v. D.C. Gen. Hosp.*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997).

The Panel further acknowledges that in *Queen v. District of Columbia Dep't. of Human Servs.*, ECAB No. 95-13, (1996), D.C. Workers' Compensation LEXIS 393, it was held that in order for an Employer to properly obtain a modification of an injured workers' disability benefits based upon a claim by Employer that there exists suitable alternative jobs in the relevant marketplace for which the worker could compete and earn wages, Employer must refer [the worker] along with their medical history and file to a physician for an opinion regarding whether [the worker] can perform [the position] and based upon the physician's recommendations a labor market survey should be conducted to determine if there are positions in the commuting area which are commensurate with the worker's limitations.

In the instant case on remand, the ALJ provided in his "Statement of the Case:"

At employer's request, Dr. Robert Collins, board certified orthopedist, examined claimant on September 19, 1999, and rendered an independent medical examination (IME). In Dr. Collins opinion, claimant had reached maximum medical improvement (MMI) and was fully capable of performing some form of employment. Dr. Collins also performed a Functional Capacity Examination on March 23, 2000. Based upon Dr. Collin's medical opinion and report, the TPA working in concert with Concentra Managed Care, Inc. had claimant undergo a Labor Market Survey. Claimant, thereafter, was determined to be capable of performing the duties and responsibilities of the following job positions: front desk clerk, car rental agent, and cashier. Considering the expected hourly earnings claimant might make in any of these positions, employer issued an August 29, 2000 Final Order of Denial which established a loss of wage earning capacity of \$206.80.

The ALJ found Dr. Collin's medical opinion was persuasive evidence sufficient to meet Respondent's burden of demonstrating a change in Petitioner's medical condition. Accordingly, the ALJ found based upon Respondent's evidence, Petitioner became obligated to introduce medical evidence supportive of an inability to return to not only his regular duties but the assigned sedentary duties as well. The ALJ indicated Petitioner had failed to introduce medical documentation supportive of his physical condition and although he characterized claimant's testimony as "bald," the ALJ reported that Petitioner raised no persuasive objection against the idea of performing the sedentary duties required of a front desk clerk, car rental agent or cashier at the Formal Hearing.

Review of the hearing transcript and hearing record confirmed the ALJ's finding that claimant had failed to meet his burden of presenting medical evidence to oppose Respondent's persuasive evidence and establish ongoing entitlement to his prior compensation rate. Specifically, the Panel notes Petitioner conceded at the Formal Hearing that although he had begun to receive notices about his eligibility to retire in 1997, he had not elected to withdraw his retirement money. HT at 23². Petitioner also conceded at the hearing that he was able to sit and answer a telephone; write with his right hand; lift light weight objects with his right hand; and if he were shown how to use a cash register he could do that with his right hand. HT at 28. Moreover, Petitioner agreed that he would be able to perform the functions Dr. Collins indicated he was able to do with his right arm and hand. HT at 26.

In light of Petitioner's concessions at the Formal Hearing, the Panel finds the ALJ's conclusion that the evidence presented by Respondent, and Petitioner's failure to produce opposing evidence, are sufficient to warrant the reduction in Petitioner's wage loss benefits based upon the establishment of an LWEC in the amount of \$206.80.

CONCLUSION

The Final Compensation Order on Remand of February 13, 2003 is supported by substantial evidence and is in accordance with the law.

ORDER

The Final Compensation Order of January 28, 2005 is hereby AFFIRMED

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Acting Administrative Appeals Judge

June 29, 2005

DATE

² Although Petitioner's failure to cooperate was not raised as an issue the Panel must note Petitioner testified at the Formal Hearing that he declined vocational services offered by Respondent because he was getting more money every month from his regular compensation check. *See* HT at 41.