

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. 07-81

MAURICE SINCLAIR,

Claimant – Respondent

v.

PREMIUM DISTRIBUTORS OF WASHINGTON, D.C. AND LIBERTY MUTUAL INSURANCE,

Employer/Carrier –Petitioner.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
OHA No. 05-364, OWC No. 606018

Curtis B. Hane, Esquire for the Petitioner

Maurice Sinclair, *pro se* Respondent

Before: LINDA F. JORY, FLOYD LEWIS AND SHARMAN J. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 Order, which was filed on March 30, 2007, the Administrative Law Judge (ALJ) granted the request by Claimant-Respondent (Respondent) for an award of temporary total disability from May 5, 2005 to the present and continuing. Employer-Petitioner (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.

On August 30, 2006, the ALJ issued a Compensation Order denying Respondent's claim for temporary total disability benefits. In a Remand Order, dated December 7, 2006, the CRB reversed and remanded this matter to the ALJ to consider additional evidence offered by Respondent. In the Compensation Order on Remand, the ALJ reversed the earlier Compensation Order and granted Respondent's claim for benefits.

Turning to the case under review herein, Petitioner alleges that the ALJ erred by considering post-hearing evidence other than the May 4, 2006 MRI study which the CRB, in the Remand Order, specifically ordered the ALJ to consider and that the ALJ failed to allow Petitioner to offer rebuttal evidence to new evidence submitted by

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.

Respondent. Respondent counters by arguing that the ALJ did not go beyond the scope of the Remand Order and that the Compensation Order on Remand should be affirmed.

In the Remand Order of December 7, 2006, the CRB stated:

Among Petitioner's complaints in this appeal is the fact that, subsequent to the formal hearing which was conducted on September 27, 2005, Petitioner obtained an MRI study of his lumbar spine, which Petitioner asserts was recommended by Dr. Michael K. Kuo on June 6, 2005 but which had not been performed by the date of the formal hearing, due to Employer/Insurer's (Respondent's) declining to provide it. According to Petitioner's "Addendum to Memorandum of Points and Authorities I [sic] Support of Employee's Application for Review" (Petitioner's Addendum), the study revealed "L3-4 left foraminal disc herniation with mass effect upon adjacent nerve root." Petitioner's Addendum, page 2. The fact that Dr. Kuo recommended this study prior to the formal hearing is acknowledged by Respondent in its "Employer/Carrier's Memorandum of Points and Authorities in Opposition to Claimant's Application for Review" (Respondent's Memorandum), at page 4 . .

In this case, the evidence is plainly material; it impacts directly upon a central pillar of the ALJ's decision, that being a lack of objective evidence of an anatomical injury, as described above. Further, the fact that the study, although recommended by a treating physician prior to the formal hearing, was not performed until after the formal hearing, and that the delay in obtaining the study was due to no fault, delay or failure of Petitioner, but rather was attributable to Respondent's declining to authorize same, persuades us that there are reasonable grounds for the failure to present the evidence at the formal hearing.

Accordingly, consistent with the foregoing discussion and with the recent decision of the District of Columbia Court of Appeals in *Darden v. District of Columbia Dep't. of Employment Serv's.*, No. 05-AA-365, 2006 D.C. App. LEXIS 624 (Decided November 22, 2006), we remand this matter to AHD for further proceedings as the ALJ deems necessary to consider the additional evidence described above.

Remand Order at 2. (footnote omitted)

Moreover, in the Compensation Order on Remand, the ALJ recognizes that the evidence to be considered was the May 2006 MRI study, stating:

On remand, the question to be resolved is whether the post-hearing submission consisting of claimant's May 4, 2006 lumbar spine MRI scan is relevant and material evidence and whether it is dispositive of the issue presented for resolution as the September 27, 2005 hearing.

Compensation Order on Remand at 5.

Petitioner contends that despite the CRB's instructions to consider the May 4, 2006 MRI, the ALJ decided to consider other additional evidence, submitted by Respondent. The ALJ clearly considered two post-hearing reports by Dr. Michael Kuo on the issue of causal relationship, stating:

I find on August 22, 2006, Dr. Kuo administered epidural steroid injections to claimant with 75% improvement in pain. I find on September 6, 2006, Dr. Kuo felt claimant's chronic low back pain as well as left lower limb pain resulted from the September 23, 2004 work injury. I find that in a letter dated December 18, 2006, Dr. Kuo noted that claimant's left sided disc herniation with nerve compression was attributable to his continued lower limb pain and that some portion of the lower pain was thought to be directly related to the original crust injury to claimant's left leg and knee.

Compensation Order on Remand at 5

Thus, Petitioner argues that the ALJ has improperly misinterpreted the CRB's very narrow Remand Order for consideration of the May 4, 2006 lumbar spine MRI only, to consider other post-hearing evidence that was offered by Respondent. As such, it is Petitioner's contention that this expansive consideration of evidence by the ALJ was clearly beyond the scope and parameter of the CRB's Remand Order of December 7, 2006.

In considering this issue, this Panel must note that while it is clear that the CRB's Remand Order instructed the ALJ to consider the MRI, it must be emphasized that the CRB also recognized the ALJ's broad discretion in considering this new additional evidence in resolving the claim for benefits. . The Remand Order states

. . . we remand this matter to AHD for further proceedings as the ALJ deems necessary to consider the additional evidence described above. While such proceedings may or may not, at the ALJ's discretion, include additional testimonial presentation related to the new medical evidence, they should at a minimum provide [Petitioner] with the opportunity to respond to the new evidence in reasonable fashion.

Remand Order at 2.

As such, the CRB recognized the ALJ's discretion to consider "additional testimonial presentation related to the new medical evidence" and this Panel does not conclude that it was improper for the ALJ to do so by considering the two reports from Dr. Kuo. However, since the ALJ decided to consider this additional evidence that was related to the MRI study, Petitioner clearly should have been afforded the opportunity to respond to this additional evidence, with any rebuttal evidence it wished to submit for the ALJ to consider. Thus, this Panel must agree with Petitioner on this point and as noted in the Remand Order, the ALJ should "at a minimum provide [Petitioner] with the opportunity respond to the new evidence in a reasonable fashion" and "revisit the case in light of this newly obtained evidence, and any rebuttal evidence presented by [Petitioner]."

Finally, this Panel notes that Petitioner also argues that the ALJ failed to consider Petitioner's issue of the voluntary limitation on income in awarding Respondent benefits in the Compensation Order on Remand. A review of the Compensation Order on Remand reveals that the ALJ did not address this issue, while in the earlier Compensation Order, in denying his request for benefits, the ALJ clearly made a finding that Respondent had voluntarily limited his income. In the Compensation Order on Remand, there is no discussion on this issue and the ALJ must address the issue of whether Respondent voluntarily limited his income, in resolving his request for benefits.

Accordingly, the Compensation Order on Remand must be reversed and this matter remanded to the ALJ to make findings of fact and conclusions of law on all issues in resolving Respondent's request for benefits. In addition, the ALJ must afford Petitioner the opportunity to adequately respond to all of the post-hearing evidence submitted by Respondent.

CONCLUSION

The Compensation Order on Remand of March 30, 2007 is not supported by substantial evidence and is in accordance with the law. This matter must be remanded for the ALJ to resolve all issues that were presented for resolution at the formal hearing and allow Petitioner to respond to Respondent's post-hearing evidence

ORDER

The Compensation Order on Remand of March 30, 2007, is hereby VACATED and REMANDED to the Administrative Hearings Division for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in cursive script, appearing to read "Floyd Lewis", is written over a horizontal line.

FLOYD LEWIS
Administrative Appeals Judge

July 10, 2007
DATE