

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. 06-61

LESLIE FIELDS,

Claimant - Respondent

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

SELF-INSURED EMPLOYER - PETITIONER

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD PBL No. XX-724A, DCP No. LTBOEDU-000862

Kevin J. Turner, Esquire, for the Petitioner

Leslie Fields, *pro se* Respondent

Before LINDA F. JORY, and SHARMAN J. MONROE, 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 §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.

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 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 Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order by an Administrative Law Judge (ALJ) of the Office of Hearings and Adjudication's Administrative Hearings Division (AHD). In that Compensation Order, (CO) which was filed on June 2, 2006, the ALJ, determined Claimant-Respondent (Respondent) was entitled to payment for new bilateral hearing aids and granted Respondent's claim for relief.

Employer-Petitioner, filed an Application for Review (AFR) of the June 2, 2006 Compensation Order, asserting the CO is not supported by substantial evidence and therefore should be reversed.

Claimant – *Pro se* Respondent, (Respondent) has not filed a response to the AFR.

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 does not take issue with the 3 prong test utilized by the ALJ to determine if a requested medical expense is reasonable and necessary under the Act. Petitioner instead concedes, in its AFR, that the first two prongs of the ALJ's test have in fact been met by Respondent, *i.e.*, that Respondent was injured while in the performance of her employment and that the medical expense were recommended by a qualified physician. Petitioner asserts however, that Respondent has failed to establish the third element of her case *i.e.*, that the medical expenses requested are likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of the monthly compensation.

In support of its contention that the ALJ erred in concluding that Respondent had met all three prongs of needed to establish a *prima facie* case that the bilateral hearings are necessary under the Act, Petitioner asserts that the ALJ relied on a stale medical report prepared by Shirley Washington, MD dated September 20, 1990 as well as Respondent's testimony who Petitioner

asserts is not an expert. In addition to being stale², Petitioner also asserts Dr. Washington never recommended bilateral hearing aids for Respondent but instead reported that Petitioner's hearing aids needed to be adjusted.

Contrary to Petitioner's assertions, the Panel finds that while the Respondent included the records of Dr. Washington in support of her claim for relief, the ALJ did not rely on solely on the report or Petitioner's testimony upon finding Petitioner met Prong 3. Pursuant to the Compensation Order, the ALJ found Dr. Iqbal prescribed new hearing aids for both ears. As found by the ALJ "The recommendation that follows both the April 16, 2003 and February 20, 2004 hearing tests is for new hearing aids "(amplification) AU" and according to the ALJ was sufficient evidence to find that a qualified physician prescribed the new bilateral hearing aids. Review of CE - D reveals that the recommendation following the hearing tests was for amplification in both ears. The Compensation Order further reveals that the ALJ found Petitioner testified credibly that her current hearing aid squeaks requiring her to turn the hearing aid down but although it produces a tone-like sound when to its maximum potential, they provide a benefit to her. See CO at 4.

Accordingly, the Panel finds the ALJ's determination that Respondent satisfied all 3 elements needed to establish a prima facie case for payment of the requested expense, to be supported by substantial evidence of record.

Review of the Compensation Order, reveals the ALJ discredited Petitioner's IME physician, Dr. Christopher P. Mesick's opinion as she determined that he had failed to respond to Respondent's request of new hearing aids for both ears and failed to address the replacement of Respondent's left-ear hearing aid. The ALJ quoted Dr. Mesick as "a hearing aid in the right ear would [not] help in addition to the one that she is already using". Review of Dr. Mesick's report reveals that the only opinion rendered as the necessary for hearing aids by Dr. Mesick was:

She has very poor speech reception threshold scores in the right ear so I do not believe a hearing aid in the right ear would help in addition to the one that she is already using"

The Panel finds while not quoted verbatim, Dr. Mesick's statement was not taken out of context. Further, as this statement is his only opinion rendered with regard to necessity, the ALJ's

² Although not cited to in the ALJ's discussion, the Court of Appeals for the District of Columbia has addressed the question of whether a report of a treating physician should be rejected in favor of a more recently issued report by a non-treating physician based on what the Court described as a "faulty premise in disregarding the treating physician's opinion as stale"². See *Shelda Kralick v. Dist. Of Columbia Dep't of Employment Services*, 842 A.2d 705 (February 26, 2004)(*Kralick*). In rejecting the argument that the treating physician rule should have been limited to cases under the private sector Act, the Court held "A claimant under the District of Columbia Government Comprehensive Merit Personnel Act (CMPA), D.C. Code An. §1-623.01 et. seq. (2001) was not to be treated any differently than a private sector claimant in this regard". *Kralick, supra* at 842, 853 and added that in fact OHA has applied that treating physician preference in CMPA cases, citing *Smallwood v. District of Columbia Dep't. of Mental Health*, 2003 DC Wrk. Comp. LEXIS 258, 16-17 (August 18, 2003); *Berryman-Turner v. Dist. of Columbia Dep't. of Corrections*, 2003 DC Wrk. Comp Lexis 322 (October 1, 2003).

determination that it is not sufficient to overcome Respondent's evidence that new hearing aids are appropriate is supported by the evidence of record. CO at 5.

We may not substitute our judgment for that of the ALJ, whose decision is clearly supported by substantial evidence and consistent with the weight afforded the opinion of the treating physician and the credible testimony of Respondent. *See Marriott*, 834 A.2d at 885; *Kralick, supra*.

CONCLUSION

The Compensation Order of June 2, 2006 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of June 2, 2006 is hereby AFFIRMED

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

September 20, 2006