

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 (Dir. Dkt.) No. 03-72

MARY BRASWELL,

Claimant – Petitioner

v.

OFFICE SPECIALISTS AND WARD NORTH AMERICA,

Employer/Carrier - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD Nos. 01-140B, OWC No. 548643

Ryan J. Foran, Esquire for the Petitioner

Joseph C. Veith III, Esquire, for the Respondent¹

Before LINDA F. JORY, SHARMAN MONROE, *Administrative Appeals Judges*, 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 § 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)².

¹The Employer/Carrier-Respondent was represented by Joseph C. Tarpine, Esquire at the Formal Hearing and filed the response to Petitioner's Application for Review. On September 21, 2006, Mr. Tarpine asked that his name be stricken from the record and Joseph C. Veith, Esquire entered his appearance on behalf of the Employer/Carrier-Respondent.

²Pursuant 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

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, (CO) which was filed on April 30, 2003, the Administrative Law Judge concluded Claimant-Petitioner (Petitioner) had failed to establish entitlement to a conversion of her temporary total disability benefits to permanent total disability benefits and concluded that Petitioner had voluntarily limited her income by refusing to accept the modified duty employment commensurate with her abilities and medical restrictions.

The Petitioner filed an Application for Review (AFR) of the April 30, 2003 Compensation Order, asserting the ALJ misstated the evidence and incorrectly applied the law and therefore the Compensation Order should be reversed.

Respondent has filed a response asserting the Compensation Order contains more than sufficient findings of fact, based upon substantial evidence adduced through the Formal Hearing, to support the decision and is further based upon a proper application of the law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, 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. D.C. Official Code § 32-1521.01(d)(2)(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 this 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.

The Panel notes at the outset that at the time of the Formal Hearing held before the ALJ which resulted in the instant Compensation Order, employer was paying Petitioner

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

temporary total disability benefits pursuant to an existing Compensation Order issued by AHD on May 9, 2001. See *Mary Braswell v. Office Specialists*, OHA No. 01-140, OWC No. 548643 (May 9, 2001) (01-140 Comp Order). In the 01-140 Compensation Order, the ALJ concluded that Petitioner had met her burden of establishing by substantial credible evidence that she remains temporarily and totally disabled from performing her regular work duties from June 15, 2000 until such time as she recovers from the authorized surgery or suitable modified duty work is provided by employer. The Panel acknowledges that in reaching said Conclusion the ALJ found the record contained insufficient evidence to establish that the position Respondent had offered to Petitioner the day before the Formal Hearing was suitable employment for which Petitioner was qualified and within her physical capabilities. See 01-140 Comp Order at 6. Pursuant to the Compensation Order, the position offered to Petitioner the day before the Formal Hearing was a position with the Pension Benefits Guaranty Corporation and according to Respondent's letter of April 17, 2001, the position was in accordance with Petitioner's "stationary work" classification made by Respondent's IME physician. See 01-140 Comp Order at 6.

Although not so stated by the ALJ, the Panel finds it clear that Petitioner in the instant matter has in fact requested that the existing Compensation Order awarding temporary benefits be modified in order to award Petitioner, in a new Compensation Order, that Respondent pay Petitioner permanent total disability benefits. Although also not so stated by the ALJ the Panel must acknowledge that, in fact, Respondent may have also requested that the Compensation Order be modified to reflect a change in Petitioner's ability to work at a job it believes to be within her physical restrictions.

It is well established in this jurisdiction that once a Compensation Order has been issued, the right to an evidentiary hearing is triggered *only* where there has been a threshold showing that there is "reason to believe that a change of conditions has occurred". See *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225 (D.C. App. 1997) (hereinafter, *Anderson*), (citing *Sylvia Snipes v. District of Columbia Department of Employment Services*, 542 A.2d 832 (D.C. 1988) (hereinafter, *Snipes*). In order to prevail, the moving party must present sufficient evidence to prove that a change of condition has occurred. This change of condition must be either a function of claimant's physical condition, or a change in his disability which has occurred since the date of the previous Formal Hearing. See *Snipes*, *supra*, 542 A.2d 832 (1988); D.C. Code §32-1524¹.

The Court in *Anderson* provided:

In the context of workers' compensation law, the burden of showing a change of conditions has also been held to be on the party claiming the

¹ A change of circumstances warranting modification of workers' compensation award pursuant to statute is not restricted to medical conditions. See *Washington Metropolitan Area Transit Authority v. District of Columbia Dept. of Employment Services*, 1997, 703 A.2d 1225, wherein the Court of Appeals found the lack of availability of employment suitable to claimant's condition as basis for change of circumstances warranting modification.

change whether a claimant or employer. 8 Larson, Larson's Workers' Compensation Law, §81.33 (c) at 15-1194.32. The burden may shift once the moving party establishes his case. 8 Larson, *supra*, §81.33 (c) at 15-1194.42. . . . Where the moving party fails to offer any evidence warranting a modification of the award, the non-moving party should prevail under this statute even if he produces no evidence at all. 8 Larson, *supra*, §81.33(c), at 15-1194.47.

As the Court of Appeals has instructed this agency in *Anderson*, consideration of the prior determination is necessarily taken into account in deciding whether, for modification purposes, a change has occurred. The moving party must first make a preliminary showing that there is reason to believe that a change of conditions has occurred which could result in a modification of the prior award. *Anderson*, 703 A.2d 1225 at 1229 (*citing Snipes, supra*). As also instructed in *Anderson*,

The "reason to believe" standard in D.C. Code §36-324(a)(1) (now cited as §32-1524(a)(1) requires an affirmative factual showing that a change of conditions has occurred. *Snipes, supra*, 542 A.2d at 835. According to the language of the statute such a change must raise issues concerning "the fact or the degree of disability or the amount of compensation payable pursuant thereto.

Upon such a preliminary showing, at what is commonly called a "*Snipes*" hearing, 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 compensation².

However, because the ALJ failed to first make a determination as to whether there is reason to believe a change has occurred and stated who in fact has filed the request for a modification, it is impossible to determine who the "moving party" is and in turn who has the initial burden of establishing a change in conditions has occurred.

While as noted above, it is unclear who the moving party is, the ALJ began his analysis of whether Petitioner is permanently and totally disabled (which can be construed as determining whether there is a change in conditions) properly with the standard set forth in *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95, 98 (D.C. 1988) *citing Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80,86; 738 F.2d 474(1984) which is "a disability is permanent if it has continued for lengthy period and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." The ALJ engaged in further discussion regarding what constitutes "total" disability which the Panel concludes is not relative as Petitioner has already been deemed temporarily and totally disabled in the prior Compensation Order and Petitioner retained no further burden to establish the same unless Respondent had established that a change in condition in Petitioner's disability

²See D.C. Code §32-1524(a), (a)(1) and (c).

status had occurred. The ALJ added that Petitioner retained a burden to establish the nature and extent of her disability citing *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109,111 (D.C. 1986) and found the medical evidence inconclusive to establish that she is totally disabled. The Panel must restate at this juncture that the instant Petitioner has no burden to re-establish that she is temporarily and totally disabled if she in fact has requested a modification of the existing Compensation Order which the Panel must reiterate has already found her to be temporarily and totally disabled and this issue cannot be re-litigated short of a successful showing by Respondent that there is reason to believe that there has been a change in her disability status, per *Snipes*.

While the Panel concedes that the party who is not asserting a change of conditions should not be limited to newly acquired evidence in defending its position that a change has not occurred³, see *Keith Bell, citing Anderson, supra*, as it is not clear who is asserting that a change in conditions has occurred, it is impossible to determine who retains the evidentiary burden. Based upon the foregoing, the Compensation Order in the instant matter must be vacated and the matter remanded to the AHD initially for a preliminary *Snipes* hearing to determine if in fact there is reason to believe that a change of condition has occurred since the Compensation Order.

In the event the matter reaches a full evidentiary hearing on the status of Petitioner's disability, based upon an alleged showing that there is reason to believe a change in conditions has occurred, the ALJ must determine whether there exists suitable available employment within Petitioner's physical restrictions, i.e., the ALJ must discuss what evidence submitted by Respondent establishes that the position offered again to Petitioner by letter on August 30, 2002 (which the Panel acknowledges is the Friday before Labor Day weekend) to start on September 4, 2002 (the day after Labor Day weekend) also with the Pension Benefits Guaranty Corp. is suitable and within her physical limitations. In the event, Respondent has in fact requested a modification of the original Compensation Order alleging the change in conditions is the increase in the amount of time Petitioner is able to withstand repetitive wrist movement the ALJ must further discuss what evidence submitted by Respondent establishes that this position falls within those physical limitations, i.e., how much time is estimated to be spent typing, inputting data, etc.⁴

³ The Panel also notes that the Court in *Snipes* agreed that §32-1524(b) which states "A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which directly addresses the alleged change of conditions" may apply only to the preliminary step of determining whether there is reason to believe a change of conditions has occurred and added that "it seems evident that in this determination a hearing examiner must necessarily take into account what came before in determining whether a "change" has occurred". *Snipes, supra* at 835.

⁴ The Panel must further remind the ALJ that, on remand, if in fact a credibility determination is made of Petitioner's testimony, as on page 3 of the instant Compensation Order, it should involve more than the opinion of another party specifically an IME physician's observation or assessment of an injured person's behavior during an independent examination with a physician who is possibly viewed as adverse. See *Russell v. WMATA*, CRB (Dir. Dkt.) No. 03-241, OHA No. 03-241, OWC NO. 560813 (Sept. 25, 2005). See also, *Dell v. Dept. of Employment Services*, 499 A.2d 102 (D.C. 1985); *Cohen v. A&A Hardware*, Dir. Dkt. No. 88-93, OHA No. 86-272A, OWC No. 075694 (1990).

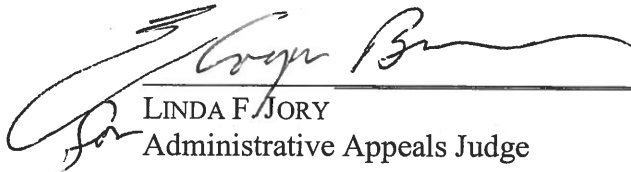
CONCLUSION

The April 30, 2003 Compensation Order which denied Petitioner's claim for permanent total disability benefits is not in accordance with the law.

ORDER

The April 30, 2003 Compensation Order is not in accordance with the law and is hereby *VACATED AND REMANDED* and the prior Compensation Order dated May 9, 2001 is hereby reinstated. On remand, the ALJ shall ascertain which party is requesting the Compensation Order be modified and to conduct a *Snipes* hearing to allow the moving party to first make a preliminary showing that there is reason to believe that a change of conditions has occurred. If applicable, the ALJ shall proceed to a formal evidentiary hearing on the modification issue, pursuant *Anderson; Snipes supra*

FOR THE COMPENSATION REVIEW BOARD:


LINDA F. JORY
Administrative Appeals Judge

September 22, 2006

Date